Back to the Future—New Rule 16.1: Simplified Procedure for Civil Cases Up to $100,000

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This article briefly summarizes the background and rationale for the development of new C.R.C.P. 16.1. It also explains the provisions of the new Rule and collateral rule changes. The effective date of Rule 16.1 is July 1, 2004.

Effective July 1, 2004, all lawyers handling civil litigation must be familiar with new Rule 16.1 of the Colorado Rules of Civil Procedure ("C.R.C.P." or "Rule"). Rule 16.1 provides dramatically simplified procedure and curtailed discovery, primarily for civil cases seeking damages up to $100,000 ("Simplified Procedure").

The essential limitations and requirements of the new Rule are summarized in Rule 16.1(a)(2), as follows:

(a)(2): *Summary of Simplified Procedure.* Under this Rule,

- Simplified Procedure generally applies to *all* civil actions, whether for monetary damages or any other form of relief
  - —unless expressly excluded by this Rule or the pleadings, or
  - —unless a party timely and properly elects to be excluded from its provisions.
- This Rule normally limits the maximum allowable monetary judgment to $100,000 against any one party.
- This Rule requires early, full disclosure of persons, documents, damages, insurance and experts, and
  - —early, detailed disclosure of witnesses' testimony,
  - —whose direct trial testimony is then generally limited to that which has been disclosed.
- Normally, no depositions, interrogatories, document requests, or requests for admission are allowed, although examination under C.R.C.P. 34(a)(2) and 35 is permitted.

(*Emphasis, bullets, and dashes added.*)

Also important are provisions in Simplified Procedure that: (1) allow parties *voluntarily* to agree to any discovery they feel may be necessary or desirable (Rule 16.1 (k)(9)); and (2) allow parties to opt *in* to Simplified Procedure, even if the monetary demand is in excess of $100,000 (Rule 16.1(e)).

The Rule 16.1(a)(2) summary is designed to be a short, but helpful, overview of the highlights of the Rule. However, the summary will not substitute for studying and analyzing the full text of Rule 16.1, which puts flesh on those summary bones.

Rule 16.1 is largely based on pilot Rule 1.1.[1] Additionally, the adoption of this new Rule is accompanied by related but collateral changes relevant to all civil trial lawyers in C.R.C.P. 8 and perhaps C.R.C.P 10 (see discussion of new case caption forms below) and by the repeal of C.R.C.P. 26.3.

This article briefly summarizes the background and rationale for the development of the new Rule. It then explains the provisions of the new Rule and collateral rule changes.

REASONS FOR THE NEW RULE

The origins of Rule 16.1 extend back several years and were explained in substantial detail in a 2000 article by this author.[2] Nonetheless, it is useful here to summarize that background briefly as an aid to understanding the new Rule.

The Civil Justice Committee's Analysis

By the latter part of the 1990s, a number of Colorado lawyers, judges, business people, lay citizens, and even Governor

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Owens had become increasingly concerned that smaller businesses and middle-class citizens were being denied effective access to the civil justice system. This is due in part to "the law's delay" and the prohibitive expense of pursuing even relatively small, but personally important, legal claims. Concurrently, there was a noticeable decline in the public's confidence in the judicial system. In response, the Colorado Supreme Court appointed a Civil Justice Committee of lawyers and judges to think creatively about possible solutions to this lack of effective access and confidence.[3]

The first paragraph of C.R.C.P. 1 provides that the rules "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action."[4] Unfortunately, that concept had become largely ignored. It was concluded that perhaps the best way to improve access to the courts and to restore public confidence was to breathe new life into the words "speedy and inexpensive."

The Civil Justice Committee recognized that bigger and more complicated cases cannot be handled properly without allowing use of the full panoply of discovery devices, providing enough time to develop the case for trial, and incurring the expense necessary to present the evidence in a comprehensible fashion. However, a problem with the Civil Rules of Procedure is that they do not distinguish between major and complicated disputes and those that are smaller and simpler. Although some cases need full discovery, others can be tried effectively with little or no pretrial discovery.

It was the consensus of the Civil Justice Committee that the word "just" in C.R.C.P. 1 had emerged as the dominant of the three adjectives. The meaning of "just" seemed to have become largely limited to whether a case is decided "correctly." When rules are construed to reach a "just" result, in isolation from consideration of whether such construction also balances the concepts of "speedy and inexpensive," such a construction can justify exhaustive discovery into all aspects surrounding the dispute. This might include the background of the participants, the credibility of the participants and witnesses, and other factual matters that have become the grist for the litigator's mill. Such constructions also can lead to abuses that create substantial delay. They often give the party who has the deeper pocket the opportunity to oppress and wear down the party who has fewer financial resources.

In the broader sense of the word "just," it can be unjust for persons injured in accidents to be delayed for years from receiving their damages or to be forced to settle for inadequate compensation to avoid inordinate litigation expense. Conversely, it can be unjust for defendants to be forced to pay invalid claims to avoid costly and time-consuming disputes. Parties of all stripes may decide to forego the judicial system entirely to avoid the time, cost, and aggravation of the litigation battles. Thus, even a correct result may be substantially thwarted if the process of obtaining that result is slow and expensive.

