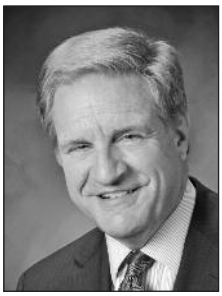

Significant Medical and Legal Negligence Cases and Developments During the Past Year – A Review and Some Observations

By Francis V. Cristiano, Esq.

Introduction

The past year was reasonably active in terms of appellate decisions dealing with professional negligence and related issues. There were three supreme court decisions, one involving the troublesome stock instruction CJI-Civ.15:4 regarding "error in judgment," another involving *Shreck* motions; and one other involving Rule 26 disclosures as they pertain to information which an expert relies upon before he is retained as an expert. There was also an extensive court of appeals' decision regarding C.R.E. 803(4) and statements made for the purposes of medical diagnosis or treatment, as well as the miscellaneous hearsay exception of C.R.E. 807. With regard to legal negligence, there was a significant supreme court decision regarding the duty of attorneys to non-clients, as well as another involving legal negligence contentions that define and resolve how "right of privacy" issues are to be assessed and managed in this state with regard to discovery requests.

Medical Negligence

Supreme Court Decisions

Day v. Johnson – The Exercise of Judgment Instruction

Day v. Johnson[1] involved a challenge to stock instruction CJI-Civ.15:4, popularly referred to as the "exercise of judgment" or "unsuccessful outcome" instruction, which many believe is incomplete, duplicative, and overemphasizes subjectivity as well as a typical defendant's theory of the case. The instruction given in *Day* followed that of the stock instruction:

> A physician does not guarantee or promise a successful outcome by simply treating or agreeing to treat a patient.
>
> 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.

This instruction oftentimes frames the defense's case in a manner of their choosing, and usually leads to a defense argument that suggests the plaintiff cannot hold a physician who exercises his or her best judgment liable for medical negligence and glosses over the "by itself" qualifier of both the second and the third sentences of the instruction. In *Day*, this was precisely the type of argument the defense made during closing argument:

> 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.[2]

This type of "error in judgment" instruction based upon a model instruction, has been overruled in a number of jurisdictions, including Oregon,[3] Kansas[4] and Pennsylvania.[5] Numerous other courts, as well, have rejected at least some form of it.[6]

After a defense verdict, the plaintiffs appealed and contended that the court gave this instruction in error. Although

the court of appeals affirmed,[7] the Colorado Supreme Court accepted certiorari.

On appeal to the supreme court, plaintiffs contended that CJI-Civ.15:4 was improper because it:

> (1) conflicted with the standard of care introducing subjectivity into an objective standard of care; (2) was duplicative; (3) commented on the evidence; (4) overemphasized the defense's theory of the case; and (5) was not supported by the evidence.

The plaintiffs hoped that the court would address each of these contentions. The court, however, noted that the plaintiffs had made no objections to the first two sentences of the instruction at trial, but only contended that the third sentence should not be included. Moreover, the plaintiffs, in fact, had tendered their own instruction at trial, which included the first two sentences. Thus, the court concluded that its review must be limited to whether the third sentence of CJI-Civ.15:4 accurately states the law, and not whether the instruction, as a whole, "was duplicative, commented on the evidence, overemphasized the defense's theory of the case and was not supported by the evidence," because those issues were "not preserved for appeal."[8]

It is not a particularly difficult argument to make that the third sentence correctly states the law, i.e., that "an unsuccessful outcome does not, **by itself**, mean that a physician was negligent," and the court found as much. The case was almost as simple as that, and the court of appeals' decision was affirmed.

What almost inevitably will happen at this point, however, is defense counsel will argue that the Colorado Supreme Court endorsed CJI-Civ.15:4 and that it is, in fact, a proper and necessary instruction. The reality, however, is that this is clearly an oversimplification of the court's ruling. First, the court specifically did not consider and thereby left for future consideration whether the instruction, as a whole, "was duplicative, commented on the evidence, overemphasized the defense's theory of the case and was not supported by the evidence because those issues were not preserved for appeal."[9] The court further emphasized the "Notes on Use" with regard to CJI-Civ.15:4, which emphasize that "a physician **may be held liable for an exercise of judgment**, but only when his judgment deviates from the objective standard of care,"[10] which strongly suggests that such language could or probably should be included in the instruction. In its discussion, it also approved language from a 1957 Colorado Supreme Court decision that stated "[t]o avail himself of the defense of a mistake of judgment, it must appear that the physician used reasonable care in exercising that judgment."[11] The court emphasized, as well, the importance of the words "by itself" in the third sentence. It suggested that perhaps these words should be emphasized in the instruction by italics or otherwise, which was the method that the court used to emphasize its importance and necessity in describing the proper legal concept, i.e., that "an unsuccessful outcome does not, **by itself**, mean that a physician was negligent."[12]

