We were warned, but we largely ignored it. Now with little fanfare, our old, comfortable and ingrained habits of extended trial preparation, expansive discovery requests and evasive discovery responses are to be both shaken and stirred.¹

On April 14, 1994, by a 4-3 vote, the Colorado Supreme Court adopted a complete revision of Rule 16 and dramatic changes to most of the discovery rules and several sections of Rule 121 of the Colorado Rules of Civil Procedure ("new Rules").² These new Rules will apply to all cases filed on or after January 1, 1995.³

The new Rules mandate early and active judicial involvement and oversight of case management and discovery; require parties to disclose key information at the outset of the case and before discovery begins; place tight presumptive limitations on allowable discovery; and necessitate "front-loading" of time, effort and expense in case processing. By these techniques, the Colorado Supreme Court obviously hopes to expedite and lessen the overall costs of litigation, limit severely the opportunities for discovery abuse, and create a positive atmosphere for more professional and less contentious case handling and resolution.

Whether or not the new Rules will accomplish these goals remains to be seen. Regardless of their efficacy, the new Rules will create fundamental changes in the way litigators prepare and try cases. Understanding the changes in the Rules will be crucial in representing clients in this new litigation order and in avoiding almost certain malpractice.

Although there are a significant number of changes in the procedures of case management and discovery which trial practitioners must learn, the outstanding features of the new Rules seem to be more about changing attitudes towards litigation than they are about modifying procedures.

The nature and scope of the changes are to be dealt with in two articles in The Colorado Lawyer. This Part I focuses on a brief background of the new Rules, the attitudinal modifications they are heralding and the principal rules which implement these modifications: completely rewritten Rule 16 introducing differential case management, and Rule 26 adopting the concept of automatic disclosure. Part II will be published in the December 1994 issue and will delve into the more "nuts and bolts" amendments to the
various discovery rules and their enforcement mechanisms and sanctions.

BACKGROUND OF THE NEW RULES

It is difficult to appreciate the breadth and depth of the intended changes in the new Rules without having some knowledge of the history of the preparation of the Rules. In this instance, the Colorado Rules reflect the confluence of two distinct but related sets of concerns.

The Federal Effort: Controlling Discovery Abuse

One track, particularly in the federal court system, attempted to address concerns that the discovery system of litigation had spun out of control. Since the 1970s, there have been increasing complaints about overbroad and wildly burdensome written discovery requests answered with concomitantly evasive, incomplete or misleading responses. Concerns also have been voiced about deposition abuses ranging from endless and far-flung questioning to increasingly vituperative and *ad hominem* attacks on witnesses and opposing counsel. With the virtually limitless discovery created by rules which have authorized discovery of facts which "appear reasonably calculated to lead to the discovery of admissible evidence," it was becoming increasingly routine for discovery to generate thousands of pages of documents, hundreds of depositions and court files measured not by the number of file folders but by the number of file cabinets they consumed.

A wide range of proposals were floated to try to curb or eliminate these abuses, but nothing progressed very far until the early 1990s when the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Federal Committee") promulgated a dramatic series of recommended changes to the federal discovery rules. The most significant of these was the concept of requiring automatic disclosure by each party of its own relevant information prior to the commencement of discovery.

The roller coaster history of this disclosure concept and the adoption of the Federal Rules is beyond the scope of this article. However, the adoption, subsequent rejection, and later readoption of the disclosure concept by the Federal Committee; the stinging dissents from the U.S. Supreme Court when it transmitted the proposed rules to the Congress for review; and the abortive last minute legislative efforts to reject disclosure are detailed elsewhere.

The Colorado Effort: Recapturing Professionalism

At the same time the Federal Committee was attempting to grapple with the issue of discovery abuse, on a separate track Colorado began looking at a somewhat broader topic which, ultimately, lead it to similar reforms. In 1989, William DeMoulin, then President of the Colorado Bar Association, established the CBA Task Force on Professionalism. This Task Force was designed to look at broad issues of the deterioration of professionalism within the practice of law, such as the breakdown of civility and trust among lawyers and the increase of borderline ethical practices. One of the results of this Task Force was a recommendation that the Colorado Supreme Court appoint a special committee to consider possible amendments to the Colorado Rules of Civil Procedure which could reduce abusive practices and set the groundwork for a return to professionalism and civility among trial
lawyers.

In response to this recommendation, the Colorado Supreme Court appointed an Ad Hoc Committee on Rules Concerning Case Management, Disclosure/Discovery and Motions Practice in Civil Litigation ("Ad Hoc Committee"). The Ad Hoc Committee was chaired by Richard Laugesen, who also served as chair of the Colorado Supreme Court Standing Committee on Civil Rules, and comprised fourteen trial lawyers and judges, several but not all of whom were also members of the Standing Committee.

**Original Proposal and Public Hearing**

After an extraordinary investment of time and effort, in mid-1993 the Ad Hoc Committee produced a proposed draft of revisions to Rule 16, most of the discovery rules and selected collateral rules. The Ad Hoc Committee wished to continue the historic Colorado practice of following the Federal Rules of Civil Procedure wherever possible, but it did recommend a number of language changes to the proposed Federal Rules. It also undertook the effort of completely revising Colorado Rule 16 relating to case management—an area where the Colorado Rules already substantially differed from federal practice.

The Ad Hoc Committee's proposed rules were published in the October 1993 issue of *The Colorado Lawyer*, together with a notice of a public hearing on the proposals to be held in November 1993. Along with the proposed Rules, the Ad Hoc Committee not only incorporated by reference the comments of the drafters of the Federal Rules, but appended substantial explanatory comments of its own to each of the proposed Rules. Thus, there is a significant body of written "legislative" history to assist in the interpretation and application of the new Rules.

