

SUPREME COURT OF COLORADO
OFFICE OF THE CHIEF JUSTICE

ADOPTING PILOT RULES FOR CERTAIN DISTRICT COURT CIVIL CASES

Whereas, the Court desires to study whether adopting certain rules regarding the control of the discovery process reduces the expense of civil litigation in certain business actions, and

Whereas, the Court has determined that the pilot project requires the use of modified rules of Civil Procedure concerning the pleading, discovery and trial management of certain cases; and

Whereas, the Court carefully considered the adoption of the pilot rules by:

- Publishing the proposal from the Colorado Pilot Project Committee (Committee);
- Inviting public comment about the proposal from the Committee;
- Holding a public hearing on January 19, 2011, concerning the Committee's proposal;
- Allowing and encouraging additional comment and suggestions to be made to the Court regarding the scope of the pilot project and the rules to be adopted;
- Narrowing the scope of the pilot to include business cases; and
- Redrafting rules to reflect the goals of the pilot to identify and narrow disputed issues at the earliest stage of litigation; require active ongoing case management by a single judge; and seek to keep litigation costs proportionate to the issues being litigated;

Now therefore, the Court orders the attached rules adopted for use in the designated cases in the First (Jefferson and Gilpin Counties), Second, Seventeenth (Adams County), and Eighteenth (Arapahoe County) Judicial Districts. The cases to which the rules apply are described in Amended Appendix A to the rules appended to this Directive.

These rules are effective January 1, 2012 and shall be applied to cases filed on or after that date. The pilot project is scheduled to be a two year pilot and shall apply to all applicable cases filed in the pilot district up to December 31, 2013 or until further order of the court.

The effect of the pilot will be studied by the Institute for the Advancement of the American Legal System (IAALS) working at the request of the Court. IAALS will issue a report on the effect of the pilot project upon the conclusion of the two year pilot.

CJD 11-02 was amended October, 2011 to correct a reference and to replace Appendix A with Amended Appendix A.

Done at Denver, Colorado this 7th day of October, 2011.

/s/
Michael L. Bender, Chief Justice

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Civil Access Pilot Project

**Applicable to Business
Actions in District Court**

January, 2012

**Civil Access Pilot Project
Applicable to Business Actions in District Court**

Pilot Project Rule 1—Scope

1.1. These Rules (“PPR”) govern all pretrial process in all actions filed after January 1, 2012 that are part of the pilot project. They will be applied only to business actions as defined in Appendix A. Inclusion in the pilot project will be determined based on the contents of the complaint at the commencement of the action.

1.2. The PPR are not meant to be a complete set of rules. The Colorado Rules of Civil Procedure (“CRCP”) will govern except to the extent that there is an inconsistency, in which case the PPR will take precedence.

1.3. At all times, the court and the parties shall address the action in ways designed to assure that the process and the costs are proportionate to the needs of the case. The proportionality factors include, for example and without limitation: amount in controversy, and complexity and importance of the issues at stake in the litigation. This proportionality rule is fully applicable to all discovery, including the discovery of electronically stored information. This proportionality rule shall shape the process of the case in order to achieve a just, timely, efficient and cost effective determination of all actions.

1.4. Continuances and extensions are strongly disfavored. Absent extraordinary circumstances, motions for continuances or extensions will be denied by the court upon receipt and without waiting for a response. Stipulated motions by the parties to continue or extend are not binding on the court and parties should assume the motion will be denied.

Pilot Project Rule 2—Pleadings—Form and Content

2.1. The intent of PPR 2 is to utilize the pleadings to identify and narrow the disputed issues at the earliest stages of litigation and thereby focus the discovery.

2.2. The party that bears the burden of proof with respect to any claim or affirmative defense should plead all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages.

2.3. Any statement of fact that is not denied with specificity in any responsive pleading is deemed admitted. General denials of any statement of fact are not permitted and a denial that is based on the lack of knowledge or information shall be so pleaded.

Pilot Project Rule 3—Pleadings and Initial Disclosures

3.1. No later than 21 days after service of a pleading making a claim for relief, the pleading party shall file with the court a statement listing all persons with information related to the claims and a brief description of the information each such individual is believed to possess, whether the information is supportive or harmful. The statement shall also include a certification that the party has available for inspection and copying all reasonably available documents and things

related to the claims, along with a description by category and subject area of the documents and things being disclosed, whether they are supportive or harmful.

