Significant Malpractice Cases and Developments during the Past Year – A Review and Some Observations

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Introduction

Last year was not a particularly active year in terms of appellate decisions dealing specifically with malpractice. There was, however, one Colorado Supreme Court decision regarding the enforceability of arbitration clauses in nursing home settings. There was a Colorado Court of Appeals decision pertaining to an underlying medical malpractice case, which addressed issues of juror bias and standards for challenges for cause, as well as a challenge to the validity of stock instruction 15:4, regarding "errors in judgment," for which *certiorari* review has now been accepted. There was also a court of appeals decision better defining the applicability of the Colorado Consumer Protection Act to legal malpractice claims, as well as whether a related contract claim can constitute an independent claim, governed by different standards and statutes of limitation. There was a significant court of appeals decision with general applicability regarding the enforceability of contingent fee contracts, involving a successful post-distribution challenge of a contingent fee for unreasonableness. Under the radar perhaps, there a notable change to C.R.C.P. 37 passed, which places limitations on the ability of trial courts to limit the length of voir dire examinations. And last, there was an important change to Fed. R. Civ. P. 26 that applies work product protection to draft reports and other documents from retained experts.

Colorado Supreme Court Decision

Moffett v. Life Care Centers of America – The Enforceability of Arbitration Clauses in Healthcare Malpractice Settings

Moffett v. Life Care Centers of America[1] is a decision of note involving the enforceability of an arbitration clause in the context of a nursing home liability claim. Although the trial court had ruled the arbitration agreement unenforceable, the court of appeals had reversed the trial court, and held the arbitration clause enforceable.[2]

The underlying facts of the claim were that it was a wrongful death action filed by the Moffetts regarding the death of their mother, Dorothy Moffett, in a nursing home facility ("Briarwood"). In the action, Briarwood filed a motion to compel arbitration based upon an arbitration agreement signed by James Moffett, who possessed a POA and a medical durable POA for his mother, upon his mother's admission to the facility. The district court, finding the arbitration agreement unenforceable, denied Briarwood's motion to compel arbitration, and Briarwood appealed. The court of appeals reversed the trial court and held the arbitration agreement enforceable. The Moffetts' contention was that the arbitration agreement was not enforceable based upon a number of factors. The factors include:

1) a person possessing a power of attorney ("POA") may not sign a binding arbitration agreement on behalf of an incapacitated patient under the arbitration provisions of the Health Care Availability Act (the "HCAA"); and
2) Briarwood unlawfully conditioned Dorothy Moffett's admission to the nursing home on her son's signing of the agreement as POA.

The basis of the trial court denying Briarwood's motion to compel arbitration was its conclusion that a POA could not enter into a binding arbitration agreement on behalf of an incapacitated person, pursuant to the HCAA.

The court of appeals, however, disagreed and reversed the trial court. It held that

1) a person holding a POA for an incapacitated person may lawfully sign an arbitration agreement on behalf of the principal and
2) a person holding a medical durable power of attorney for an incapacitated patient may lawfully sign an arbitration agreement on behalf of the principal [as well], because the decision to arbitrate in that context is a 'medical treatment decision.'[3]

The court of appeals also ordered the trial court to resolve contested issues of fact bearing on the validity of the agreement, which it determined had not been properly resolved by the trial court. Upon the Moffetts' petition, the Colorado Supreme Court granted certiorari review.

The court reviewed legislation pertaining both to the general assembly favoring the broad use of delegation authority to POAs to make significant decisions on behalf of a principal for such things as medical issues and a broad range of personal financial decisions. Thus, the court reasoned that a broad and liberal interpretation of the right of a POA to bind his or her principal was consistent with legislative intent. The court emphasized, as well, Colorado's strong policy favoring arbitration.