All of these are important points, and plaintiffs' attorneys should continue to emphasize these arguments and contentions and not concede that the instruction is entirely accurate. Perhaps of equal importance, plaintiffs' attorneys should not tender instructions that duplicate its language, but should tender language that they think is accurate. Because of the limited scope of the court's review, the issue of the appropriateness and viability of CJI-Civ.15:4 has not been finally determined.

Ford v. Eicher – *Shreck* Motions

The Estate of Ford v. Eicher[13] was the Colorado Supreme Court's analysis of what a proper *People v. Shreck*[14] or "*Shreck*" assessment should be in determining the admissibility of proffered scientific testimony regarding causation issues. The underlying case, involving birth trauma, involved a brachial plexus injury to a child's right shoulder. Specifically, the child suffered two nerve ruptures and an avulsion in her right shoulder resulting in permanent impairment to her right arm. The estate for the child offered expert opinion that the injury was the result of excessive traction during delivery. The defendant, on the other hand, offered an alternative causation opinion, that maternal intrauterine forces caused the child's injuries. The theory, known as the "intrauterine contraction theory," posits that in certain circumstances, internal forces of labor and delivery cause brachial plexus injuries and does not require excessive traction during delivery.

In response to the plaintiff's pretrial *Shreck* motion, however, the trial court excluded the opinions of both of the defense's experts. The trial court found that one of the experts, Dr. Cooper, did not hold his causation opinion to the required degree of medical probability but only opined that such was a "possibility" and excluded his opinons on that baisis. The trial court also rejected the opinion of the other defense expert, Dr. Ouzounian. The court based this upon the fact that ethical issues made it impossible to test the theory scientifically even though Dr. Ouzounian held the opinion to a reasonable degree of "medical probability." The doctor also contended that he based the theory upon a "differential diagnosis" assessment commonly practiced by physicians and taught in medical schools.

The supreme court's analysis serves as an excellent guide to the admissibility of expert testimony based upon a *Shreck* analysis, and once again, showed the court's bias in favor of admissibility versus exclusion. The court reiterated the analysis required by *Shreck* as an analysis that considers

> . . . whether (1) the scientific principles underlying the testimony are reasonably reliable; (2) the expert is qualified to opine on such matters; (3) the expert testimony will be helpful to the jury; and (4) the evidence satisfies CRE 403.

At the outset, the court made it clear that the threshold criteria for expert opinions as described in *People v. Ramirez*[15] was "relevance and reliability," and not "certainty." Thus, admissible expert medical testimony need not be rendered with "medical probability or certainty," but could in fact be based merely on possibility. The court reasoned, in that regard, that "concerns about the degree of certainty to which the expert holds his opinion [can be] sufficiently addressed by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof rather than exclusion."[16] Thus, the trial court's exclusion of Dr. Cooper's proffered testimony, which the trial court excluded based upon the fact that Dr. Cooper did not hold the opinions based upon a reasonable degree of medical probability, was ruled to be improper.