The process is aggravated further when the expense of litigation causes an ever-increasing number of parties to conclude that the only possibility of relief is to appear in a case *pro se.* In light of this realization, the Civil Justice Committee concluded that, at least for smaller cases, it was desirable to elevate increased speed and reduced expense as considerations in the pantheon of justice.

The Civil Justice Committee examined the speed of civil litigation. It recognized that civil trials may suffer directly from the statutory priority given to criminal trials, the time consumed by extensive discovery, and the difficulty of obtaining prompt rulings from overburdened judges on numerous and sometimes complex (or seemingly complex) pretrial discovery disputes.

With respect to the expense element, many things significantly increase the expense of a case to the litigants. Among these are taking and defending depositions, drafting and responding to interrogatories, requesting and providing volumes of documents, repeatedly preparing for continued trials, preparing case and trial management orders, regurgitating disputed issues of fact and law, and struggling over "stipulated" facts for which testimony will be presented anyway.

The Civil Justice Committee determined that it needed to find a means of increasing access to the courts and to justice while limiting the problems for litigants, especially in cases involving smaller claims. This was not an issue of believing that smaller dollar cases were inherently less important than cases making larger claims. Instead, it was a matter of salvaging the ability of parties to obtain an affordable judicial determination of even the smaller dollar-volume controversies.

The Criminal Case Analogy

While looking for inspiration as to how to enhance speed and lower cost to increase access to the courts and the "justice" they should provide, the Civil Justice Committee was reminded of Chief Justice Luis Rovira's rhetorical questions at a prior Colorado Supreme Court hearing: "Why don't we do away with discovery completely? Why don't we just file our complaints and go to trial, like we used to?"[5] In short, shouldn't we consider going back to the future?

The Civil Justice Committee also asked itself why even small civil actions should be so much more expensive than criminal actions. It was hard to imagine that the stakes and complexities of a kidnapping or first-degree sexual assault case are truly less than those of small to modest-sized civil actions. Essentially, in a criminal case, the defendant receives the charges, a list of the prosecution's possible witnesses, and the prosecution's documents. Depositions, requests for the production of documents, interrogatories, and requests for admissions are either extremely rare or are simply unauthorized.[6]

On a daily basis, prosecutors and defense counsel cross-examine persons who have not been previously deposed. Certainly, information garnered from detectives or private investigators is sometimes used in proving or rebutting facts and attacking credibility. However, this information normally is obtained without the pretrial involvement or expense of using the judicial system.

Pilot Rule 1.1

With these thoughts in mind, the Civil Justice Committee crafted a proposed Rule 1.1 for Simplified Procedure. It suggested placing Rule 1.1 immediately following Rule 1 to reinforce the concept that the emphasis was to be on providing a "just, speedy *and* inexpensive" determination of cases. After months of drafting, publication, and a public hearing before the Supreme Court, Rule 1.1 was promulgated and authorized as a pilot Rule to be used by Adams County District Court Chief Judge Harlan Bockman and Jefferson County District Court Judge Christopher Munch. The pilot study was to run from April 2000 until April 2002.

The result of the pilot project was that Rule 1.1 proved more acceptable than even its most ardent advocates expected. Both judges reported: (1) they sent out information about the pilot Rule to most of their civil cases that qualified for consideration under the pilot Rule; and (2) 75 percent of those cases then proceeded under the pilot Rule—better than two-thirds of their

total civil caseload. Indeed, Judge Bockman found the pilot Rule so useful that he continued to use it following the conclusion of the pilot project. After the two judges explained the workings of the pilot Rule at the September 2002 Colorado Judicial Conference, several other judges around the state asked for and were granted permission by the Supreme Court to use the pilot Rule in their courts as well.

Based on the preliminary success of pilot Rule 1.1, the Supreme Court Standing Committee on Civil Rules ("Civil Rules Committee") began to study how to craft a permanent rule for use in civil cases.[7] The result is Rule 16.1, which has now been adopted by the Colorado Supreme Court and will become effective for cases filed after July 1, 2004.

THE NEW SIMPLIFIED PROCEDURE AND RULE 16.1

As adopted by the Colorado Supreme Court, new Rule 16.1 is largely based on pilot Rule 1.1. Nonetheless, a number of changes have been made. Some changes deal with a few practical problems revealed during the pilot project and the statewide application of a permanent rule; others were clarifying amendments.

Essential Balance for Justice in Smaller Cases

As can be seen from the summary of Simplified Procedure contained in Rule 16.1(a)(2), quoted above, it was concluded that maximum access to justice in smaller cases is better provided by inexpensive and faster resolutions than by exhaustive pretrial discovery with its consequent disputes and motion practice. There is little doubt that with this new system, there will be cases (although probably infrequently) where a party cannot gain access to crucial information and, thereby, the ultimate search for the most "just" (that is, correct) result may be obstructed. However, the Civil Rules Committee and Supreme Court had to balance whether the present, known injustices created by expensive and delayed trials would outweigh the potential situations where intentional refusal to disclose crucial information might defeat justice. This balancing is especially relevant in cases where the dollar amounts at stake are within the range of normal attorney fees and expenses for a litigated matter.

