

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Address: City and County Building 1437 Bannock Street Denver, CO 80202	DATE FILED: August 16, 2018 CASE NUMBER: 2018CV33011 <input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
Plaintiff(s): GERALD ROME, Securities Commissioner for the State of Colorado , v. Defendant(s): GARY DRAGUL, ET AL.	Case Number: 18CV33011 Courtroom: 424
<u>PRETRIAL ORDER</u>	

I. CIVILITY

This Court is, first and foremost, a civil court. In accordance with the Preamble to the Colorado Rules of Professional Conduct, attorneys are not only representatives of clients, but are also officers of the legal system and public citizens having special responsibility for the quality of justice. Preamble [1]. Attorneys may not use the law's procedures for illegitimate purposes or to harass or intimidate others. Preamble [5]. Attorneys are expected to demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. Preamble [5].

The Court therefore expects civility among counsel at all times, both in and outside of the courtroom. The Court will not tolerate rudeness, aggressive tactics, or personal attacks in the course of the case. Counsel and parties are expected to treat the Court, opposing counsel, parties, witnesses, jurors and the court staff with courtesy and respect at all times. This applies to all conduct and communications, verbal and nonverbal, written and oral, in and out of the courtroom. Attempts to harass and/or intimidate by threatening to seek sanctions are contrary to the Preamble of the Rules of Professional Conduct and will not be tolerated.

Expressions of opinion that tend to denigrate another's integrity are not persuasive, will not be well-received, and are more likely to reflect more negatively on the author than on the object of the remark. Adjectives, both in written pleadings and oral communications, should be used sparingly and never in a manner that maligns, denigrates, or otherwise attacks opposing counsel.

The Court will address conduct that is contrary to this order and apply enforcement mechanisms as necessary.

II. DUTY TO CONFER

The Court expects complete and good faith compliance with C.R.C.P. 121 section 1-12(1) and (5), and section 1-15(8).

Counsel are expected to initiate efforts to confer well enough before the anticipated filing date to enable two-way communication. Certification that a telephone call, e-mail or fax was directed to opposing counsel fewer than 24 hours before the pleading was intended to be filed and "no response" was received is per se **not** a good faith effort.

It is the expectation of the Court that counsel confer either face-to-face or on the telephone; the Court regards a letter or e-mail message to constitute "notice," but not a sufficient attempt to confer. If attempts to confer are unsuccessful, the certification must describe the attempts in detail. Any pleading not in compliance with C.R.C.P. 121 and this Order will be stricken.

III. CASE MANAGEMENT ORDER

The provisions of C.R.C.P. 16 concerning a Case Management Order will apply. If all parties have not participated in the preparation of a proposed Case Management Order, that fact shall be noted in the title of the Proposed Case Management Order.

In accordance with C.R.C.P. 16, the CMO shall contain a specific setting date or trial date and the case shall be set for trial not later than **28 days** from the date the case is at issue. The Court prefers to conduct a Case Management Conference in most cases and is usually unwilling to waive the Case Management Conference under C.R.C.P. 16(d) (3).

The Responsible Attorney as defined in C.R.C.P. 16(b)(2) must file and serve a Notice to Set the case for trial and must complete the setting of the trial no later than **28 days** from the date the case is at issue. Trial settings may be obtained Tuesday through Thursday between the hours of 10:00 a.m. and noon. **Any case where the parties request more than five (5) trial days or be set beyond one year will require an in-person trial setting conference with lead trial counsel present.**

The Court adheres to the provisions of Chief Justice Directive (CJD) 08-05 which requires that 90% of all civil actions filed shall be concluded within one year of filing.

IV. CASE PREPARATION CHECKLIST

1. **No Written Discovery Motions.** NO WRITTEN DISCOVERY MOTIONS WILL BE ACCEPTED. THE COURT WILL ADDRESS ALL DISCOVERY DISPUTES WITH AN IN PERSON DISCOVERY HEARING INSTEAD OF WRITTEN MOTIONS.