Per *Shreck*, the experts' opinions nevertheless needed to pass an oft-quoted reliability test as described in *Shreck* that includes the following factors:

> (1) Whether the technique can and has been tested;
>
> (2) Whether the theory or technique has been subjected to peer review and publication;
>
> (3) The scientific technique's known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation;
>
> (4) Whether the technique has been generally accepted;
>
> (5) The relationship of the proffered technique to more established modes of scientific analysis;
>
> (6) The existence of specialized literature dealing with the technique;
>
> (7) The non-judicial uses to which the techniques are put;
>
> (8) The frequency and type of error generated by the technique; and

> (9) Whether such evidence has been offered in previous cases to support or dispute the merits of a particular scientific procedure.[17]

The Colorado Supreme Court determined that the trial court had excluded Dr. Ouzounian's opinion based primarily upon the trial court's conclusions that his opinions could not be tested, even though it was clear that because of the nature of the problem the tests for such would necessarily cross ethical bounds by causing injury to human beings. The supreme court concluded that such tests should not be preclusive as to the evidence's admissibility, which the court concluded as well, was nevertheless supported by "research, clinical study, and a body of peer-reviewed literature spanning almost twenty years," as well as has been "adopted in authoritative texts and in the medical practice guidelines."[18] Again, the court emphasized that any concerns regarding its reliability to the jury could be "sufficiently addressed by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."[19]

The trial court also had made the interesting observation and conclusion that Dr. Ouzounian had eliminated the possibility of excessive upward traction of the baby during delivery, based at least in part on the defendant's testimony that he did not apply upward traction. The trial court noted this can only be substantiated by the trier of fact: "simply. . . assuming what Dr. Eicher says is true."

The supreme court noted that in this regard Dr. Ouzounian had bolstered his opinion, however, with additional facts that "the medical literature does not substantiate that upward traction applied during delivery could cause brachial plexus injury." It was also Dr. Ouzounian's opinion that "peer-reviewed studies showed that maternal forces of labor are four to nine times greater than the force applied by delivering clinicians."[20]

Thus, the court concluded that:

> Dr. Ouzounian's testimony regarding the intrauterine forces theory in general and his causation testimony applying the theory to this case is admissible under CRE 702 because: (1) the theory is reliable in general and the methodology used to apply the theory to this case is reliable; (2) Dr. Ouzounian is qualified to opine on the theory; (3) testimony about the intrauterine forces theory generally and as applied to determine causation in this case is extremely helpful to a jury; and (4) the highly probative value of an alternative explanation for this injury far outweighs any undue prejudice.[21]

The court found, that the proffered testimony of Dr. Cooper, based upon the same type of analysis, was admissible as well.

Garrison v. Bowen – Rule 26 Disclosure Issues Regarding Data or Information Considered or Relied Upon Before His or Her Endorsement as an Expert – "Temporal" and "Purpose Driven" Limitations

Garrigan v. Bowen[22] involved a not particularly uncommon case where the defense endorsed an expert to testify concerning the defendant's alternative theory of causation. The underlying facts were that the plaintiff had undergone a six hour lumbar spine surgery where he had been placed in a prone, or face down position. When he awoke from surgery, he discovered he could not see. He was diagnosed as having suffered postoperative visual loss, and more specifically ischemic optic neuropathy. He contended that the anesthesiologist, Dr. Bowen, had failed to properly place and maintain him in a proper position, as well as failed to adequately monitor and administer fluid input and output, and that all of such caused his vision loss.

Dr. Bowen, on the other hand, retained an expert, Dr. Lee, to testify in his defense. Dr. Lee was the lead author of an article regarding a study of postoperative visual loss ("POVL"), published in *Anesthesiology* in 2006, which was a study involving 93 cases of spinal surgery-related visual loss. Although the authors of the article cautioned that there were limitations regarding their study methodology, they opined that the cause of the type of visual loss suffered by the plaintiff, specifically ischemic optic neuropathy ("ION") remained unknown, although two factors, i.e., the length of the surgery and use of the prone position, were shown to be associated with the condition. Dr. Lee was endorsed to testify not only concerning the study, but her opinion that neither factor had been shown to cause the condition, and that most patients with similar surgical parameters did not experience the condition. Further, it was her opinion that neither factor was within Dr. Bowen's control.

Dr. Bowen did not disclose, pursuant to C.R.C.P. 26(a)(2)(B)(I) or otherwise, the underlying raw data of the POVL study. Dr. Bowen endorsed, as well, two other experts to testify regarding causation and standard of care, who both, as well, would heavily rely upon the POVL study.