At the November 1993 public hearing before the Colorado Supreme Court, some comments were provided which led the Ad Hoc Committee to recommend an extremely important change in the proposed Rules. First, Chief Justice Rovira noted that the Colorado Supreme Court was considering modifications to the discovery rules on an almost annual basis, in a continuing effort to patch up the newest discovery abuses and problems which had come to the Rules Committee's attention. He then commented that the discovery system seemed to have run amok and was causing more problems than it was solving. Perhaps, he mused, the court should consider abolishing discovery completely and having the lawyers simply present their evidence in trial, "the way trial lawyers used to do."

Second, Jefferson County District Court Judge Ruthanne Polidori reported that she had entered orders imposing the limited discovery provisions of C.R.C.R 26.1 in all of her cases for almost a year. She had discovered that in more than 80 percent of her cases, none of the parties had objected to the imposition of extremely, limited discovery. Fellow Jefferson County District Court Judge (and past-president of the CBA) William DeMoulin was reported to have had a virtually identical experience.

The original proposed amendments by the Ad Hoc Committee contained no limitations on the amount of discovery which would be permitted, other than those which might be established by the attorneys and the trial judge in the Case Management Order. The Ad Hoc Committee had also recommended that Rule 26.1 be repealed. Judge Polidori urged that the Ad Hoc Committee reverse its position and make the highly restrictive limited discovery provisions of Rule 26.1 presumptively applicable in all cases, unless good cause could be shown for greater amounts of discovery.
Following the November 1993 public hearing, the Colorado Supreme Court returned the proposed Rules to the Ad Hoc Committee to consider whether further changes should be proposed in light of the public hearing. In January 1994, the Ad Hoc Committee issued its "Report and Recommendations." Although the Report included a number of "polishing" language changes, the principal significance of the Report was to adopt Judge Polidori’s suggestion and to incorporate the presumptive discovery limitations from old C.R.C.P. Rule 26.1 into new Rule 26(b)(2).

CHANGING ATTITUDES

Although the new Rules contain a number of technical improvements and clarifications in the discovery rules, as noted above, the major changes revolve around the Colorado Supreme Court’s apparent perceived need to foster some basic changes in the attitude of litigators and trial courts to deal with the problems of abusive discovery, deteriorating professionalism and skyrocketing litigation expense. Thus, the most important rule changes are directed to one or more of three attitudes, approaches or philosophies toward handling litigation:

1) Increased professionalism and decreased discovery abuse;

2) Increased judicial oversight and decreased expense; and

3) Increased "front-loading" of case preparation and decreased delay.

The first two issues are explicit from the Rules; the last will necessarily follow from application of the Rules. For example, the opening sentence of the Ad Hoc Committee's Report notes "increasing concern about expense, delay and deterioration of professionalism in the civil justice system." The Report then goes on to observe:

The proposed Rules require a team effort with Court leadership to insure that only appropriate discovery is conducted and motions filed, and to carefully plan for and conduct an efficient and expeditious resolution of the case.

. . . the greater length [of the Rules] is necessary . . . to avoid tactics and abuses that are occurring under the present system.

The proposed reform has been drafted to emphasize and foster professionalism and to de-emphasize sanctions for non-compliance.10

Exemptions from The New Rules

Although it can be anticipated that the courts are likely to insist on the application in all cases of the philosophical changes exemplified by the new Rules, the two critical Rules explicitly do not apply to domestic relations, juvenile, mental health, water law, forcible entry and detainer and Rule 120 or other expedited proceedings. Nonetheless, courts are likely to impose similar restrictions
to the maximum extent practicable in those cases as well. Furthermore, the Colorado Supreme Court Standing Committee on Civil Rules is commencing discussions of specific additional rules that may apply to some or all of those exempted classes of litigation.

**NEW RULE 16**

Although the most dramatic changes in the new Rules will be the required disclosure prior to undertaking discovery under Rule 26(a) and the severe presumptive limitations on discovery contained in Rule 26(b), the Ad Hoc Committee and the Colorado Supreme Court viewed the complete rewriting of Rule 16 as "the heart of the reform." The aim of new Rule 16 is to create "effective differential case management," under which pretrial discovery, motion practice and trial preparation should be substantially more tailored to the needs and idiosyncracies of each case than has been the practice previously in Colorado state courts."

Because this change in Rule 16 will, of necessity, require much earlier and more knowledgeable involvement in the case by the trial judge, there undoubtedly will be some resistance among trial courts which believe lawyers should handle cases until they arrive at the courthouse for trial. The approach of "letting the case handle itself" was exemplified, among other ways, by the provisions of Rule 16 as it was last completely revised in 1988. At that time, Rule 16 was rewritten to require the preparation of disclosure certificates which required the parties to reveal necessary information about their cases to their opponents prior to trial.

Early Judicial Involvement On Request

The new Rule 16 requires trial judges to become involved in case management whenever there is a dispute about how the case should be discovered and prepared, at the mere request of any party. This judicial involvement is provided at an early stage of the case. It is to occur after the case is "at issue" (in essence, after all the pleadings are closed) and after the initial required disclosures have been made, but before depositions and written discovery are allowed. In this way, the parties will know enough about the case to understand its basic outline and to have at least a rational estimate as to the amount of discovery required. However, judicial oversight will occur prior to the time that the parties will be allowed to undertake what, today, could turn into massive and abusive discovery.

There undoubtedly will be significant judicial resistance to participating in the development of Case Management Orders at the outset of the case. However, the Ad Hoc Committee and the Colorado Supreme Court concluded that an ounce of prevention would be worth a pound of cure. If the trial court...
becomes involved at the outset, it may reduce or prevent a deluge of discovery motions later in the case.

The New Attitude Toward Case Management Orders

The Ad Hoc Committee is clear as to the basic philosophy to be imposed under the new Case Management Order system, and has given unmistakable guidelines to the trial judges:

However, these Rules have been developed to describe and eliminate "hide-the-ball" and "hard ball" tactics under previous Disclosure Certificate and Discovery Rules. It is expected that trial judges will assertively lead the management of cases to insure that justice is served. In the view of the [Ad Hoc] Committee, abuses of the Rules to run up fees, feed egos, bludgeon opponents into submission, force unfair settlements, build cases for sanctions or to belittle others should not be tolerated.