The purpose of this procedure is to ensure expedited and inexpensive resolution of discovery disputes. The following procedures will be in effect in this case:

- a. If there is a discovery dispute, the attorneys are expected to confer in a meaningful way, consistent with the provisions of this order, to try to resolve it.
- b. If counsel cannot resolve the dispute, counsel shall place a joint conference call to the clerk at 720-865-8612 to schedule an in-person hearing on the Court's calendar, preferably within one week. Once the matter is set, each party may file a pleading **not to exceed three pages** describing the issue(s) and listing any authority. Pertinent discovery and disclosures may be attached.
- c. If counsel are unable to jointly call the clerk, the attorney contacting the clerk should have available dates on opposing counsel's calendar. If opposing counsel does not cooperate in scheduling a hearing, advise the clerk of the efforts made to obtain their input and the Court will set a hearing accordingly.
- d. The dispute will be argued and resolved at the hearing, or taken under advisement with a prompt ruling by the Court.

2. **Non-Disputed Motions for Extension of Time.**

Stipulated agreements to extend the dates for filing discovery responses, objections, and disclosures of *no more than 7 days* do not need to be filed with the Court. THIS DOES NOT APPLY TO THE DEADLINES FOR FILING MOTIONS. PLEASE SEE § 4 BELOW.

3. **Other Written Motions**

Please remember the page and word limits under C.R.C.P. 121, section 1-15(1). The Court takes these limits seriously. So should you.

4. **Pretrial Motions.** The Court adheres strictly to C.R.C.P. 16(c) and its deadlines.

- a) Motions for summary judgment must be filed at least 91 days (13 weeks) before trial. The Court will generally not grant extensions of time to file summary judgment motions. The late filing of motions for summary judgment does not permit the Court sufficient time to rule in advance of trial. A motion filed outside of this time limit may be summarily denied as untimely.

- b) All other pretrial motions, including motions *in limine*, must be filed **no less than 35 days** before trial, except for motions challenging the admissibility of expert testimony pursuant to C.R.S. 702, which must be filed no later than **70 days (10 weeks)** before the trial. A written response may be filed no later than 14 days after the motion is filed, and no reply shall be allowed unless ordered by the Court. Any motion filed contrary to this time limit may be summarily denied as untimely.
 - c) If an expedited ruling is required, the moving party must specifically request an expedited schedule in the original motion and contact the Clerk of Courtroom 424 to advise of this request.
 - d) Do not combine motions or combine your own motions with a response or reply.
 - e) The requirements of C.R.C.P. 121(1-15) concerning the time for filing motions and the content and length of briefs will be strictly enforced. The Court may expedite the briefing schedule pursuant to C.R.C.P. 121(1-15) on its own motion, or by request of a party. The Court may rule on motions without a hearing pursuant to C.R.C.P. 121, or the Court may order a hearing prior to trial.
5. **Service of Process.** Returns of Service on all defendants shall be filed within **63 days** after the date of the filing of the complaint. *See* C.R.C.P. 4(m)
 6. **Default.** Application for default shall be filed **within 21 days** after default has occurred.
 7. **Affirmative Defenses.** Please note the 2015 Comment to Rule 12: “The practice of pleading every affirmative defense listed in Rule 8(c), irrespective of a factual basis, is improper under C.R.C.P. 11(a).
 8. **Trial Management Order.** The Trial Management Order must comply with the requirements of C.R.C.P. 16, as amended and **must be filed at least 28 days before trial**. All parties must participate in the preparation of the Trial Management Order. If a Trial Management Order is not filed in compliance with this Order, the Court may make further Orders to compel compliance.
 9. **Discovery.** Discovery in all cases will be conducted subject to the provisions of the Court ordered Discovery Protocol attached.