Although the plaintiff challenged the admissibility of the POVL study under *Shreck*, contending that it was "seriously flawed" and not "of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," his *Shreck* motion was rejected by the trial court. The trial court, however, ultimately granted the

plaintiff's motion to strike Dr. Lee as an expert, based upon the fact that Dr. Lee could not produce the underlying raw data from the POVL study, and the trial court's conclusion that such data was something that Dr. Lee necessarily must have "considered" pursuant to C.R.C.P. 26(a)(2)(B)(I) in forming her opinions in the case. The trial court reached this conclusion, even though the trial court conceded that Dr. Bowen had demonstrated by affidavit that Dr. Lee did not have legal control over the data, but instead, such was under the legal control of the University of Washington, which the trial court found to not be controlling.

A direct appeal was accepted by the supreme court. The court reversed the trial court's order striking Dr. Lee's testimony. The court's primary focus was with regard to the requirements of C.R.C.P. 26(a)(2)(B)(I), and specifically what is required in terms of producing material that the expert "relied upon" in formulating his or her opinions. In concluding that Dr. Bowen was not required to produce the underlying data of the POVL study, the supreme court interpreted the meaning of "considered in forming the opinions" under 26(a)(2)(B)(I), as having "temporal" and "purpose driven" limitations. In doing such, the court defined two types of information that perhaps do not require disclosure. These two types would be as follows: (1) "information that an expert reviewed prior to learning about, being retained for, and reviewing a case," and (2) "information that might have had a bearing on an expert's opinion because it was reviewed contemporaneously with, but for a different purpose and separately from, the expert's review of the a case." The supreme court expressed no opinion with regard to the second category of information, other than it was a closer question than the first category. With regard to the first category, i.e., information reviewed prior to the expert being retained, the supreme court determined that no disclosure was necessary under Rule 26 or otherwise. Instead, the supreme court opined that "what must be disclosed is not all data and information the expert has ever considered but rather data and information the expert considered while forming her opinions for the case."[23]

The court emphasized that there were various other ways for the plaintiff to attack the credibility of the POVL study including the plaintiff's contention that the study was conducted under "suspicious" circumstances

where there appeared to be a gross bias from the beginning, claiming that the American Society of Anesthesiologists had promoted the study to further their efforts to reduce liability of anesthesiologists for this type of phenomena; that the study had been rejected by other peer review journals as being unreliable; and that the study itself provided comprehensive explanations of the methodology and source data underlying the analysis, which would give a basis for the plaintiff's attack in terms of its methodology.

This is an interesting analysis which may have significant impact in terms of required disclosures for expert witnesses. Justice Bender, who delivered a dissenting opinion criticized it as being too much of a limitation on a trial court's discretion to determine "what data or information the expert considered and what should be disclosed in fairness to the other side,"[24] which he believes should be reviewed only on an abuse of discretion standard.

Court of Appeals Decisions

Haralampopoulos v. Kelly – Statements Made for Purposes of a Medical Diagnosis or Treatment per C.R.E. 803(4), and the Miscellaneous Hearsay Exception of C.R.E. 807

Haralampopoulos v. Kelly[25] is a case with good guidance which relates to situations not uncommon to medical negligence cases, where a questionable but prejudicial statement is made or allegedly made in the medical record or otherwise, which is repeatedly mentioned at the trial, and forms a major basis for the defendant's contentions at trial regarding causation. In *Haralampopoulos*, the issue was cocaine use by the plaintiff, which the plaintiff clearly engaged in the mid-nineties, but only questionably engaged in during November 2004, when he went into a seizure, causing permanent brain damage. It nevertheless became the centerpiece of the defendants' case.

The facts in *Haralampopoulos* were that the plaintiff presented to an emergency room on November 23, 2004 with abdominal pain of unknown origin. Tests disclosed a cyst on his liver. The surgeon on call ordered a needle biopsy of the cyst for the following day. Dr. Waintrub, the internist on call, took the decedent's medical history and admitted him for the procedure, but did not ascertain the cause of the cyst. The defendant, Dr. Kelly, performed a needle biopsy the following day on November 24, 2004. Shortly after Dr. Kelly pierced the cyst, the decedent suffered an allergic reaction, went into anaphylactic shock and suffered severe and permanent brain injury. The plaintiff's guardian contended that had the cause of the cyst been determined, a risk would have been recognized that spillage of the cyst's contents might lead to anaphylactic shock, and that the defendants were negligent in not ascertaining such prior to performing the biopsy.

