New Pretrial Rules for Civil Cases—Part II: What is Changed

by Richard P. Holme

Effective July 1, 2015, the Colorado Supreme Court has adopted a series of amendments to the Colorado Rules of Civil Procedure designed to significantly reduce the cost of and delays in litigation and to create a new culture for the handling of lawsuits. The amended rules will increase involvement of judges to establish early and personal judicial oversight of pretrial activities; provide for expedited discovery motions; change the breadth of required disclosures; limit discovery to what is needed, not what is wanted; limit expert discovery; clarify obligations when responding to interrogatories and requests for documents; and strengthen judges' ability to award sanctions for noncompliance with these rules. The newly amended rules are available at www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes/2015.cfm (click on Rule Change 2015(05)).

These revised pretrial rules will apply only to cases filed on or after July 1, 2015. Cases filed before then will continue to be governed by the older rules.[1] This article explains, for both judges and lawyers, the nature of and justification for the changes and how the changes endeavor to foster a new culture and paradigm for handling civil cases in a way that will be faster and less expensive, while preserving the necessary search for and applicaton of justice.

Reasons for the Changed Rules

With the approaching termination of the Civil Action Pilot Project (CAPP) in early 2014, the Colorado Supreme Court asked its Civil Rules Committee to consider what should be done with those rules. The Civil Rules Committee appointed a subcommittee that considered and recommended a number of amendments to the rules,[2] which were discussed, modified, and approved by the entire Committee. The Supreme Court solicited written comments, held a public hearing to discuss the proposals, and adopted the recommended amendments with a few changes.

The reasons for these changes arose in conjunction with a dramatically increased nationwide recognition of the problem and the need for revised rules. The proposed rules were described in the April 2015 article in *The Colorado Lawyer*[3] ("Part I: A New Paradigm"). The primary influences on the changes were (1) the changes to the Federal Rules of Civil Procedure (Federal Rules) recommended by the federal Judicial Conference Committee on Rules of Practice and Procedure, which are expected to be effective December 1, 2015;[4] and (2) the June 30, 2015 expiration of CAPP for the handling of business actions applicable in five of the Denver metropolitan counties.[5] The more specific reasons and justifications for substantive changes in Colorado's various amended rules are discussed below. The amendments contain a number of other organizational and non-substantive technical and conforming changes that are not detailed in this article.

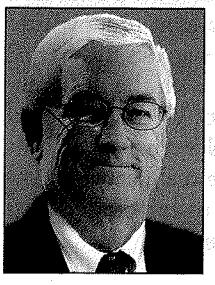
It is significant that the Supreme Court has adopted not only the revised rules (New Rules) discussed below, but also a set of Comments that are published along with the New Rules. Thus, interpretation of the New Rules, if necessary, should begin with an analysis of any pertinent provisions of the Court's "2015 Comments."

Rule 1—Scope of Rules

Other than the belated removal of the reference to the "Superior Court," gone for so long that most readers will have never heard of it,[6] the reason for amending Rule 1 was to make clear the intended breadth of its impact. Thus, securing "the just, speedy, and inexpensive determination of every action" is no longer simply a basis for "liberal construction" of the Civil Rules. As amended, Rule 1 now requires that the rules are also to be "*administered and employed* by the court *and the parties*" to achieve a just, speedy, and inexpensive determination of all cases. (Emphasis added).

The amended language in Rule 1 is taken verbatim from the change recommended for Federal Rule 1. As explained by the federal Advisory Committee on Civil Rules (Advisory Committee), a significant reason for bringing parties under the requirements of Rule 1 is to emphasize the need for the parties, and their counsel, to cooperate with each other to bring about the expeditious and effective processing of cases.[7]

No one challenges the proposition that litigation moves much more smoothly, quickly, and efficiently when parties, and especially the lawyers, cooperate with each other in handling lawsuits. Although it is difficult to legislate civility, with the broadening of



About the Author

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Rule 1's applicability, lawyers can expect courts to remind them regularly of the importance—and effectiveness—of cooperating among themselves.

Rule 12—Defenses and Objections

The changes to Rule 12 are largely cosmetic. Rule 12(a) is broken into several subsections to make its provisions somewhat easier to find and read. Also, a number of changes were made to amend gender-based terminology.

