08-CV-175

Marcia S Krieger/COD/10/USCOURTS
02/13/2009 01 50 PM

To Rules_Comments@ao uscourts gov
cc Judge Paul Kelly/CA10/10/USCOURTS@USCOURTS
bcc
Subject Proposed Fed R Civ P 56

Thank you for the opportunity to comment upon the proposed amendments to the civil rules I apologize for the informality of this comment, but comes mid-trial

I must commend the Committee for its effort to streamline and clarify Rule 56, which in my experience, is invoked in virtually every civil case With regard to the proposed provisions, I would make the following suggestions

1) Change the title of the rule to **Summary Judgment or Summary Determination.** Use of the word "judgment" in all contexts creates misunderstandings as to the effect of the ruling on a Rule 56 motion Sometimes, the determination results in a judgment; sometimes it is simply an interlocutory determination This confusion is particularly significant when the rule is used for determination of "part of" a claim or defense Changing the title of the Rule also will encourage the user to read it all because it appears new

2) Proposed Subsection (c) will require specification of material facts In my experience, it is difficult/inconvenient for counsel to decide what facts are truly material to a given issue They want to tell the "whole story", that is why they prefer the narrative statement of the facts In order to avoid iteration of the complaint and answer, I would suggest that 1) the movant be required to identify the claim/defense on which a summary determination is sought, what party has the burden of proof, what the standard of proof is and what the elements are, and 2) the listing of material facts should be limited to those that are material to the claim/defense, or part thereof, which is the subject of the motion. For several years, now, I have required movants to do this Doing so defines the issues, focuses the parties and speeds determination My procedures and an example can be found at

http //internet usdc10 dcn/Documents/Judges/MSK/msk_ps_civil pdf

http //internet usdc10 dcn/Documents/Judges/MSK/msk_sj pdf

3) One technique that is often helpful in resolution of legal issues is not squarely addressed anywhere in the rules, but could be incorporated into subsection (f). There currently is no rule that allows parties to stipulate to material facts and jointly request a legal determination upon them. I often offer this when the dispute is limited to an application of the law - ERISA, declaratory judgment/ insurance coverage, contract interpretation cases, agency appeals When I use this procedure, the parties submit a stipulation as to material facts (or stipulated record for an agency appeal) and a joint motion for determination of a specified legal issue based on it. Then they submit two sets (opening & response) of simultaneously filed briefs in which they argue their interpretation of how the law applies (The procedure that I use certainly need not be incorporated, but it would be helpful to expressly authorize, indeed encourage, parties to stipulate to material facts and seek a summary determination based on them)

4) Also with regard to subsection (f), the requirement that notice be given if the Court intends to grant summary judgment in favor of a non-movant is, in my opinion, unwise According to the law in the 10th Circuit and logic, if there is no genuine dispute as to any material fact, then judgment should be entered as the law requires The judgment/determination could be for or against the non-movant That is the risk that a movant takes when requesting a summary determination To require additional notice would not serve any useful purpose and would increase both cost and delay

Thank you for your efforts on this and the other rules If you have questions about these suggestions, please feel free to contact me

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We are all servants of the laws to the end that it may be possible for us to be free.
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PRACTICE STANDARDS
CIVIL ACTIONS

TO: Counsel and Parties
FROM: Judge Marcia S. Krieger, United States District Judge
RE: Practice Standards (Civil Actions)

I. INTRODUCTION

A. Purpose and Authority

Consistent with FED.R CIV.P. 1, these practice standards are intended to secure the just, speedy, and inexpensive determination of every civil action They have been most recently revised and simplified with the input from the Bar through the Faculty of Federal Advocates. Also, with an eye toward uniformity, the format and in many instances the content of these practice standards have been harmonized with those of the Honorable Robert E. Blackburn

These practice standards apply in all civil matters as of **January 15, 2008**. They will likely be further revised and may be modified by orders entered in specific cases.

B. Relation to Local Rules

These practice standards supplement, but do not supplant or supersede, the Local Rules of Practice of the United States District Court for the District of Colorado. To the extent that there is a direct conflict between these practice standards and the requirements of the Electronic Case Filing Procedures, the Electronic Case Filing Procedures control. In circumstances in which these practice standards and Electronic Case Filing Procedures contain different, but not directly inconsistent, requirements, parties should comply with both sets of procedures to the extent possible.

C. Access to Local Rules & Electronic Case Filing Procedures

1. Copies of the local rules are available through the "Local Rules" link on the District of Colorado's home page at http://www.cod uscourts.gov, and/or from the Clerk of Court in **Room A105**.

2. Copies of these practice standards are available through the "Judicial Officers' Procedures" link on the District of Colorado's home page at http //www cod uscourts gov and/or from the Clerk of Court in **Room A105**

3. The Court calendar for the pending week is available through the "Judicial Officers' Calendars" link on the District of Colorado's home page at http://www.cod.uscourts.gov

II. GENERAL PROCEDURES

A. Applicable Rules

Those appearing in the District Court must know and follow:

1. The Federal Rules of Civil Procedure,
2. The Federal Rules of Evidence;
3. The Local Rules of Practice of the United States District Court for the District of Colorado, and
4. The United States District Court for the District of Colorado Electronic Case Filing Procedures (Civil Cases).

B. Communications with Chambers

1. Unless otherwise instructed, all pleadings, motions, and other papers must be filed as required by the Electronic Case Filing Procedures. Please review the Court's Privacy Policy, D.C Colo.ECF Proc. XI, found at: www.co.uscourts.gov/documents/CMECF/ecfPro.pdf in order to make appropriate redactions. No courtesy copy for chambers is required unless a paper is filed less than 48 hours before a hearing. In that event, send a copy of the filing to the chambers e-mail account (krieger_chambers@cod.uscourts.gov) marked URGENT and identify in the subject of the e-mail the case number and hearing for which the filing has been submitted.