It was clear that the plaintiff had been a cocaine user in the early nineties. One of the witnesses to such was his girlfriend, Lori Hurd. Although Hurd testified concerning the plaintiff's cocaine use in the nineties, she also testified that by 1998, when they split up, to her knowledge he was no longer consuming cocaine. Further, she testified that when the plaintiff was living in her house in 2004, she never saw him using cocaine or any other drugs.

Approximately three weeks after the event, Hurd had occasion to meet with Dr. Kelly concerning the plaintiff. At this point, Dr. Kelly was clearly no longer treating the plaintiff. Some mention of the plaintiff's cocaine use, however, was part of their conversation. According to Hurd, she initially asked if the plaintiff might have had an underlying heart problem that none of them were aware of. She also mentioned the plaintiff's drug use in the past and queried whether such might have had an effect on him going into "cardiac arrest." According to Hurd, when Dr. Kelly asked her if she had any knowledge of the plaintiff recently consuming cocaine, she denied it, and instead stated, "I was not there when he got admitted into the hospital."

Dr. Kelly's account of the conversation was much more extensive and favorable to the defense. Based upon C.R.E. 803(4) pertaining to statement for the purposes of medical diagnosis, and C.R.E. 807 regarding the residual hearsay exception, the trial court allowed Dr. Kelly to testify in detail concerning his version of the conversation, during the trial. Since the plaintiff's pretrial motions in limine had addressed this issue, there was no contemporaneous objection to the testimony during the trial. The most damaging of Dr. Kelly's testimony was his account that:

> [Hurd] told me that he was a recreational cocaine user and that that had been an issue in their relationship, and that in the days around his first emergency room visit, he had been using a significant amount of cocaine because of the pain; and he didn't feel that the physicians at the hospital after his first visit had given him enough pain medicine.

This issue became a major focus in the trial, with defendants contending that the event was caused not by spillage of the cyst's contents, but by the plaintiff's cocaine use. Both defendants characterized the plaintiff as a "chronic cocaine user" based primarily on Dr. Kelly's description of Hurd's statements. Further, their experts used this same evidence as a foundation for their opinions that the plaintiff suffered the untoward event he did because of

his cocaine use, not because of the spillage from the cyst. At the conclusion of the trial, the jury found in favor of the defendants. The plaintiff appealed.

Judge Fox wrote the court of appeals' opinion. The court reversed the trial court's judgment based upon the introduction of the evidence concerning Ms. Hurd's statements pursuant to C.R.E. 803(4) and C.R.E. 807 (previously C.R.E. 803(24)). The court of appeals also ruled that the evidence was otherwise inadmissible pursuant to C.R.E. 403. Judge Webb wrote a dissenting opinion. Judge Fox's analysis is instructive.

At the outset, there was a significant issue raised concerning the adequacy of the plaintiff objecting to the evidence only by way of the plaintiff's motions in limine, but raising no contemporaneous objections at trial. Noting that "our supreme court has made it clear that objections lodged in a motion in limine satisfy the purposes of the contemporaneous objection rule,"[26] the court ruled that a renewed objection at the time of trial would have merely been "futile," and unnecessary. This is a significant finding for trial practice. Parties don't have to repeat objections at trial that they made beforehand by way of motion in limine.

Judge Fox thereafter engaged in an extensive discussion pertaining to the applicability of C.R.E. 803(4) regarding statements made for the purposes of medical diagnosis or treatment, as well as C.R.E. 807, the so-called "residual" hearsay exception, and C.R.E. 403 regarding undue prejudice. The court concluded that the evidence concerning the plaintiff's alleged cocaine use:

> (1) did not qualify for the CRE 803(4) or former CRE 803(24) [now CRE 807] hearsay exceptions; (2) concerned the question of responsibility for plaintiff's injury or physical condition and thus was not admissible pursuant to *Clark v. People*[27] [a 1939 supreme court decision]; and (3) presented a danger of unfair prejudice or confusion of the issues, which substantially outweighed any probative value of the evidence.[28]

The court's C.R.E. 803(4) analysis was significant. The court ruled that for statements to be admissible under 803(4) it must satisfy a two-part test of reliability as follows:

> First, the declarant's motive in making the statement must be consistent with the purpose of promoting treatment or diagnosis; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis.[29]