3.2. The due date for filing the answer and all other responsive pleadings shall be 21 days following the filing of the statement required by PPR 3.1.

3.3. No later than 21 days after service of a pleading defending against a claim for relief, the pleading party shall file with the court a statement listing all persons with information related to the claims for relief and the defenses asserted and a brief description of the information each such individual is believed to possess, whether the information is supportive or harmful. The statement shall also include a certification that the party has available for inspection and copying all reasonably available documents and things related to the claims and defenses, along with a description by category and subject area of the documents and things being disclosed, whether they are supportive or harmful.

3.4. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the initial case management conference pursuant to PPR 7.1, at which time they may raise those issues.

3.5. When a party withholds information by asserting that the information is privileged or subject to some other protection, the party shall make the assertion expressly and shall provide a privilege log that describes the nature of the documents, communications, or things not produced or disclosed in a manner which, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. The privilege log shall be provided at the same time as the initial disclosures required by PPR 3 are filed.

3.6. Each party has an ongoing duty to supplement the initial disclosures promptly upon becoming aware of the supplemental information.

3.7. Unless the court makes a specific determination that failure to disclose in a timely and complete manner was justified under the circumstances or harmless, such failure shall result in one or more of the following:

- (a) a denial of the right to use the information not disclosed for any purpose;
- (b) a denial of the right to object to the admissibility of the evidence;
- (c) a dismissal of all or part of any claim or defense;
- (d) assessment of attorney fees and costs; and
- (e) any other sanction the court deems appropriate.

3.8. Parties may not stipulate to extend any of the deadlines set forth in this Rule 3. The court shall address any motions for extension immediately, without waiting for a response; and shall deny them absent extraordinary circumstances.

Pilot Project Rule 4—Motion to Dismiss

4.1. The filing of a motion to dismiss shall not eliminate the need to also file an answer. Unless otherwise prohibited by statute, the filing of a motion to dismiss shall not disrupt or interfere with the pleading and disclosure requirements of PPR 3 and the scheduling of the initial case management conference under PPR 7.

Pilot Project Rule 5—Single Judge

5.1. Upon the filing of a complaint, a judge will be assigned to the case for all purposes, and, absent unavoidable or extraordinary circumstances, that judge will remain assigned to the case until final resolution, including any post-trial proceedings. It is expected that the judge to whom the case is assigned will handle all pretrial matters and will try the case.

Pilot Project Rule 6—Preservation of Relevant Documents and Things

6.1. Within 14 days after the filing of an answer, the parties shall meet and confer concerning reasonable preservation of all relevant documents and things, including any electronically stored information. In the absence of an agreement, any party may move for an order governing preservation of such documents and things. The response to such motion shall be filed within 7 days. The court promptly shall enter an order governing preservation of such documents and things.

6.2. Unless directed otherwise by an order of the court, the cost of preserving, collecting and producing electronically stored information shall be borne by the producing party. The court may shift any or all costs associated with the preservation, collection and production of electronically stored information as the interests of justice and proportionality so require.

Pilot Project Rule 7—Case Management Conferences

7.1. Unless requested sooner by any party, the judge to whom the case has been assigned shall hold an initial case management conference no later than 49 days after the answer and responsive pleadings are filed pursuant to PPR 3.2. Each party's lead trial counsel shall attend this conference. At least seven days before the conference, the parties shall submit a joint report setting forth their agreement or their respective positions on matters set forth in the form contained in Appendix B.

7.2. As soon as possible after the initial case management conference, the judge shall issue an initial case management order with respect to each of the matters set forth in the form contained in Appendix B. In determining whether to permit or exclude discovery and pretrial motions, the court shall apply the proportionality factors set forth in PPR 1.3. Modifications to the initial case management order may be made only upon a showing of good cause.

7.3. The number and subject areas of expert testimony, and the dates for production of expert reports and files, shall be set forth in the initial case management order. There shall be no continuances of the trial date solely based on a failure to complete expert disclosures within the deadlines set forth in the case management order.