2 For information about filing documents electronically please contact the ECF Help Desk at 1-866-365-6381 or 303-335-2050. If you have questions about the status of a motion or order, please utilize the PACER system at http://www.co.uscourts.gov

3. If authorized to appear by telephonic connection, please contact the Courtroom Deputy Clerk, **Patricia Glover,** at **303-335-2185**. However, for information on testimony by telephone, or on attorney appearances by telephone, see MSK Civ Practice Standards II.H and III A 4

4. For other information or assistance, please contact **Janine Aguero** at **303-335-2289**. Please do not contact the law clerks. They speak to counsel only pursuant to specific instructions

C. [Reserved]

D. Citations

1. Citations shall be made pursuant to the most current edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (currently the 18th ed 2005)

2 General references to cases, pleadings, depositions, or documents are insufficient if the document is more than one page in length. Specific references in the form of pinpoint citations should be used to identify relevant excerpts from a document.

3. These practice standards should be cited as MSK Civ Practice Standard, Part, Section, Subsection, Paragraph, and Subparagraph (e.g., MSK Civ. Practice Standard V.F.1.a).

E. [Reserved]

F. Continuances of Hearings and Trials

Motions to continue (including motions to vacate or reset) hearings and trials are governed by D.C.COLO.LCivR 6.1 and 7.1. If a motion does not comply with these local rules, it will be denied. Oral or written motions to continue made at the hearing or trial are unacceptable. To be granted, such motions must show good cause (See MSK Civ. Practice Standard II. G below).

G. Motions for Extension of Time

Motions for extensions of time are governed by D.C.COLO LCivR 6.1 and 7.1, and D.C.Colo.ECF Proc. V L.2 Motions will be denied if they do not comply with these rules. To be granted, such motions require a showing of good cause. Unless the circumstances are unanticipatable and unavoidable, the following do not constitute good cause. inconvenience to counsel or parties, press of other business, scheduling conflicts (especially when more than one attorney has entered an appearance for a party), or agreements by counsel

Please be aware that requested extensions of time, even if stipulated, may be denied if the extension adversely affects the scheduling of the case or other cases. In addition, if extensions are granted, they may prevent the determination of the matter prior to a scheduled hearing or trial.

H. Testimony by Telephone or Video

Together with FED R CIV P 43(a) for trials and 43(c) for motions, this practice standard governs requesting and taking testimony by telephone or video. For purposes of this practice standard, the phrase "remote testimony" includes live, one-way or two-way testimony by telephone or video. It does not apply to deposition testimony preserved on video.

1. A party may request that remote testimony be presented at any trial or hearing. Except in extraordinary circumstances, such request should be made by written motion or stipulation filed at least **twenty-one (21)** days before the trial or hearing. The motion should include:

a the reason(s) such testimony should be taken remotely and what means will be used,

b. a detailed description of all testimony which is proposed to be presented remotely; and

c. copies of all documents or reports which will be used or referred to in such testimony

2. If any party objects to the presentation of remote testimony, the party shall file within **seven (7)** days following service of the motion a written objection stating the basis of the objection. If no objection is filed, the motion will be deemed unopposed.

3. The court shall determine whether, in the interest of justice, the testimony may be presented from a remote location The factors to be considered include but are not limited to the following:

a. whether there is a statutory right to live or remote testimony;

b the cost savings to the parties;

c. the availability of appropriate equipment to permit the presentation of remote testimony;

d the availability of the witness to physically appear in court;

e. the relative importance of the issue or issues for which the testimony is offered;

f. whether credibility of the witness is a material issue;

g. whether the case is to be tried to the court or to a jury; and

h. whether the presentation of remote testimony would unreasonably inhibit the ability to cross examine the witness

4. If remote testimony is approved, the proponent of the testimony shall ensure that an officer authorized to administer oaths by the law of the jurisdiction in which the witness is located be physically present with the witness to certify the witness' identity and to administer the oath

I. Partial Case Settlement/Dismissal

If fewer than all claims or defenses are resolved by a settlement, a motion requesting approval of same shall specify what claims, defenses and parties will be affected by the settlement/dismissal and which will remain. The proposed order shall set out a proposed revised caption, deleting parties whose claims have been resolved, to be used on all subsequent pleadings. An order will not issue when parties stipulate to a dismissal of their case pursuant to FED.R CIV.P. 41(a)(1)(A)

J. [Reserved]

K. Rulings and Recommendations of Magistrate Judges

1. Pursuant to D C COLO.LCivR 72.1(B) magistrate judges may issue rulings on non-dispositive matters. Appeal from these rulings shall be subject to the time limitations provided in such order, or if none are specified, then they will be governed by D.C.COLO.LCivR 7 1(C) and Part V of these practice standards.

2. Pursuant to D.C.COLO.LCivR 72 1.(B)(4)(c) and 72.1(C)(3), magistrate judges may make recommendations on dispositive matters. Objections to such recommendations shall be subject to the time limitations imposed by the magistrate judge, or if none are specified, then they shall be governed by D.C COLO.L.CivR 7.1(C) and Part V of these practice standards.

III. COURTROOM PROCEDURES

A. Court Appearances

1. Unless otherwise directed, all matters will be heard in Courtroom **A901** located on the ninth floor of the Alfred A. Arraj U.S. Courthouse. Matters heard by a magistrate judge will be in the courtroom assigned to that magistrate judge.

2. Court time is valuable to litigants, counsel, and court staff. Counsel should arrive one-half hour before any scheduled hearing or trial and confer to confirm what issues are in dispute and what stipulations can be made

3. If a scheduled matter is called for hearing and a party or a party's counsel is not present, the matter may be moved to the end of the docket, reset for hearing, a default entered, sanctions imposed, or other orders entered as appropriate. If a party is not prepared as required by the order setting the hearing, the matter may be reset without deference to the parties' needs, the request for relief, defense(s), or objection(s) may be denied; or other sanctions may be imposed

4. Counsel – and, where specifically directed, the parties – shall appear personally at all hearings unless leave to appear by telephone has been timely sought and expressly granted. Motions seeking leave to appear by telephone should be made at least **three days** before the scheduled hearing date. For non-evidentiary hearings, leave to appear by telephone will be liberally granted, providing that both sides are in full compliance with all prior orders and the case is making satisfactory progress Leave to appear by telephone for evidentiary hearings will be granted only in exceptional circumstances.

