CHAPTER 3

EVIDENCE

A. BURDENS OF PROOF

B. PRESUMPTIONS AND PARTICULAR INFERENCES

C. WEIGHING OF EVIDENCE

A. BURDENS OF PROOF

3:1 BURDEN OF PROOF AND PREPONDERANCE OF EVIDENCE —DEFINED

1. The plaintiff has the burden of proving (his) (her) (its) claim(s) by a preponderance of the evidence.

2. The defendant has the burden of proving (each of) (his) (her) (its) affirmative defense(s) by a preponderance of the evidence.

3. To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not.

4. "Burden of proof" means the obligation a party has to prove (his) (her) (its) claim(s) or defense(s) by a preponderance of the evidence. The party with the burden of proof can use evidence produced by any party to persuade you.

5. If a party fails to meet (his) (her) (its) burden of proof as to any claim or defense or if the evidence weighs so evenly that you are unable to say that there is a preponderance on either side, you must reject that claim or defense.

Notes on Use

1. If there is no affirmative defense, omit paragraph 2.

2. If there is a counterclaim, and no affirmative defense, omit the words "affirmative defense" in paragraph 2 and substitute the word "counterclaim."

3. If there is an affirmative defense and counterclaim, add in paragraph 2 the words "and counterclaim" following the words "affirmative defense."

4. Generally, in all civil cases, the burden of proof "shall be by a preponderance of the evidence," except as to claims for exemplary damages for which the facts supporting such relief must be proved "beyond a reasonable doubt." § 13-25-127, C.R.S. Also, in some cases, *see, e.g.*, Instructions 22:1, 22:2, 35:1, 35:2, some elements of a claim may have to be established by "clear and convincing evidence." *See* Instruction 3:2. If so, this instruction must be modified accordingly as to such elements and Instruction 3:2 defining "clear and convincing evidence" must also be given. Concerning the constitutionality of section 13-25-127, see **Page v. Clark**, 197 Colo. 306, 592 P.2d 792 (1979).

5. Proof "by a preponderance of the evidence" demands only that the evidence must "preponderate over, or outweigh, evidence to the contrary." **City of Littleton v. Indus. Claim Appeals Office**, 2016 CO 25, ¶ 38, 370 P.3d 157, 168-69.

6. In cases in which a party is asserting a claim for punitive damages, *see* Instruction 5:4, and consequently the supporting facts for such relief must be established "beyond a reasonable

doubt," this instruction must be appropriately modified, and Instruction 3:3, defining "reasonable doubt," must also be given.

Source and Authority

This instruction is supported by section 13-25-127. *See also* **People v. Garner**, 806 P.2d 366 (Colo. 1991); **Kaiser Found. Health Plan v. Sharp**, 741 P.2d 714 (Colo. 1987); **Swaim v. Swanson**, 118 Colo. 509, 197 P.2d 624 (1948); **Sams Automatic Car-Coupler Co. v. League**, 25 Colo. 129, 54 P. 642 (1898).

3:2 CLEAR AND CONVINCING EVIDENCE — DEFINED

A fact or proposition has been proved by "clear and convincing evidence" if, considering all the evidence, you find it to be highly probable and you have no serious or substantial doubt.

Notes on Use

1. Generally, in all civil cases the burden of proof "shall be by a preponderance of the evidence," except as to claims for exemplary damages for which the facts supporting such relief must be proved "beyond a reasonable doubt." § 13-25-127, C.R.S. Also in some cases, *see, e.g.*, Instructions 22:1, 22:2, 35:1 and 35:2, some or all the issues may have to be established by clear and convincing evidence. When some of the issues must be so determined, this instruction must be given with Instruction 3:1 and the language of Instruction 3:1 must be modified to indicate which issues must be established by "clear and convincing evidence" as contrasted to "preponderance of the evidence." Concerning the constitutionality of section 13-25-127, see **Page v. Clark**, 197 Colo. 306, 592 P.2d 792 (1979).