Based upon all this, and despite some legislative language that might suggest differently, the court determined that the intent of the existing Colorado statutory law was to enable POAs to execute arbitration agreements relating to claims for medical negligence "unless the POA specifically limits this authority."[4]

More specifically, the court noted,

> James Moffett held a POA executed by his mother before she became incapacitated. Absent a restriction or limitation on his authority under the POA he holds, he was authorized to enter into the Agreement on behalf of his mother.[5]

The court noted however, by way of reservation, that "[w]e need not and do not reach the issue of whether a person holding a medical durable power of attorney is authorized to sign an arbitration agreement on behalf of an incapacitated patient."[6]

The court disagreed with the Moffetts' contention, as well, that conservators and guardians, who they contended are legally superior to POA's, should be the only ones entitled to make these types of determinations, although admittedly the court noted that there may be some overlap and shared responsibility if conservators and guardians are appointed.

The Moffetts contended further, that the agreement was void because Briarwood conditioned medical care on the execution of the agreement, and thus it had not been voluntarily executed as the statute required. The court of appeals had found that factual issues concerning such had not been properly resolved at the trial court level. The court emphasized that the issue of voluntariness was quite significant, and the analysis should not overlook it. The court noted the "key provisions of the HCAA" in this regard to include the following:

Subsection 13-64-403(1), which provides as follows:

> It is the intent of the general assembly that an arbitration agreement be a **voluntary agreement between a patient and a health care provider** . . . ;

Subsection 13-64-403(5), which provides as follows:

> **Once signed, the agreement shall govern all subsequent provision of medical services for which the agreement was signed until or unless rescinded by written notice**. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor. Where the agreement is one for medical services to a minor, it shall not be subject to disaffirmation by the minor if signed by the minor's parent or legal guardian; and

Subsection 13-64-403(7), which provides as follows:

> **No health care provider shall refuse to provide medical care services to any patient solely because such patient refused to sign such an agreement or exercised the ninety-day right of rescission**.[7]

The court also later noted that § 13-64-403(10)(b) permits a court to declare an arbitration agreement invalid if fraud induced the execution of the agreement.[8]

The issue of voluntariness, however, was a factual issue, which they agreed had not been improperly resolved at the trial court level. The trial court based its resolution only on consideration of an affidavit submitted by the plaintiffs. Thus, the supreme court ruled that the court of appeals properly remanded the matter to the trial court to determine those factual issues.

The Colorado Supreme Court also instructed that a factual issue existed as to whether the POA executed by

Dorothy Moffett contained a limitation that would limit the authority of the POA to enter into these types of agreements, and remanded it to the trial court for a determination of that issue.

Colorado Court of Appeals Decisions

Day v. Johnson – Rule 47 Juror Challenges for Cause, and CJI-Civ. 15:4, regarding "Unsuccessful Outcomes" and "Exercise of Judgment"

Day v. Johnson[9] involved two points of interest. First, the plaintiffs challenged the trial court's denial of their motion to disqualify jurors for cause. Second, and of perhaps of greater significance, the plaintiffs challenged stock instruction CJI-Civ. 15:4 regarding "unsuccessful outcomes," and a physician's "exercise of judgment," as being outmoded and misleading. Although the plaintiffs were not successful with regard to either contention at the court of appeals level, the Colorado Supreme Court has now accepted review of the case on certiorari with regard to 15:4, giving hope that this troubling instruction may someday be modified or even eliminated.[10]

The Juror Challenges

During the trial, the plaintiffs challenged two jurors for cause, Juror "M" and Juror "G." Juror M was an operating nurse in Pueblo where the case was tried. She stated on *voir dire* that she had a "'a little bit of concern' that the size of the medical community in which she and defendant both practice may lead her to work 'with [defendant] at some point in time, which may or may not have repercussions on [her].'"

The plaintiffs contended that this evinced "interest on the part of the juror in the event of the action, or in the main question involved in the action,"[11] as set forth in C.R.C.P. 47(e)(5) and that the trial court should have granted their motion to exclude her for cause.