The conclusion of that balancing is unmistakably enunciated in the first paragraph of the new Rule 16.1:

> (a)(1): *Purpose of Simplified Procedure.* The purpose of this rule is to *provide maximum access* to the district courts in civil actions; to enhance the provision of just, speedy, and inexpensive determination of civil actions; to *provide the earliest practical trials*; and to *limit discovery and its attendant expense.* (*Emphasis added.*)

Initially, civil litigators must understand the types of cases that are subject to Rule 16.1's Simplified Procedure. This understanding also is necessary to appreciate the collateral changes made in Rules 8, and perhaps Rule 10 (*see* discussion of new case caption forms below). Civil litigators must then comprehend the "opt out" provision of Simplified Procedure, pursuant to Rule 16.1(d), when a legitimate analysis of a case shows that it is inappropriate for Simplified Procedure. These issues are discussed next and in that order.

Cases Subject to Rule 16.1's Simplified Procedure

Rule 16.1(b) identifies the actions subject to Simplified Procedure. It starts from the proposition that Simplified Procedure applies to "all" civil actions, "other than" two classes of cases. Some will wonder if the exception swallows much of the new Rule, but the experience with pilot Rule 1.1 has shown that a large number of civil cases still will be subject to the Rule.

Cases Exempted by Type

The bulk of the first class of cases exempted from the application of Rule 16.1 are those already exempted from existing Rules 16 and 26; that is, "civil actions that are class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 [appellate review on the record from lower tribunals] and 120 [foreclosure sales], or other similar expedited proceedings, unless otherwise stipulated by the parties."[8]

Although class actions are governed by procedures established by both Rules 16 and 26, and are not exempted from either of those rules, they are exempted from Rule 16.1. It would be rare that a class action will be filed seeking less than $100,000. Even if such cases were filed, the necessary procedures inherent in any class action lawsuit immediately remove them from the realm of Simplified Procedure. Consideration was given to listing in Rule 16(b)(1) each of the specific rule numbers relating to class action-type cases: C.R.C.P. 23, 23.1, and 23.2. Ultimately, however, the generic description was chosen so that lawyers will not have to check the rules every time they read those seldom-used numbers.

A Civil Case is Subject to Rule 16.1, Unless:

- It is an exempt type of case (*e.g.*, domestic relations) (Rule 16.1 (b)(1))
- It claims more than $100,000 by one party against one party (Rule 16.1(b)(2))
- A party timely opts out (Rule 16.1(d))

Cases Exempted by Amount Of Damages Sought

The second class of exempted cases, described in Rule 16.1(b)(2), are "civil actions in which any party seeks a monetary judgment from any other party of *more than* $100,000, exclusive of interest and costs." (*Emphasis added.*) To understand the parameters of this exclusion completely, it is important to read it in conjunction with Rule 16.1(c), which establishes limitations on monetary judgments in cases handled under Simplified Procedure.

Among other things, Rule 16.1(c) limits the amount of any monetary judgment "to a maximum of $100,000 *including any attorney fees, penalties or punitive damages*, but excluding interest and costs. The $100,000 limitation *shall not* restrict an award of non-monetary relief." (*Emphasis added.*) (Given Rule 8's prohibition against stating a dollar amount in the prayer for relief, the issue of how a defending party will know whether a claimant is seeking more or less than $100,000 is discussed below in the section dealing with Rules 8 and 10.) Rules 16.1(b)(2) and (c), read together, incorporate a number of important considerations.

Cases Seeking Monetary Judgments

As noted above, Rule 16.1(b)(2) advises that cases are excluded from the strictures of Rule 16.1 where any party is seeking monetary judgments against any other party in excess of $100,000, exclusive of interest and costs. This exclusion raises the following questions, among others:

1. What is meant by the "any party" limitation?
2. What amount is included in the judgment a party is "seeking"?

3. How does a party manifest that it is "seeking" such an amount?
4. What is included in the term "interest and costs"?

Any Party: The claim for a judgment in excess of the monetary limit must be made "by any party" and "against any other party." For example, assume a complaint in which one of two married plaintiffs seeks damages for a broken leg against one defendant in the amount of $80,000, and the spouse seeks a loss of consortium in the amount of $40,000. Neither involves a claim in an amount in excess of $100,000. Such a case would not be exempt from Simplified Procedure. Likewise, a suit for a breach of construction contract in which one plaintiff seeks damages from each of three defendant subcontractors, with each claim being for $75,000, will not exceed the limitation on claims sought "against any other party."

This limitation of "any party," however, also applies to *any* party in a lawsuit. Thus, a plaintiff's claim for damages of $50,000, followed by a defendant's counterclaim against that plaintiff of $110,000, can trigger the exclusion of the case from Simplified Procedure under subsection (b)(2). The same analysis is applicable to any party asserting a cross-claim or a third-party claim. In short, the exclusion created by subsection (b)(2) applies when, but only when, any one party in a lawsuit brings a claim seeking monetary relief of more than $100,000 in damages against any other single party.