2. The standard set out in this instruction of "clear and convincing evidence" should be used by the court when determining under section 13-21-102.5(3), C.R.S., whether a jury damage award for noneconomic loss or injury in excess of $250,000 (periodically adjusted for inflation) is "justified" or whether any jury damage award for derivative noneconomic loss or injury is "justified." Under section 13-21-102.5(4), the statutory limitations of subsection (3) are not to be disclosed to the jury, but imposed instead by the court before judgment.

3. For other statutory provisions requiring the use of the standard of "clear and convincing evidence" in a civil action to establish liability or a defense to liability, see the Drug Dealer Liability Act, §§ 13-21-801 to -813, C.R.S., which imposes vicarious liability on one who makes illegal drugs available to an illegal user, and the use of such drugs causes damages to others. *See* §§ 13-21-804(3) (proof of liability), -806(2) (proof of comparative negligence as a defense).

Source and Authority

This instruction is supported by **Page**, 197 Colo. at 318, 592 P.2d at 800 ("highly probable"); **Whatley v. Wood**, 157 Colo. 552, 404 P.2d 537 (1965) ("clear and convincing" is somewhere between "preponderance" and "beyond a reasonable doubt"); **Jackson Enterprises, Inc. v. Maguire**, 144 Colo. 164, 355 P.2d 540 (1960) ("clear and convincing" greater than a probability or preponderance); and **Huber v. Boyle**, 98 Colo. 360, 363, 56 P.2d 1333, 1335 (1936) ("clear and convincing" means "clear, precise and indubitable" but does not require direct evidence). *See also* **People v. Lane**, 196 Colo. 42, 581 P.2d 719 (1978) (citing the former instruction and quoting its operative language with approval); **M.W. v. D.G.**, 710 P.2d 1174 (Colo. App. 1985) (same).

3:3 REASONABLE DOUBT — DEFINED

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and thoughtful consideration of all the evidence, or the lack of evidence, in the case. It is not a vague, speculative, or imaginary doubt, but one that would cause reasonable persons to hesitate to act in matters of importance to themselves.

Notes on Use

1. This instruction is to be used in conjunction with instructions such as Instruction 5:4.

2. Typically, courts should not go beyond the bounds of this instruction and attempt to further define reasonable doubt. **Johnson v. People**, 2019 CO 17, ¶ 19, 436 P.3d 529, 534 ("[A]ttempts to further define reasonable doubt do not provide clarity[, e]ven if well- intentioned . . . .").

Source and Authority

1. This instruction is supported by **Clark v. People**, 232 P.3d 1287 (Colo. 2010).

2. This instruction is modeled after the third paragraph of COLORADO JURY INSTRUCTIONS — CRIMINAL E:03 (2018).

3:4 NO SPECULATION

Any finding of fact you make must be based on probabilities, not possibilities. You should not guess or speculate about a fact.

Notes on Use

Although the prohibition against surmise, speculation or conjecture is applicable to all issues on which a party may have the burden of proof, it is frequently referred to on issues of damages. The prohibition does not mean, however, that damages must be established with absolute certainty. *See* Instruction 5:6; **Palmer v. Diaz**, 214 P.3d 546 (Colo. App 2009) (difficulty in assessing damages does not preclude damages award).

Source and Authority

This instruction is supported by **Letts v. Iwig**, 153 Colo. 20, 384 P.2d 726 (1963) (negligence); **Safeway Stores, Inc. v. Rees**, 152 Colo. 318, 381 P.2d 999 (1963) (proximate cause); **Mosko v. Walton**, 144 Colo. 602, 358 P.2d 49 (1960) (proximate cause); **Alley v. Troutdale Hotel & Realty Co.**, 131 Colo. 124, 279 P.2d 1060 (1955) (proximate cause); **Johns v. Tesley**, 126 Colo. 331, 250 P.2d 194 (1952) (negligence); **Coakley v. Hayes**, 121 Colo. 303, 215 P.2d 901 (1950) (negligence); **Polz v. Donnelly**, 121 Colo. 95, 213 P.2d 385 (1949) (breach of contract); and **Brown v. Hughes**, 94 Colo. 295, 30 P.2d 259 (1934) (negligence).