The court of appeals disagreed. It emphasized at the outset, the very broad discretion that trial courts have to determine this issue, and that a trial court's decision to deny a challenge for cause "will not be disturbed on review, absent a manifest abuse of that discretion."[12] In dealing with the plaintiffs' challenge to Juror M, the court emphasized that although the juror expressed concern about the potential of a future relationship with the defendant, she also stated that she neither knew him nor had any plans to work with him in the future. The court noted the precedent that "an attenuated, existing relationship did not give rise to sufficient 'interest' in the proceedings on the part of the juror to support a challenge for cause."[13] Thus, the court reasoned that if an "attenuated relationship" is not sufficient "to warrant exclusion for cause, . . . the mere possibility of a future relationship between Juror M and defendant should not result in Juror M's dismissal under C.R.C.P. 47(e)(5)." The court further stated that "a prospective juror's expression of concern or indication of the presence of some preconceived belief as to some facet of the case does not automatically mandate exclusion of such person for cause,"[14] particularly where the juror later on assures the court that "she believed she could set aside [her] own personal understandings . . . and follow the judge's instruction at the end of the case."[15]

Juror G was a little bit more emphatic about her bias. As described by the court of appeals' panel, she advised on voir dire that "'she had some strong leanings already' and feared that she 'might feel emotional about this,' and can feel herself 'having a lot of sympathy for this doctor.' She later expressed a 'potential reluctance to award damages for pain and suffering.'" Regardless of this, however, during the rehabilitative phase of her examination, she stated that "she could 'listen fairly' and 'be fair,'" and "that if she were 'convinced' defendant had 'committed malpractice and caused injury to Ms. Day,' she could 'render a verdict against him.'"[16] The court of appeals, in dealing with the plaintiffs' contention that Juror G should have been eliminated for cause pursuant to C.R.C.P. 47(e)(7) based upon the "existence of the state of mind of the juror evincing enmity against or bias to either party," emphasized that "a prospective juror who makes a statement suggesting actual bias may nonetheless sit on the jury if she agrees to set aside any preconceived notion and make a decision based on the evidence and the court's instructions."[17]

The "take away" from the above discussion is perhaps simply only the exceptionally wide latitude that at least one panel of the court of appeals is willing to give trial courts in exercising their discretion concerning challenges for cause of jurors. This is particularly true even where the juror, despite strong statements of bias, later on states in response to leading questions posed to her by someone from the other side, who perhaps likes the bias, that he or she can "set it aside," and "follow the court's instructions."

The Challenge to CJI-Civ. 15:4

The second part of the decision has more broad reaching effects, and challenges an instruction favored by physicians, i.e., stock instruction 15:4, regarding an "unsuccessful outcome" and "exercise of judgment," as being outdated and not a proper statement of Colorado law. The instruction states, in part:

> An unsuccessful outcome does not, by itself, mean that a physician was negligent. An exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that a physician was negligent.

The origin of this instruction dates back to a 1934 Colorado Supreme Court decision, *Brown v. Hughes*,[18] a case decided in an era where the standards for provable malpractice seemingly went well beyond mere negligence. By reviewing the language in that case, one can perhaps appreciate why many still refer to this area of law as "malpractice," instead of the more accurate term of "medical negligence." In one part of *Brown*, in fact, the Colorado Supreme Court had referred to the standard as thus:

> The defendants herein must first have left and entirely abandoned all knowledge acquired in the fields of exploration and adopted some rash or experimental methods before they approached the danger zone of liability. Does the evidence here evince want of skill or a reckless disregard of consequence? We think not.[19]

The plaintiffs' concern with 15:4 was primarily with regard to its second part, i.e., "an exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that a physician was negligent," which is oftentimes used by physicians to argue that if he or she were exercising their "professional judgment," he or she by definition was not negligent. A case in point, was in fact *Day*, where plaintiffs note in their brief to the supreme court that defense counsel's argument on closing argument was precisely that, i.e.:

> I would submit this case is truly about did Dr. Johnson reasonably exercise his best judgment to try to help Ms. Day with a growing ongoing problem and that is not negligence under the jury instructions. That's what this case is about.[20]

Although this is perhaps an effective argument, it is not an accurate reflection of modern medical negligence law, which does not exclude judgment that is negligently formulated or exercised, as being outside the bounds of professional negligence. Nor does the instruction give a basis for the plaintiff to argue otherwise. *See* for e.g., N.Y. Pattern Jury Instr. – Civ. 2:150 ("a doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation, if it is a judgment that a reasonably prudent doctor could have made under the circumstances.")