Amount Sought: The amount the party is "seeking" is determined in context with Rule 16.1(c), because that latter rule limits what judgment can be recovered. The $100,000 limitation on a maximum judgment includes punitive damages, penalties, and attorney fees. Thus, if a party seeks a judgment including actual damages of $75,000 and equal punitive damages against any other party, the monetary judgment sought—$150,000—would exceed the $100,000 limit in subsection (b)(2).

Declaration of Amount Sought: The answer to how a party declares whether he or she is seeking damages at a level sufficient to trigger the exclusion from Rule 16.1 is contained in amendments to Rules 8 and, perhaps, 10 and is discussed below.

Interest and Costs: The phrase "exclusive of interest and costs" must be considered carefully by litigators planning to file a suit with claims in the range of the $100,000 maximum. The Rule is not specific as to what the term "interest" includes. Almost certainly, the Rule excludes from the limitation on maximum judgments pre-judgment and post-judgment interest *on* damages. Where a lawsuit is filed to collect a past-due note with an unpaid balance of $99,000, a judgment for that full amount plus another $10,000 in past-due interest should be subject to Simplified Procedure. However, when interest is sought *as* damages, the limitation on the judgment should include interest of that nature.

$100,000 Limit on Judgments: Rule 16.1(b)(2) and (c)

- Limits judgments in favor of one party against one party
- Does not include interest and costs
- Includes punitive damages
- Includes penalties
- Includes attorney fees
- Does not affect claims for non-monetary relief
- Does not apply to cases that opt in (Rule 16.1(e))

As to "costs," the Rule is clearer, especially as to the question of whether attorney fees can be deemed to be "costs." Subsection (c)'s limitation on maximum judgments specifically includes attorney fees. No distinction is made as to whether these are attorney fees awarded as damages, pursuant to a contract, or as "costs." The inclusion of attorney fees as falling within the judgment limitations was intentionally written to avoid disputes as to whether such fees are or are not costs.

Some statutes provide that attorney fees are recoverable "costs."[9] Under this Rule, however, even such statutory attorney fee "costs" would be subject to the limitation on judgments. Therefore, a party seeking $90,000 in damages for employment discrimination and $40,000 in recoverable attorney fees is seeking monetary relief in excess of $100,000, and the case is initially excluded from Simplified Procedure.[10]

Similarly, the party seeking to collect a $99,000 past-due note, together with attorney fees recoverable under the terms of the note, is seeking a monetary judgment that places the case outside the provisions of Rule 16.1. Because the Rule excludes attorney fees from the concept of costs and because there will be few or no discovery costs under Rule 16.1, the amount of costs awarded in cases subject to Simplified Procedure normally will be quite small.

Jury Instruction on Damages

As noted above, Rule 16.1(c) limits the maximum judgment in a case under Simplified Procedure to $100,000 (including attorney fees, penalties, and punitive damages), plus interest and costs. Anticipating issues that have previously arisen under tort reform limitations on damages, subsection 16.1(c) provides that juries are not to be instructed about the limitation on maximum judgments. This is provided to avoid the problem of establishing a "target" for juries to hit. If a jury delivers a larger judgment than is allowed under Simplified Procedure, the judge is simply instructed to reduce the verdict to $100,000. The court can then assess allowable court costs and appropriate interest on the verdict.

Cases Seeking Non-Monetary Relief

Rule 16.1(b) commences with the statement that it applies to "all" civil actions. The exception in subsection (b)(2) only excludes cases in which a party "seeks a *monetary* judgment" exceeding $100,000. Thus, Simplified Procedure applies to actions seeking injunctions, declaratory relief, and other purely equitable forms of relief. This inclusion was intentional. Many of these kinds of actions are not heavily fact-intensive and do not implicate large monetary impacts. Suits seeking judicial interpretations of agreements, determining boundary disputes, enjoining trespasses, and other actions may be examples of such actions.

Speed may well be important, and preventing one party from abusing another with expensive discovery can justify this inclusion. Moreover, given the relatively easy escape valve of the election for exclusion from Simplified Procedure,[11] the opportunities to abuse an opponent by forcing the inappropriate use of the abbreviated procedures of Rule 16.1 will be extremely rare.

Importantly, the $100,000 limitation on monetary judgments does *not* restrict the award of non-monetary relief. Thus, an argument that granting an injunction may cause the defendant more than $100,000 in damages will not exclude the case from Simplified Procedure or create any need to limit the non-monetary relief. The Civil Rules Committee discussed this and concluded that the difficulty of measuring, proving, and arguing about the value or damage created by non-monetary relief would far outweigh the utility of such a limitation. If the underlying monetary im-

pact is more than $100,000, the concerned counsel always can opt out of Simplified Procedure.

Election for Exclusion from Simplified Procedure—Opting Out

Although the Colorado Supreme Court has adopted a procedure for opting out of Simplified Procedure under Rule 16.1, as this article is going to press, the Court is considering a slightly modified procedure that may be adopted in place of the existing Rule 16.1(d) for opting out. At the risk of complicating things, both procedures will be described, even though the proposed revised procedure might not be adopted or might be subjected to further changes by the Court. (*See* "Court Business," on page 117 of this issue, for the proposed changes to Rules 8, 10 and 16.1(d)). The proposed forms for Civil Cover Sheets and Notice to Elect Exclusion from C.R.C.P. 16.1 are appended to this article.