It is noteworthy, however, and consistent with the aim of making litigation more just, speedy, and inexpensive, that the 2015 Comment to Rule 12 also pointedly notes that, "The practice of pleading every affirmative defense listed in Rule 8(c), irrespective of a factual basis for the defense, is improper under C.R.C.P. 11(a)." The 2015 Comment notes that defenses may be pleaded only if well founded in fact and warranted by existing law or a good-faith argument for changing existing law. If an adequate basis for a defense is subsequently discovered, a defendant may then move to amend the answer to add it.

Rule 16—Case Management

The case management provisions of Rule 16(b) through (e) are largely rewritten, and the central focus of case management has been significantly changed. The primary change has been to involve the trial judge in case management personally and actively from an early stage of the case. As noted in "Part I: A New Paradigm" in describing the proposed amendments to the Federal Rules, the federal Advisory Committee said, "What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management."[8] Likewise, this judicial involvement and oversight were crucial and widely appreciated aspects of CAPP by both lawyers and judges.[9] Early, active judicial case management is also an important factor emphasized by leading judges nationwide.[10]

Early judicial involvement should include review and discussion of a number of matters, depending on the individual case. It can and should include identifying pleading and discovery issues proportional to the needs of the case, narrowing the claims and defenses, focusing and targeting discovery, establishing limits on allowable discovery, emphasizing the expectation that parties must cooperate civilly and efficiently, and setting a firm trial date.[11]

New Rule 16 provides that the initial case management conference will be held within forty-nine days of the at issue date of the case.[12] There is nothing in the Rule, however, that precludes a judge from initiating an earlier, in-person (or telephonic or video) status conference. Indeed, a number of judges use such early conferences.[13] There are several matters that can be accomplished at such an early status conference and probably within about fifteen minutes. For example, the court can impress on the parties its view of the importance that counsel cooperate and maintain civility; and in smaller cases, it can urge the parties to give serious consideration to using Simplified Procedure under Rule 16.1 as a means of avoiding the need to prepare a proposed case management order (proposed order). (One of the reasons Simplified Procedure was successful during its pilot phase, under Judges Harlan Bockman and Christopher Munch, but was not as successful later, was that the pilot judges specifically urged parties to use simplified procedure, but subsequent judges generally have not affirmatively encouraged its use.) The court can also urge parties to demonstrate genuine cooperation and to agree on appropriately proportional discovery in their proposed order so they can avoid the necessity of a subsequent initial case management conference, as provided in Rule 16(d)(3). Additionally, the court can encourage reducing unnecessary claims and defenses, as well as targeting initial discovery on a key issue or issues in the case.

To facilitate meaningful case management, the parties will need to communicate early in the case to prepare a proposed order that will provide the court the basic information it needs to meaningfully participate. The new Rule 16 also anticipates an expanded use of oral motions and the potential for more regular contact between the parties and the judge to keep the case moving efficiently.

The revisions to Rule 16 reflect several matters learned both from CAPP and from the case management experience of the members of Civil Rules Committee. Under CAPP, case management conferences were to be attended in person by lead counsel;[14] they were to be preceded by a fairly extensive report of pertinent matters; and they were then followed by a case management order from the judge.[15] Thereafter, courts were instructed by CAPP to provide "active case management," including prompt conferences by telephone if permitted by the court.[16] Firm trial dates were to be set at the case management conference and not changed absent extraordinary circumstances.[17]

After more than two years of experience with CAPP, the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver published its report of the case data and experience of lawyers and judges with CAPP based on surveys, interviews, and reviews of case filings.[18] For lawyers, "CAPP's focus on early, active and ongoing judicial management of cases received more positive feedback than any other aspect of the project."[19] Similarly, judges found that the initial case management conference was "the most useful tool for determining a proportionate pretrial process."[20]

The use of the "presumed case management order" was adopted by the Colorado Supreme Court in 2002 as a means of reducing the time attorneys spend preparing individual proposed orders. Nonetheless, the intervening years have shown that it also isolated the judges from involvement in the early and frequently most expensive and time-consuming aspects of litigation. The presumed case management order also had the somewhat perverse effect of disengaging the lead trial lawyers from much thought or collaboration with opposing counsel about the genuine needs of the case. Thus, in some cases, much of the pretrial disclosure and discovery was left in the hands of junior lawyers with less experience and little or no independent responsibility and accountability to the judicial system. The prevailing culture of "leave no stone unturned regardless of the cost" remained unchanged.