B. Courtroom Organization and Protocol

1 Plaintiff's table is closest to the jury box. There is one lectern in the courtroom at which all counsel and parties shall stand to make any statement or argument. Counsel may object by standing at counsel table. Absent prior court order, no person should be addressed by first name. Counsel may not approach a witness at the witness stand If something is to be tendered to a witness it should be supplied to Ms. Glover, the Courtroom Deputy Clerk.

2. In jury trials, bench conferences are strongly discouraged and will be minimized. Matters should be raised either before or after the trial day or during a scheduled recess.

3. For questions about courtroom protocol or equipment, please contact the Courtroom Deputy Clerk, **Patricia Glover**, at **303-335-2185**.

4. Filings made within 48 hours before a hearing will likely not have been reviewed by the time of the hearing

C. Recording of Proceedings

The official record of all trials and proceedings will be taken by a realtime court reporter. Prior to the beginning of any proceeding, please provide the court reporter with your business card. The court reporter assigned to the court is **Paul Zuckerman** who can be contacted at **303-629-9285** Transcripts of proceedings may be ordered from Mr. Zuckerman. Requests for realtime, daily, or hourly copy must be made at least **thirty (30)** days before the trial or hearing.

D. Exhibits

1. All exhibits must be pre-marked and a copy provided to opposing counsel or any *pro se* party before the hearing or trial in accordance with the deadlines specified in the order setting the hearing or trial. If no deadline is stated in such order, exhibits shall be exchanged between or among the parties at least **three (3) business days** before the hearing. Absent stipulation of the parties, exhibits not timely exchanged before the hearing or trial may not be admitted. Stipulations of fact may be marked as an exhibit

2 The parties shall prepare a single, joint list of exhibits, utilizing the form exhibit list posted through the "Judicial Officers' Procedures" link on the District of Colorado's home page at http://www co.uscourts.gov/documents/judges/msk/msk_exhibit wpd , and if no time is specified in an applicable pretrial order, file the list before any hearing or trial. No exhibit should be designated as "Plaintiff's Exhibit ___" or "Defendant's Exhibit ___." The exhibit list should not contain duplicate entries The notation on an exhibit list that an exhibit's admission is stipulated does not automatically result in the admission of any exhibit (see subsection 4, below)

3. Paper exhibits must be bound in three-ring notebooks or folders. Each notebook or folder shall be labeled with the following information:

a. caption,
b. the proceeding for which the exhibits are submitted (*i e* trial, evidentiary hearing on ___'s motion to ____, etc.);
c. the date and time of the proceeding, and
d. "original" or "copy."

If exhibits are not properly bound and labeled, time set aside for hearing or trial will be consumed while they are appropriately assembled Two full sets of exhibits shall be produced for the court.

4. All exhibits must be offered orally on the record. If parties have stipulated to their admission, they may be offered by reference to the exhibit number.

5. Rather than handing a witness an exhibit, counsel or a *pro se* party should direct the witness to the appropriate exhibit in the exhibit book or request the Courtroom Deputy Clerk to present the exhibit to the witness. In a bench trial, receipt of stipulated exhibits will be conditioned upon counsel specifically referencing the relevant part(s) of the exhibit in testimony or argument. Without such reference, the exhibit or portion thereof will be disregarded.

E. Witnesses

The parties shall prepare a single, joint list of witnesses, utilizing the form witness list posted through the District of Colorado's home page at http://www.co.uscourts.gov/documents/judges/msk/msk_witness.wpd The list should be filed at the time set forth in the Court's orders, or, if no time for filing has previously been specified, at least **three (3) business days** before any hearing or trial. Designations of witnesses as "may call" or "will call" are not required, nor will they be deemed binding on any party. Counsel desiring a witness' physical presence at a trial or hearing shall ensure that witness' presence either by stipulation with the opposing party (if the witness is in the control of that party) or by subpoena (in all other circumstances).

F. Depositions

1. In accordance with FED R.CIV.P. 32, deposition testimony, whether by video or transcript, is treated as live testimony. Although parties may have filed designation of deposition testimony in accordance with FED.R.CIV.P 26(a)(3), no determination on the admissibility of deposition testimony will be made before trial. As with all other live testimony, objections shall be raised at the time the deposition testimony is presented.

2. To accommodate evidentiary objections to deposition testimony presented by video, the proponent must have the technical ability to "mute" excluded responses and efficiently "fast forward" to the next question.

3. If evidence is to be presented through a written deposition transcript in a jury

trial, the proponent shall supply a person to read from a written deposition transcript. In bench trials, the offering party shall provide the Courtroom Deputy Clerk with two (2) copies of the relevant transcript marked as an exhibit with the plaintiff's designated portions highlighted in yellow, the defendant's in blue, and any other party's in green.

G. [Reserved]

H. Special Equipment (Audio/Video)

The court has audio, video, audio-visual, and other special equipment that may be used by the parties. A listing of available equipment can be found through the District Court's home page, http://www.cod.uscourts.gov, at the "Judicial Officers' Procedures" and "Courtroom Technology Manual for Attorneys" links. Notify the Courtroom Deputy Clerk, **Patricia Glover**, at **303-335-2185**, no later than fourteen (14) days before a hearing or trial of the date and time you need such equipment or if you need your own equipment to be brought through security for use in the courtroom.

I. [Reserved]

J. Settlement

1. Settlement discussions are encouraged at all phases of the litigation process However, hearings, trials and pretrial deadlines will not be continued or vacated to facilitate settlement negotiations or alternative dispute resolution, or in anticipation of the filing of settlement documents.