These Rules have been drafted to emphasize and foster professionalism and to de-emphasize sanctions for noncompliance. Adequate enforcement provisions remain. It is expected that attorneys will strive diligently to represent their clients' best interests, but at the same time conduct themselves as officers of the Court in the spirit of the recently adopted Rules of Professional Conduct. 13

When a Case is "At Issue"

New Rule 16 establishes the critical "trigger date" from which meetings among counsel, preparation of the Case Management Order, initial required disclosure and discovery run (see Timetable at page 2479). This trigger date occurs when the case is "at issue." New Rule 16(b) defines "at issue" as being the time when "all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against non-appearing parties, . . . Alternatively, and this seems more likely to apply in complex cases, the court may enter an order directing that some other date be deemed to be the "at issue" date.

Although in multiple party cases calculation of the "at issue" date will require close attention, using this date as the starting date for the substantive handling of each case has the benefit of assuring that all parties to the case be present, accounted for, and able to participate fully in preparation of the Case Management Order, disclosure and discovery.

One of the obvious impacts of calling for disclosure and discovery after the case is "at issue" is that all motion practice, including motions which may be transformed under Rule 12 into Rule 56 summary judgment motions, must be determined and ruled on before the case is "at issue." Motions resolved before disclosure and discovery will have the advantage of avoiding discovery and disclosure on claims refined or even removed from the case at an early date. However, the absence of any permitted discovery until after motion practice could create a severe problem for parties opposing motions that are transformed into summary judgment motions. This feature will require substantially greater attention to the provisions of C.R.C.P. 56(e) and (f) which allow the party opposing summary judgment to seek and obtain discovery prior to the time the court rules on a summary judgment motion.
Another feature of deferring substantive case handling until after the Rule 12 motions have been resolved and the pleadings are completed is that it will place considerably greater pressure on trial courts to act promptly in ruling on those preliminary motions. This may be greeted with dismay by trial judges, but will be applauded by the trial bar. These motions are one of the more powerful means of simplifying discovery and expediting handling of cases. This can substantially reduce trial preparation expense.

Once the case is "at issue," a series of deadlines are triggered under new Rule 16(b). Within fifteen days after the case is at issue, lead counsel must confer about the nature and basis of the claims and defenses and discuss items which must be disclosed pursuant to new Rule 26(a)(1) (in most cases, lead counsel should have met long before this).

The specific reference to "lead" counsel in the Rule is not accidental. The new Rule is designed to require the principal lawyer handling the case to become familiar with the case at the outset and to participate directly in the thinking about case management, discovery, disclosure and settlement from the outset of the litigation. The days of trial lawyers picking up the file for the first time two weeks before trial after their minions have "worked up" the case are about to end.

Following the initial conference among lead counsel, no later than thirty days after the case is at issue, the parties are to have accomplished their required disclosures. As detailed below, these disclosures under new Rule 26(a)(1) include the identity of individuals with discoverable information, copies of documents computations of damages and copies of insurance agreements.

By thirty-five days following the at issue date, lead counsel are required to confer about the possibilities of prompt settlement and to confer and cooperate in the development of a proposed Case Management Order.

Forty-five days following the at issue date, the parties must submit to the court a proposed Case Management Order, together with a list of the new Rule 26(a)(1) disclosures which were previously made. If the parties are in complete agreement on the Case Management Order, they may submit it directly to the court for approval. The court may then either approve the order as is or may call for a Case Management Conference. Indeed, the Ad Hoc Committee specifically instructs trial courts not to "simply 'rubber-stamp' a proposed discovery schedule even if agreed upon by counsel."14

**Mandated Judicial Intervention**

The new Rule 16 makes its major leap from past practice at this point. If the parties do not agree to one or more portions of the proposed Case Management Order, they can set out their respective positions and indicate the issue is "disputed." Either party may then request a case management conference with the judge. Then, pursuant to new Rule 16(b)(2), the trial court "shall" hold a case management conference. Thus, before anything more than the minimal presumptive discovery begins, the parties can require the judge to look at the disputed issues and deal with them early in the case. Even if one of the parties does not request a case management conference, the judge can order one pursuant to new Rule 16(b)(2).
Any trial lawyer who has handled large or complex cases is well aware that a leading cause of out-of-control discovery and skyrocketing trial preparation expenses is the failure of trial judges to roll up their sleeves and become involved at an early stage of the proceedings. Knowledgeable judicial rulings narrowing issues or imposing rationality on discovery could go a long way toward solving many of the issues plaguing out-of-control litigation.

The Case Management Order

The Case Management Order is required to contain information relating to a number of matters. First, the parties must estimate the length of trial and set forth either a trial date or the date by which a trial date is to be set. Given the more limited discovery contemplated by the new Rules, trial courts will probably routinely require that trial dates be set by the time the Case Management Order is submitted, since discovery is not likely to delay the processing of the case significantly.

The Case Management Order also is to include the required disclosures under new Rule 26(a)(1); the dates by which all witnesses and trial documents are to be disclosed; the time to join additional parties and amend pleadings; a list of pending motions and a schedule for filing of other anticipated pretrial motions; and a confirmation that the parties' counsel have discussed settlement and an outline of their expected future efforts to settle the case. ¹⁶

Discovery Schedule

The Case Management Order is also to establish a discovery schedule. This must include the timing and number of interrogatories, requests for production, requests for admissions and depositions. Any discovery beyond the extremely limited discovery permitted by new Rule 26(b) must have court approval, in advance, for good cause shown. Furthermore, all discovery is to be completed at least ten days before submission of the Trial Management Order, unless otherwise ordered by the court. ¹⁷

Required Advice to Clients of Cost of Discovery

Litigators reading new Rule 16(b)(1) IV relating to the Case Management Order discovery requirements will probably be jolted to see a totally new provision to the Civil Rules requiring that "counsel shall certify that they have advised their clients of the estimated costs and fees involved in conducting such discovery." The Ad Hoc Committee comments explain that the purpose of this provision is to force an advanced realization on the attorneys and their clients of the expense of the discovery so that they can decide about the propriety, feasibility and possible alternatives to that discovery. ¹⁸

