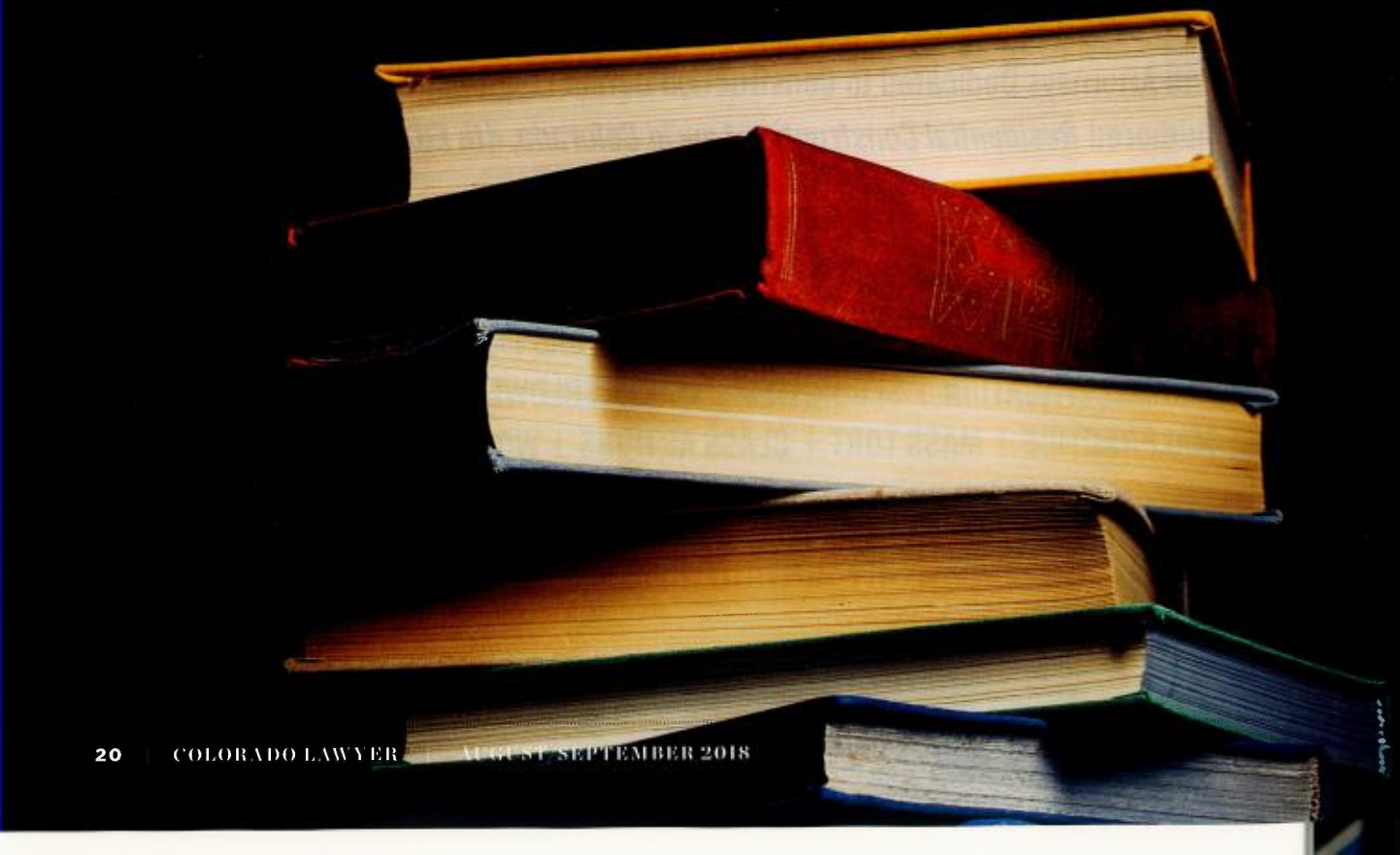
Revised Rule 16.1 Makes Simplified Procedure Mandatory for Most Cases

BY RICHARD P. HOLME



CRCP 16.1's simplified procedure for district court civil cases up to $100,000 provided the automatic right to opt out of its restrictions without cause or justification. As of September 1, 2018, that right no longer exists. This article discusses the recent revisions to Rule 16.1.

In 2004, the Colorado Supreme Court adopted CRCP 16.1, Simplified Procedure for Civil Actions (Simplified Procedure). Its purpose was to significantly reduce the cost of litigation for claims up to $100,000 and to increase access to the judicial system for most persons. Lawyers who used the Simplified Procedure and judges who saw it in operation strongly approved of it.[1] However, because Simplified Procedure was voluntary and easy to avoid, lawyers in a large majority of applicable civil cases opted out of using it.[2]

Although parties were not required or asked to give a reason for opting out of Simplified Procedure, attorney surveys and analyses of court dockets revealed several reasons for opting out, including (1) agreeing to limited discovery might expose a lawyer to malpractice claims; (2) the Rule banned *any* depositions or opportunities to observe and question adversaries before trial; and (3) the $100,000 limit had to include contractual or statutory claims for attorney fees.[3] (Rarely admitted were the additional reasons that some clients believe the use or threat of excessive discovery will discourage potential claimants or at least force better settlements, or that many lawyers have a general distaste for new and different procedures that affect the way they are accustomed to handling cases.[4])