2. If a settlement is reached before a hearing or trial, as a courtesy, please advise **Janine Aguero** at **303-335-2289**. However, no deadline, hearing or trial will be vacated, except upon the filing of papers sufficient to resolve the matter and issuance of an order If counsel and/or any *pro se* party is unable to file the appropriate documents before the hearing or trial, counsel and/or any *pro se* party shall appear at the scheduled hearing or trial to memorialize the settlement on the record. Please be aware that jury costs may be assessed in accordance with D.C.COLO.LCivR 54.2 if a matter is resolved after noon on the last business day before trial

IV. TRIALS

A. Final Pretrial Conference

1. A final pretrial conference is held in all civil cases and will be used to set the trial date. The Trial Preparation Order - Civil will direct specific tasks to be completed in advance of this conference, and will direct the filing of a proposed final pretrial order in a specific format

B. Trial Settings

1. Depending on the nature of the case, Rule 16 conferences may be conducted by the magistrate judge or the district judge, or both.

2 To determine the appropriate amount of time necessary for trial, parties should consider the number of hours required to present testimony, objections, motions, and argument. Please note that Monday mornings are devoted to criminal matters and are not available as trial time

3. Jury trials will usually begin at 1:00 p.m. on Mondays *Voir dire* (conducted by the court), preliminary jury instructions, and if time allows, opening statements usually take up the entire afternoon. Presentation of evidence usually begins on Tuesday morning. Trial days run from Tuesday through Friday, approximately 8:30-9:00 a.m to 4:00-5:00 p.m. Excluding morning, afternoon, and lunch recesses, approximately 6 hours of in-court time is available per trial day. On the final day of trial, presentation of evidence must be concluded by noon so that the jury can be charged and closing arguments given in the afternoon In general, a 5-day jury trial contains approximately 21 hours of in-court time for the presentation of evidence, objections, argument and motions. Trial days in multi-week trials may be limited to Tuesday through Friday after the first week.

4. Bench trials usually begin at 9:00 a m on Tuesdays. Approximately 6 hours of trial time are available per day for presentation of evidence, objections, argument, and motions.

5. At or shortly after the Rule 16 conference, a pretrial scheduling order will be issued setting pretrial deadlines. If there is a request for extension of the dispositive motion deadline or to extend the time to respond or reply, such requests may be denied to facilitate consideration of the motion prior to an anticipated trial preparation conference or trial date. If extensions are granted, they may prevent ruling on the motion prior to trial. Dispositive motions not able to be determined by trial will be denied and can be reasserted pursuant to FED R.CIV.P. 50 or 52.

C. [Reserved]

D. [Reserved]

E. Jury Trials

1. See MSK Civ Practice Standard IV.B.3 for a description of the trial day schedule Counsel and *pro se* parties shall be present thirty minutes prior to the scheduled trial time on the first day of trial to discuss trial preparation matters with the Courtroom Deputy Clerk. Counsel should be prepared to file, if not already filed, a written stipulation of all undisputed facts.

2 The jury shall consist of twelve (12) jurors. Pursuant to FED.R.CIV.P. 47(b) and 28 U.S.C § 1870, each side shall have three (3) peremptory challenges

3. The court will conduct all *voir dire* Counsel may request the court to ask additional and/or follow-up questions before peremptory challenges are exercised.

4. Submission of proposed *voir dire* questions, proposed jury instructions and verdict forms will be addressed at the Final Pretrial Conference.

5. Absent objection, jurors will be permitted to take notes during the trial. The jurors' notes will be destroyed after the jury is discharged

6. The jury will be instructed before closing arguments.

7. Each juror will be given a copy of the written jury instructions for their use and consideration during deliberations.

8. Counsel may request that after a verdict is received the jurors be provided with a form, upon which they may record written comments that will then be transmitted to counsel.

F. [Reserved]

G. Expert Testimony

1. Fed. R. Evid. 702 motions must be made by the deadline specified in the Trial Preparation Order - Civil and in compliance with the format set forth in Judge Krieger's Procedures for Rule 702 Motions available at www.co uscourts gov/documents/judges/msk/msk_702procedures pdf. Pretrial hearings will be held on Rule 702 motions in accordance with such procedures. Failure to file a Rule 702 motion within the time set in the Trial Preparation Order - Civil shall be deemed a waiver of all foundational objections contemplated by Rule 702.

2. At trial, admissible expert testimony can be presented either by live testimony or by stipulated admission of an expert's pre-trial report, but not by both means. If an expert testifies, the expert's pre-trial report will not be received.

3. In either a bench or jury trial, an expert's qualifications can be established by admission of a written curriculum vitae

V. MOTION PRACTICE

A. [Reserved]

B. [Reserved]

C. Untimely or Non-Complying Motions, Responses, or Replies

A "non-complying" motion, response, or reply is a filing that does not conform in form and substance to the procedural, formatting, or technical requirements of applicable statutes, regulations, rules of civil procedure, local rules, and these practice standards

As noted earlier, motions without a certification required by D.C COLO.LCivR 6 1A or 7.1A will be denied without prejudice *sua sponte*. Otherwise untimely or non-complying motions, responses, or replies may be denied in whole or part, or their determination may be delayed relative to compliant motions.

D. [Reserved]

E. Responses and Replies

A response or reply shall clearly and completely identify the motion it is addressing by title, docket number and date filed.

F. Forthwith Hearings on Motions

1. A "forthwith hearing" is a hearing that cannot be handled in the normal course of notice and setting due to a need for immediate judicial intervention (For motions for temporary restraining orders, see MSK Civ. Practice Standard V.K, *infra*.) A request for forthwith hearing must be made by separate motion stating the reason(s) warranting immediate action and whether notice was given to all parties or why such notice could not be given. A courtesy call to **Janine Aguero** at **303-335-2289**, advising that such a motion is being filed, is appreciated and will help facilitate prompt consideration (*See* MSK Civ. Practice Standard II.B 1).

2. Unless required by statute or rule of procedure, after reviewing the request for forthwith hearing, the court may order that the matter be heard as soon as possible on a forthwith basis, require that notice and opportunity to respond be given to any opposing party, or deny the request for forthwith hearing and require that the matter be set using normal setting procedures. If the court determines that forthwith hearing is necessary, it shall not occur without notice to all parties of record in the manner and form directed by the court.