On appeal, the Days contended that the instruction is "antiquated and misleading," and a growing number of other jurisdictions have rejected similar instructions "because the language may immunize medical professionals from liability for any action that may be considered within their judgment," and it thus "no longer reflects modern views of malpractice law."[21] Other jurisdictions that have rejected "error in judgment" instructions outright include Oregon[22], Kansas[23] and Pennsylvania.[24] Numerous other courts, as well, have rejected at least some form of the error-of-judgment instructions.[25]

The court of appeals however disagreed, holding that *Brown v. Hughes* still reflects an accurate statement of the law, which merely "follows a fundamental tenet of tort law that the mere fact that a plaintiff has suffered an injury, without more, does not mean the defendant was negligent." It rejected the notion, as well, that CJI-Civ. 15:4 suggested to jurors that they could not hold the defendant liable for exercising good faith judgment.

The plaintiffs, however, petitioned for, and the court granted, *certiorari* review on June 21, 2010. The issue the Colorado Supreme Court will review is

> "[w]hether, the court of appeals properly concluded that C.J.I.-Civ. 15:4, the 'unsuccessful outcome/exercise of judgment' instruction, correctly states the law and should be given in medical malpractice cases."[26]

While this matter is pending before the supreme court, practitioners would be well advised to object to the present form of the instruction based upon the above authority.

Legal Malpractice –

General Steel v. Hogan & Hartson, LLP – A Further Definition of the Coverage of the CCPA With Regard to Legal Malpractice Claims, and Contract Claims for Legal Service Malfeasance

General Steel Domestic Sales, LLC v. Hogan & Hartson, LLP,[27] addressed two significant issues. The first is the breadth of coverage of the Colorado Consumer Protection Act ("CCPA") regarding legal services. Second is whether a claim based upon contentions

of legal service malfeasance can be set forth in a separate breach of contract claim, where the standards, criteria and law are different, including a statute of limitations that is three years instead of two.

The plaintiffs' CCPA claim pertained to statements made in the *Denver Post* about one of the attorneys in Hogan & Hartson, Ty Cobb. The plaintiff alleged that the *Post* article included "a glowing interview of Cobb"[28] which represented him as an accomplished attorney "experienced in representing white collar defendants in complex, high-stakes cases like the [action they were confronted with]."[29] They thus sought out his services through his firm, Hogan & Hartson. While Cobb was actively engaged in their action for approximately two months, he later moved his practice to Hogan & Hartson's offices in Washington, D.C., and effectively terminated his involvement in the plaintiffs' defense. The plaintiffs contended that this effectively was a "bait-and-switch" tactic prohibited by the CCPA, where Hogan & Hartson had brought them in as clients based upon the assurance that Cobb would represent them, but soon switched them to another attorney. In a contract claim, which they subsequently added to their original claims, they also contended that the contract between themselves and Hogan & Hartson included an understanding that Cobb would "have primary responsibility" for their defense in the underlying action - which did not occur - and that they suffered damages as a result.

There thereafter transpired both court and arbitration proceedings. Ultimately, despite the fact that the arbitrator had found in the plaintiffs' favor on their contract claim, the trial court dismissed the claims. It found with regard to the CCPA claim that there was insufficient "public impact." With regard to the breach of contract claim, the trial court found that "to the extent plaintiffs sought consequential damages beyond legal fees paid . . . such damages were identical to those plaintiffs could have claimed in the negligence action." Therefore, the applicable two-year statute of limitations precluded them, even though the plaintiffs had asserted their claims within the three-year statute of limitations related to contract claims.