This requirement may raise a host of collateral practical problems between attorneys and their clients if the attorneys underestimate the cost of the proposed discovery at the outset of the case. Those potential problems may well have been viewed by the Ad Hoc Committee as providing additional, useful incentives on the attorneys to do everything they can to hold down discovery expense.
Trial Management Order

New Rule 16 also requires, shortly before trial, the preparation by the parties of a Trial Management Order. This must be filed no later than thirty days prior to trial, unless the court orders otherwise. As with the Case Management Order, plaintiff's counsel is specifically given the obligation to schedule meetings and prepare the proposed Trial Management Order. Again, if counsel cannot agree on the terms of the Trial Management Order, they may designate portions of the proposed order as "disputed" and may request a trial management conference with the court.

The Trial Management Order required by new Rule 16(c) will contain much of the same information presently required in disclosure certificates or in the federal court pretrial orders. However, the Ad Hoc Committee did away with the basically useless listing of undisputed facts and disputed issues. The Rule requires the parties to identify whether they intend to file trial briefs and, if so, requires that they be filed at least seven days before trial.

The Trial Management Order must be approved by the trial court and is to control the subsequent course of the trial. In addition, new Rule 16(c)(4) requires that, no less than seven days before trial, each of the parties designate which witnesses it anticipates calling, the order in which they are to be called and the anticipated length of their testimony, including the length of expected cross-examination. This provision, not presently required in either state or federal rules, was designed by the Ad Hoc Committee to facilitate scheduling and save expense.

Finally, new Rule 16 requires that the parties submit jury instructions and verdict forms to the court at least three days before trial, rather than at the beginning of or during the trial under the current practice. The burden for carrying out this chore is placed by new Rule 16(d) on the first party to demand a jury trial who still desires such a trial.

NEW RULE 26

In effectuating the desired attitudinal changes which have impelled the new Rules, the revisions to new Rule 26 are at least as crucial as the case management provisions of new Rule 16. New Rule 26 with its dual whammy of required automatic disclosure of certain information to the opponents at the outset of the case and its stringent presumptive limitations on discovery completes what appears to be the most revolutionary changes in the Rules of Civil Procedure since their initial adoption in 1941. Some will view the clamps placed on potentially abusive discovery and the emphasis on decreasing the expense and delay, which now seem to have become "inherent" in litigation, as a positive step to a brave new world. Others will view the potentially draconian limitations on pretrial discovery and the apparent encouragement of increasingly detailed pleading as going back to the future by returning to concepts of labyrinthian code pleading and trial by ambush.

Most lawyers and clients, at least at the outset, are likely to find the necessary front-loading of effort and expense on cases under the new Rules to be contradictory to the professed desire to decrease
litigation expense. However, after substantial study and effort, the Ad Hoc Committee and a slim majority of the Colorado Supreme Court feel that the potential benefits of these changes substantially outweigh the possible detriments.

Although the new Colorado Rules adopt many of the changes recently enacted in the Federal Rules of Civil Procedure, which are applicable in the U.S. District Court in Colorado, there are a significant number of differences between the two sets of Rules. These differences range from simple clarifying changes in phraseology to extremely significant substantive changes. This article does not attempt to delineate or describe all of the differences. Trial lawyers who practice in both federal and state courts should reread and carefully parse the precise language of the Rules of a particular jurisdiction so as to avoid using the wrong procedure.

**Required Disclosure Before Discovery**

Without doubt, the most startling innovation of new Rule 26 (as well as new Federal Rule 26) is the requirement in new Rule 26(a)(1) that all parties make mandatory, automatic disclosure of certain key information to their opponents early in the handling of the case and without request by the opponent. As noted earlier, these disclosures are to take place thirty days after the time a case is "at issue" and, normally, about two weeks after lead counsel for the parties have conferred to discuss the breadth of the required disclosures.

Commentators have complained bitterly that attorneys would be required to reveal their clients' "smoking guns," with the attendant concerns that this would effectively breach the attorney/client privilege and work product doctrine. They have decried the problems of lawyers having to decide if those smoking guns were genuinely relevant. They have puzzled over how a lawyer would persuade a client to reveal the information without a fight. Nonetheless, in the great bulk of civil litigation, the disclosure provisions are not likely to be terribly traumatic.

In many respects, the required automatic disclosures are not much different than the information which would have to be revealed in response to any competently drafted first set of interrogatories and request for production of documents under today's practice. The drafters of the new Rule felt that automatic disclosure of relevant material, without requiring the opposing party to fire the shotgun blast of its overly word-processed "standard set" of numerous interrogatories, might cause opposing counsel to serve their clients better. Counsel may find even before serving their discovery that they have virtually all the information they need following the automatic disclosure; that the parties can get immediately to the brass tacks; and that the automatic disclosure substantially decreases the cost of generating abusive interrogatories or non-responsive answers to those interrogatories.

The automatic disclosures mandated by new Rule 26(a)(1) relate to the identity of prospective witnesses, copies of relevant documents, the computation of damages and copies of insurance agreements. Substantial time can be spent analyzing the precise wording of the required automatic disclosures, but the principal thing that such exercise will emphasize is that many of these issues can, should and probably will be capable of being dealt with during the initial new Rule 16(b) meeting(s) of lead counsel. However, counsel will want to reread these provisions closely at the beginning of each case in order to comply with the new Rules.
"Facts Alleged With Particularity"

With respect to identification of persons, new Rule 26(a)(1)(A) requires the name, address and telephone number of the individuals to be identified. The individuals to be disclosed under that Rule are those who are "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, . . .". Expressed concerns about the return to detailed, "code style" pleadings arise primarily from the latter portion of that phrase. Since disclosure need be made concerning only matters alleged with particularity, some of the simpler, recommended forms of notice pleading [e.g., Forms 2-13, 7A CRS at 529-532 (1990 Rep. Vol.)] may not be particularly useful in triggering the disclosure requirement on the opposing party. Conversely, stock defenses such as, "The plaintiff's complaint is barred by the doctrine of laches [estoppel, statute of limitations, comparative negligence, etc.]") will not trigger any disclosure requirements on the plaintiff.