G. Motions in *Limine*

1. Motions in limine shall be governed by the Trial Preparation Order - Civil and/or directions given at the Final Pretrial Conference.

H. Hearings on Motions

Motions may be determined without a hearing, set for an evidentiary/oral argument hearing, or set for a law and motion hearing Law and motion hearings are usually short (15 minutes) and intended to set appropriate preparation deadlines for an evidentiary hearing or to hear brief oral argument. Counsel shall appear thirty (30) minutes before the time set for any hearing to confer with opposing counsel about what issues are in dispute and what issues have been resolved

I. Dispositive Motions

1. Motions seeking relief pursuant to FED.R.CIV.P 12 or 56 are governed by D.C.COLO.LCIVR. 7.1(C) and 56.1. Using these procedures will help to expedite determination. Failure to use these formats may result in a delay in their determination The following formats for motions and responses should be used

2 FED.R.CIV.P. 12(b)

a. All requests under Rule 12 should be brought under a single motion.

b. Motions brought pursuant to FED R CIV.P 12(b)(1)-(5) shall identify the grounds for dismissal, which party has the burden of proof, the material facts, and whether materials outside the pleadings should be considered. If matters outside the pleadings are pertinent, the motion may be set for evidentiary hearing or treated as one brought pursuant to Rule 56.

c. Motions brought pursuant to FED.R.CIV P. 12(b)(6) are discouraged if the defect is correctable by the filing of an amended pleading. Counsel should confer prior to the filing of the motion to determine whether the deficiency can be corrected by amendment (e g , failure to plead fraud with specificity) and should exercise their best efforts to stipulate to appropriate amendments For Rule 12(b)(6) motions, the following format should be used.

1 For each claim for relief that the movant seeks to have dismissed, the movant shall clearly enumerate all elements of the claim, then specify the element(s) *that movant contends must be alleged but was/were not* A sample motion and response using this format may be found at www.cod.uscourts.gov/Documents/Judges/MSK/msk_samp_dis_mot.pdf

2 The respondent should utilize the same format for each challenged claim. If the respondent disputes that a particular element must be alleged, the element should be identified as disputed and addressed in an accompanying brief If the respondent contends that a proper and sufficient factual allegation has been made in the complaint, the respondent should specifically identify the page and paragraph containing the required factual allegation.

3. If matters outside the pleadings are filed in support of or in opposition to a Rule 12(b)(6) motion, an order to show cause why the motion should not be treated as a Rule 56 motion may be issued, or the parol submissions may be disregarded

3. FED. R. CIV. P. 56

For Rule 56 motions, the following format should be used: (A sample motion and response using the proper format may be found at http://www.cod.uscourts.gov/Documents/Judges/MSK/msk_sj.pdf

1. For each claim for relief or defense (*as to which judgment is requested*) the motion shall:

a. identify the party having the burden of proof,

b. identify each element that must be proved;

c. for each identified element, the motion should identify the material, undisputed, or admitted facts[1] that prove such element and their pinpoint location in the filed record, or

d if the respondent has the burden of proof, the motion should identify the elements which the movant contends the respondent cannot prove (with reference to the record where appropriate)

2. The response should utilize the same format for each claim/defense:

a. if the respondent disputes the movant's statement of the burden of proof on necessary elements, it shall identify the element as disputed.

b. if the movant has the burden of proof, the respondent shall identify all elements for which there are disputed material facts and identify where in the record the disputed facts are located,

c. if the respondent has the burden of proof, for each element identified by the movant as lacking proof, the respondent should identify the facts and their location in the record which establish the element

3 Motions for partial summary judgment on some, but not all, legal theories arising from a single factual scenario are not favored unless:

a. if granted, the resulting judgment can be certified in accordance with Rule 54(b); or

b if granted, the scope of evidence to be presented at trial will be significantly reduced

[1]Parties may include a separate descriptive summary or chronological recitation of facts, but such presentation does not substitute for the specific identification of the relevant facts under each individual element of each claim.

J. Default Judgments

1. A motion for default judgment under FED.R.CIV.P. 55(b) shall include copies of the following documents

a. the summons and return of service or a waiver of service, showing valid service on the particular defendant in accordance with FED.R.CIV.P. 4,

b. an affidavit or affidavits establishing that the particular defendant is not an infant, an incompetent person, an officer or agency of the United States, the State of Colorado, or in the military service;

c. an affidavit or exhibit establishing the amount of damages and interest, if any, for which judgment is being sought;

d. if attorney fees are requested: an affidavit indicating that the defendant agreed to pay attorney fees or citation to statutory authority establishing that such fees are recoverable; an assertion that such fees have been actually incurred in the prosecution of the action; and sufficient evidence that the fees sought are reasonable under the circumstances,

e. if the action is on a promissory note, the original note shall be presented to the court in order that the court may make a notation of the judgment on the face of the note; if the note is to be withdrawn, a photocopy shall be substituted;

f. a proposed form of judgment (do not include "proposed" in the title of the order) that shall recite in the body of the judgment:

1. the name of the party or parties to whom the judgment is to be granted,

2. the name of the party or parties against whom judgment is being entered;

3. the specific basis of the court's jurisdiction,

4. when there are multiple parties against whom judgment is entered, whether the relief is intended to be joint and several; and

5 the principal amount, interest, and attorney fees, if applicable, and costs which shall be stated separately.

2 If further documentation, proof, or hearing is required, the court shall notify the moving party.

3. If the party against whom default judgment is sought is in the military service or his status cannot be shown, the court shall require such additional evidence or proceedings as will protect the interests of such party in accordance with 50 U.S C § 520, including the appointment of an attorney when necessary The appointment of an attorney shall be made upon application of the moving party, and expense of such appointment shall be borne by the moving party but taxable as a cost awarded to the moving party as part of the judgment.

K. Temporary Restraining Orders

1 To minimize delays, the court strongly encourages counsel who seek a temporary restraining order to confer, in advance, with the opposing party's counsel (or, if not yet represented, with the party itself). Counsel need not wait at the Courthouse after filing the motion, the Court contact counsel if a hearing is required.