The Supreme Court recently made significant revisions to Simplified Procedure.[5] These revisions were designed partly to address some of the objections to original Rule 16.1 and partly to make Simplified Procedure more widely useful in advancing the Supreme Court's goals to cut costs and delays and thus increase access to justice, especially in smaller dollar amount lawsuits. The newly revised CRCP 16.1 applies to most normal civil cases[6] filed in district courts on or after September 1, 2018. Specifically, it automatically applies to cases seeking damages of not more than $100,000, unless a court approves a motion to exclude the case from the limitations of Simplified Procedure.[7] Parties or their attorneys will no longer be able to simply opt out of the provisions of revised Rule 16.1 without explanation or justification. Further, limited discovery and depositions will now be available to the parties to supplement mandatory disclosures. The $100,000 lid on claims subject to Simplified Procedure will be determined without including allowable attorney fees. Also, the preexisting cap on possible awards for damages has been removed.

Aside from those significant changes, most of the provisions of revised Rule 16.1 remain largely unchanged. This article focuses on the significant new provisions in Rule 16.1. It does not dwell on the unchanged details of Rule 16.1, which were discussed when the Rule was originally adopted.[8]

History of Rule 16.1

The last decade has seen a national firestorm of both state and federal efforts to institute rules changes that give teeth to Rule of Civil Procedure 1's mandate that rules be "construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Colorado, however, had already taken steps to implement that goal. In 2000, Colorado instituted a pilot project to test the essential provisions of Simplified Procedure.[9] Because this pilot rule was applicable in only two courts, it was voluntary, to avoid potential equal protection problems. Automatic exclusion from Simplified Procedure was allowed for any party that desired to "opt out" of the test procedures in those courts.[10] However, the pilot case judges encouraged attorneys to participate rather than to opt out, and with this encouragement, most smaller cases participated in the pilot project.

Based on the results of the pilot project over three years, in 2004 the Colorado Supreme Court adopted CRCP 16.1, which was essentially identical to the pilot project.[11] Because of the newness of the concepts and effects of Simplified Procedure, Rule 16.1 retained the voluntary opt-out provision.

Although Rule 16.1's rationales were detailed in a 2004 *Colorado Lawyer* article,[12] briefly, they boil down to an attempt to control litigation costs—largely discovery costs, which have grown increasingly out of control and out of proportion to their benefits, particularly in cases with smaller claims. These costs, together with delays in pretrial handling of cases, especially discovery and dispositive motions, frequently and effectively block or discourage access to judicial determination of disputes. Moreover, courts began to appreciate that serious criminal cases can be tried without

extensive delays and normally without any depositions and interrogatories.[13] Thus, there is little reason for boundless discovery in cases with limited claims and complexity.

Reform Efforts

During the last decade, many nationwide efforts have been directed toward reforming practices in civil litigation. The American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS) conducted surveys and analyses of civil rules.[14] These reports led to several pilot projects in different state and federal trial courts[15] and thereafter to amendments to the Federal Rules of Civil Procedure, which became effective in 2015.[16]

Likewise, concerns about the cost and inefficiency of the civil justice system were being studied by the Council of Chief Justices (CCJ), a group comprising chief justices of all the nation's supreme courts (or equivalent courts). In August 2016, the CCJ issued its own report, "Call to Action: Achieving Civil Justice for All: Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee" (Call to Action).[17]

The uniform theme that runs through these various reform efforts is that the civil litigation system no longer works well when lawyers are allowed or encouraged to control the pace and scope of litigation. For example, the chief justices' Call to Action states:

> [T]he leading Recommendation [of this Report] advocates that *courts* take definitive responsibility for managing civil cases from filing to disposition. This includes effective enforcement of rules and administrative orders designed to promote the just, prompt, and inexpensive resolution of civil cases. *That Recommendation is the lynchpin for all that follows.*[18]

That recommendation may not be as surprising as it first appears. The prevailing reward system for lawyers handling civil cases is largely based on billable hours. Litigators, especially those representing defendants, are rarely financially rewarded for being more efficient, reducing discovery and motion practice, and disposing of cases quickly.[19] This is not to impugn lawyers' integrity or professionalism; given the need to avoid professional malpractice, many lawyers may justifiably believe that being careful and thorough overrides efforts to be efficient. A related and growing factor is the fear of malpractice suits where it may be contended that a lawyer did not use every available discovery tool that might have allowed the client to prevail. (Of course, a powerful and perhaps complete defense to such alleged malpractice is that the applicable court rules and judge's rulings precluded the lawyer from exhausting every imaginable pretrial tool.) Although inappropriate, it is also not rare for lawyers or clients to prefer a "hardball" or "scorched earth" approach to litigating a case in hopes of bludgeoning the other side into submission. Such approaches justify and may even necessitate "adult supervision" by the trial judge.