However, parties preparing pleadings will also want to observe that new Rule 26(a)(1) has not repealed the requirement of Rule 8 that a pleading "shall contain . . . a short and plain statement of the claim. . . .". New Rule 261(a)(1) should not be viewed as an excuse for prolixity! In fact, exhaustive factual pleadings may well not force the revelation of much more information than relatively shorter pleadings would produce. Moreover, extensive pleadings may create admissions which can be used for cross-examination and impeachment if subsequently uncovered facts turn out to be at variance with overly detailed pleaded facts. In any event, the new Rule 26(a)(1) will require all of the parties to think about their pleadings more closely than in the past. This is one more of the features which create a front-loading of cost.

"Disputed Facts"

Disclosures only have to be made with respect to "disputed" facts which are alleged with particularity. Thus, parties can avoid the need to provide disclosures by admitting facts in their responsive pleadings. The requirement of disclosure only as to "disputed" facts is another reason why new Rule 16 wisely triggers disclosure following the time when the case is at issue. In that way, all responsive pleadings will have been filed and all parties will indeed know what facts are disputed.

A Two-Way Street

Importantly, parties must recall that the disclosure requirement does not only apply to the opponent. Thus, plaintiffs will have to disclose persons with information relevant to facts pleaded with particularity in the complaint, and defendants must disclose people with information relevant to particularly pleaded defenses. Indeed, new Rule 37(c)(1) explicitly provides that any such information which is not disclosed "shall not" be admissible at trial unless the failure to disclose is either "substantially justified" or is "harmless."

Not only does this feature create additional mental hurdles for litigators to leap while drafting their pleadings and alleging facts with particularity, it also creates a significant potential Rule 11 trap. When, before any discovery has been allowed, a plaintiff must reveal that it has little or no information relating to the facts it has pleaded for its claim, or defendants must admit that they have no information
supporting their defenses, counsel may walk themselves directly into a virtual slam-dunk Rule 11 violation.

**Persons " Likely to Have" Information**

Prospective witnesses must be disclosed who are "likely to have" information. The Rule does not require that the party’s counsel know that the individual does, in fact, have such information. Under these circumstances, it may behoove counsel to interview as many witnesses as possible prior to preparing their pleadings so that counsel will know whether the person does or does not have discoverable information. This will avoid, in some instances, disclosing names of persons who in fact have no knowledge of the allegations in issue.

"Relevant" Information

Although some commentators have railed at the idea of litigating counsel having to make their own determination as to whether an individual has "discoverable" information and whether that information is "relevant," the reality is that this requirement is no different than the obligation currently placed on any trial counsel when answering interrogatories or document requests from opposing counsel.

In addition to providing the name, address and telephone number of prospective witnesses, the new Colorado Rule requires identification as to "who the person is" and the subjects of the information that person possesses. Thus, the new Rule requires the parties to identify prospective witnesses in some meaningful fashion such as "the plaintiff's brother-in-law," "the defendant's Director of Human Resources" or "the plaintiffs supervisor." It also mandates disclosure of the subjects about which the person is likely to have information.

**Documents**

Following the identification of persons, the second type of information for which automatic disclosure is required is all documents relevant to disputed facts alleged with particularity in the pleadings. Again, the documents sought are those relate to facts alleged with particularity, and only those facts which are disputed. Furthermore, new Rule 26(a)(1)(B) requires that copies of the documents be produced, together with a listing of the documents actually produced.

This, too, is an area where opposing lead counsel should discuss practical ways of dealing with the disclosures at their new Rule 16(b) initial meeting. It may well be, for example, that opposing counsel will not wish to have copies of all documents, but will merely wish to have them made available for inspection to that they can decide precisely which documents they want to have copied.

The Rule is not clear as to the reason that a "list" of the disclosed documents must be prepared or how detailed that list must be. However, since Rule 16 requires that the list be included in the Case Management Order, it appears that the list is intended to give the trial judge a sense of the magnitude and completeness of the disclosure. Where there are only a few documents disclosed, the preparation of the list is not a major issue. Where the disclosure may run into hundreds or thousands of documents, it is unlikely that any court will demand or even want a document-by-document lit.
case, a listing of documents by category with inclusive Bates stamp numbers should be sufficient.

**Damages**

The third category of information to be required is important and may create problems for claimant's counsel. New Rule 26(a)(1)(C) requires disclosure of a computation of "any category of damages" and documents supporting that computation, "including materials bearing on the nature and extent of the injuries suffered." This category of disclosure is clearly another area where case preparation is being front-loaded. Although these materials are always provided before trial, it is relatively rare that they are gathered or disclosed very long before trial.

It is apparent that the drafters of the Rule wanted to force the issue of the precise amount of damages into the fore-front of the thinking about the case. Defendants will be forced to confront the seriousness of the injuries at an early stage, where such is the case, and plaintiffs will be required to confront their lack of proof of damages at an early stage, where that is their problem.

**Insurance**

Finally, new Rule 26(a)(1)(D) requires disclosure of insurance agreements for inspection and copying where the insurance company may be liable to satisfy the judgment. Disclosure of this information has been required for a number of years under old Rule 26(b)(2) and is a routine subject of initial interrogatories and document requests under current practice. Given the virtually universal request for this information, it clearly makes sense to include this category of information in the initial disclosures. Furthermore, since another of the requirements of Rule 16 is that lead counsel for parties discuss settlement shortly after disclosure, the disclosure of this information at the outset will facilitate those discussions.