Pilot Project Rule 8—Ongoing Active Case Management

8.1. The court shall provide active case management from filing to resolution on all pending issues.

8.2. The parties may contact the court clerk by telephone, or as otherwise directed by the court, to arrange for prompt conferences for clarification, modification or supplementation of any of the court's outstanding orders, or for resolving disputes regarding any pretrial matter.

8.3. The court may hold additional status conferences on its own motion.

8.4. A conference may be held in person or by telephone or videoconference, at the court's discretion.

8.5. The trial date shall be set in the initial case management order, and shall not be changed absent extraordinary circumstances.

Pilot Project Rule 9—Discovery

9.1. Discovery shall be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and shall comport with the factors of proportionality in PPR 1.3.

9.2. Discovery shall be limited in accordance with the initial case management order. No other discovery will be permitted absent further court order based on a showing of good cause and proportionality.

Pilot Project Rule 10—Expert Discovery

10.1(a) In accordance with the case management order, each retained expert and any party or representative of a party who is testifying in part as an expert, shall furnish a report (in the form of the expert report set forth in Appendix C) signed by the expert, with each paragraph initialed by the expert, setting forth his or her opinions, and the reasons for them. Each expert witness report shall, at a minimum, contain:

1. a specific statement of the opinions by the expert and the facts and other information which form the basis for each opinion;
2. a listing of all of the material relied upon by the expert;
3. references to literature which may be used during the witness' testimony;
4. any then-existing exhibit prepared by or specifically for the expert for use at trial;
5. the witness' curriculum vitae including a list of publications over the last 10 years;

6. a list of all trial or deposition testimony given by the witness in the last four years;
7. an accounting of all time spent on the case; and
8. a fee schedule.

(b) The substance of each expert's direct testimony shall be fully addressed in the expert's report. Experts shall be limited to testifying on direct examination about matters disclosed in reasonable detail in their written reports.

(c) The parties shall obtain and voluntarily produce to all other counsel the files of their retained expert witnesses at the time the witness is disclosed. The expert has a continuing duty to make supplemental disclosures of new information and material obtained subsequent to the expert's production of his/her file. The court shall determine what, if any, portion of the supplemental information may be used at trial. See Appendix C for a complete list of what the expert's file shall include. Drafts of the expert report prepared by the expert are not required to be produced.

(d) There shall be no depositions or other discovery of experts.

10.2. Except in extraordinary cases, only one expert witness per side may be permitted to submit a report and testify in any given specialty or with respect to any given issue.

10.3. If any retained expert becomes unavailable to testify at trial, the court, upon good cause shown, should liberally grant a request for substitution by an equivalent expert. Any substituted expert remains subject to all requirements of PPR 10.

Pilot Project Rule 11—Costs and Sanctions

11.1. In addition to the sanctions set forth in PPR 3.7, the court may impose sanctions as appropriate for any failure to timely or completely comply with these PPR's.

**AMENDED APPENDIX A:
Actions in the Colorado Civil Access Pilot Project**

The case types listed in Section I are included in the Pilot Project; Section II contains specific exclusions from the Pilot Project.

I. INCLUDED ACTIONS

Business Actions. The district court should handle the following types of actions under the Pilot Project Rules for business actions, whether the relief requested is legal or equitable. Pilot project business actions are not limited to “business v. business,” but also include “business v. individual” and “individual v. individual” business cases.

- (a) Breach of contract actions;
- (b) Business tort actions (e.g., unfair competition, fiduciary duty, fraud, misrepresentation);
- (c) Actions for statutory and/or common law violations where the breach or violation is alleged to arise out of business dealings (e.g., sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, or other business agreements);
- (d) Actions involving transactions governed by the Uniform Commercial Code;
- (e) Actions involving commercial real property;
- (f) Owner/investor derivative actions brought on behalf of business organizations;
- (g) Actions involving business transactions with commercial banks or other financial institutions;
- (h) Actions involving the internal affairs of business organizations;
- (i) Actions involving insurance coverage, including directors and officers, errors and omissions, business interruption, environmental, or bad faith;
- (j) Actions involving dissolution of corporations, partnerships, limited liability companies, limited liability partnerships or joint ventures;
- (k) Private actions for securities fraud under C.R.S. § 11-51-501, et seq., and the common law;
- (l) Private antitrust actions brought under the Unfair Practices Act (C.R.S. § 6-2-101, et seq.) or the Colorado Antitrust Act of 1992 (C.R.S. § 6-4-101, et seq.);
- (m) Actions involving intellectual property, including state trademark laws;
- (n) Professional malpractice actions, excluding those actions listed in Section II(h) below;

- (o) Products liability actions.