For parties who do not wish to be subject to the limitations and provisions of Simplified Procedure, withdrawal from the application of the Rule is easy. This will be true under both the proposed new version of Rule 16.1(d) being considered by the Court and the previously adopted version of that section.

In cases that are not already exempted under Rule 16.1(b)(1) or (2), the presently adopted Rule 16.1(d) provides that within thirty-five days of the time the case is at issue, any party may file a written statement in a pleading or otherwise opt the entire case out of the new Rule. The only limitation on such an opt-out statement is that *both* the party and, if represented, his or her attorney, must sign the statement. If such a statement is filed, the case reverts to being handled under Rule 16.

As a practical matter, a civil litigator will want to explain Simplified Procedure to the client in some detail before submitting an opt-out statement for the client's signature. This should be done so that: (1) the opt-out election and consequent relinquishment of the opportunity to limit costs and expedite the proceeding will be knowingly waived; and (2) the attorney is not left open to second-guessing and recrimination down the road if the expenses in the case expand substantially and the delays multiply.

Another thing the careful litigator should do before opting out is to communicate with opposing counsel. In close cases, the parties may be able to agree to limited voluntary discovery as allowed under Rule 16.1(k)(9), and still take advantage of the remaining benefits to the client of Simplified Procedure. Indeed, the Colorado Supreme Court also is considering adopting a form for exclusion from Simplified Procedure that contains several useful advisements. (*See*, proposed form "Notice to Elect Exclusion from C.R.C.P. 16.1," appended to this article.)

As implementation of the new Rule 16.1 to cases filed on and after July 1, 2004 has approached, the needs of the court clerks and trial judges to know whether cases are subject to Simplified Procedure has raised some new concerns. As just noted, the present version of Rule 16.1(d) allows a party to opt out merely by filing a "written statement in a pleading or otherwise." If such a statement is contained in a pleading or some other document, the clerks and judges might not become aware of the fact that the case is no longer subject to Simplified Procedure. Thus, the Court is seriously considering revising Rule 16.1(d)

to provide that opting out of Simplified Procedure must be accomplished by means of a written "notice," instead of a "statement in a pleading or otherwise."

Such a notice, filed as a separate document, would make it much easier for the clerks and trial courts to learn that a case is no longer subject to Simplified Procedure. A notice in compliance with Rule 16.1(d) would be sufficient, stating that the party elects to be excluded from the application of Simplified Procedure and signed by the party and its counsel. However, the revised Rule 16.1(d) may provide specifically that filing of the Court's form for "Notice to Elect Exclusion From C.R.C.P. 16.1" shall comply with this notice requirement. The proposed form would be included in the Appendix of Forms published at the end of the Civil Rules and also would be available on the Court's Web page for ease of use in any case.

To remove the case from Simplified Procedure, only one party needs to file an opt-out statement or notice. Moreover, once any opt-out statement or notice is filed, this subjective judgment of the filing party cannot be challenged. The Rule provides for no review of an opt-out decision and for no sanctions against a party who invokes the right to opt out—and none was intended.

The requirement that an opt-out statement or notice be filed within thirty-five days after the case is at issue is to ensure that none of the crucial deadlines under Rule 16 will be missed. Thus, for example, if a party is to opt out on the thirty-fifth day after the case is at issue, the parties still will have ten days under Rule 16 within which to determine whether they wish to be governed by the presumptive case management order ("CMO") or whether they desire to file a modified CMO. Also, the time limit for filing an opt-out statement or notice brings the case under Rule 16 in time for the permissive start of discovery under Rule 16 at the forty-five-day mark.

The expectation is that parties with modest claims for known amounts would be most likely to use the Simplified Procedure. These may include, for example, claims relating to collections, breach of contract, property damage, employment, and real estate. Smaller personal injury claims or claims in which plaintiffs are willing to cap the claim to take advantage of the cheaper, faster procedures under Rule 16.1 also could come under its terms. Those claims that can be expected to opt out of Simplified Procedure more frequently include personal injury claims or claims where the damages are more uncertain and might therefore surpass the $100,000 cap, as well as claims with potentially significant punitive damages, penalties, or attorney fees.[12]

Plaintiffs with limited resources may even choose to forego the possibility of a higher recovery so they can save costs and time. At a minimum, they will have an option for access to the civil justice system that presently may be unavailable. The obvious benefit to defendants for their loss of full discovery (even if they have no interest in saving money or expediting resolution of the dispute) is their assurance that the judgment against them cannot exceed $100,000, plus interest and costs.

Defendants who opt out will lose the protection of the damages cap. Moreover, the defendant's insurance company that opts out when the policy limit is at or under $100,000 may open itself to assertions that it must provide excess coverage counsel for its insured and may subject itself to possible bad faith claims. Thus, even with an easy way to opt out of Simplified Procedure, parties may not opt out as often as lawyers who are used to undertaking substantial discovery might expect.