At the outset, the court determined that the relationship between Hurd and the plaintiff was not likely sufficiently close for the declarant's statement to be reliable. Further, even assuming Hurd's relationship was sufficiently close, the court found that the record supported the conclusion that Hurd's motive for making the statements after the plaintiff's irreversible brain damage had occurred was not to promote a diagnosis or treat, inasmuch as the time for that had all passed. Thus, Hurd had not made the statement to help the defendants in the "diagnosis or treatment" of the plaintiff's then irreversible brain damage, and the second prong of the court of appeals' test had not been satisfied. This conclusion was buttressed by the fact that the defendants did nothing with the information to affect the plaintiff's treatment, but merely used the information to defend themselves in the medical negligence action.

The court determined, as well, that the residual exception of C.R.E. 807 was not available because the statements did not "have the necessary guarantees of trustworthiness" required by the rule. Hurd, for example, was not with

the plaintiff when he was admitted to the hospital and was not aware of any recurrent cocaine use. The only other testimony about cocaine use was other hearsay about the remote use of such in the 1990s. Thus, the statements did not meet the reliability criteria of 807.

Of significance as well, the court referenced with approval a 1939 Colorado supreme court decision, i.e., *Clark v. People*[30], that in the court of appeals' mind represents an overriding consideration of both 803(4) and 807, which is that "hearsay statements relating to fault which are not relevant to diagnosis or treatment are inadmissible."[31] With regard to such, the court concluded that: "given plaintiff's vegetative state, the post-injury statements could only have been made to determine who or what was responsible for plaintiff's condition," and thus was inadmissible pursuant to the guidance of *Clark*.

The court concluded its analysis with a C.R.E. 403 assessment, as well, and opined that "the mere suggestion of the plaintiff's alleged cocaine use created a danger of unfair prejudice and threatened to confuse the jury."[32] Thus, the evidence, in the court of appeals' mind, should not have been admitted under any standard.

All of these conclusions are significant and should be borne in mind by practitioners. Since Judge Webb filed a dissenting opinion, the story concerning these issues may not yet be final.

Legal Negligence

Supreme Court Decisions

Allen v. Steele – Duties of Attorneys to Non-Clients

Allen v. Steele[33] involved the significant issue of an attorney's duties to a prospective client. In the underlying case, the plaintiffs had consulted with attorney Katherine Allen about the possibility of her representing them in a negligence action. No attorney client relationship was developed, but the plaintiffs maintained the relationship of being "prospective clients," i.e., a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship."[34] The plaintiffs contended that Allen had given them negligent advice concerning the statute of limitations which led to their missing the filing deadline for the negligence suit.

The plaintiffs thereupon brought a negligence claim against Allen, claiming both negligent misrepresentation and professional negligence. The trial court had dismissed the case based upon the trial court's conclusions of lack of duty with regard to both claims. The plaintiffs conceded the issue of professional negligence and appealed only the trial court's dismissal of their negligent misrepresentation claim. Because of this, only half of the questions regarding this important issue were answered, i.e., those dealing with claims for negligent misrepresentation based upon §552 of the Restatement (Second) of Torts, which defines the elements of negligent misrepresentation. This section had been recognized by the supreme court in the context of a law firm preparing opinion letters to induce a third party's participation in a business transaction, in *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver.*[35]

The elements of negligent misrepresentation, per §552, includes the requisite criteria that the representation must have been for "the guidance of others in their business transactions." The underlying court of appeals' decision, had recognized the plaintiffs' interest in their negligence claim to have been sufficient to have satisfied this criteria and reversed the trial court.[36]

The supreme court, however, granted certiorari review. Justice Bender wrote the decision. Whether a sufficient "business relationship" existed became a major focus of the supreme court's decision. In this context, Justice Bender wrote that a person's interest in a negligence action was not, in itself, sufficient to satisfy this element of the Restatement's criteria, but that the type of "business transaction" that needed to occur must have been "commercial" in nature. Thus, although in *Mehaffy* where the opinion letters were written to induce a third party's participation in a business transaction, and thus satisfy this criteria, a person's interest in a mere negligence action did not. The court's conclusions regarding this issue were thus as follows:

> . . . [A] "business transaction" in the context of negligent misrepresentation means exactly what common understanding of the term implies: to state a claim of negligent misrepresentation, the misrepresentation must be given for the plaintiff's business or commercial purposes. Although a negligence lawsuit against another party has the potential to affect indirectly a non-client's financial or economic interest, a civil lawsuit does not involve a business or commercial relationship or transaction.
>
> Hence, we hold as a matter of law that an initial consultation to discuss a potential lawsuit is not sufficient to meet the element of "guidance of others in their business transactions."