B. PRESUMPTIONS AND PARTICULAR INFERENCES

3:5 PERMISSIBLE INFERENCE ARISING FROM REBUTTABLE PRESUMPTION

The trial court has discretion whether to give either version of this instruction, but the supreme court has stated that "we disfavor instructions emphasizing specific evidence." See Notes on Use before giving this instruction.

Version 1 (to be used when any portion of the factual premise for applying a rebuttable presumption is disputed):

You may, but are not required to, draw an inference that *(insert description of fact or conclusion that may be inferred)* **if you find that** *(insert description of the factual premise for applying a rebuttable presumption).*

If you draw this inference, you may consider it along with all the other evidence in the case in deciding whether or not *(state the issue to which the inference is relevant; e.g., the defendant was negligent).*

Version 2 (to be used when the factual premise for applying a rebuttable presumption is undisputed).

In this case it is established that *(state the factual premise for applying a rebuttable presumption, if the premise is undisputed).* **From** *(this fact) (these facts)* **you may, but are not required to, draw an inference that** *(insert description of fact or conclusion that may be inferred).*

If you draw this inference, you may consider it along with all the other evidence in the case in deciding whether or not *(insert description of fact or conclusion that may be inferred).*

Notes on Use

1. This instruction applies only to rebuttable presumptions governed by CRE 301. That Rule provides:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

See **Chapman v. Harner**, 2014 CO 78, ¶ 25, 339 P.3d 519 (holding that CRE 301 applies to the res ipsa loquitur doctrine in Colorado; overruling **Weiss v. Axler**, 137 Colo. 544, 328 P.3d 88 (1958) (decided before the adoption of CRE 301)). For statutory presumptions that shift the burden of proof as well as the burden of going forward, which are not governed by Rule 301, see Instruction 3:6.

2. The effect of rebuttable presumptions and the procedure for applying them were substantially altered by **Chapman**, 2014 CO 78, and **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009). Those decisions concern: (a) the presumption of negligence arising when res ipsa loquitur applies (**Chapman**) and (b) the presumption of undue influence when a will beneficiary is in a fiduciary or confidential relationship with the testator (**Krueger**). The supreme court has not yet considered whether to apply the holdings of these cases beyond the specific presumptions at issue in those two cases. However, (i) **Chapman** states that "**Krueger** supplies a description of the general effect of rebuttable presumptions," 2014 CO 78, ¶ 15; (ii) the supreme court adopted the identical procedure in both cases; (iii) the language of the opinions is broad; and (iv) the holdings are consistent with CRE 301. On the face of these decisions, and in the absence of decisions addressing other presumptions, it appears that substantial changes are required in instructions that formerly dealt with rebuttable presumptions.

3. Based on **Krueger** and **Chapman**, the jury is not to be instructed about rebuttable presumptions. Instead, such a presumption "shifts the burden of going forward to the party against whom it is raised." **Krueger**, 250 P.3d at 1154. If the presumption applies and is not rebutted by legally sufficient evidence, then the presumed fact is established as a matter of law. *Id.* at 1156. If the presumption applies and is rebutted by legally sufficient evidence, the presumption is destroyed and leaves only a permissible inference of the presumed fact. **Chapman**, 2014 CO 78, ¶ 25; **Krueger**, 205 P.3d at 1154, 1156.

4. When the permissible inference arises, the trial court has discretion whether to instruct on that inference. However, the supreme court "disfavor[s] instructions emphasizing specific evidence." **Krueger**, 205 P.3d at 1157. "A trial court does not abuse its discretion in failing to instruct the jury on a permissible inference unless the omission caused substantial prejudice to the requesting party." *Id.* When the permissible inference arises, an instruction should be given if "justified by strong underlying policy considerations." *Id.*

5. As an example of policy considerations that would support giving a permissible inference instruction, the supreme court cited the presumption that evidence destroyed by a civil litigant would have been unfavorable to the destroying party. *Id.* "A trial court may give this permissible inference instruction as long as it furthers two underlying rationales. The instruction should be both punitive and remedial; it should deter the parties from destroying evidence, and restore the prejudiced party to the position she would have been in had the evidence not been destroyed." *Id.*

6. Formerly, the jury was instructed that a presumption arose and that the jury should consider the presumption along with all the other evidence in the case. The plaintiff in **Krueger** requested such an instruction. The supreme court held, however, that "a jury instruction on inoperative presumptions is inappropriate," and would "confuse[] the jury as to the role of the rebutted presumption." *Id.* at 1157.