Election for Inclusion, With No Monetary Limitation on The Judgment

Although most litigators may worry about whether their case is subject to Simplified Procedure and whether they wish to opt out, litigators also should be aware that parties are allowed under Rule 16.1(e) to opt *in* to Simplified Procedure. This may not be a frequent request. However, there may be cases in which the parties desire the faster and less expensive option of Simplified Procedure, even though their claims exceed the $100,000 threshold. An example of such a case is one for declaratory judgment as to the meaning of a contract, coupled with a claim for the collection of a fixed amount of $200,000 due under the plaintiff's desired interpretation of the contract.

After lawyers become accustomed to the efficiency of Rule 16.1, they may be more willing to consider opting in. To opt in, all parties must agree and must file their stipulation to be governed by the new Rule within forty-five days of the case being at issue. Again, the forty-five-day requirement dovetails with the date for CMO under Rule 16—the rule that will apply if all parties do not agree to opt in.

Importantly, for parties with larger cases who wish to opt in, Rule 16.1(e) abrogates the maximum judgment limitation for opt-in cases. Thus, in the example given above, the party seeking the $200,000 claim for breach of contract could in fact obtain a valid judgment for the entire $200,000.

Notice of Simplified Procedure: New Case Caption Forms

As with the proposed change to Rule 16.1(d) relating to opting out of Simplified Procedure, the Court also is in the process of considering changing the method of providing notice to parties, court clerks, and judges of whether cases are to be subject to Simplified Procedure. Because the new proposed revision solves several problems and will leave the existing forms of document captions unchanged, it seems likely that the new proposal will be adopted. Thus, this article first addresses the proposed changes that may be adopted after press time. (*See* "Court Business," in this issue, for the proposed changes to Rules 8, 10, and 16.1(d). The proposed forms for Civil Cover Sheets and Notice to Elect Exclusion from C.R.C.P. 16.1 are appended to this article.) Next, the article discusses the method presently adopted in Rules 8 and 10 for providing this notice, in the event the new method is not adopted.

By way of background, the adopted method of providing notice of the applicability of Simplified Procedure is a requirement that all lawyers in all non-criminal actions include a required statement in the caption of any pleading making a claim for relief. This was accomplished by amendments to both Rules 8 and 10.

One of the unanticipated problems created by the changes to the caption forms adopted in Rule 10 is that there are a large number of approved forms of pleadings and court filings that clerks and the State Court Judicial Administrator's Office believe must be changed to accommodate the new caption requirements. Thus, the Supreme Court is seriously considering rescinding the new caption requirements just added to Rule 10, which are applicable to *all* non-criminal cases. Instead, the Court would require filing of a Civil Cover Sheet only applicable to civil cases *other than* domestic relations, probate, water, juvenile and mental health cases.

Litigators who have practiced in the Colorado federal courts are familiar with the requirement that all plaintiffs file a cover sheet. The Civil Cover Sheet being proposed for adoption under Rule 8 would

be significantly simpler than the existing federal form. First, it would not have to be filed in domestic relations, probate, water, juvenile, and mental health cases. Second, it would have to be filed only by parties making claims for relief at the time such claims were filed. Thus, it would have to be filed only with pleadings asserting an original claim, counterclaim, cross-claim, or third-party claim.

As shown by the proposed form of Civil Cover Sheet appended to this article, the filing party would have to check one or two boxes indicating whether the case was or was not covered by Simplified Procedure under Rule 16.1. The Civil Cover Sheet must be served on the opposing parties to provide them with notice of whether Simplified Procedure was applicable to the case.

The proposed form also contains a space for indicating whether a jury trial is being demanded. Although unrelated to the issues of Simplified Procedure, this will provide an easy way for clerks' offices to determine whether the case should be set for trial to a jury.[13]

The proposed form of Civil Cover Sheet also reminds all parties that they can elect to have their case included under Simplified Procedure, even though the claims might be in excess of the $100,000 limit. Furthermore, it advises parties of their right to opt out of Simplified Procedure, if they desire.

The new proposed revision to Rule 8 requiring submission of a Civil Cover Sheet specifically provides that the failure to file it is not a jurisdictional defect. However, it can be expected that the clerk's office, judge's clerk, or opposing party will be asking that the form be completed and filed promptly whenever the claiming party overlooks it.

Under Rules 8 and 10 as they exist as of this writing, parties to a lawsuit can determine if the case is excluded from Simplified Procedure because of new requirements governing case captions. These amendments are discussed next in the event the requirement to file a Civil Cover Sheet is not adopted by the Supreme Court.

Amendments to Rules 8 and 10

The Rule changes that will impact the largest number of practitioners are those to the required form of caption for all state court civil cases, including those cases exempted from the coverage of Rules 16 and 16.1 (for example, divorce and water cases). Although the changes are not particularly substantive, unlike Rule 16.1, *all* lawyers filing civil cases, regardless of specialty, must adopt them. These amendments also provide the answer to the questions posed above of how the parties will know whether they are included in or exempted from the provisions of Rule 16.1 and whether they need to consider the issue of possibly opting out of (or into) Simplified Procedure.