Although these same concerns and principles motivated the 2015 revisions to Rules 16 and 26 of the Colorado Rules of Civil Procedure,[20] the new changes to Rule 16.1 add more tools to assist the courts in managing civil cases and promoting their just, speedy, and inexpensive resolution. Indeed, revised Rule 16.1 is also crucial to changing the basic culture of trial lawyers, clients, and litigation, without which implementing Federal Rule of Civil Procedure 1's mandate will continue to be an exercise in futility.

Actions Subject to the Revised Simplified Procedure —Rule 16.1(a) to (e)

As noted above, the automatic opt-out provision from Simplified Procedure no longer exists. Rule 16.1(b) continues to make Simplified Procedure applicable to "all civil cases" other than (1) historically and previously exempted

cases involving special subject matters, (2) cases seeking damages exceeding $100,000, and (3) cases approved for exclusion by specific court order under Rule 16.1(d).

For most civil cases, at the time of filing a claim for damages (whether a complaint, counterclaim, cross claim, or third-party claim) the claiming party must file a Civil Cover Sheet.[21] The new approved form for Civil Cover Sheets is revised Form 1.2 (JDF 601SC R09-18).[22] The form serves to identify and provide notice to the defending party as to any reason why Simplified Procedure is not applicable to the case.

Exempted Special Case Types and Subject Matters—Rule 16(b)(1)

The first exclusion from mandatory Simplified Procedure, which also existed under original Rule 16.1, applies to district court civil cases involving "class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, or other similar expedited proceedings."[23] These are largely specialized types of proceedings, most of which are governed by unique rules of practice or controlling statutory procedures.[24] The cases falling under this exclusion that are not required to be filed with a Civil Cover Sheet are those with court filing numbers designated as Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), and mental health (MH). Class actions, forcible entry and detainer cases, CRCP 106 actions for extraordinary relief (e.g., certiorari review and habeas corpus), CRCP 120 foreclosures, and other expedited proceedings are still excluded from Rule 16.1, although these claims need to be accompanied by a Civil Cover Sheet.[25]

The remaining "CV" numbered cases that are not excluded from Rule 16.1(b)(1) are referred to in this article as "normal civil cases."[26]

Normal Civil Cases Seeking Damages Exceeding $100,000—Rule 16(b)(2)

The second exclusion from Simplified Procedure involves civil cases "in which any one party seeks monetary judgment from any other party of more than $100,000, exclusive of reasonable allowable attorney fees, interest and costs."[27] Here, as previously required under Simplified Procedure, the claim in excess of $100,000 must be sought by a claiming party from a defending party.

Rule 16.1(b)(2) contains three new and significant additions applicable to this group of monetarily excluded cases. First, the limit of $100,000 is no longer calculated by including awardable attorney fees. Thus, for example, a suit seeking to collect on a promissory note of $95,000, which note has a provision allowing the holder to recover reasonable attorney fees expended in collecting the note, will still be handled under Simplified Procedure even if the total award, once attorney fees are awarded, could ultimately exceed $100,000. This change addresses one of the expressed concerns for opting out of the prior Simplified Procedure.

A second change concerns how to determine whether a case seeks damages exceeding $100,000. Part of the challenge here is that parties in professional liability cases are not allowed to state the amount of their claimed damages in their prayer for relief.[28] Although specific allegations in a complaining pleading or attached documents may establish qualification for exclusion,[29] in some cases, often personal injury claims, the amount of damages may not be capable of being pled with specificity. Rather than requiring a trial judge to undertake an initial estimation of the likely damages, Rule 16.1(b)(2) allows a case to be excluded from Simplified Procedure if a party or the party's attorney signs the following statement on the Civil Cover Sheet: "In compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify that the value of this party's claims against one of the other parties is reasonably believed to exceed $100,000."

Third, this provision was adopted to bring this certification under CRCP 11 by requiring the signator to certify that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the possibility of the claims being in excess of $100,000 is well grounded in fact, is warranted by existing law, and is not asserted for any improper purpose such as needlessly increasing the cost of litigation, and other factors as more specifically required by Rule 11(a). It is anticipated that parties or lawyers in some personal injury claims may use this basis for obtaining exclusion from Simplified Procedure. However, in cases where there is legitimate but not serious injury, or where the claimant prefers cost and efficiency protections, parties will likely not seek exemption from Simplified Procedure.

Repeal of Cap on Simplified Procedure Cases

Previously, no damages award after trial of a case under Rule 16.1 could exceed the $100,000 amount.[30] This provision was deleted from former Rule 16.1(c) so that a verdict of damages exceeding $100,000 can be awarded. This protects a defending party who legitimately fears a larger award; if more discovery is genuinely necessary, the defending party can move for exclusion under either Rule 16.1(d)(1) or 16.1(l), as appropriate.

Another reason for removing the damages cap was the concern that the cap might be viewed as a "substantive" provision, which is normally within the exclusive power of the legislature, rather than a judicial, "procedural" provision that is within the Supreme Court's power to establish.[31] This issue is thorny because the line between "substantive law" and "procedural rules" is both fuzzy and confused.[32]

Repeal of Voluntary Exclusion

The most significant change in Simplified Procedure is the repeal of the prior Rule 16.1(d) provision that allowed any party to opt out of Simplified Procedure without any stated reason. Indeed, the frequency with which parties opted out suggested that they often opted out for no reason at all, and certainly with no consideration of the worthwhile justifications summarized in Rule 16.1(a) for the existence of the rule.