V. TRIAL PREPARATION CHECKLIST

1. **Jury Instructions.** Attorneys are required to meet and confer in good faith, preferably in person, regarding jury instructions. The Court has already prepared the following instructions: 3:1, 3:4, 3:8, 3:9, 3:12, 3:14, 3:15, 3:16, 4:1, 4:2, 4:2A, 5:1 and 5:6. Counsel for the plaintiff is required to submit a joint proposed initial draft of the

final jury instructions directly to the court **via e-mail** to the Court's administrative assistants (karen.jurgensmeier@judicial.state.co.us and nancy.magdaleno@judicial.state.co.us) no later than **7 days prior to the scheduled pre-trial conference**. By initial draft, the Court means a single document that includes the instructions the Court has already prepared; the instructions to which all parties have stipulated; and any additional or disputed instructions of any party, as discussed below. **Please note**: the Court **does not** need, nor will it accept, basic introductory or closing instructions, oaths, admonitions, lengthy annotations, or like instructions.

Counsel shall submit instructions using the following order: opening instructions (the Court has already selected those); 2:1 claims and defenses; basic evidentiary instructions (the Court has already selected those); instructions relating to the plaintiff's claims; instructions relating to defenses; damages; definitions; closing instructions (the Court has already selected those). An example of the instructions used by the Court may be found, in editable Word format, on the Colorado Judicial Branch website [www.courts.state.co.us] under the following links: *Courts; Second Judicial District; Judges and Staff; Martin F. Egelhoff; view more*. **COUNSEL ARE STRONGLY ENCOURAGED TO USE THE INSTRUCTIONS ON THE WEBSITE AS A TEMPLATE WHEN PREPARING THE INITIAL DRAFT**; the initial draft submitted pursuant to this order shall be in substantial compliance with that format.

Unless a stipulation can be reached, counsel for both parties shall be responsible for submitting their own version of a proposed 2:1 instruction under the "Claims of the Parties" instruction, and the Court will either choose between those submitted instructions or prepare its own. If counsel cannot agree on the wording of other instructions then both counsel shall submit instructions defining applicable stipulations, claims, standards of proof, affirmative defenses, damages, and special definitions under the appropriate sections. Additional instructions may be submitted. However the Court **does not** favor, and rarely gives, special instructions patterned after caselaw; any such instructions shall be submitted separately **via e-mail**, accompanied by a *brief* statement of authority, in compliance with the requirements for the initial draft. All proposed instructions must be organized in substantial compliance with the format utilized by the Court. If either counsel has an objection to a submitted instruction, the nature of the objection shall be *briefly* stated on the initial draft submitted to the Court, along with a *brief* statement of authority.

Counsel shall also submit proposed verdict forms that conform to the proposed instructions.

2. **Exhibit lists**. Each counsel shall prepare an index of exhibits that counsel expects to offer. The exhibit lists shall be submitted directly to the court **via e-mail** to the Court's administrative assistants (karen.jurgensmeier@judicial.state.co.us and nancy.magdaleno@judicial.state.co.us) **no later than 7 days prior to the scheduled pre-trial conference**. A sample Exhibit List may be found, in editable Word format,

on the Colorado Judicial Branch website [www.courts.state.co.us] under the following links: *Courts*; *Second Judicial District*; *Judges and Staff*; *Martin F. Egelhoff*; *view more*. **COUNSEL ARE STRONGLY ENCOURAGED TO USE THE EXHIBIT LIST ON THE WEBSITE AS A TEMPLATE, AS EXHIBITS LISTS SUBMITTED PURSUANT TO THIS ORDER MUST BE IN SUBSTANTIAL COMPLIANCE WITH THAT FORMAT.** Exhibits shall be identified on the lists in accordance with paragraph 3, below.