7. The trial court is to decide whether a party has presented sufficient evidence to invoke the presumption and whether the opposing party has presented sufficient evidence to rebut it. *See id.* at 1153, 1154.

8. This instruction is presented in two alternate versions, depending on whether the factual premise for applying the presumption is disputed. In **Krueger**, for example, the factual premise was that the defendant was (a) a beneficiary of the will, (b) in a confidential or fiduciary relationship with the testator, and (c) actively involved in the preparation or signing of the will. If any portion of the factual premise is in dispute, use version 1. If all of the factual premise is undisputed, use version 2.

9. This instruction should not be given unless there is sufficient evidence from which a reasonable jury could find by a preponderance of the evidence that the basic facts giving rise to the presumption are true. **Devenyns v. Hartig**, 983 P.2d 63 (Colo. App. 1998). Also, this instruction should be used only if supported by an applicable statute or common-law rule. *See, e.g.*, **Yampa Valley Elec. Ass'n v. Telecky**, 862 P.2d 252 (Colo. 1993) (reversible error to instruct on rebuttable presumption in absence of statutory or common-law justification).

10. Instruction 3:8 defines "inference" and should be given if either version of this instruction is given.

Source and Authority

This instruction is supported by CRE 301; **Chapman**, 2014 CO 78, ¶ 25; and **Krueger**, 205 P.3d at 1157.

3:5A INFERENCE ARISING FROM INVOCATION OF FIFTH AMENDMENT PRIVILEGE

You may, but are not required to, draw an inference that the answer to any question that *(name of party)* **refused to answer by asserting (his) (her) Constitutional privilege against self-incrimination would have been unfavorable to (him) (her). You should not decide** *(name of party's)* **(claim) (damages) (liability or non-liability) based solely on (his) (her) assertion of (his) (her) privilege against self-incrimination.**

Notes on Use

1. Before deciding what adverse consequences, if any, will flow from a party's invocation of the Fifth Amendment privilege against self-incrimination, the trial court must preliminarily determine whether the privilege has been properly invoked. **Steiner v. Minn. Life Ins. Co.**, 85 P.3d 135, 141 & n.5 (Colo. 2004) ("As a threshold matter, a trial court must necessarily determine if the privilege is properly invoked. In other words, the information withheld must be of the sort which could, directly or indirectly, subject the [party] to the possibility of prosecution."). Further, before determining what consequence will flow from a party invoking his or her Fifth Amendment privilege, the trial court must consider the other party's need for the information withheld, whether that party has any alternative means of obtaining that information, and whether any effective remedy, short of dismissal, is available to safeguard both parties' interests. *Id*. at 141. Allowing a negative inference to be drawn from the party's refusal to answer questions is but one potential remedy. *Id.* at 143 (court should consider various possibilities, including negative inference or issuing a stay of discovery until the applicable statute of limitations has run on the party's potential criminal activity).

2. This instruction may be used, in modified form, if a nonparty witness invokes his or her Fifth Amendment privilege. *See* **McGillis Inv. Co. v. First Interstate Fin. Utah LLC**, 2015 COA 116, ¶ 35, 370 P.3d 295 (admissibility of nonparty's invocation of Fifth Amendment privilege and concomitant drawing of adverse inferences should be considered on a case-by-case basis to assure that any inference is reliable, relevant, and fairly advanced). In deciding whether the suggested inference is reliable, relevant, and fairly advanced, four non-exclusive factors should be considered: (a) the nature of the relevant relationships between the parties and the witness, focusing on the perspective of the nonparty witness's loyalty to the plaintiff or the defendant; (b) "[t]he degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation," and whether any such control suggests that the testimony might serve as a vicarious admission; (c) "whether the non-party witness is pragmatically a noncaptioned party in interest, and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation"; and (d) whether the nonparty witness is a key figure in the litigation and played a controlling role in any of the underlying aspects of the litigation. *Id*. at ¶¶ 29-35. If the instruction is modified for use with a nonparty witness, the following language may be appropriately added: "You should not draw such an inference if you find that *(name of witness)* asserted the privilege for reasons unrelated to this case." *Id*. at ¶ 36. It is unclear whether this additional language is appropriate when a party asserts the privilege.