**Forms**

Sample forms showing an example of a plaintiffs and a defendant's Rule 26(a)(1) disclosure statements are included in CLE in Colorado, Inc.'s "Colorado's New Civil Rules on Case Management, Disclosure/Discovery, and Motions Practice," available by calling (303) 860-0608.

**Other Requirements**

New Rule 26(a)(1) requires the party to make disclosures based on information "known and reasonably available" to the party at the time of the disclosure. However, the fact that information becomes known and available to a party following the first set of required disclosures does not excuse the party from automatically disclosing the information. New Rule 26(e) places all parties under a duty to supplement their disclosures both to provide additional information and to correct information subsequently ascertained to be incorrect.

Under new Rule 26(a)(1), it is no excuse to withhold making disclosures because (1) the party has not completed its investigation, (2) another party has not made its disclosures or (3) the party is
challenging the sufficiency of another party's disclosures. Where one party has failed to make disclosures or has made incomplete disclosures, it is expected that the proposed Case Management Order, which must be filed shortly after the disclosure date, would reveal that information to the trial court. Given the strong admonition that these new Rules are designed to avoid "hide-the-ball" and "hard ball" tactics, a party failing to make initial disclosures should expect to explain the problem at the Case Management Conference and, unless there are excellent reasons for the failure, may expect to face stem and prompt judicial disapprobation.

**Expert Testimony**

In addition to the early disclosures required under new Rule 26(a)(1), the new Rule 26 also requires substantially greater disclosure of prospective expert testimony. On this topic, the disclosure may be made significantly later in the case. Unless the Case Management Order requires a different timing or sequence, new Rule 26(a)(2)(C) requires that a claiming party (plaintiff, or counterclaiming or crossclaiming defendant) make expert witness disclosure at least 120 days prior to trial; that the defending party disclose its expert information thirty days later; and that any rebuttal disclosure be made twenty days after that (see Timetable at page 2479). Thus, all expert witness disclosures should be complete at least seventy days before trial.

The new Colorado Rule requires written disclosure of the kind of information which, historically, would have been obtained from an expert during the expert's deposition. One apparent reason for this is the Ad Hoc Committee's hope that by requiring disclosure of the type which would normally be requested during a deposition, such expert depositions frequently may be avoided. The new Colorado Rule also contemplates different disclosures for two different types of expert witnesses: (1) retained experts and (2) occupational experts, such as treating physicians, police officers or others who might testify as experts but whose opinions are formed as part of their normal occupational duties.

Disclosure with respect to the experts who are retained or specially employed to provide expert testimony in the case must include a written report or summary which contains "a complete statement" of all opinions and the basis and reasons therefor. Disclosure is also required of the data or other information considered by the witness in forming an opinion, including prospective exhibits, a curriculum vitae, a list of all publications authored by the expert within the preceding ten years, the expert's compensation, and a list of other cases in which the expert has testified at trial or by deposition within the prior four years.23

With respect to the second class of expert witnesses, the treating physician, police officer and so on, the disclosure is more limited and only requires a report or summary containing the qualifications of the witness and a complete statement setting forth the substance and basis of the expert's opinions.24

**Filing and Certification By Attorneys**

New Colorado Rule 26(a)(4) requires that disclosures be made in writing and be filed with the trial court. However, the filed disclosure should be a written description of the information disclosed and need not and should not include copies of all the disclosed documents. Furthermore, all disclosures
must be signed by an attorney of record, which signature serves as a certification that the disclosure is complete and correct at the time it is made.25

Although the Ad Hoc Committee proposed to the Colorado Supreme Court that the certification be signed by the party as well as an attorney, when the court finally promulgated the new Rules, it deleted the requirement for a certification by a party. This change places an additional burden on the attorneys since new Rule 26(g)(3) provides that if the certification is in violation of the Rule, the trial court may impose sanctions, including reasonable expenses and attorney fees, created by the improper certification.

Mandatory Privilege Logs

Another familiar concept which has now been brought into the Rules and made mandatory without request from the opposing party is the provision in new Rule 26(a)(6) that a party must provide a privilege log whenever it withholds information based on claims of privilege or work product. Under this Rule, parties withholding information for that reason must make the claim expressly and describe the matters withheld in sufficient detail that the other parties may assess the applicability of the privilege. Not only will this apply in response to discovery requests, it will also apply to relevant privileged documents withheld from disclosure.

Presumptive Limited Discovery

The second highly significant change in Rule 26 was made following the November 1993 public hearing and adopted Judge Polidori’s suggestion that old Rule 26.1 limitations be retained as the presumptive limitation on discovery in all cases. New Rule 26(b)(1) retains the basic authorization for parties to undertake discovery which has existed in Rule 26 since the original adoption of the Civil Rules of Procedure. The major new limitations are contained in New Rule 26(b)(2) and will apply except on order of the court following a showing of good cause.

Depositions: Parties Plus Two

Without an order allowing more, a party only may take one deposition of each adverse party and the depositions of two other persons.26 Moreover, there is no special permission for additional depositions of expert witnesses and, therefore, without order of court, the depositions of two other persons must also include the experts. Apparently, one of the reasons the Ad Hoc Committee did not expand the number of allowable depositions from the existing Rule 26.1 was its thought that under the new expert disclosure requirements of new Rule 26(a)(2), depositions of experts would frequently not be needed.

Another practical issue lead counsel and trial judges will have to confront as these new Rules take effect is how limitations should apply to aligned parties. Should a plaintiff sue three employees of a corporation in order to be sure to depose all of them? If the plaintiff sues the corporation and the three employees, do the defendants now get depositions of the plaintiff and eight other depositions while plaintiff gets the four named defendants and only two other depositions? If the plaintiff adds loss of consortium claims for a spouse and three children does the plaintiff now get ten other depositions? Trial courts will have to become attuned to and sophisticated about these potential evasive efforts to
avoid the discovery limitations.

**Interrogatories**

Thirty "Single Questions"

With respect to interrogatories, each party may serve on each adverse party thirty interrogatories, each of which shall consist of a single question. This glass slipper will be extremely difficult for lots of litigators to get on their foot. However, its impact, in many cases, will be extremely salutary.