3. **Witness lists and orders of proof.** Each counsel shall prepare a list of witnesses that will and may be called that the Court can read to the jury at the beginning of the trial. The list shall be in addition to any prior designation of witnesses. In addition to listing the names of the witnesses, the list may also specify the witnesses' title or degree and employment (e.g. Dr. Murray, M.D., Children's Hospital) but no other identifying information should be included (e.g. address, phone number etc.). Additionally, counsel **shall confer** and prepare a joint order of proof which identifies each counsel's good-faith estimate of the order in which witnesses will be presented and shall specify separately the time required for direct and cross-examination of each witness. The time estimates must include re-direct and re-cross examination. In no event may the cumulative time for witness examination exceed the time allocated for presentation of the trial; the total time allocation shall also account for the time necessary for jury selection, opening statements, regularly scheduled breaks, the jury instruction conference, and closing arguments. The Court reserves the right to enforce the time estimates stated in the order of proof. The witness lists and order of proof shall be emailed to the Court's Administrative Assistants, (karen.jurgensmeier@judicial.state.co.us and nancy.magdaleno@judicial.state.co.us), no later than **7 days prior to the scheduled pre-trial conference.**
4. **Exhibits.** All exhibits must be pre-marked. Plaintiffs will use numbers; defendants will use letters. Plaintiffs and defendants shall not mix numbers and letters, even for related exhibits (e.g. 1(a), 1(b), 1(c), etc.). The civil action number of the case should also be placed on each of the exhibit labels. Copies of exhibits must be exchanged as required by C.R.C.P. 16, and counsel shall determine whether an objection will be made as to the admissibility of the exhibit. Only where counsel has not had a reasonable opportunity to view an exhibit in advance will trial be interrupted for such a review.
5. **Depositions.** If counsel intends to use depositions in lieu of live testimony, said counsel must notify opposing counsel no later than 28 days prior to trial. Counsel must make objections to all or part of the offered deposition testimony no later than 14 days prior to trial and must cite page, line, and the specific evidentiary grounds supporting the objection. The same rules apply to both videotape and written depositions. When applicable, counsel is required to provide someone to read testimony.

Original depositions will remain sealed until counsel request at trial that they be unsealed. Before trial begins, counsel must provide the Court with copies of all depositions likely to be used at the trial, as either direct evidence or impeachment.

6. **Audio-Visual Technology.** If counsel needs any form of audio-visual equipment, counsel must provide it.
7. **Trial Briefs.** Trial briefs may be filed. They should be concise and should not repeat previously filed pleadings or motions. Trial briefs must be filed no later than 7 days before the trial date and shall not exceed five pages in length.
8. **Juror Notebooks.** Each trial juror will be provided with a juror notebook. In each civil jury trial, there will be at least 1 alternate juror seated. The court will provide the one-inch binder notebooks, but the parties must prepare the contents. Each page must be three-hole punched in advance so it can be placed in a notebook and all exhibits must be tabbed so that the jurors can easily refer to them. All notebook materials must be submitted at the same time as jury instructions. No more than 50 pages per side shall be included in the juror notebooks without permission of the Court. All other exhibits shall be presented to the jury either by projector or other visual aids. Counsel must also provide three complete sets of exhibits, whether stipulated or not: 1 for the Court, 1 for the witness stand, and 1 for the use of the jury for exhibits that are not contained in the juror's notebooks.
 - a. Copies of stipulated exhibits may be put in the juror notebooks before trial, subject to the limitations above. If exhibits are lengthy, stipulated excerpts may be used. Seven (7) copies of each exhibit shall be submitted, with three-hole punches, for the jury. If a party wants a copy of an exhibit in the juror notebooks (subject to the page limitations above) and the parties have not stipulated to its inclusion, the party should bring to trial seven (three hole-punched) copies of the exhibit; copies will be placed in the notebook if and when the exhibit is admitted, along with the tabs for the exhibit.
 - b. If there are any scientific or other specialized terms which will be used repeatedly, those should be set forth, with an agreed-upon definition. If the parties have a legitimate dispute about the definition of any term, just the term should be listed.

VI. CONDUCT OF THE TRIAL

1. **Scheduling/Use of Time.**
 - a. The trial day will start at 8:30 a.m. and end at 5:00 p.m. There will be a morning and an afternoon break of 15 to 20 minutes each. Lunch will normally run from approximately noon to 1:00 or 1:30 p.m.