On the plaintiffs' appeal, the court of appeals discussed and further defined CCPA claims with regard to legal services, a claim the Colorado Supreme Court first recognized in *Crowe v. Tull*.[30] The court of appeals ultimately ruled that a bait-and-switch tactic under the CCPA required a subjective "intent to deceive," with regard to both the "bait" and "switch" elements of the claim and that the record lacked any evidence of an intent to "switch." The court of appeals thus affirmed the dismissal of the CCPA claim. Significantly, however, the court of appeals made no effort to rule out the *Post* article definitively as an "advertisement" under the CCPA,[31] which assumedly was based upon an interview with representatives of the defendants. Specifically, in addressing the claim, the court stated:

> [t]he question is whether the newspaper article (which we will assume, arguendo, was an advertisement, see § 6-1-102(1), C.R.S. 2009 (defining advertisement), that was disseminated to a broad public audience), actually represented that Cobb would act as lead counsel on any case for which his services were sought. The answer is no."[32]

Thus, the question of whether the CCPA considers statements made in a newspaper interviews to be "advertisements" remains open.

Also significant was the court of appeals' discussion concerning the plaintiffs' breach of contract claim. By the time that the plaintiff had asserted the breach of contract claim, the statute of limitations for negligence had run out. In a previous case, *McLister v. Epstein & Lawrence, P.C.*,[33] the court of appeals had refused to recognize a separate claim for breach of contract based upon a written provision in the attorney-client contract where the attorney represented that he would "faithfully and with due diligence" pursue the client's claim; concluding that such a provision was merely a "restatement of the duties and care and loyalty that attorneys owe to their clients," and thus that the contract claim was "subsumed in plaintiff's malpractice claim."[34] Using that logic, the trial court in *General Steel*, likewise ruled that the plaintiffs could not assert a separate breach of contract claim, and thus dismissed the claim, which the arbitrator had ruled in their favor on. The court of appeals, however, distinguished General Steel's contentions from those made in *McLister*, because General Steel was relying upon a "specific term in the contract,"[35] which was that Hogan & Hartson had represented that Cobb would "have primary responsibility" for plaintiffs' representation, and thereby concluded that:

> [B]ecause, under the circumstances here, we conclude that plaintiffs' contract claim was separate and distinct from their negligence claims, we further conclude that the trial court erroneously prohibited plaintiffs from seeking recovery of their consequential damages for breach of contract.

Thus, the plaintiffs had set forth a separate contract claim whereby they could recover from consequential damages so long as the damages were "based upon the expectation of the party at the time the contract [was] formed,"[36] versus tort damages which compensates for damages "foreseeable to the tortfeasor at the time he commits the tort."[37]

Berra v. Springer and Steinberg — Enforceability of Contingent Fee Contracts

Berra v. Springer and Steinberg[38] involves an unsettling issue of a successful post-distribution challenge of a contingent fee for unreasonableness. The plaintiff, Berra, had worked as a legal assistant in a law office for a number of years, consulted with independent counsel concerning a proposed fee agreement. After negotiating the applicable percentage to 30%, she accepted a proposed contingent fee agreement with Springer and Steinberg, P.C. ("S&S") with respect to the collection of a $500,000 personal injury judgment in the plaintiff's favor, originally obtained in 1998. Counsel in the personal injury action recorded a lien in Pitkin County, where the judgment debtor, Wilkinson, resided and owned property. After initial efforts by Berra's original legal counsel to collect were unfruitful, Berra hired S&S in 1999. S&S's initial efforts of collection proved to be unsuccessful, as well. When the judgment lien was about to expire in 2004, S&S attempted unsuccessfully to revive it, then filed a new judgment lien, which caused Berra to lose her priority. In 2005, however, doctors diagnosed Wilkinson with a fatal illness, so he began negotiating the sale of that property in Pitkin County. After a contested court hearing, S&S obtained a court order requiring the title company to honor Berra's lien. Berra thereby received $1,177,500.22 at closing, including $676,796.22 in interest, in full satisfaction of the judgment. Pursuant to their contingent fee agreement, S&S received a contingent fee of $353,250.07, which represented 30% of the recovery of the judgment and interest.