First, a number of the standard interrogatories asking for identification of witnesses, documents, damages and insurance policies will not be needed because of the pre-discovery disclosure requirements. Second, most experienced litigators have long since learned that interrogatories are a lousy way to gather general information about a case. Experienced opponents can virtually always object to and write their way around an answer in a way that provides little, if any, useful information (and probably no damaging information). Interrogatories will probably be much more useful when they are required to be rifle shots instead of shotgun blasts.

The trial courts can expect a significant number of disputes during the break-in period of the new Rules over the meaning of "a single question." For example, assume a set of interrogatories contains a definition of "identify," which specifies that, for any person, the responding party should provide the name, home and business address, home and business telephone number and business occupation. Then, as the first interrogatory, there is a request to identify any person who "saw, heard about or learned about the accident in question." Is this one interrogatory, three interrogatories (saw, heard, otherwise learned) or eighteen interrogatories (six identifying characteristics for each of three separate topics)?

The best guidance that can be provided at this time is to look at the form interrogatories which the Ad Hoc Committee has suggested be approved in conjunction with new Rule 33. It can at least be argued by analogy that each independent question or each subpart of the pattern interrogatories should be calculated as only one question and, therefore, that similar questions asked by parties in their own interrogatories should be treated the same way.

In any event, one tactic which can be anticipated in dealing with interrogatories is that the answering party will perform its own count of the interrogatories and will stop answering after it hits the thirtieth interrogatory. Thus, parties propounding interrogatories would be well-advised to put their most important interrogatories first so that they will be answered even if a restrictive counting technique is utilized.

**Physical or Mental Examination**

Parties are authorized to obtain a physical or mental examination under Rule 35. However, nothing about the provision in new Rule 26(b)(2)(C) changes Rule 35's limitation that such examinations may only occur on motion for good cause shown.

**Requests for Production**

Twenty Single Requests
Parties are limited to requests for production of documents or tangible things to twenty requests, each of which shall consist of a single request. Again, the requirement of initial disclosure of documents should substantially limit the need for additional document requests in most cases. However, as with the requirement that interrogatories be limited to "a single question," the limitation on requests to "a single request" should serve as a fertile ground for dispute in the early days of the new Rules.

**Requests for Admission: Twenty Single Requests**

Finally, parties are limited to twenty requests for admission under new Rule 36, each of which must be a single request. Since requests for admission are a discovery device generally disused or ignored by most practitioners, this limitation may not have much effect. However, given the limitations on the number of interrogatories, some parties may decide to utilize requests for admissions as surrogates for interrogatories which they cannot otherwise fit within the thirty-question limitation. Since an answering party under Rule 36 must state the reasons for any objections to a response and must qualify its partial denials, parties may be able to gain almost as much information from the request to admit as they can from an interrogatory.

It is not apparent from the language of this new provision whether a party that requests admissions of the genuineness of documents must count as a single request the request for admission as to each document or whether it can submit a group of documents, request an admission of their collective genuineness and have that request count as a single request.

**Additional Discovery Needs Court Approval**

As noted earlier, all of these presumptive limitations on discovery are susceptible to being increased on a court order for good cause shown. However, the new Colorado Rules specifically preclude opposing counsel from agreeing among themselves to expand discovery without a court order. New Colorado Rule 21 allows parties to stipulate to certain changes in the discovery procedures. However, a provision in the new Federal Rule 29 which specifically allows counsel to agree to waive discovery limitations was stricken by the Ad Hoc committee from the new Colorado Rule.

**"Good Cause" for Additional Discovery**

New Rule 26(b)(2), instructs trial judges in determining good cause to consider

1) whether discovery is unreasonably cumulative or duplicative or could be obtained from more convenient, less burdensome or less expensive sources;

2) whether the party has already had ample opportunity to obtain the information sought;

3) whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case;
4) the amount in controversy;

5) the resources of the party and the importance of the proposed discovery in resolving the issue; and

6) whether because of the number of parties and their alignment with respect to claims that discovery is reasonable.

At least in this context, the trial judge is given explicit authority to consider alignment of the parties, as in the above example of the plaintiff and her family suing the corporation and its three employees.\textsuperscript{32}

There seems to be little doubt, given the stringent limitations, especially on depositions, that the trial court should be reasonable in giving authority for additional discovery, particularly in large or complex cases. However, both Rule 16 and Rule 26(b) contemplate that the trial court should become substantially more active in overseeing and controlling discovery so that it does not become over, whelming, abusive or unnecessarily expensive. Trial courts will be expected to keep the parties focused on the main issues and stop the frequent present practice of turning over every grain of sand on the beach to see whether there are any tidbits underneath.

Although it is not specifically stated, this author believes trial courts, when being asked to approve additional discovery, should be expected to require the same kind of certification now called for in Rule 16(b)(1)\textsuperscript{IV}C\textsuperscript{i.e.}, that counsel have advised their clients of the estimated costs and fees for the additional discovery.

Meaningful exercise of control on discovery by the trial courts could go a long way toward fulfilling Chief Justice Rovira's dream of returning to the days when trial lawyers were trial lawyers, not just litigators.

\textit{Case Management/Disclosure/Discovery}

\textit{Timetable}

The following are the \textit{latest} deadlines under the new Colorado Rules, unless otherwise ordered by the court.