Opting out immediately subjects cases to Rule 16's slower and more expensive procedures. The repealed language in prior Rule 16.1(d) has been completely replaced by new Rules 16.1(d)(1) and (2).

Motion for Exclusion for Normal Civil Cases with Damages Exceeding $100,000—Rule 16.1(d)(1)

Whether claims are or may be over $100,000 will normally be known at the time a case is filed, and this can be noted on the Civil Cover Sheet

to exempt the case from Simplified Procedure from the outset. However, sometimes the scope of damages is not sufficiently known until after the case has begun under Simplified Procedure. In such a case, and within 42 days of the case becoming "at issue," Rule 16.1(d)(1) allows the claimant to file a motion with the same certification contained in the Civil Cover Sheet.[33]

The 42-day period for filing the certification of potentially higher damages assumes that most cases are not going to be "at issue" until at least 21 days after service of the complaint, and persons who develop a reasonable belief that the damages may exceed $100,000 likely reach this conclusion within the minimum of 63 days following service of the complaint. Also, 42 days after the case is "at issue" is well beyond the time for providing mandatory disclosures, which include disclosures about the total amount of damages.

Many of the cases to which this provision may apply will involve personal injury claims. The mandatory disclosures in personal injury cases are listed in Rule 16.1(k)(1)(B)(i) and are broader and more specific than in other normal civil cases. Rule 16.1(d)(1) also allows a defending party against whom claims exceeding $100,000 are being sought to file its own motion and certification if the defending party desires to avoid the discovery limitations of Simplified Procedure.

Where the magnitude of the damages claim is not discovered until after the case is at issue for more than 42 days, a motion for exclusion from Rule 16.1 can still be filed under the terms of Rule 16.1(l), discussed below.

Exclusion for Complex Cases with Small or No Damages—Rule 16.1(d)(2)

Rule 16.1 recognizes that not all cases with claims under $100,000 are simple or can be handled fairly and easily with Simplified Procedure's limited discovery. For example, injunction actions, declaratory judgment suits, and constitutional challenges to governmental statutes, ordinances, and regulations may not involve significant monetary claims but may be critically important to the litigants or society at large and may be fact intensive.[34] Parties in such cases should not be forced to litigate under the limitations applicable to normal civil actions with smaller monetary claims governed by Rule 16.1.

Thus, Rule 16.1(d)(2) allows for motions to exempt cases from Simplified Procedure, again within 42 days after the case is at issue. By that time, the parties should have easily uncovered the complexities of the case and what is necessary to prepare the case for trial. The trial court faced with such a motion is directed to consider the same kinds of issues that the judge would weigh in determining whether increased discovery was necessary, appropriate, and proportional in any larger case, pursuant to CRCP 26(b)(1). Thus, parties seeking to be freed from the limitations of Simplified Procedure should address and be prepared to discuss in their motions for exclusion "[1] the complexity of the case, [2] the importance of the issues at stake, [3] the parties' relative access to relevant information, [4] the parties' resources, [5] the importance of discovery in resolving the issues, and [6] whether the burden or expense of proposed discovery outweighs its likely benefit."[35]

> "The most significant change in Simplified Procedure is the repeal of the prior Rule 16.1(d) provision that allowed any party to opt out of Simplified Procedure without any stated reason."

Election for Inclusion—Rule 16.1(e)

Most litigators worry about whether their case is subject to Simplified Procedure and whether they can establish a basis for exclusion. Conversely, revised Rule 16.1(e) contemplates and allows for parties to opt *in* to Simplified Procedure. Although this will likely not be a frequent request, there may be cases in which the parties desire the faster and less expensive option of Simplified Procedure even though their claims exceed the $100,000 threshold. A case for declaratory judgment seeking a determination of the meaning of a contract provision which, if successful, would lead to an undisputed amount of penalty damages of $300,000 might be such a case. Also, once lawyers become accustomed to the efficiencies of Rule 16.1, they may be more willing to consider opting in to Rule 16.1 (and in such cases, courts may urge the parties to opt in).

To opt in, all parties must agree and file their stipulation to be governed by the new Rule within 42 days after the case's at-issue date. The 42-day requirement dovetails with the date for submitting a proposed case management order under Rule 16(b). Rule 16 will apply if all parties do not agree to opt in.

Case Management—Rule 16.1(f) to (k)

Most of the Colorado Rules of Civil Procedure on case management still apply to Rule 16.1 cases. As stated in Rule 16.1(k), the only civil rules that are *not* applicable are Rules 16, 26–27, 31, 33, and 36, unless otherwise specifically provided in the Rule. Thus, all the familiar rules relating to commencing an action, service of process, pleadings, Rule 12 motions to dismiss, third-party practice, trials, judgments, injunctions, and so on still apply to cases under Simplified Procedure. However, mandatory disclosures

and some limited discovery are now allowed in the revised Simplified Procedure as discussed below relating to Rule 16.1(k)(1) to (5).