Prior to the current amendments, Rule 16(b) normally meant that no case management order would be issued by the court. The Rule itself became the "presumptive" order, unless the parties filed either a stipulated or disputed case management order within forty-two days of the at-issue date. Experience suggests that having an actual court order improves compliance with the discovery terms and is easier to enforce, when needed. Without judicial awareness of pretrial activities, lawyers' financial incentives and concerns about protection against possible future malpractice claims meant that many cases proceeded on a "give us everything" basis without independent oversight and supervision.

Although Rule 16(b) focuses on the initial case management conference, courts and parties should note that nothing in this rule prevents additional status conferences when the need becomes apparent. Indeed, in complex cases, it may be desirable to have regularly scheduled status conferences (for example, "3:30 p.m. on the last Friday of every month") to deal with new issues that may have arisen or to determine which conference can be cancelled if no new problems have arisen that would benefit from the court's participation and oversight.

Rule 16(a)—Purpose and Scope

First, and importantly, the Civil Rules Committee did not revise Rule 16(a). The message and meaning of that section remain significant and should create the environment for the remainder of Rule 16 (and all other pretrial matters).

> (a) Purpose and Scope. The purpose of this Rule 16 is to establish a uniform, court-supervised procedure involving case management which encourages professionalism and cooperation among counsel and parties to facilitate disclosure, discovery, pretrial and trial procedures.

This purpose carries added weight and reemphasizes the expansion of Rule 1's requirement that court and parties now also administer and employ these rules to secure the just, speedy, and inexpensive determination of every action.

Rule 16(b)—Case Management Order

This section of Rule 16 has been completely revised. The parties must now prepare and submit to the court a proposed order not later than forty-two days after the case is at issue. There is now an approved form—JDF 622—that can be downloaded and filled in to comply with this requirement. The proposed order is to be submitted in editable format so that the court can make whatever amendments to the proposed order it deems to be appropriate and desirable. It is expected that many proposed orders will have attached pages providing the information requested in the form. Also, when the parties are not in agreement on certain issues, each party must supply on the form its own version of the information sought by any particular inquiry.

Although there are a number of items of information that must be included, the judges who had experience with the use of a detailed form under CAPP[21] have concluded that the greater amount of information was necessary for them to effectively provide guidance at the case management conference. While the required information will necessitate more thought and more conferring at the outset of the case by parties and their counsel, this information should, in any event, be discussed early in the case if the goal of just, speedy, and inexpensive is to be approached. Furthermore, although some lawyers complain that preparation of this information is unnecessary "front-loading" of expense, counsel and parties will need this same information to evaluate and expedite any possible settlement or to consider the wisdom of proceeding to trial.

Each of the requirements contained in revised Rule 16(b) is described below. Readers are cautioned to read the text of the rules, because not all details of each subsection are discussed.

Rule 16(b)(1)—At-issue date. The at-issue date still triggers the timing requirements of the proposed order, initial disclosures, and discovery. The at-issue date remains the day when all parties have been served and all Rule 7 pleadings have been filed, or defaults or dismissals have been entered. The at-issue date is included in the proposed order for the court's information.

Rule 16(b)(2)—Responsible Attorney. As in the prior Rule 16(b)(2), the responsible attorney is charged with organizing and preparing the proposed order and the steps leading to the preparation of that order. Normally, the responsible attorney will be plaintiff's counsel, unless the plaintiff is *pro se*; in that case the responsible attorney may be the defendant's counsel. The proposed order must identify the responsible attorney and provide contact information for the court's use.