- b. Counsel and parties will be in court by 8:00 a.m. on the first day of trial and 8:15 a.m. thereafter so that counsel may discuss anything with the Court that needs to be dealt with before the trial begins.
- c. It is the obligation of counsel to have witnesses scheduled to prevent any delay in the presentation of testimony or running out of witnesses before 5:00 p.m. on any trial day. Accordingly, there shall be no more than five minutes delay between witnesses. Counsel should not expect the Court to take lengthy recesses or otherwise unduly interrupt the trial because of scheduling issues with witnesses. Failure to have witnesses available may result in a party being required to call witnesses out of order or rest prematurely.

2. **Jury Selection**

- a. Each side will normally have 30 minutes for *voir dire*, unless additional time is requested and permitted in advance of the first day of trial. In multi-party cases, time must be divided between all parties on one side of the case.
- b. *Voir dire* will be conducted from the podium.
- c. For most trials, there will be one alternate juror seated, but for lengthier trials, the Court may seat two alternate jurors. The Court will advise counsel on the first day of trial how the alternate will be designated.
- d. Normally, challenges for cause will be exercised at the bench upon the conclusion of all parties' *voir dire*. Preemptory challenges will be announced orally in open court and indicated on the list of jurors remaining.

3. **Opening Statements.** The Court generally does not limit the time for opening statements. However, opening statements in excess of 30 minutes are strongly discouraged; the Court may terminate an opening statement longer than that or which is repetitive or argumentative.

4. **Questioning Witnesses.** Because the Court utilizes FTR, all questioning must be done from the podium. If counsel arrange for a court reporter, the Court will address this issue prior to the commencement of trial.

5. **Closing Arguments.** The Court may impose limits on closing argument. In multiple-party cases, this time may be divided between the parties.

6. **Proposed Findings of Fact and Conclusions of Law.** For court trials, counsel should be prepared to file Proposed Findings of Fact and Conclusions of Law upon the conclusion of the presentation of evidence. The proposed factual findings shall be specific and supported by evidence elicited at trial.

7. **Withdrawal of Exhibits.** Because this courtroom no longer has a court reporter and because of a reduced work force in the clerk's office, the court will no longer maintain custody of exhibits at the conclusion of a trial or hearing. Unless all parties agree on the record that exhibits need not be maintained, the following procedure will be followed:
- a. When the trial or hearing is concluded, each party will withdraw any exhibits or depositions which that party marked and/or admitted, whether or not admitted into evidence;
 - b. Each party will maintain in its custody the withdrawn exhibits and/or depositions without modification of any kind until sixty days after the time for the need of such exhibits for appellate or other review purposes has expired, unless all parties stipulate otherwise on the record or in writing. It will be the responsibility of the withdrawing parties to determine when the appropriate time period has expired.

VII. SETTLEMENT

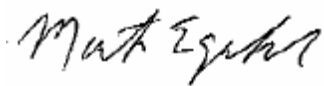
The parties are to **notify the Court within 24 hours of settlement or resolution of the case. All documents confirming settlement shall be filed not later than 14 days from the date of settlement,** unless otherwise ordered by the Court. The Court will not vacate or continue any previously scheduled trial in anticipation of resolution.

VIII. GENERAL RULES

1. This Order shall apply to pro se parties.
2. Counsel for the plaintiff or the pro se plaintiff shall send copies of this order to all future counsel/parties in this case, except where the Court has e-filed this Order to the parties. A certification of compliance with this portion of the Order shall be filed.
3. This Pre-Trial Order applies to **ALL** cases without exception and supersedes any prior pre-trial order that may have issued. Counsel are expected to familiarize themselves with the provisions of this order. Failure to comply with this Order will not be excused due to lack of familiarity with the requirements set forth herein.

Dated: August 16, 2018

BY THE COURT:



Martin F. Egelhoff
District Court Judge

DISCOVERY PROTOCOL

Counsel are reminded that all discovery responses shall be made in the spirit and with the understanding that the purpose of discovery is to elicit facts and to get to the truth. The Rules of Civil Procedure are directed toward securing a just, speedy and inexpensive determination of every action. The discovery process shall not be employed to hinder or obstruct these goals nor to harass, unduly delay or needlessly increase the cost of litigation.