Source and Authority

This instruction is supported by **Steiner**, 85 P.3d at 141 (where party refused to answer questions based on Fifth Amendment privilege, trial court should have considered remedies short of dismissal, such as allowing a negative inference to be drawn from); **McGillis Inv. Co.**, 2015 COA 116, ¶ 27 (negative inference instruction may be proper when nonparty witness invokes Fifth Amendment privilege); **Chaffin, Inc. v. Wallain**, 689 P.2d 684 (Colo. App. 1984) (factfinder in civil case should be permitted to draw an adverse inference against party who claims the Fifth Amendment privilege in response to discovery requests and to properly posed questions); and **Asplin v. Mueller**, 687 P.2d 1329 (Colo. App. 1984) (not error to require party who declines to answer certain questions on Fifth Amendment grounds to invoke the privilege in jury's presence, and such failure raises a strong inference that the answers would have been unfavorable).

3:6 STATUTORY PRESUMPTIONS THAT SHIFT THE BURDEN OF PROOF

If you find by a preponderance of the evidence that *(insert the basic facts of the applicable presumption, describing them in terms appropriate to the specific evidence in the case)***, then you must find that** *(insert the presumed facts, describing them in terms appropriate to the specific evidence in the case)* **(unless you find** *[insert appropriate description of burden of proof, e.g., "by a preponderance of the evidence," "by clear and convincing evidence," "beyond a reasonable doubt"]* **that** *[insert appropriate negative description of presumed fact, e.g., "(name) was not in fact negligent," "(name) is not in fact the father of (name)"]***).**

Notes on Use

1. This instruction should be used only for rebuttable statutory presumptions that not only shift the burden of going forward with the evidence, but also shift the burden of proof, and consequently are not governed by CRE 301. *See* **City of Littleton v. Indus. Claim Appeals Office**, 2016 CO 25, ¶ 37, 370 P.3d 157 (distinguishing between a "Thayer–Wigmore" presumption that shifts only the burden of production and a "Morgan-type" presumption that shifts the burden of persuasion); *see also* § 33-44-109(2), C.R.S. (presumption of sole responsibility of skier and not ski area operator for certain collisions, discussed in **Pizza v. Wolf Creek Ski Dev. Corp.**, 711 P.2d 671 (Colo. 1985), and **Scott v. Silver Creek Ski Corp.**, 767 P.2d 806 (Colo. App. 1988)).

2. This instruction should not be given unless there is sufficient evidence from which a reasonable jury could find by a preponderance of the evidence that the basic facts giving rise to the presumption are true.

3. When this instruction is given, the parenthetical last clause of the instruction should be omitted unless the party opposing the presumption has established a prima facie case of the nonexistence of the presumed fact. If the party has done that, then that party is entitled to have the jury determine whether the burden of disproving the presumed fact has also been met.

4. Normally the burden of proof to be met as described in the parenthetical last clause will be a preponderance of the evidence. § 13-25-127(1), C.R.S. A specific statute, however, may require a higher standard. *See, e.g.*, § 19-4-105(2), C.R.S. (statutory presumptions of paternity may be rebutted only by clear and convincing evidence).

Source and Authority

This instruction is supported by **Pizza**, 711 P.2d at 680, and **Scott**, 767 P.2d at 807.

3:7 CONSTRUCTIVE KNOWLEDGE BASED ON DUTY TO INQUIRE

You must find that a person knew a fact, if (he) (she) had information that would have led a reasonable person to inquire further and that inquiry would have revealed that fact.

Notes on Use

1. This instruction is applicable to those situations where the law imposes a duty to inquire. Such situations may include negligence cases where a reasonable person would have made further inquiry before proceeding in his or her conduct, e.g., investigating the meaning of a warning signal such as a flashing red light on a road indicating a major road hazard. *See* **Sheffield Servs. Co. v. Trowbridge**, 211 P.3d 714 (Colo. App. 2009) (inquiry notice in negligent misrepresentation case), *overruled on other grounds by* **Weinstein v. Colborne Foodbotics, LLC**, 2013 CO 33, 302 P.3d 263.