Parts of Rule 16 Early Case Management Apply—Rule 16.1(f) to (j)

Aside from the notice required in the Civil Cover Sheet asserting a party's claim for monetary relief, the first time Rule 16.1 starts to affect case handling is after the case is "at issue," as defined in Rule 16(b)(1)—that is, after all the motions directed to the pleadings are completed and the pleadings themselves are finalized, or when ordered by the court.

Because parties will not necessarily know whether any party has been excluded from Simplified Procedure until 42 days after the case is at issue, Rule 16.1(f) specifically plugs a case management gap by incorporating the initial case management provisions of Rule 16. Thus, revised Rule 16.1(f) incorporates Rule 16's requirements concerning the "responsible attorney,"[36] the 14th day meet-and-confer requirement,[37] and the requirement for initial exploration of settlement.[38] These actions are all mandatory regardless of whether the case is subject to Rule 16 or Rule 16.1.

The requirement for setting the case for trial is established by Rule 16.1(g) to occur not later than 42 days after the case is at issue. Nonetheless, as provided in Rule 16, trial courts are given discretion to defer the trial setting until a later time, as they sometimes do in some rural districts. Rule 16.1(i) provides that trials in Simplified Procedure cases should be given early trial settings if possible.

The amendments to Rule 16 effective July 1, 2015 have required substantially more information in proposed case management orders due 42 days after the case is at issue.[39] Because of the goal of holding down attorney fees in smaller cases, the requirement to prepare and file the Rule 16 Proposed Case Management Order is omitted from Simplified Procedure.[40] In that absence and to assure the court that the parties are still proceeding apace with their case, Rule 16.1(h) requires the responsible attorney to file a Certificate of Compliance by the 49th day after the at-issue date, stating that the parties have complied with the requirements incorporated from Rule 16 that need to have been accomplished by then. If the parties have not done so—for example, if one party has not made its initial disclosures—the certificate must identify which obligations have not been fulfilled and why.

> "Most litigators worry about whether their case is subject to Simplified Procedure and whether they can establish a basis for exclusion. Conversely, revised Rule 16.1(e) contemplates and allows for parties to opt in to Simplified Procedure."

The option to seek a Case Management Conference is maintained in Rule 16.1(j). When all parties are represented by counsel, the request must be accompanied by a statement of why the conference is needed so the court has pertinent information to grant or refuse the request. When one or more of the parties is unrepresented by counsel, however, the court is required to hold a case management conference. It was felt that it would significantly increase the utility of Simplified Procedure if unrepresented parties and their opponents were required to attend a meeting with the judge to be advised clearly of the differing procedures applicable under Simplified Procedure and to explain the reasons for and philosophy of Simplified Procedure.

Disclosures and Discovery —Rule 16.1(k)(1) to (5)

Under the original Rule,[41] the disclosure requirements were like those in CRCP 26—essentially written information about identity of witnesses with relevant knowledge, documents, damages, and insurance.[42] To add assurance of completeness, these disclosures had to be signed by the disclosing *party* (not just the party's lawyer) under oath.[43] Additionally, further detailed disclosures of information were required in personal injury actions and employment cases,[44] along with Rule 26's required disclosures of expert reports.[45] Finally, Simplified Procedure mandated disclosure of a party's proposed witnesses' direct trial testimony supporting their case or defenses.[46] Although these limitations appeared stringent, they are appropriate for Simplified Procedure cases, which generally shouldn't be saddled with substantial discovery costs.

The required disclosures under revised Rule 16.1(k)(1), (2), and (3) are unchanged in any material way. One area of disclosures was tightened by limiting the number of retained experts to only one expert witness per side unless there is a showing of good cause justifying more.[47]

Discovery in Simplified Procedure was originally limited, resembling that in criminal cases. Complaints about the inability to take depositions were numerous and based on varying rationales. Many lawyers complained about the inability to see and evaluate a party's appearance, personality, communication skills, memory, credibility, and ability to cope with cross-examination.[48] One critic described the need for depositions this way:

A deposition provides an opportunity to meet the other side and gather fundamental verbal and nonverbal information in a short amount of time. In minutes, an artful deposition of an opposing party or expert can lead to settlement that avoids a much greater expenditure of time, effort, and resources to prepare for and conduct a three-to-five-day jury trial. Most attorneys prefer to discern these truths and facts after a couple of short depositions, rather than spending two weeks of trial preparations and performance where $100,000 is at stake.[49]

Although Simplified Procedure applies only to smaller and less complex cases, revised Rule 16.1 now allows each party a cumulative total of six hours of depositions.[50] The six hours can be split up any way the party chooses—one six-hour deposition, three two-hour depositions, or any number of depositions a party wants to take within the six-hour total time whether taken on one day or more than one day.

To stay within these limitations, lawyers must evaluate the importance of various items of information. For example, questions about the complete details of a deponent's educational and employment background may not be the most useful expenditure of deposition time. Focusing on the deponent's fundamental verbal skills, memory of crucial factual details, or responses to defenses may prove to be much more useful, even if brief.