2. As a general rule, *ex parte* motions for issuance of temporary restraining orders will be granted only upon strict compliance with FED.R.CIV P. 65(b) and (c) In appropriate circumstances, the Court may instead issue an order to show cause, directing the person to be enjoined to appear at a hearing to show cause why the temporary restraining order should not be issued; deny the motion, or set a hearing, requiring the movant to serve the order and all underlying papers on the respondent in accordance with FED.R.CIV P. 4 within the time specified in the order. A continuance of the scheduled return date on the order to show cause will ordinarily not be granted absent stipulation by the parties.

3. At the hearing, counsel for both sides should be prepared to proffer the evidence they would present at an evidentiary hearing on the request for a preliminary injunction, as well as any legal argument that is appropriate At the conclusion of this hearing, the court will, if appropriate, set a preliminary injunction hearing.

4. The preliminary injunction hearing will be an evidentiary hearing. Both parties must be prepared to present evidence in accordance with the Federal Rules of Evidence.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Case No. 999-cv-99999-MSK-XXX

JANE ROE,

Plaintiff,

v.

SMITH CORP., and
JACK SMITH,

Defendants.

SAMPLE SUMMARY JUDGMENT MOTION[1]

COME NOW Defendants Smith Corp. and Jack Smith, who move for summary judgment on all of the claims in the Complaint **(# XX)** pursuant to Fed. R. Civ P. 56.

Defense counsel discussed the grounds for this motion and the relief requested with counsel for the Plaintiff on February 30, 2999. Plaintiff's counsel opposes the relief requested herein.[2]

CLAIMS AND DEFENSES UPON WHICH JUDGMENT IS SOUGHT[3]

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[1] *This document provides a sample of a motion for summary judgment that sufficiently complies with the requirements of the Practice Standards of Judge Krieger*

[2] *Although compliance with Local Rule 7 1(A) is not required before filing a Rule 56 motion, the Court nevertheless encourages counsel to confer and discuss not only the relief requested, but the arguments to be presented in the motion Doing so may lessen or avoid entirely the need for judicial intervention*

[3] *Note that a separate statement or summary of the facts is not necessary, nor is a recitation of the summary judgment standard However, parties are encouraged to review the Court's decision in* In re Riobzyme Pharmaceuticals, Inc Securities Litigation, *209 F Supp 2d 1106 (D Colo 2002) for an extended discussion of the standards applicable to summary judgment motions*

A. Defendants are entitled to Summary Judgment on Claim 1: Sex Discrimination

1. Burden of proof and elements

The Plaintiff's claim of sex discrimination under Title VII of the Civil Rights Act, 42 U.S C. § 2000e *et seq* , requires the Plaintiff to establish, by a preponderance of the evidence, a *prima facie* case that: (i) she is female; (ii) she was qualified for the position she held; (iii) she suffered an adverse employment action; and (iv) that adverse action occurred in circumstances giving rise to an inference of discrimination *St. Mary's Honor Center v Hicks*, 509 U.S. 502, 506 (1993). The Defendants do not challenge any elements beyond the Plaintiff's ability to state a *prima facie* case, and thus, do no address the remaining elements of this claim.

2. Elements that cannot be proven by the Plaintiff

Element 3· The Defendants contend that the Plaintiff cannot demonstrate a triable issue of fact as to whether she suffered an adverse employment action.[4]

A. The Plaintiff testified that she considered the following three events to have been discriminatory: (i) Defendant Smith accused her of being a "thief" in a disciplinary hearing on November 4, 2999, *Plaintiff's Deposition*, attached hereto as Exhibit A, at 55; (ii) Plaintiff's supervisor Jones verbally disciplined her for coming in late, Exhibit A at 59; and (iii) Plaintiff was "terminated," Exhibit A at 71. The Plaintiff testified that she "can't think of anything else" that she claims is discriminatory. Exhibit A at 77.

B. For purposes of this motion, the Defendants will accept the Plaintiff's factual claim that Defendant Smith called her a thief However, this isolated incident does not constitute

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[4]*In this example, because the movant does not bear the burden of proof on this claim at trial, it need only identify those elements it contends the non-movant cannot prove. Thus, this sentence alone is sufficient, and no further factual discussion is necessary by the movant To the extent that the movant prefers to anticipate the non-movant's factual response (and perhaps avoid the need to file a reply brief), any factual discussion should be in the following form*

an adverse employment action. *See Aquilino v Univ. of Kansas*, 268 F3d 930, 934 (10th Cir. 2001). It is undisputed that the Plaintiff was never actually disciplined based on Defendant Smith's accusation. Exhibit A at 89, *Deposition of Jack Smith*, attached hereto as Exhibit B, at 19.

C Supervisor Jones denies ever having disciplined the Plaintiff for being late *Deposition of Supervisor Jones*, attached hereto as Exhibit C, at 42. On occasion, he threatened to "write her up" for being late, Exhibit C at 106, 118, but the Plaintiff's personnel record does not reflect any discipline for tardiness. *Affidavit of Human Resource Manager Doe*, attached hereto as Exhibit D, at ¶ 4. Other than insisting that she was disciplined, the Plaintiff cannot recall any specifics of the incident. Exhibit A at 61

D. The Plaintiff tendered a letter of resignation on November 21, 2999. Exhibit D at ¶ 8; *Resignation Letter*, attached hereto as Exhibit E. In that letter, she states that she is resigning "to seek job opportunities closer to my interests." Exhibit E Thus, she was not terminated, but resigned voluntarily

Element 4: The Plaintiff cannot establish that any adverse employment action arose in circumstances giving rise to an inference of discrimination.

A. The Plaintiff admits that Supervisor Jones threatened to discipline male employees who were late for work. Exhibit A at 62

B. Although Defendant Smith denies the Plaintiff's contention that he stated "girls aren't cut out for this kind of work," for purposes of this motion, the Defendants assume the Plaintiff is correct. The Plaintiff admits that Defendant Smith also referred to male employees as "boys" and said that "the boys down there just can't figure it out." Exhibit A at 101. These comments do not support an inference that Defendant Smith's conduct was a result of

discrimination.