2. This instruction does not apply in deceit cases. *See* Instruction 19:10.

3. This instruction need not be given in negligence cases if other instructions given in the case adequately advise the jury as to the applicable law. **Allen v. Ramada Inn, Inc.**, 778 P.2d 291 (Colo. App. 1989).

Source and Authority

This instruction is supported by **Martinez v. Affordable Housing Network, Inc.**, 123 P.3d 1201 (Colo. 2005).

C. WEIGHING OF EVIDENCE

3:8 EVIDENCE IN THE CASE — STIPULATIONS — JUDICIAL NOTICE — INFERENCES PERMITTED AND DEFINED

The evidence in the case consists of the sworn testimony of all the witnesses (all exhibits which have been received in evidence), (all facts which have been admitted or agreed to), (all facts and events which have been judicially noticed), (and all presumptions stated in these instructions).

In deciding the facts, you must consider only the evidence received at trial. Evidence offered at the trial and rejected or stricken by the Court must not be considered by you. Statements, remarks, arguments, and objections by counsel and remarks of the Court not directed to you are not evidence.

You are to consider only the evidence in the case and the reasonable inferences from that evidence. An inference is a conclusion that follows, as a matter of reason and common sense, from the evidence.

(If there are any stipulations or admissions of fact or stipulations regarding the testimony of any witnesses, instruct the jury in accordance with Instructions 1:12 and 1:13 unless the jury has already been so instructed.)

(When the Court declares it has taken judicial notice of some fact or event, the jury must accept that fact or event as proved.)

Notes on Use

1. If no exhibits have been admitted, or if no facts have been admitted or stipulated or judicially noticed or the jury will not be instructed on any presumptions, references to any of these matters should be deleted from the first paragraph. If the parties have agreed or stipulated to any facts or if the court has judicially noticed any facts, the court should enumerate such facts at the appropriate time, preferably during the trial. Omit the fourth paragraph (or portions thereof) and the fifth paragraph if not applicable.

2. Instruction 3:9 should be given with this instruction whenever the third paragraph of this instruction is given.

3. Though instructions emphasizing specific evidence are disfavored, policy considerations in some circumstances may permit the trial court to instruct the jury on inferences it may draw from particular facts. **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009) (though presumptions of undue influence and unfairness were sufficiently rebutted such that a presumption instruction was inappropriate, trial court had discretion to inform jury of permissible inferences to be drawn from the evidence giving rise to the presumptions); *see, e.g.*, Instructions 3:5 and 34:17.

4. Courts may take judicial notice of the contents of a county attorney's website where (1) the contents of the website on a specific date and time are not subject to reasonable dispute; (2) the party making the request complies with the requirements of CRE 201(d); (3) the website is self-authenticating as an official publication; and (4) the contents fall within an exception to the hearsay rule (such as that for public records and reports). **Shook v. Pitkin Cty. Bd. of Cty. Comm'rs**, 2015 COA 84, ¶ 12 n.4, 411 P.3d 158.

Source and Authority

1. As to the definition and use of inferences, this instruction is supported by **Venetucci v. City of Colorado Springs**, 99 Colo. 389, 63 P.2d 462 (1936); and **Independence Coffee & Spice Co. v. Kalkman**, 61 Colo. 98, 156 P. 135 (1916). *See also Black's Law Dictionary* 897 (10th ed. 2014).

2. Under CRE 201(g), a judicially noticed fact must be taken by the jury as conclusive. *See also* C. MCCORMICK, EVIDENCE § 332, at 931 n.9 (E. Cleary 3d ed. 1984).

3:9 DIRECT AND INDIRECT (CIRCUMSTANTIAL) EVIDENCE — DEFINED

Evidence may be either direct or circumstantial. Circumstantial evidence is the proof of facts or circumstances from which the existence or nonexistence of other facts may reasonably be inferred. All other evidence is direct evidence. The law makes no distinction between the effect of direct evidence and circumstantial evidence.