It should be recalled that parties normally must submit detailed descriptions of direct testimony they intend to offer at trial. However, they do not have to provide such detailed descriptions for witnesses who have been deposed by opposing parties.[51] Thus, a downside of taking depositions that are not crucial is that opposing counsel will not have to provide a written and binding disclosure of that person's direct trial testimony.[52]

In addition to the six hours of discovery deposition time, parties are still allowed to take depositions solely for obtaining and authenticating documents from nonparties,[53] and for preservation of testimony for experts or others who cannot be available at trial.[54] To prevent preservation depositions from becoming a mask for further discovery depositions, the party taking the preservation deposition is not allowed to call the deposed witness at trial.

Because the preservation deposition is taken in lieu of the witness's trial testimony, the time taken for the preservation deposition will not be counted against the six-hour limit on discovery depositions. However, after the noticing party takes the deposition, the opposing party is allowed to cross-examine the witness and to admit any admissible parts of the cross-examination even if the witness is "available" for testimony at trial.[55] Thus, taking the preservation deposition of an unfriendly or opposition witness and going beyond what is truly necessary for trial, or otherwise broadening the scope of that witness's testimony, risks the opposing party's ability to include all of the harmful information it was able to derive from cross-examining the witness who is friendly and might be asked leading questions.

To allow judges time to consider and rule on objections to preserved testimony, preservation depositions are to be taken 21 days before trial, unless some shorter time is authorized by the court or stipulated by the parties.[56]

In addition to the foregoing depositions, parties are now allowed to make not more than five requests for production of documents and things.[57] This right replaces the previous provision that parties could request additional disclosures of materials called for in Rule 26(a)(1).[58] Parties may also obtain inspection of property under Rule 34(a)(2) and may seek medical examinations under CRCP 35.[59]

Other Trial Matters—Rule 16.1(k)(6) to (9)

Revised Rule 16.1(k) also addresses various other administrative matters concerning trials.

Trial Exhibits. Rule 16.1(k)(6) provides that trial exhibits in the possession, custody, or control of a party should be identified and exchanged at least 30 days before trial. The authenticity of such exhibits is deemed admitted, unless a written objection to the exhibit is filed within 10 days after the exhibit is received. Under normal operating procedures, one would expect this deadline to expire 20 days before trial. However, this Rule allows and contemplates that one or more trial exhibits might be tendered to the opposing party well in advance of 30 days before trial. In that event, any written objection to the documents must still be served within 10 days of the receipt of the trial exhibit. Thus, for example, if a party has a critical document that it thinks might be challenged for lack of authenticity, the party might tender the document as a trial exhibit to the opposing party 50 or 60 (or more) days before trial. Then, if the other party timely objects, the offering party would have time to take a deposition to authenticate the document under Rule 16.1(k)(5) or otherwise prepare to establish its authenticity at trial. If the opponent fails to object, the offering party can proceed to trial knowing that any objection to authenticity has been waived.

The ability to foreclose an authenticity objection is not intended to create a trap for the opposing party. To start the deadline for objection running earlier than 30 days before trial, the proponent of the document must submit a copy of it as a designated exhibit. Caution also suggests that the opposing party's attention be called expressly to the running of the 10-day period to object when the trial exhibit is submitted, if it is submitted for review more than 30 days before the trial date.

Of course, a party proceeding under Simplified Procedure may not have all the documents that are in the hands of third parties and may feel comfortable simply subpoenaing them for trial. The provisions of CRCP 45 still apply so that trial subpoenas can be issued to obtain additional exhibits at trial that had not already been obtained at a document deposition and were not in the possession of the offering party. In that event, when listing trial exhibits, the offering party is required to identify the documents to the extent possible, for example, as "the construction contract between [property owner] and [principal contractor] dated May [-], 20[-]." The description might also be "John Jones's file relating to [some relevant subject in the lawsuit]," if that is as close as the offering party can get to a meaningful description. Again, trial by surprise is not the object of Simplified Procedure.

Note that trial exhibits that have not been previously disclosed when required by CRCP 26(a) and (e) may still be subject to the preclusive and other sanctions of CRCP 37(c)(1).

Limitations on trial evidence. Given the discovery limitations, a limit on admissible trial testimony is also necessary. To this end, Rule 16.1(k)(7) limits a witness's testimony to matters "disclosed in reasonable detail in the written disclosures," unless that witness had been deposed in the case. This helps to prevent trials by ambush.

The trial court should be careful to ensure that opposing parties are not surprised by any significant direct testimony that might be offered by another party. Nonetheless, if a party calls an adverse party or hostile witness in its direct case, the only limitation on the scope of the testimony is a requirement that the testimony be limited to the subject matters that had been previously disclosed as matters on which testimony would be sought.

Voluntary discovery. The specific allowance for voluntary discovery has been repealed.[60] The fact that all parties may still voluntarily agree to increase discovery without any involvement of or notice to the court may not meet resistance from some judges, but could raise significant objections from others, particularly if the extra voluntary discovery is sufficient to increase the cost of the litigation or to delay the trial date. In any event, parties agreeing to such discovery must also assume that any party upset by misunderstandings about the scope or details of such discovery or the failure to respond will be without any judicial remedy.