Rule 16(b)(3)—Meet and Confer. Within two weeks of the at-issue date, lead counsel and unrepresented parties are to confer about the case and the proposed order. The rule specifically calls for these conferences to be person-to-person ("in person or by telephone") so that ordinary e-mails are insufficient to comply. Indeed, it is anticipated that preparing proposed orders may require multiple conferences and meetings. To ensure these conferences take place in a timely fashion, the rule also requires that the proposed order list the dates and identities of persons participating in those conferences. The conferences are held to discuss the basis for the claims and defenses, anticipated initial disclosures, the proposed order, and possible dates for the case management conference. The responsible attorney, who has arranged the conference, must obtain a date for the case management conference from the court. This sounds like a lot of time and effort, but if started in a timely fashion (and much can be done even before the final pleadings are filed), it should normally be easy to accomplish, because the time between the at-issue date and the case management conference can be up to seven weeks, and the proposed order does not have to be filed until one week before the case management conference.

Rule 16(b)(4)—Description of the Case. To advise the court of the nature of the case, each party must prepare a one-page (double-spaced) description of the case, including identification of the issues to be tried. Obviously, this is not intended to be a detailed factual recitation or a regurgitation of the entire complaint. It simply needs to be enough for the court to tell, for example, whether this is a single or multiple car accident, an antitrust case, or a building defect dispute. If publishers such as West Publishing can summarize a case decision in a paragraph or two, it was felt that parties to the litigation should also be able to describe the case succinctly.

Rule 16(b)(5)—Pending Motions. When there are motions under Rule 12 or otherwise that have not been resolved or ruled on when the proposed order is submitted, they are to be listed so the court will be reminded of them. Parties should be prepared to argue or discuss those motions at the case management conference, even if the time for full briefing has not expired. The court may decide them at that time, either by written order or orally from the bench.

Rule 16(b)(6)—Evaluation of Proportionality. For other than smaller, routine cases, this may be one of the more important parts of the proposed order. It will not be unusual for one of the major topics of discussion at the case management conference to be the proportionality of desired discovery, with the court deciding how much discovery is appropriate under the circumstances of the case. To the extent that the parties are seeking either more discovery than the limits set out in Rule 26(b)(2) or are seeking to limit even that discovery, this is the portion of the proposed order in which to address those issues. Parties should at least discuss the propor-

tionality considerations listed in Rule 26(b)(1) that are relevant to the case at hand. These may include: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. Individual cases may have additional matters that a court should consider, and they should be identified in this section of the proposed order.

Rule 16(b)(7)—Initial Exploration of Prompt Settlement and Prospects for Settlement. The parties are required to discuss possible settlement, describe the prospects for settlement, and provide future dates for mediation or arbitration. Experience shows that more than 95% of the cases will not go to trial, so this requirement merely reflects that reality and seeks to have the parties start the discussions earlier rather than later. The discussion may also be helpful in organizing discovery. For example, if the defendant believes that liability is probably going to be established but that it needs to understand the plaintiff's damages before settlement discussions are likely to be useful, the parties or court may suggest phasing discovery to focus on damages before going into all other areas. This way, settlement can be reopened before unnecessary sums are spent on less pertinent issues. Thus, in this example, proposed dates for settlement could be set for shortly after the projected date for completing discovery on damages.

Rule 16(b)(8)—Proposed Deadlines for Amendments. This provision moves the date for amending pleadings and adding parties up to two weeks from the deadline in prior Rule 16(b)(8). However, if this deadline is unnecessary or can be moved sooner to the case management conference, that fact should be addressed in this portion of the proposed order. The justification for fifteen weeks following the at-issue date is: seven weeks for the case management conference, five weeks for the first set of discovery responses, and three weeks to prepare any amendments. Of course, nothing prevents parties from taking depositions to investigate this subject following the case management conference or requesting expedited written discovery responses related to this issue. Parties should be prepared for the possibility that the court may not believe that much time is needed and may expedite this deadline to keep the case moving.

Rule 16(b)(9)—Disclosures. The parties' initial disclosures under Rule 26(a)(1) are due twenty-eight days following the at-issue date—that is, three weeks before the case management conference deadline. The proposed order must state when those disclosures were actually made and when the documents were produced. Because parties sometimes disagree on whether the disclosures are complete, this proposed order requests that any objections to the other parties' disclosures be addressed here. This way, there is a significant likelihood that the judge can rule on those issues at the case management conference without further delay. Indeed, Rule 26(a)(1) specifically prohibits filing motions objecting to allegedly inadequate disclosures prior to the case management conference. This is required because the adequacy of disclosures normally can be more easily addressed in person at the case management conference at the same time the court is considering issues of proportionality.