Although plaintiff accepted the distribution, in time she became uncomfortable with it. She asked S&S to document its hours spent on her case. S&S could document only 209 hours expended on the case, but estimated an additional 50-100 undocumented hours. Berra thereupon filed a claim for declaratory judgment and restitution of unjust enrichment, as well as breach of contract. The trial court bifurcated the first two equitable claims and tried them first.

After a trial on these issues, the court, using a R.P.C. 1.5 analysis regarding reasonableness of fees, found that Berra's judgment was satisfied ultimately "not because of any substantial effort by S&S, but because of the fortuitous occurrence" of Wilkinson's decision to "sell his property for a price . . . large enough to satisfy [Berra's] judgment, including accumulated interest." Thus, it concluded that the fee S&S received was unreasonable, excessive and not sustainable.[39] The trial court thereupon devised a formula for quantum meruit recovery by S&S. This amounted to the number of hours that S&S had documented multiplied by its hourly rate, or the "lodestar" amount, times a multiplier of 2.5 to account for the "potential risk involved in [S&S's] representation." "The risk, the court found, existed because 'Wilkinson was an eccentric, as well as a scofflaw' and because the actual, unencumbered value of his real property was unknown."[40]

This raised significant issues on appeal concerning the enforceability of contingent fee agreements. Berra was able not only to challenge retrospectively the contingent fee contract for reasonableness successfully, but also did so well after final distribution.

S&S argued in part that the court's role should be merely to "determine whether the contingent fee contract was freely and fairly made in accord with ordinary contract law." The court of appeals, however, rejected this. In this vein, the court noted that the Colorado Supreme Court has stated that there are "special considerations inherent in the attorney-client contractual relationship" that "distinguish the attorney-client relationship from other business relationships." The court of appeals was able to draw on extensive authority as well, to conclude that: "'[u]nder its general supervisory power over attorneys as officers of the court, a court may and should scrutinize contingent fee contracts and determine the reasonableness of their terms,' apart from whether the contracts were fairly and freely entered into."[41]

S&S further contended that the trial court had erred in evaluating the enforceability of the agreement in the form of a post-hoc analysis, rather than with regard to whether the parties entered into the contract fairly and whether the contract reflected the risk of litigation as it appeared at the time. The court gave this contention some credence, but ultimately rejected it as controlling. At the outset the court of appeals "readily acknowledged" that "'[t]he whole point of contingent fees is to remove from the client's shoulders the risk of being out-of-pocket for attorney's fees upon a zero recovery. Instead, the lawyer assumes the risk, and is compensated for it by charging what is (in retrospect) a premium rate.'"[42]

Having said this, however, the court of appeals stated that this did "not mean that the reasonableness of a contingent fee agreement is assessed only in light of the circumstances existing at the time the agreement was entered into." [43] Instead it is proper for the court to determine "whether the 'services to be performed were reasonably worth the amount stated in the agreement,' by considering the 'amount of time spent, the novelty of the questions of the law, and the risk of non-recovery to the client and attorney.'"[44] Thus, in that way trial courts are entitled to, and moreover directed to conduct a "post-hoc," or retrospective analysis.

Although this may be a product of "hard facts" (for S&S's facts were certainly less than compelling), to many this sounds like a bold and disturbing statement that gives contingent fee attorneys the worst of both worlds. First is a universally accepted contractual inability to challenge a fee as being too low when they lose or overestimate the probable recovery or underestimate the necessary effort to be involved in obtaining the recovery. Added to that now is an additional inability to rely on language from the same contract, fairly entered into at the time of the agreement, to defend against a retrospective challenge by the client that the fees were too high when the job turns out easier than the parties had originally envisioned. Nor does the court's analysis take into account the comprehensive business plan of the contingent fee attorney (with its winners, losers, pro bono causes - intentional or not - and long periods of drought), but focuses only on facts that are specific to the particular contract at issue.