The Escape Hatch—Motion to Terminate under Rule 16.1(l)

Finally, revised Rule 16.1 contains an ultimate escape hatch for those cases that appear at the outset to be appropriate for Simplified Procedure, but later turn out to be inappropriate for such handling. Rule 16.1(l) allows a party to seek to exempt the case from Simplified Procedure even after the 42-day deadline for automatic exclusion under Rule 16.1(d). However, a motion to terminate the application of Simplified Procedure is not intended to benefit any party that just happens to change its mind or decides it really would like to take a deposition that it did not have enough time for. To use this provision, a party filing a motion to terminate must make a "specific showing" of facts establishing "substantially changed circumstances," and that such changed circumstances "render application of Simplified Procedure unfair."

Additionally, the moving party must show good cause for the timing of the motion to terminate. Thus, the closer the case gets to trial, the greater the showing of "good cause" must be. In proposing this escape route, the Civil Rules Committee did not anticipate that many of these motions would be filed or granted, but wanted to leave a way to avoid injustice in extreme cases.

> "Finally, revised Rule 16.1 contains an ultimate escape hatch for those cases that appear at the outset to be appropriate for Simplified Procedure, but later turn out to be inappropriate for such handling."

If a motion to terminate is granted, the Rule provides that the court should make "such orders as are appropriate under the circumstances." Such orders will obviously vary depending on the stage of proceedings during which the motion is granted, the reasons for the motion, and so on.

Rule Comments

The Comments to Rule 16.1 inform how Simplified Procedure is to be interpreted and enforced and shed light on the spirit underlying the Rule. Comment 8 is noteworthy in this regard:

> Because of the limited discovery, it is particularly important to the just resolution of cases under Simplified Procedure, that parties honor the requirements and spirit of full disclosure. Parties should expect courts to enforce disclosure requirements and impose sanctions for the failure to comply with the mandate to provide full disclosures.

Practitioners should take heed of this cautionary advice.

Conclusion

As the revised Simplified Procedure takes hold, there will undoubtedly be occasional cases in which the application of the rule may appear to lead to unjust results. No set of rules is perfect for all cases. Nonetheless, the anticipated efficiencies and improvements to access to justice from Simplified Procedure justify its use. Careful adherence to the provisions and spirit of revised Rule 16.1 should promote the Rule's goal of a "just, speedy and inexpensive determination" for many cases.

Richard P. Holme is senior of counsel in the Trial Group at Davis Graham & Stubbs LLP. He is a member of the Colorado Supreme Court Standing Committee on Civil Rules and was a member of its Rule 16.1 Subcommittee, which drafted the proposed changes to revised Rule 16.1—(303) 892-7340, richard.holme@dgslaw.com. This article expresses the author's views and does not represent all the views of the Civil Rules Committee members or the Colorado Supreme Court.

Coordinating Editor: Timothy Reynolds, timothyreynolds@bryancave.com

NOTES

1. *See* Gerety, "Simplified Pretrial Procedure in the Real World Under C.R.C.P. 16.1," 40 *Colorado Lawyer* 23, 25 (Apr. 2011).

2. *Id.* at 25–26.

3. *See, e.g.*, Jorgenson, "A Rule That's Ready for Retirement," 42 *Colorado Lawyer* 53 (Feb. 2013).

4. Gerety, *supra* note 1 at 26–27.

5. *See* Rule Change 2018(06), www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes/2018.cfm.

6. *See* text accompanying note 26.

7. According to the Colorado Office of the State Court Administrator, in 2015 85% of judgments entered in district civil cases (excluding distraint warrants) were for less than $100,000. Although this only reflects the final judgment amount of these cases and does not include cases that did not reach final judgment, the experience of trial judges who handled Rule 16.1 cases during its pilot stage was consistent: they found that well over 50% of the civil cases had damages under $100,000.

8. For information on the undiscussed Rule provisions, *see* Holme, "Back to the Future—New Rule 16.1: Simplified Procedure for Civil Cases Up to $100,000," 33 *Colorado Lawyer* 11–12 (May 2004).

9. *See* Holme, "Just, Speedy, and Inexpensive: Possible Simplified Procedure for Cases Under $100,000," 29 *Colorado Lawyer* 5–8 (Mar. 2000).

10. *See* former CRCP 16.1(d).

11. Holme, *supra* note 8.

12. *Id.*

13. Criminal cases require mandatory document disclosures enforced by sanctions for failure to comply. Crim. P. 16.

14. IAALS is a national independent research center at the University of Denver headed by former Colorado Supreme Court Justice Rebecca Love Kourlis. These studies and reports included the Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and Civil Justice and IAALS, which includes the 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers (http://iaals.du.edu/rule-one/publications/interim-report-joint-project-actl-task-force-discovery-and-iaals); the March 2009 Final Report on the Joint Project of the ACTL Task Force on Discovery and IAALS (http://iaals.du.edu/rule-one/publications/final-report-joint-project-actl-task-force-discovery-and-iaals); the April 2015 Reforming Our Civil Justice System: A Report on Progress and Promise (http://iaals.du.edu/rule-one/publications/reforming-our-civil-justice-system-report-progress-and-promise); and the Summary of Empirical Research on the Civil Justice Process: 2008–2013, IAALS (http://iaals.du.edu/rule-one/publications/summary-empirical-research-civil-justice-process-2008-2013).