Rule 16(b)(10)—Computation and Discovery Relating to Damages. Rule 26(a)(1)(C) requires (and has for years) disclosure of categories of damages, a computation of damages, and supporting documents. That requirement is not changed in the New Rules. However, experience has shown that frequently claimants will assert that they have not been able to establish those calculations or to have gathered the supporting documents. Because this information is often crucial to resolving the case through settlement discussions, this new provision demands at least that if the disclosures have not been made, the claiming party must explain why it was unable to provide the disclosures as required and when it expects that it can produce those disclosures and documents. If the court believes the delay does not result from inability to provide the damages or that the delay is too distant, it may well shorten those time limits when it issues the case management order.

Rule 16(b)(11)—Discovery Limits and Schedule. This provision essentially incorporates the presumptive limits on discovery contained in Rule 26(b)(2), although it expressly permits parties to request more or less discovery and allows the court to either increase or decrease those limits after considering the proportionality factors in Rule 26(b)(1). Parties should expect to be asked to support any changes in discovery when they attend the case management conference. The changes in authorized discovery may not only impact numbers of deponents or allowed hours of depositions, but might also limit the number of interrogatories, requests to produce documents, or requests for admissions. Before attending the case management conference, parties should think about what specific written discovery they might want, especially interrogatories and requests for admission, because some judges and lawyers believe that such discovery is often unproductive or not proportional.

This provision also establishes that discovery may not commence until the case management order is served. This delay is incorporated to allow the court to expand or limit discovery before the parties begin under possibly erroneous assumptions as to what discovery will be allowed or limited. Likewise, the deadline for discovery is set for not later than forty-nine days before trial—a date the court can alter if appropriate.

A provision relating to discovery limits allows the court to consider limits on awardable costs. For example, a court might include in the order that it will not allow recovery of videotape charges for depositions, travel costs for out-of-state depositions of relatively unimportant witnesses, or travel costs for the depositions that could be taken telephonically. The parties can consider how badly they really need that discovery.

Rule 16(b)(12)—Subjects for Expert Testimony. This subsection asks the parties to identify subject areas for anticipated expert testimony both for retained experts and for percipient witnesses of facts who may also be asked to provide opinion testimony (such as the investigating police officer, the attending physician, or a party's accountant). If parties on one side of a case are seeking more than one retained expert per subject, they must show the good cause for them, consistent with proportionality. (A case for negligent heart surgery may justify more experts than a case for negligent setting of a broken arm.) Sometimes, parties on one side of the case may have different perspectives and need additional experts, which this provision allows. For example, plaintiffs in medical malpractice cases may sue hospitals, nurses, and doctors, each of whom may want to have available expert testimony as to why they are not liable but other defendants might be. The same problem can be routinely expected in building defect cases.

Rule 16(b)(13)—Proposed Deadlines for Expert Disclosures. Expert disclosures are to be made within the time limits established in Rule 26(a)(2)(C), unless some different date is set in this subsection. For example, it might be expeditious for discovery to focus on liability at the outset and, therefore, to have liability experts provide their disclosures early so parties can attempt to settle or so the court could consider summary judgment on that issue before the parties undergo the entire panoply of discovery.

Rule 16(b)(14)—Oral Discovery Motions. A significant number of judges have found that requiring discovery disputes to be presented on short notice and orally is much faster, cheaper, and more efficient than using an extended written motion briefing schedule and then plowing through dozens of pages of briefs.[22] Other judges require that motions be written and fully briefed. Because of the substantial potential savings in time and expense of oral motions, it was felt desirable to bring this issue to everyone's attention and to have the judge advise the lawyers of the judge's practice in this respect. If the lawyers are not already aware of the court's procedures, they should leave unmarked the choice of "(does)(does not) require discovery motions to be presented orally" in the proposed order. The judge can then mark out the inappropriate one or may insert a more extensive description of the judge's desires concerning discovery motions.