Of benefit to contingent fee attorneys, however, was the court of appeals' tacit approval of the trial court's load star analysis, which included a 2.5 risk factor multiplier.

S&S has petitioned the Colorado Supreme Court for *certiorari* review.

Rule Changes

C.R.C.P. 47(a)(3) Amendments - An Expansion of Voir Dire Examination?

C.R.C.P. 47(a)(3) in its previous state, stated as follows:

> …In order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination. The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive or otherwise improper examination.

A common but significant complaint among trial attorneys is that what perhaps began as a "reasonable" limitation for the voir dire examination of a 14-person panel (perhaps 5-10 minutes per juror) was rapidly regressing to the point that the standard for the entire panel was 30 minutes, or less (all perhaps in the name, some thought, of simply making sure the jury got picked before lunch).

The new version of C.R.C.P. 47(a)(3) addresses this issue and offers potentially significant relief. The new version is as follows:

> …The judge may limit the time available to the parties or their counsel for juror examination based on the needs of the case. Any party may request additional time for juror examination in the Trial Management Order, at the commencement of the trial, or during juror examination based on developments during such examination. Any such request shall include the reasons for needing addition juror examination time. **Denial of a request for additional time shall be based on a specific finding of good cause reflecting the nature of the particular case and other factors that the judge determines are relevant to the particular case and are appropriate to properly effectuate the purposes of juror examination set forth in section (a) of this Rule.** The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive or otherwise improper examination. (Emphasis added).

The authors clearly intended this revision to address the trial court's previously unfettered discretion to limit voir dire. Although counsel should accompany a request for additional time with specific reasons for needing additional juror examination time, a trial court must base its denial of such a request upon specific findings on the record of lack of good cause. The rule is thus more liberal, and trial attorneys should take note.

Change to Fed. R. Civ. P. 26 – Work Product Protection for Draft Reports and Materials from Retained Experts

One problem that attorneys oftentimes face is how much communication they should have with prospective experts, for fear that anything that is written down is fair game for a subpoena, which in turn gives the other side insight into the attorney's thought process and strategy. This all seems counterproductive to a number of goals, including that of free and open communication with one's experts, which can only enhance an attorney's ability to effectively represent his client's causes. Perhaps recognizing this, the 2011 version of Fed. R. Civ. P. 26(b)(4)(c) now

provides that draft expert reports and most communications with retained experts are protected as attorney work product. The only exceptions to this is material that: (i) relates to compensation for the expert's study or testimony; (ii) identifies facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identifies assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

At least in this author's opinion, this is good and well founded change that can perhaps serve as a basis for objection by analogy even under the state rules, and greatly enhances an attorney's ability to communicate effectively with his experts. ▲▲▲

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Endnotes

[1] *Moffett v. Life Care Ctrs. of Am.*, 219 P.3d 1068 (Colo. 2009)

[2] *Moffett v. Life Care Ctrs. of Am.*, 187 P.3d 1140 (Colo. App. 2008)

[3] *Moffett*, 219 P.3d at 1072.

[4] *Id.* at 1076.

[5] *Id.* at 1079.

[6] *Id*. at 1072.

[7] *Id*. at 1073.

[8] *Id.* at 1079.

[9] *Day v. Johnson*, 232 P.3d 175 (Colo. App. 2009)

[10] 2010 WL 2488986 (Colo. 2010) (Not Reported in P.3d).

[11] *Id*. at 178.

[12] *Id.*

[13] *Id.* at 179.

[14] *Id.* at 179.

[15] *Id.*

[16] *Id.* at 180.

[17] *Id.*

[18] *Brown v. Hughes*, 30 P.2d 259 (1934).

[19] Id. at 262.