Notes on Use

This instruction should be given whenever the third paragraph of Instruction 3:8 is given.

Source and Authority

This instruction is supported by **Quintana v. Kudrna**, 157 Colo. 421, 402 P.2d 927 (1965); **Miller v. Boma Inv. Co.**, 112 Colo. 7, 144 P.2d 988 (1944); and **In re Estate of Ramstetter**, 2016 COA 81, ¶¶ 53-54, 411 P.3d 1043 (Because circumstantial evidence enjoys the same status as direct evidence, it may be sufficient to support a finding of mutual mistake in a contract dispute.).

3:10 DEPOSITIONS AS EVIDENCE

Certain testimony (will be) (has been) (summarized and read) (video recorded and introduced) (audio recorded and introduced) into evidence from a deposition. A deposition is testimony taken under oath before the trial. You are to consider that (testimony) (summary of testimony) as if it had been given by the witness from the witness stand.

Notes on Use

1. Use whichever parenthesized words are most appropriate.

2. This instruction should be given immediately before or after the deposition is admitted into evidence.

3. This instruction should be given only if a deposition has been admitted as substantive evidence. It should not be given if a deposition has only been used for impeachment, for example, by showing a prior inconsistent statement. If one or more depositions have been used for impeachment purposes in a case in which one or more other depositions have been admitted as substantive evidence, the court should add to this instruction an identification of those depositions which have been admitted as substantive evidence and those which have been used only for impeachment purposes. As to the latter, the court should also caution the jury that they are not to be considered as substantive evidence on the merits of the case, but should be considered by them only insofar as such depositions may relate to the credibility of a witness.

4. The "Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries," adopted in principle by the Colorado Supreme Court in February 1997, recommends:

> The court should adopt procedures that would encourage parties to use concise written summaries of deposition testimony instead of reading depositions to the jury and to present such testimony in a logical order.

Id. at p. 49, ¶ 21.

Source and Authority

This instruction is supported by C.R.C.P. 32(a).

3:11 TESTIMONY READ FROM TRANSCRIPT

Certain testimony (will be) (has been) read into evidence from a transcript of an earlier proceeding. The transcript is testimony taken under oath at the earlier proceeding and preserved in writing. You are to consider that testimony as if it had been given before you from the witness stand.

Notes on Use

This instruction should be given immediately before or after the prior testimony has been properly admitted. As to when such prior testimony is admissible under the hearsay rule, see CRE 804(b)(1).

Source and Authority

This instruction is supported by C.R.C.P. 80(c) and 380(b).

3:12 PREPONDERANCE NOT DETERMINED BY NUMBER OF WITNESSES

The weight of evidence is not necessarily determined by the number of witnesses testifying to a particular fact.

Notes on Use

This instruction may be given by the trial court in its discretion when more witnesses have testified to a particular fact for one side than for the other.

Source and Authority

This instruction is supported by **Swaim v. Swanson**, 118 Colo. 509, 197 P.2d 624 (1948); **Green v. Taney**, 7 Colo. 278, 3 P. 423 (1884); and **Gonzalez v. Windlan**, 2014 COA 176, ¶ 34, 411 P.3d 878.

3:13 ADVERSE INFERENCE FROM THE LOSS OR DESTRUCTION OF EVIDENCE

(Before) (During) the trial of this case, (plaintiff) (defendant) *(insert description of party's misconduct)***. You may, but are not required to, draw an inference that by reason of the (loss of) (destruction of)** *(insert description of affected evidence)***, the (lost) (destroyed) evidence was unfavorable to (plaintiff) (defendant).**

Notes on Use

1. Before this instruction is given, the court must determine that the loss or destruction of evidence was willful, although it need not be in bad faith. The court must also determine that the lost or destroyed evidence is relevant to the action and otherwise naturally would have been introduced into evidence. **Aloi v. Union Pac. R.R.**, 129 P.3d 999 (Colo. 2006).

2. When this instruction is given, also use Instruction 3:8 defining inference.

3. If the evidence has been altered or tampered with, the instruction should be modified accordingly.

Source and Authority

This instruction is supported by **Aloi**, 129 P.3d at 1002-07.