As used herein, the term “business organization” includes all forms of entities recognized by Colorado law, and applies to single owner or member entities, for profit and nonprofit entities, unincorporated associations, and sole proprietorships.

As used herein, the term “financial institution” includes any bank, savings and loan association, state or federal savings bank, bank holding company, thrift holding company, industrial bank, credit union, mortgage or finance company, credit card company, or collection agency.

II. EXCLUDED ACTIONS

The following types of actions are not subject to the Pilot Project Rules:

- (a) Actions solely for the payment of rent on real property;
- (b) Colorado Rule of Civil Procedure 120 proceedings;
- (c) Isolated motions for the appointment of a receiver that are not part of or attached to a civil complaint stating additional claims;
- (d) Actions brought by commercial banks or other financial institutions solely for the collection of debt;
- (e) Employment actions arising out of existing or former employment relationships, unless the dispute concerns claims of breach of non-compete covenants or theft of trade secrets;
- (f) Actions involving construction defect claims;
- (g) Actions subject to the Colorado Governmental Immunity Act;
- (h) Medical negligence actions alleging a breach of the standard of care by a health care provider and which are covered under the Colorado Health Care Availability Act (C.R.S. §§13-64-101 to 503);
- (i) Actions alleging negligence for physical injuries to one or more individual(s);
- (j) Replevin actions under Colorado Rule of Civil Procedure 104;
- (k) Administrative agency actions and proceedings, such as those involving the securities commissioner or the insurance commissioner;
- (l) Actions involving a statute or rule that contains distinct time frames for the proceedings;
- (m) Post-judgment proceedings in aid of satisfaction of a judgment.

**Amended Appendix B:
Form for Initial Case Management Conference Joint Report of the Parties**

District Court _____ County, Colorado Court Address:	COURT USE ONLY
Plaintiff(s): _____, v. Defendant(s): _____,	
Attorney or Party Without Attorney (Name and Address): Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____	Case Number: Division Courtroom
COLORADO CIVIL ACCESS PILOT PROJECT INITIAL CASE MANAGEMENT CONFERENCE JOINT REPORT OF THE PARTIES (CJD 11-02, APPENDIX B)	

Pursuant to Colorado Pilot Project Rule (PPR) 7.1, the parties should discuss each item below. If they agree, the agreement should be stated. If they cannot agree, each party should state its position. If an item does not apply, it should be identified as not applicable. This form shall be submitted to the court in editable format.

1. **Date for joinder of additional parties:** _____
2. **Date for amending or supplementing pleadings:** _____
3. **Non-parties at fault:** _____
4. **The timing of mediation or other alternative dispute resolution:** _____

5. Dispositive motions: _____

6. The issues to be tried: _____

7. An assessment of the application to the case of the proportionality factors in PPR 1.3: _____

8. Production, continued preservation, and restoration of electronically stored information, including the form in which electronically stored information is to be produced and other issues relating to electronic information, including the costs: _____

9. Proposed discovery and limitations on discovery, consistent with the proportionality factors in PPR 1.3. Counsel will be required to represent to the Court at the conference that they have discussed the costs of the proposed discovery with their clients, or state to the court why they have not done so.

a. adequacy of the initial disclosures: _____

b. limitations on scope of discovery: _____

c. limitations on the types of discovery: _____

d. limitations on the number of written discovery requests: _____

e. limitations on the number and length of depositions, and/or the total time of depositions allowed to each party: _____

f. limitations on persons from whom discovery can be sought: _____

g. limitations on the restoration of electronically stored information: _____

h. cost shifting/co-pay rules, including the allocation of costs of the access to and production of electronically stored information: _____

i. any other cost issues: _____

10. Proposed dates for:

- a. commencement of fact discovery: _____
- b. completion of fact discovery: _____
- c. disclosure of trial witnesses: _____
- d. exchange of all trial exhibits: _____
- e. exchange of all demonstrative exhibits: _____

11. The amount of time required for the completion of all pretrial activities and the approximate length of trial: _____

12. Proposed date for trial: _____

13. Expert witnesses: _____

14. Proposed dates for:

- a. production of expert reports: _____
 - i. Plaintiff: _____
 - ii. Defendant: _____
- b. production of rebuttal expert reports: _____
- c. production of expert witness files: _____

15. Limitations on experts' fees to be taxed as costs: _____

16. Computation of damages and the nature and timing of discovery relating to damages: _____

17. Other appropriate matters: _____

DATED this ____ day of _____, 20 ____.