When the Civil Rules Committee was discussing adoption of Simplified Procedure, it was clear that the dramatic changes in procedure envisioned by Rule 16.1 initially would come as a surprise to most Colorado lawyers. Thus, a prime concern was to provide notice to opposing parties and their lawyers as to whether a case was subject to the discovery limitations and other restrictions of Simplified Procedure. The problem was aggravated by the existing requirement in Rule 8(a) that the prayer for relief must not include a statement of the dollar amount of the judgment sought.[14] For example, under Rule 8(a), a

shorter time period and with significantly less expense. It has proven successful in the pilot courts in which it was used. Some lawyers have a natural resistance to significant change. Therefore, the new Rule is likely to be viewed with greater skepticism by lawyers than by their clients, many of whom have been clamoring for faster and less expensive methods of resolving disputes.

It is expected that the greatest initial use of Simplified Procedure will be in ordinary business transactions, rather than in cases involving even relatively small personal injuries. However, it is hoped that as lawyers and clients become increasingly used to its advantages, Simplified Procedure will become more widely used, not only in the "smaller" cases with claims under $100,000, but also in larger cases.

NOTES

1. *See* Holme, "Just, Speedy, and Inexpensive: Possible Simplified Procedure for Cases Under $100,000," 29 *The Colorado Lawyer* 5 (March 2000). That article described pilot Rule 1.1 in detail. Because much of new Rule 16.1 is taken from pilot Rule 1.1, the present article uses many of the same descriptions. However, there are enough differences between the pilot Rule 1.1 and new Rule 16.1 that the prior article should not be relied on for any of its descriptions of the provisions of Simplified Procedure.

2. *See* Holme, *supra*, note 1 at 5-8 (and citations contained therein).

3. The Civil Justice Committee included approximately sixteen lawyers, with varying practices, and ten justices and judges from around the state.

4. C.R.C.P. 1(a); *see also* F.R.C.P. 1.

5. Colorado Supreme Court public hearing on proposed changes to Rule 16 (1994).

6. *See* C.R.Crim.P. 15 and 16.

7. The Supreme Court Standing Committee on Civil Rules includes approximately eighteen civil trial lawyers, with virtually all types of practice, and eight judges and magistrates from all levels of the judiciary.

8. Rule 16.1(b)(1).

9. *Cf. Marek v. Chesny*, 473 U.S. 1, 44-48 (1985).

10. The phrase "initially excluded" is used because the parties in the case can agree to opt in to Simplified Procedure under Rule 16.1(e), if they wish to do so.

11. *See* Rule 16.1(d).

12. The likelihood that personal injury cases might frequently opt out was not seen as a major shortcoming by the Civil Justice Committee, because personal injury cases comprise only approximately 9 percent of the district courts' civil dockets. *See* Judicial Branch, *Fiscal Year 2003 Annual Report* at 37, available online at http://www.courts.state.co.us/panda/statrep/ar2003/ar2003toc.htm.

13. There is no change to Rule 38, so a party may still demand a jury in the manner and time provided by that Rule. The Civil Cover Sheet simply provides an easy way of advising the clerks and parties that a jury is being demanded, if the claiming party has decided that it wants a jury at the time it is making its initial pleading. The party must still pay the jury fee when making such a demand.

14. This prohibition was adopted in 1987 as part of the tort reform movement and was intended to prevent the growing practice of claiming parties to assert huge claims for damages in their complaints, either to gain publicity and notoriety for their case or themselves, or to embarrass or prejudice the defending party.

15. *Id.*

16. Most Rule 106 cases are brought under Rule 106(a)(4) as appeals from lower courts, administrative agencies, or governmental entities, and are heard on the record made before the original hearing body. However, some persons apparently had believed that Rule 16 might apply even though Rule 16 is patently related to trial proceedings in the then-pending case. To avoid any further confusion, Rule 106 cases were explicitly added to the list of cases exempt from Rule 16.

17. The provisions of Rule 26 that are not incorporated are 26(a)(5), 26(b), and 26(d), all of which authorize additional discovery that would not be available under Rule 16.1. For those keeping track, Rule 26(a)(2), relating to disclosure of experts, is dealt with in Rule 16.1(k)(2). *See also* note 21, *infra*.

18. A request for gynecological records from a plaintiff seeking damages for a broken foot is an example of a request properly subject to a protective order. Given the prior consultation requirements of Rule 121, § 1-15(8), it is hoped that protective orders against responding to such requests would be needed only infrequently.

19. *See, e.g., Johnson v. Trujillo*, 977 P.2d 152, 157 (Colo. 1999) (generic claims for mental anguish and emotional distress do not waive physician/patient privilege for prior psychiatric and marriage counseling records).

20. The Rule 37(c) sanctions include precluding evidence at trial that was not disclosed; requiring payment of expenses, including attorney fees, caused by the failure to disclose; designating facts as being established for purposes of the action; striking all or parts of the recalcitrant party's pleadings; and even entering default judgment. *Cf. Todd v. Bear Valley Village Apts.*, 980 P.2d 973 (Colo. 1999).

21. The changes in Rule 26(a)(1)(B) through (D) that require immediate production of disclosed documents without a Rule 34 request for production were inspired by this same requirement that was included in the earlier pilot Rule 1.1. *See* Holme, *supra*, note 1 at 12.