WRITTEN DISCOVERY

These discovery protocols shall be considered as part of the responsibility of parties and counsel to comply with the Rules of Civil Procedure relating to discovery.

1. The parties should refrain from interposing repeated boilerplate type objections such as “overbroad, unduly burdensome, vague, ambiguous, not reasonably calculated to lead to the discovery of admissible evidence” and other similar objections. In the event any such objections are made, they shall be followed by a clear and precise explanation of the legal and factual justification for raising such an objection. Additionally, if the objecting party otherwise responds to the discovery request but does so subject to or without waiving such an objection, that party shall describe with reasonable specificity the information which may be available but which is not being provided as a result of the objection raised.
2. When a responding party claims not to understand either a discovery request or the meaning of any words or terms used in a discovery request, that party shall, within fourteen (14) days of receiving the discovery request, seek clarification of the meaning from counsel who served the discovery. A failure to seek such clarification shall be considered a violation of this Order for Discovery Protocol.
3. A discovery response which does not provide the information or material requested but promises to do so at some point in the future will be treated as the equivalent of no response unless the party so responding provides a specific reason for the information not being produced as required by the Rules of Civil Procedure, and also provides a specific date by which such information will be produced.
4. A response to a discovery request that does not provide the information or material requested but rather states that the party is continuing to look for or search for such information or material will be treated as the same as no response unless that party provides a clear description of where such information or material is normally located, who is normally in custody of such information or material, where the party has searched, the results of the search, as well as the identity of all persons who have engaged in such a search. The responding party shall also provide a clear explanation of the ongoing search and a specific date by which the search will be complete.

5. Whenever a party objects to discovery based upon a claim of attorney/client privilege, work product protection or any other privilege or protection, that party shall produce a detailed privilege/protection log that includes at least the following for each such item for which privilege is claimed:
 - a. The information required by C.R.C.P. 26(b)(5);
 - b. The date of the information or material;
 - c. All authors and recipients; and
 - d. The specific privilege or protection which is claimed.

The proponent of the privilege has the burden of establishing that privilege. Failure to comply with this paragraph 5 and Order for Discovery Protocol will constitute a waiver of the claimed privilege.

DEPOSITIONS

1. Depositions shall be conducted in compliance with the Colorado Rules of Civil Procedure.
2. During all depositions, counsel shall adhere strictly to C.R.C.P. 30(d) (1) and (3). No objections may be made, except those which would be waived if not made under C.R.C.P. 32(d)(3)(B) (errors, irregularities), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the Court, or to present a C.R.C.P. 30(d)(3) motion (to terminate a bad faith deposition). Objections to form shall be stated: "Objection as to form." Any further explanation is inappropriate and prohibited unless specifically requested by the attorney asking the question.
3. There shall be no speaking objections. It is inappropriate and prohibited for an attorney, during the course of questioning, to advise a witness to answer "if you know," or "if you remember." It is similarly prohibited for an attorney during questioning to advise a witness not to speculate. All such questions shall be considered speaking objections. All deponent preparation shall be conducted prior to the commencement of the deposition and shall not take place during the course of the deposition.
4. It is appropriate for the deponent to request clarification of a question. However, it is not appropriate for counsel to do so.
5. A deponent and an attorney may not confer during the deposition while questions are pending. Similarly, neither a deponent nor counsel for a deponent may interrupt a

deposition when a question is pending or a document is being reviewed, except as permitted by C.R.C.P. 30(d) (1).

6. Counsel shall refrain from excessive objections that have the purpose or effect of disrupting the flow of questioning or the elicitation of testimony.
7. Counsel may instruct the deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion under paragraph 3 of C.R.C.P. 30(d). Whenever counsel instructs a witness not to answer a question, counsel shall state on the record the specific reason for such an instruction, the specific question, part of a question or manner of asking the question upon which counsel is basing the instruction not to answer the question.
8. Violations of these Discovery Protocols will result in the Court limiting or prohibiting additional discovery in the case.