[20] Opening Brief of Petitioner at 12, 2010 WL 3414689.

[21] *Day v. Johnson*, 232 P.3d 175, 180-181 (Colo. App. 2009).

[22] *Rogers v. Meridian Park Hosp.*, 772 P.2d 929 (Ore. 1989).

[23] *Foster v. Kaumann*, 216 P.3d 671, 689-690 (Kan. App. 2009).

[24] *Pringle v. Rapaport*, 980 A.2d 159 (Pa. Super. 2009) *appeal denied*, 987 A.2d 162 (Pa. 2009).

[25] *Logan v. Greenwich Hosp. Ass'n*, 465 A.2d 294 (Conn. 1983); *Sleavin v. Greenwich Gyn. & Ob.,P.C.*, 505 A.2d 436 (Conn.App. 1986); *Watson v. Hockett,* 727 P.2d 669 (Wash. 1986); *Veiz v. Am. Hosp., Inc*., 414 So.2d 226 (Fla. App. 1982); *Wall v. Stout*, 311 S.E.2d 571 (N.C. 1984); *Shamburger v. Behrens*, 380 N.W.2d 659 (S.D. 1986); *Teh Len Chu v. Fairfax Emer. Med. Assocs*., 290 S.E.2d 820 (Vir. 1982).

[26] *Day v. Johnson*, 2010 WL 2488986 (Colo. June 21, 2010).

[27] *Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP*, 230 P.3d 1275 (Colo. App. 2010).

[28] *Id.* at 1279.

[29] *Id.* at 1278.

[30] *Crowe v. Tull*, 126 P.3d 196 (Colo. 2006).

[31] *See* § C.R.S. 6-1-102(1) (defining advertisement).

[32] *Gen. Steel*, 230 P. 3d at 1280.

[33] *McLister v. Epstein & Lawrence, P.C.*, 934 P.2d 844 (Colo. App. 1996).

[34] *Id.* at 847.

[35] *Gen. Steel*, 230 P. 3d at 1294.

[36] *Id.* at 1285, *See also, Giampapa v. Am. Fam. Mut. Ins. Co.,* 64 P.3d 230, 251 (Colo. 2003).

[37] *Id.*

[38] *Berra v. Springer and Steinberg*, ___P.3d ___, 2010 WL 3259883 (Colo. App., August 19, 2010) (subject to revision upon final publication).

[39] *Id*.

[40] *Id*. at *8.

[41] *Id*. at *3, *citing*: *People v. Nutt*, 696 P.2d 242, 248 (Colo. 1984); Restatement (Third) of the Law Governing Lawyers § 34 cmt. b (2000) (*Restatement of Lawyering*) ("A client-lawyer fee arrangement will be set aside when its provisions are unreasonable as to the client. . . . Lawyers . . . owe their clients greater duties than are owed under the general law of contracts."); 23 Richard A. Lord, Williston on Contracts § 62:4, at 295-97 (4th ed. 2002) ("Due to the special nature of a contingent fee contract, which gives an attorney an interest in the outcome of the litigation and is most susceptible to improper influence and duress, the courts will closely review them. In particular, they will scrutinize the agreement for reasonableness, paying special attention to the reasonableness of the fee.").

[42] *Berra* at *4, *citing* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 8.6, 8-15 (3d ed. 2010); *Brody v. Hellman*, 167 P.3d 192, 201 (Colo. App. 2007) ("The size of the contingent fee is designed to be greater than the reasonable value of the services reflect the fact that attorneys will realize no return for their investment of time and expenses in cases they lose."); Restatement of Lawyering § 35 cmt. c ("[a] contingent fee may permissibly be greater than what an hourly fee lawyer of similar qualifications would receive for the same representation," because "[a] contingent- fee lawyer bears the risk of receiving no pay if the client loses and is entitled to compensation for bearing that risk").

[43] *Berra* at *4.

[44] *Id*., *citing Nutt*, 696 P.2d at 248.