22. Rule 26(a)(2)(C) is not incorporated because it contains different timing provisions than those under Simplified Procedure.

23. Judge Zita Weinshienk has made such a statement frequently. ■

Proposed Civil Cover Sheet

District Court _____ County, Colorado Court Address: Plaintiff(s): v. Defendant(s):	[Proposed Civil Cover Sheet] COURT USE ONLY
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
DISTRICT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT	

1. **This cover sheet is filed by a party or Attorney for the party to this case. This cover sheet is not to be filed in a Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), or Mental Health (MH) case. Check the boxes applicable to this case.**

   ❑ Simplified Procedure under C.R.C.P. 16.1 **applies** to this case because this case is not a class action, forcible entry and detainer, Rule 106, Rule 120, or other expedited proceeding and because this party does not seek a monetary judgment in excess of $100,000.00 against another party, including any attorney fees, penalties or punitive damages but excluding interests and costs.

   ❑ This case is **not subject** to the Simplified Procedure for actions pursuant to C.R.C.P. 16.1, because:
   ❑ This is a class action, forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding.

   or

   ❑ This party is seeking a monetary judgment for more than $100,000.00 against another party, including any attorney fees, penalties or punitive damages, but excluding interests and costs (see C.R.C.P. 16.1(c)).

2. This party makes a **Jury Demand.** ❑ Yes ❑ No

This party understands:

1. Even if the claim is for a monetary judgment against another party in excess of $100,000.00, all parties, within 45 days of the case being at issue, can file a stipulation to be subject to simplified procedures of C.R.C.P. 16.1 and without the $100,000.00 judgment limitation under the rule.

2. Even if all parties have indicated that Rule 16.1 applies to this case, any party, within 35 days of the case being at issue, may elect to have the case excluded from the Simplified Procedure of the Rule by filing with the Court in this action a notice, pursuant to Rule 16.1(d), which may be in the form and content of a "Notice to Elect Exclusion From C.R.C.P. 16.1," Appendix to Chapters 1 to 17, Form 1.3 (JDF 602).

_____ _____

Signature of Party or Attorney for Party Date

NOTICE

✓ Any party making a claim against another party must complete this cover sheet for all District Civil (CV) Cases.
✓ Any party that is required to file this cover sheet must serve a copy on all other parties along with the first pleading.

JDF 601 7/04 DISTRICT CIVIL CASE COVER SHEET

Proposed Opt-Out Notice

District Court _____ County, Colorado Court Address: Plaintiff(s): v. Defendant(s):	[Proposed Opt-Out Notice] COURT USE ONLY
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

NOTICE TO ELECT EXCLUSION FROM C.R.C.P. 16.1

NOTICE: THIS FORM MUST BE FILED WITH THE COURT AND SENT TO ALL OTHER PARTIES NO LATER THAN 35 DAYS AFTER YOUR CASE IS "AT ISSUE," OR THIS CASE WILL BE SUBJECT TO THE LIMITATIONS OF COLORADO RULE OF CIVIL PROCEDURE (C.R.C.P.) 16.1. IF YOU DO NOT UNDERSTAND THE SIGNIFICANCE OF THE "AT ISSUE" DATE, YOU MAY NEED TO SEEK LEGAL ADVICE. (The case is at issue, as defined in C.R.C.P. 16(b)(1), within 35 days after all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults have been entered against all non-appearing parties, or within such other time as the Court has directed).

Simplified Procedure under C.R.C.P. 16.1 is intended to be a less expensive and faster method of handling civil cases and applies where the Simplified Procedures for Civil actions amount sought against each party is $100,000.00 or less. The Rule requires early and full disclosure of the information that each party has about the dispute and addresses what evidence will be introduced at trial. However, what a party can learn about the other party's case is limited in order to reduce the cost of litigation. A party can choose to be excluded from this procedure and have the right to seek information from the other party using all of the civil discovery rules.

The party and attorney, if applicable, signing this Notice hereby elect to exclude this case from the Simplified Procedure under C.R.C.P. 16.1.

By signing this form, the undersigned state that:

1. They understand that discovery can still occur under C.R.C.P. 16.1 if the parties or attorneys agree despite the limitations of the rule.
2. They are aware of the potential benefits of C.R.C.P. 16.1, but want the case to be excluded from the rule.
3. The attorney signing this form has conferred with the attorneys for all other parties to this action about the possibility of having this case stay under the rule before signing this notice.
4. They understand that once this Notice is filed, the procedures of C.R.C.P. 16, Case Management and Trial Management, will apply to this case.

This Notice must be signed by the party and, if represented, by the attorney.

Date: _____ _____
Signature of Party

Date: _____ _____
Signature of Attorney for Party, if applicable

CERTIFICATE OF SERVICE

I certify that on _____(date) this ***NOTICE TO ELECT EXCLUSION FROM C.R.C.P. 16.1*** was filed with the Court; and true and accurate copies of the Notice were served on all other parties by: _____ (method of service) and if by mail, postage pre-paid, and addressed to the following:

_____

_____

_____

_____

_____
Signature of Party or Attorney

JDF 602 7/04 NOTICE TO ELECT EXCLUSION FROM C.R.C.P. 16.1