Rule 16(b)(15)—Electronically Stored Information. The federal courts have tended to impose exhaustive and frequently onerous requirements on parties with respect to preservation, production, and handling of electronically stored information (ESI).[23] The Colorado Civil Rules Committee on the other hand has been reluctant to impose specific requirements on all Colorado cases primarily because more than 50% of the civil cases seek relief of under $100,000 and very few seek as much as $1 million. Thus, while cases will almost inevitably have some information that is in the form of ESI, a large proportion of those cases in Colorado courts will not involve unusual amounts of relevant ESI, and parties acting in good faith can normally find it easy to agree on and produce that information.

Where, however, it appears early in the case that a significant amount of the discoverable ESI will be involved, the parties must discuss, attempt to resolve, and report in the proposed order (1) issues of any search terms that should be used; (2) production, preservation, and restoration of ESI; (3) the form of production (for example, native format, with or without metadata, etc.); and, if significant, (4) an estimate of the related cost of such production. Here, as in many aspects of litigation, genuine cooperation and communication among counsel can save thousands of dollars, weeks or months of time, and substantial brain damage to all concerned. This provision does not attempt to draw a sharp line between whether and when such details are to be included, because this decision must be made on a case-by-case basis. Whatever is decided, the parties should expect to be asked about it by the judge at the case management conference.

Even if discovery of ESI is relatively simple and noncontroversial, it is important to address this topic soon after the case is at issue so the parties can understand what problems, if any, might be anticipated. Even an agreement that the parties will work together and do not need special provisions can smooth the way for better cooperation, less time, and less expense.

Rule 16(b)(16)—Trial Date and Length of Trial. The parties should discuss and report on their sense as to when they expect to complete discovery, as well as the expected length of the trial itself. In most cases, the parties should expect that the court will set a trial date during the case management conference. However, some courts decline to set trial dates until the completion of discovery or some other date further into the case preparation. This provision allows for both situations. Still, most judges expect that the case will be tried on the first trial date, so parties should not count on easy or automatic extensions of a trial date.

Rule 16(b)(17)—Other Appropriate Matters. This portion of the report is simply a catch-all for other issues unique to the particular case.

Rule 16(b)(18)—Entry of Case Management Order. Once the proposed order is prepared for filing, lead counsel are to approve and sign it before filing. After the case management conference and after reviewing and making any changes the court deems necessary or appropriate, the court shall sign the document, at which time it will become the official case management order and will bind the parties thereafter, unless modified pursuant to Rule 16(e).

Rule 16(c)—Pretrial Motions

The provisions of the prior Rule 16(c) (modified case management orders) are completely deleted because that section related to modifications of presumptive case management orders, which have been repealed. Modification of those orders is now moot. In its place, the provisions of former Rule 16(b)(9) have been moved verbatim to Rule 16(c). Thus, the need to file pretrial motions and motions *in limine* thirty-five days before trial, summary judgment motions ninety-one days before trial, and challenges to the admissibility of expert testimony seventy days before trial remain intact.

Rule 16(d)—Case Management Conferences

Again, because the prior version of this section related to resolution of disputed modified case management orders, or specially requested case management conferences, this section has been completely rewritten and is now a focal point of the effort to bring early, active judicial case management to the forefront of civil litigation. The impetus for this change was from several sources. The ACTL Final Report states:

> We believe that pretrial conferences should be held early and that in those conferences courts should identify pleading and discovery issues, specify when they should be addressed and resolved, describe the types of limited discovery that will be permitted and set a timetable for completion. We also believe the conferences are important for a speedy and efficient resolution of the litigation because they allow the court to set directions and guidelines early in the case.[24]

This conclusion was bolstered by the interviews with outstanding trial judges, virtually all of whom use in-person, initial case management conferences.[25]

Similarly, an amendment to Federal Rule 16(b) strikes the prior reference to scheduling conferences (the federal term for case management conferences) being held by "telephone, mail, or other means." Although the text of the federal rule suggests that scheduling conferences are to be conducted in person, the accompanying Committee Note urges that the conference be held "in person, by telephone or by more sophisticated electronic means," anticipating video conferences.[26] The Note adds that a "scheduling conference is more effective if the court and parties engage in direct simultaneous communication."[27]