15. Several states undertook pilot projects to test some of those theories and proposals. For example, Colorado implemented the Civil Action Pilot Project (CAPP), while New Hampshire (New Hampshire's PAD Pilot Project Rules to be Implemented Statewide, http://iaals.du.edu/blog/new-hampshires-pad-pilot-project-rules-be-implemented-statewide) and Utah (http://iaals.du.edu/rule-one/utah-rules-civil-procedure) substantially revised their civil rules to incorporate many of those reports' recommendations. The Federal Judicial Conference Committee on Rules of Practice and Procedure also studied and recommended changes to the Federal Rules of Civil Procedure, which became effective in December 2015.

16. *See* Groh III, "The 2015 Amendments to the Federal Rules of Civil Procedure," 45 *Colorado Lawyer* 23 (Feb. 2016).

17. www.ncsc.org/~/media/Microsites/Files/Civil-Justice/NCSC-CJI-Report-Web.ashx.

18. *Id.* at 12 (emphasis on "courts" in the original; emphasis on the last sentence added).

19. The fact that prosecutors and public defenders are paid annual salaries may partially explain why they have neither insisted on the availability of endless discovery nor resisted early settlements.

20. *See* Holme, "Proposed New Pretrial Rules for Civil Cases—Part I: A New Paradigm," 44 *Colorado Lawyer* 43–45 (Apr. 2015).

21. CRCP 16.1(c).

22. *See* Rule Change 2018(06).

23. CRCP 16.1(b)(1).

24. Class actions are governed in the first instance by CRCP 23; domestic relations are subject to CRCP 16.2; juvenile cases are governed by the Colorado Rules of Juvenile Procedure (Colorado Court Rules Chapter 28); mental health cases frequently need emergency action and are governed by numerous statutes; probate cases are subject to the Colorado Rules of Probate Procedure (Colorado Court Rules Chapter 27); water law cases operate under Uniform Local Rules For All State Water Court Divisions (Colorado Court Rules Chapter 36); forcible entry and detainer cases are covered by CRS §§ 13-40-101 to -126; Rule 106 regulates cases formerly governed by judicial writs and most frequently constitutional challenges to governmental actions or inactions; and Rule 120 establishes procedures for public trustee real estate foreclosures.

25. CRCP 16.1(b)(1). *See* Form 1.2 (JDF 601SC R09-18).

26. *Id.*

27. CRCP 16.1(b)(2).

28. CRS § 13-21-112.

29. *E.g.*, a collection action on a past due note for $150,000 attached to the complaint.

30. That limitation was included in the original CRCP 16.1(c). That section is deleted and revised so that revised Rule 16.1 relates to filing Civil Cover Sheets.

31. *See, e.g., Borer v. Lewis*, 91 P.3d 375, 380 (Colo. 2004).

32. *See, e.g., Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979) ("The proper focus of inquiry has been stated in many ways."); *People v. McKenna*, 585 P.2d 275, 277 (Colo. 1978) ("Although numerous tests have been proposed to assist in making such a determination, none has been uniformly accepted."); *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 582 (Colo. 2004) (statutory damages caps in Colorado's Health Care Availability Act do not infringe impermissibly on the judicial role in the separation of powers).

33. CRCP 16.1(d)(1).

34. *See* CRCP Rule 16.1, cmt. [5].

35. CRCP 16.1(d)(2).

36. CRCP 16(b)(2).

37. CRCP 16(b)(3).

38. CRCP 16(b)(7).

39. CRCP 16(b)(1) to (18).

40. CRCP 16.1(f).

41. *See* Holme, *supra* note 8 at 21–24.

42. CRCP 16.1(k)(1)(A).

43. *Id.*

44. CRCP 16.1(k)(1)(B)(I) and (II).

45. CRCP 16.1(k)(2).

46. CRCP 16.1(k)(3).

47. CRCP 16.1(k)(2).

48. Every day, prosecutors and criminal defense counsel are faced with and deal with these difficulties because their rules do not provide for depositions.

49. Jorgenson, *supra* note 3 at 55.

50. CRCP 16.1(k)(4)(A).

51. CRCP 16.1(k)(3) ("Each party shall serve written disclosure statements [for a witness] . . . whose deposition has not been taken . . .").

52. *Id.*

53. CRCP 16.1(k)(5)(A).

54. CRCP 16.1(k)(5)(B).

55. *Id.* Thus, for example, hearsay objections based on CRE 804 will not prevent the admissibility of such deposition testimony.

56. *Id.* Stipulating to a deposition date closer to trial than 21 days without clearing a later time with the court risks delays at trial while the court reviews the transcript to rule on issues of admissibility.

57. CRCP 16.1(k)(4)(B).

58. CRCP 16.1(k)(1)(B)(iii) (repealed).

59. CRCP 16.1(k)(4)(C).

60. CRCP 16.1(k)(9) (repealed).