\textit{Action Day C.R.C.P.}

1. Case is "at issue" 0 16(b)

2. Conferring of lead counsel to discuss the 15 16(b)

nature of claims and defenses and what is
to be disclosed

3. Mandatory automatic disclosures 30 16(b) and 26(a)(1)

4. Conferring of lead counsel to:
   a) Discuss settlement 35 16(b)
   b) Develop Case Management Order

5. Submit proposed Case Management Order 45 16(b)

6. Initial discovery begins after #5 26(d)

7. Case Management Conference (if requested) after #5 16(b)(2)

8. Case Management Order approval after #5 or #7 16(b)(2)

9. Discovery in excess of C.R.C.P. 26(b)(2) limits after #8 16(b)(1)1V

**Days**

**BEFORE Trial**

10. Expert disclosure by claimant 120 26(a)(2)(C)

11. Expert disclosure by defending party 90 26(a)(2)(C)

12. Rebuttal expert disclosure 70 26(a)(2)(C)

13. Completion of discovery 40 16(b)(1)IV

14. File proposed Trial Management Order 30 16(c)

15. Trial briefs (if any) 7 16(c)(1)1V

16. Designation of Order of Proof 7 16(c)(4)

17. Jury instructions (if any) 3 16(d)
Discovery is Deferred

To reduce unnecessary discovery, new Rule 26(d) provides that no party may seek discovery from any source prior to submission of the proposed Case Management Order to the court. Submission of the Order will occur shortly after the initial required disclosures. This limitation on timing may be altered by court order or by agreement of the parties pursuant to new Rule 29. Once the Case Management Order is submitted, parties may commence discovery. However, they may not exceed the presumptive discovery limitations of new Rule 26(b)(2) until after the Case Management Order allowing additional discovery is issued by the court. This limitation may not be waived by the parties under new Rule 29.

Duty to Supplement Disclosure and Discovery

New Rule 26(e) imposes on parties the duty to supplement their disclosures when they learn that the information disclosed is materially incomplete or incorrect. The same duty to supplement is imposed with respect to amending prior responses to discovery and with respect to information contained in an expert’s report or summary.

CONCLUSION

Although the new Rules create a number of dramatic revisions in the way litigators will conduct pretrial activity, on closer inspection, they do not appear to be genuinely revolutionary. If they do not reflect a shot through the bow of the litigators’ ship, however, they at least reflect a close shot across the bow. The message is clear that the Colorado Supreme Court is fed up with harassing, abusive and inordinantly expensive discovery (“hide-the-ball” and "hard ball" tactics).

Some may decry the insistence on a return to professionalism (including civility) as misguided efforts at "social engineering." Nonetheless, it is clear that the Colorado Supreme Court is giving the trial courts both the authority and the mandate to step in, to referee and to stop inappropriate activities. Such authority should directly impact the attitudinal changes referred to above of increasing professionalism and judicial oversight, while decreasing discovery abuse.

The combined requirements of new Rules 16 and 26 place incentives on more focused pleadings, early and full disclosure of witnesses and documents and several rounds of consultation among lead counsel. It also requires negotiation and preparation of a detailed Case Management Order, which includes setting of discovery parameters and discussing the costs of that discovery with clients at the outset of the case. All of this will necessitate substantially increased front-loading of case preparation and should, in many cases, promote the opportunity for more expeditious settlement.

Part II of this article will discuss specific changes made to Rules 30-37 relating to discovery and sanctions, as well as related changes in Rule 121.

NOTES

2. Justices Rovira, Lohr and Vollack opposed adoption, without opinion.

3. The original proposal for changes to the rules was published in the October 1993 issue of The Colorado Lawyer, supra, note 1. Subsequently adopted changes to these proposed rules were published in the October 1994 issue, "Court Business" 23 The Colorado Lawyer (Oct. 1994) at 2367. *See also* "Colorado's New Civil Rules on Case Management, Disclosure/Discovery, and Motions Practice (CLE in Colorado, Inc. 1994) (hereinafter, "CLE Booklet").

4. *See, e.g.*, Hall v. Clifton Precision, 150 FRD. 525 (E.D. Pa. 1993); Paramount Commun. Inc. v. QVC Network, Inc., 637 A.2d 34, 51-57 (Del. 1994) (court finds quoted deposition conduct of Texas attorney "outrageous," a lesson of conduct not to be tolerated or repeated" and to be viewed with "revulsion.")


8. Id. at 2165.

9. Another source of "legislative" history for the meaning of the new Rules are transmittal letters from the Ad Hoc Committee to the Colorado Supreme Court, which can be found in Proposed Colorado Rules, supra, note 1 at 2165-68. *See also* CLE Booklet, supra, note 3.


12. New Rule 16(b).

14. *Id.*


17. New Rule 16(b)(l)IV. Sample forms of Case Management Orders and Trial Management Orders were published along With the Ad Hoc Committee's revised proposal. See CLE Booklet, *supra*, note 3.


19. New Rule 16(c)(2) and (3).

20. Dist. Ct. Colo. Local Rule 26.1 (effective April 15, 1994); but cf., 154 F.R.D. LVIILXXXVII (June 1994). The differences in wording can be easily seen in the format in which the proposed Colorado Rules were printed. See Proposed Colorado Rules, *supra*, note 1 at 2173-83, and are discussed in the Committee Comments, CLE Booklet, *supra*, note 3.


22. See, e.g., note 6, *supra*.


26. New Rule 26(b)(2)(A). Although historic practice has generally limited parties to taking only one deposition of each person, the old Rules contained no such explicit limitation. The wording of the new Rule 26(b)(2)(A) states there shall be only one deposition by each party of each party.


28. This author believes an identification question should be allowed to ask for the name, business or home address, business or home telephone number and present occupation, if known, as being minimally necessary identification information, which should count as only one inquiry. The author also would view alternative means of gathering information or of expressing one thought ("saw, heard, or learned about") as only involving one question. Therefore, if the definition of "identify" were limited as just suggested, the author would count the interrogatory in the text as a single question.

30. Obviously, opposing counsel can agree to further discovery, but they will have to rely on each other's good faith in performing that discovery. Absent a court order authorizing the discovery, they will not be able to ask for a court order enforcing the discovery or any sanctions as a result of the discovery.

31. This provision of Federal Rule 29, however, has been effectively eviscerated by the Colorado federal courts. Dist. Ct. Colo. Local Rule 7.1M and 29.1.

32. See section entitled "DepositionsCParties Plus Two," paragraph 2, supra, page 2471.

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