[signature block]

[signature block]

[Attorney for Plaintiff]

[Attorney for Defendant]

**Amended Appendix C:
Form for Disclosure of Expert Witness(es)**

District Court _____ County, Colorado Court Address:	COURT USE ONLY
Plaintiff(s): _____, v. Defendant(s): _____,	
Attorney or Party Without Attorney (Name and Address): Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____	Case Number: Division _____ Courtroom _____
COLORADO CIVIL ACCESS PILOT PROJECT <u>[NAME OF PARTY]</u> DISCLOSURE OF EXPERT WITNESS[ES] (CJD 11-02, APPENDIX C)	

[NAME OF PARTY], by counsel, pursuant to Colorado Pilot Project Rule (PPR) 10.1, hereby discloses persons who may present evidence at trial pursuant to Colorado Rules of Evidence 702, 703, or 705:

**I. WITNESS[ES] RETAINED OR
EMPLOYEE[S] OF DISCLOSING PARTY.**

The following person[s] have either (1) been retained or employed to provide expert testimony, or (2) are employees of the disclosing party whose duties regularly include giving expert testimony and for each such expert the following information is submitted:

A. NAME, PROFESSIONAL ADDRESS, AND TELEPHONE NUMBER OF EXPERT.

B. A REPORT WHICH SHALL CONTAIN THE FOLLOWING:

1. A specific statement of the opinions by the expert and the facts and other information specifically relating to and forming the basis for each opinion:
2. A listing of all of the material relied upon by the expert:
3. References to literature which may be used during the witness testimony:
4. Any existing exhibit prepared by or specifically for the expert for use at trial; any additional exhibits to be used at trial shall be disclosed consistent with the deadlines set forth in the case management order at 10(d) and (e):
5. Witness' curriculum vitae, including a list of publications over the last 10 years:
6. A list of all trial or deposition testimony given by the witness in the last four years:

<u>Name of Case</u>	<u>Court</u>	<u>Case Number</u>	<u>Retained By</u>	<u>Date</u>	<u>D/T</u>
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7. Accounting of all time spent on the case:
8. A fee schedule:
9. A certification that this expert has:

[] prepared or reviewed the report,
[] signed the report and,
[] initialed each paragraph of the report.

[Attach report hereto as an exhibit.]

C. CERTIFICATION THAT THE FILE FOR THE EXPERT HAS BEEN PRODUCED

The term "File" includes exhibits which the expert may use at trial, e-mails, notes of any kind, billing documentation, time logs, correspondence, literature references which the expert reviewed or relied upon as the basis of his opinion, and all reports or memos describing the experts opinions related to this litigation. The materials produced should also include copies of any chronologies, outlines, summaries or similar materials provided by counsel or created by the expert in either written or electronic form. Drafts of the expert report are not required to be produced.

Materials common to both parties (depositions, pleadings, voluminous documents supplied by the opposing party) need not be produced if they are included in the *Listing Of All Of The Material Relied Upon By The Expert*, unless they contain written notations, highlighting or other markings made by the expert.

II. WITNESS[ES] NOT RETAINED OR EMPLOYEE[S] OF DISCLOSING PARTY.

The following person[s] may be called to provide expert testimony but have neither (1) been retained to provide expert testimony, nor (2) are employees of the disclosing party whose duties regularly involve giving expert testimony:

A. NAME, PROFESSIONAL ADDRESS, AND TELEPHONE NUMBER OF WITNESS.

- 1. Qualifications:**
- 2. Substance of all opinions to be expressed and the basis and reasons therefor:**

DATED this ____ day of _____, 20 ____.

[signature block]

[Attorney for Disclosing Party]