B. Defendants are entitled to Summary Judgment on Claim 2: Defamation

1. Burden of proof and elements: To state a claim for defamation under Colorado law, a plaintiff must allege: (i) a defamatory statement; (ii) published to a third party; (iii) the existence of special damages or actionability absent special damages, and (iv) actual malice. *Card v Blakeslee*, 937 P.2d 846, 850 (Colo. App. 1996); *Barnett v Denver Publishing Co* , 36 P.3d 145, 147 (Colo. App 2001). The Plaintiff has the burden of proof by clear and convincing evidence. *Barnett, id*

2. Elements that cannot be proven by the Plaintiff

Element 2: Defendant Smith's statement that the Plaintiff was a "thief" was not published to a third party.

A The statement was made in a disciplinary hearing. Ex. A at 68 The only people present were the Plaintiff, Defendant Smith, and Ms. Doe, the Defendants' Human Resources Manager. Ex. A at 68-69; Ex B at 44; Ex. D at ¶ 6.

B. As a matter of law, Ms Doe is in privity with Defendant Smith Corp., and is not a third-party for purposes of publication. *Johnson v. Made-Up Case*, 000 P.2d 999 (Colo. 2000)

C Although the Plaintiff contends other employees could have overheard the comment through the open office door, she cannot identify any employee who did, in fact, overhear the statement. Ex A at 71.

Element 3. The Plaintiff cannot show special damages or that the comment was *per se* defamatory

A. To be *per se* defamatory, the statement must allege a criminal offense. *Gordon*

v. Boyles, 99 P3d 75, 79 (Colo. App 2004) Defendant Smith's statement accused the Plaintiff of being a "thief" with regard to entries on her timecard. Ex. A at 88, Ex. B at 56. In essence, Defendant Smith accused the Plaintiff of "theft of time," not a criminal offense.

B. Special damages must be specific monetary losses resulting from the alleged defamatory statement. *Lind v OReilly*, 636 P.2d 1319, 1321 (Colo. App 1981) The Plaintiff cannot identify any special damages she sustained. Ex. A at 89-90.

Element 4: The Plaintiff cannot show actual malice

A. "Actual malice" requires proof that the statement was made with knowledge of its falsity or with reckless disregard as to its truth. *Wilson v Meyer*, ___ P 3d ___, 2005 WL 2046224 (Colo. App. 2005).

B. Defendant Smith compared the Plaintiff's timecard entries with the recollection of the Plaintiff's supervisor as to her arrival time. Ex. B at 75. He believed in good faith and upon reasonable investigation that the Plaintiff's timecard was fraudulently endorsed. Ex. B. at 76.

C. Defendants are entitled to summary judgment on their affirmative defense of statute of limitations regarding Claim 2, Defamation

1. Burden of proof and elements·

The Defendants bear the burden of establishing the affirmative defense of statute of limitations This defense has one element: that the Plaintiff's action was not commenced within one year of the defamatory statement. C R S § 13-80-103(1)(a).

2. The undisputed facts show the Complaint is untimely[5]

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[5]*Note carefully the difference between the format to be used by a movant who does not bear the burden of proof on an issue, and the format to be used where the movant bears the burden of proof at trial. In the latter case, the movant must point to sufficient, undisputed evidence to establish every element of the claim or defense In response, the non-movant must*

A Defendant Smith's allegedly defamatory statement was made at the disciplinary meeting of July 10, 2003. Ex. A at 63

B The Plaintiff commenced this action by filing a Complaint on July 19, 2004. *Docket #* **XY**

C. Therefore, the undisputed facts establish that the defamation claim is untimely.

CONCLUSION

Because the Plaintiff's evidence, viewed in the light most favorable to her, is insufficient to establish all of the elements of her claims, the Defendants are entitled to summary judgment on both claims In addition, the undisputed evidence indicates that the Defendants have proven their affirmative defense of statute of limitations on the Second Cause of Action, entitling them to summary judgment on that defense.

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point to evidence indicating the existence of a genuine issue of fact with regard to one or more elements of the claim or defense

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S Krieger

Case No. 999-cv-99999-MSK-XXX

JANE ROE,

Plaintiff,

v.

SMITH CORP , and
JACK SMITH,

Defendants.

SAMPLE SUMMARY JUDGMENT RESPONSE

COMES NOW Plaintiff Jane Roe, in opposition to the Defendants' Motion for Summary Judgment **(# XY)** pursuant to Fed. R. Civ. P. 56. Triable issues of fact exist with regard to both claims upon which the Defendants seek summary judgment.

CLAIMS AND DEFENSES UPON WHICH JUDGMENT IS SOUGHT[6]

A. Claim 1: Sex Discrimination

1. Burden of proof and elements

The Plaintiff agrees with the Defendants' recitation of the burden of proof and elements on this claim.

2. Elements challenged by the Defendants

Element 3 The Plaintiff can demonstrate a triable issue of fact as to whether she suffered an adverse employment action.

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[6]*Note that, once again, separate statement or narrative summary of the facts is not necessary.*

A. The Plaintiff agrees that the three adverse actions discussed by the Defendant are the only actions at issue in this claim.

B. The standard for "adverse action" in the 10th Circuit is to be "liberally construed." *Heno v Sprint/United Mgmt.* Co 208 F.3d 847, 857 (10th Cir. 2000). Actions which pose no immediate consequence but potentially harm future employment prospects may be adverse actions *Burlington Industries Inc v. Ellereth*, 524 U S 742, 761 (1998).

C Defendant Smith's accusation that the Plaintiff was a "thief" constitutes an adverse action After calling the Plaintiff a "thief," Defendant Smith stated that "we can't have people like that working here." Ex. A at 103. The Plaintiff interpreted this statement as effectively terminating the Plaintiff's employment. Ex. A at 105 Human Resources Manager Doe told the Plaintiff after the meeting, that "[Defendant Smith] pretty much thinks you should look for a job elsewhere." Ex. A at 109.