3:14 SYMPATHY — PREJUDICE

You must not be influenced by sympathy, bias, or prejudice for or against any party in this case.

Notes on Use

This instruction should not be given in a juvenile delinquency case because the point is covered by the fourth paragraph of Instruction 40:3, which is applicable to such proceedings.

3:15 EXPERT WITNESSES

A witness qualified as an expert by education, training, or experience may state opinions. You should judge expert testimony just as you would judge any other testimony. You may accept it or reject it, in whole or in part. You should give the testimony the importance you think it deserves, considering the witness's qualifications, the reasons for the opinions, and all of the other evidence in the case.

Notes on Use

1. This instruction should be given only if one or more expert witnesses have testified in the case. The court should not point out to the jury which witnesses testified as experts, since this might put undue emphasis on their testimony.

2. This instruction applies to a "professional person" appointed by the court under section 27-65-111(2), C.R.S., to testify in a mental health proceeding for short-term or long-term care and treatment.

Source and Authority

1. This instruction is supported by CRE 702; **Young v. Burke**, 139 Colo. 305, 338 P.2d 284 (1959); and **Ryan Gulch Reservoir Co. v. Swartz**, 83 Colo. 225, 263 P. 728 (1928).

2. The testimony of an expert witness is to be treated the same as that of any other witness. **Burnham v. Grant**, 24 Colo. App. 131, 134 P. 254 (1913).

3. For a discussion regarding the propriety of admitting expert testimony under CRE 702, see **Huntoon v. TCI Cablevision of Colorado, Inc.**, 969 P.2d 681 (Colo. 1998).

4. The jury is not bound by the expert's testimony even when there is no contradictory evidence. **McWilliams v. Garstin**, 70 Colo. 59, 197 P. 246 (1921).

3:16 DETERMINING CREDIBILITY OF WITNESSES

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; the consistency or lack of consistency in their testimony; their motives; whether their testimony has been contradicted or supported by other evidence; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses.

Based on these considerations, you may believe all, part or none of the testimony of a witness.

Notes on Use

A separate instruction on impeaching a witness by contradictory evidence, bad reputation for truth and veracity, convictions of a felony, etc., should not be given since these matters are adequately covered by this instruction.

Source and Authority

1. This instruction is supported by **Prudential Insurance Co. of America v. Cline**, 98 Colo. 275, 57 P.2d 1205 (1936), *overruled on other grounds by* **Lockwood v. Travelers Insurance Co.**, 179 Colo. 103, 498 P.2d 947 (1972).

2. In **Murray v. Just in Case Business Lighthouse, LLC**, 2016 CO 47M, ¶ 21, 374 P.3d 443, 451, the Colorado Supreme Court held that, subject to the trial court's discretion to determine whether to allow a witness to testify, "a witness's credibility is for the fact-finder to decide."

3. The jury is entitled to disregard all or any portion of the testimony of any witness who it finds has willfully testified falsely to any material fact. **Denver & Rio Grande R.R. v. Warring**, 37 Colo. 122, 86 P. 305 (1906); **Ward v. Ward**, 25 Colo. 33, 52 P. 1105 (1898); *see also* **Gordon v. Benson**, 925 P.2d 775 (Colo. 1996) (jury may believe all or just part of the testimony of a witness); **Huntoon v. TCI Cablevision of Colo., Inc.**, 948 P.2d 33 (Colo. App. 1997) (same), *rev'd on other grounds*, 969 P.2d 681 (Colo. 1998).

3:17 HIGHLIGHTED EXHIBITS

The lawyers have highlighted certain parts of some exhibits. However, it is for you to determine the significance of the highlighted parts.

Notes on Use

The "Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries," adopted in principle by the Colorado Supreme Court in February 1997, recommends:

> The court should adopt procedures that would allow important exhibits to be highlighted or otherwise marked to direct jurors' attention to significant parts of an exhibit.

Id. at p. 50, ¶ 22.

Source and Authority

This instruction is supported by C.R.C.P. 16(f)(3)(VI)(B).