D. Although Supervisor Jones never formally disciplined the Plaintiff, Defendant Smith clearly incorporated Jones' "warnings" to the Plaintiff in his decision to terminate her. Defendant Smith told the Plaintiff "This isn't the first problem we've had with your attendance. Jones has talked to you about it many times." Ex. A at 92. Tardiness is an offense warranting progressive discipline, including oral and written warnings, before termination may result. *Employee Handbook*, attached hereto as Exhibit F,[7] at 7. Thus, Defendant Smith essentially concedes that Jones' warnings had the same effect as formal discipline.

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[7]*Notwithstanding D C Colo L. Civ R 56 1(C)(1), the Court encourages a responding party submitting additional exhibits to continue the identification scheme used by the movant – e g. if the movant finished with* Exhibit G, *the respondent's first new exhibit would be* Exhibit H *If that approach is impractical, the respondent should begin an entirely new scheme (i e using letters if the movant has used numbers) Schemes that result in multiple documents bearing the similar exhibit designations (e g. "Defendants' Exhibit A" and "Plaintiff's Exhibit A") shall not be used*

E. The Plaintiff "resigned" only in response to Defendant Smith implying that she was going to be terminated. Ex. A at 109. Human Resources Manager Doe confirmed that the Plaintiff was essentially told to look for another job *Id* The Plaintiff's resignation was by no means voluntary Her "resignation" letter was carefully-worded out of fear that a less-diplomatic tone would result in adverse employment references by Defendant Smith. Ex. A at 111

Element 4. The Plaintiff can establish that these adverse actions arose in circumstances giving rise to an inference of discrimination.

A "Circumstances giving rise to an inference of discrimination" may arise in many contexts. For example, the Plaintiff may show actions or remarks by decisionmakers reflecting discriminatory animus, preferential treatment given to employees outside the protected class, or questionable timing of an employment decision *Plotke v. White*, 405 F.3d 1092, 1101 (10th Cir. 2005).

B Defendant Smith admits, at least for purposes of this motion, the Plaintiff's contention that he stated "girls aren't cut out for this kind of work " *See Defendant's Motion* at 3-4. This clearly discriminatory remark alone is sufficient to raise an issue of fact as to Defendant Smith's motivation

C. The Defendants cannot identify a single male employee terminated for tardiness. Ex B at 88 The Plaintiff has identified several males in her department that have been as late to work as she, if not more so. Ex A at 51-53

B. Claim 2: Defamation

1. Burden of proof and elements

The Plaintiff disputes the Defendants' statement of the burden of proof and elements on this claim. Specifically, the Plaintiff denies that she is required to prove this claim by clear and

convincing evidence That standard applies only to claims by public figures. *Barnett v Denver Publishing Co* , 36 P.3d 145, 147 (Colo. App. 2001). The Plaintiff also denies that she is required to prove actual malice. That element is only required in claims brought by public figures. *Barnett, id*

2. Elements challenged by Defendants

Element 2 Defendant Smith's statement that the Plaintiff was a "thief" was published to a third party.

A. The Plaintiff contends that Defendant Smith's statement was published to third parties, including employee Mary Clark In August 2003, Clark stated to Plaintiff "Word from the office is that [Defendant Smith] is looking for you. Are you a thief, Jane? Did you steal something from the company or something? What is this all about?" Ex A at 58. Clark's use of the word "thief" clearly indicates that Defendant's Smith's statement was published to persons not involved in the disciplinary meeting. Whether Clark overheard Defendant Smith using the word at the meeting, or whether he or some other agent of the company repeated the statement later is of no consequence, as it was undisputedly published by someone within the Defendants' control.

Element 3· The Plaintiff can show special damages or that the comment was *per se* defamatory.

A. By accusing the Plaintiff of theft, a criminal offense, Defendant Smith's statement was *per se* defamatory. *Gordon v Boyles*, 99 P.3d 75, 79 (Colo App. 2004) Defendants' distinction between tangible "theft" and "theft of time" is of no consequence. Defendant cites no caselaw supporting this alleged distinction

B. In the alternative, Defendant Smith's statement is defamation *per se*, as it harms the Plaintiff in her trade or profession. *Id* The statement accuses the Plaintiff of being an

untrustworthy employee.

Element 4 The Plaintiff can show actual malice.

A. "Actual malice" is not an element of a claim against a private party *Barnett, supra*

B Assuming actual malice is a necessary element, Defendant Smith knew that his accusation of theft was untrue, or, at the least, reckless. At the disciplinary meeting, the Plaintiff informed Defendant Smith that somebody else wrote the false entry on her timecard. Ex A at 79; Ex. B at 63 Defendant Smith did not investigate this contention before calling the Plaintiff a thief. Ex. B at 70.

C. Defendants are not entitled to summary judgment on their affirmative defense of statute of limitations.

1 Burden of Proof and Elements

The Plaintiff does not dispute the Defendants' statement of the burden of proof and elements applicable to this defense

2. Elements that cannot be established by Defendant

Element 1: The claim was commenced within one year of accrual

A. A claim of defamation accrues when the Plaintiff has knowledge of all of the necessary elements, including publication *Taylor v Goldsmith*, 870 P.2d 1264, 1265-66 (Colo. App 1994)

B. The Plaintiff first learned that Defendant Smith (or his agents) had published his defamatory statement about the Plaintiff in August 2003, when the Plaintiff spoke to Clark. Ex. A at 109. The Defendants have not pointed to facts warranting an earlier accrual date Therefore, the Plaintiff's claim did not accrue until August 2003, and the Complaint, filed in July 2004, was

timely

CONCLUSION

For the foregoing reasons, the Plaintiff has come forward with sufficient evidence, taken in the light most favorable to her, to establish all of the challenged elements of her claims, and the Defendants' request for summary judgment on those claims should be denied. A genuine issue of fact exists as to the sufficiency of the Defendants' affirmative defense of statute of limitations, and thus, summary judgment on that defense should be denied