The court of appeals had, however, bolstered its opinion finding a duty with an additional finding that §15 of the Restatement (Third) of the Law Governing Lawyers added support to the proposition that a duty should be found. Section 15 states in relevant part as follows:

> (1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship

> for a matter and no such relationship ensues, the lawyer must. . .
>
> (c) use reasonable care to the extent the lawyer provides the person legal services.

It is this provision that perhaps renders more support for a duty than anything else. With regard to this provision, however, the supreme court ruled that the court of appeals had erred in utilizing it to bolster its conclusions with regard to the plaintiffs' negligent misrepresentation claim, because in the supreme court's mind it addresses "legal malpractice" claims and not claims for "negligent misrepresentation"[37] as contemplated by §552 of the Restatement. Further, by allowing such, "prospective clients could make legal-malpractice-like claims under the guise of negligent misrepresentation, to circumvent the requirement to prove an attorney-client relationship, a necessary element of the tort of legal malpractice."[38]

Thus, in essence, the supreme court determined that a plaintiff cannot rely upon §552 of the Restatement (Second) of Torts regarding negligent misrepresentation, unless the attorney had rendered advice for the purposes of guiding a non-client with regard to business or commercial transactions, as was the case in *Mehaffy*. Saved for another day, however, was a definitive opinion concerning when "an attorney-client relationship" exists, and whether any type of a duty exists with regard to a lawyer's obligations to "prospective clients," although the decision did, in fact, give some strong suggestions. With regard to the issue of whether attorneys owe duties to "prospective clients," at least Justice Bender indicated an inclination not to head in the direction of finding such a duty, even in the face of §15 of the Restatement (Third) of the Law Governing Lawyers. His language in that regard is instructive, as follows:

> In addition to the fact that section 15(1)(c) does not address negligent misrepresentation, it blurs the distinction between a prospective client and a client because it subjects attorneys to the same civil liability and ethical responsibilities, irrespective of whether a person is a client or a prospective client. The distinction between a client and a prospective client is fundamental to Colorado law. In Colorado, attorneys do not owe a duty of reasonable care to non-clients – either for legal malpractice or under the ethical rules. *Mehaffy*, 892 P.2d at 240; Colo. RPC 1.18. A plaintiff must establish the existence of an attorney-client relationship to state a claim of legal malpractice. *Mehaffy*, 892 P.2d at 239. Attorneys owe a host of ethical obligations to clients which they do not owe to prospective clients. *See, e.g.,* Colo. RPC 1.1 (competence); 1.3 (diligence); 1.4 (communication). Section 15(1)(c) of the Restatement blurs the lines which are distinct in our jurisprudence to impose liability for legal malpractice broader than our precedent allows.[39]

The only guidance with regard to when an attorney-client relationship exists for the purposes of a legal negligence or "malpractice" claim, is in a footnote where the court noted as follows:

> An attorney-client relationship may be demonstrated in the absence of contractual formalities. An attorney-client relationship may be "inferred from the conduct of the parties,"

such as when "the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or completed actions." *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991) (holding that an attorney-client relationship existed where the attorney had previously performed miscellaneous legal services and the client regarded him as the family lawyer).[40]

In a concurring opinion, Justice Eid made it clear that she concurred only because of her understanding that the majority's opinion took "no position on the scope of section 15(1)(c) and its application to legal malpractice actions in Colorado."[41] This suggests, of course, that she was not as far away as Justice Bender was in finding a duty based upon that section from an attorney to prospective clients. Further, at least in her opinion, Justice Bender's opinions concerning the possible applicability of §15(1)(c) was not binding authority. The problem at this point, is we don't know where the other five justices stand.

In re District Court – Guidelines for "Right of Privacy" Issues in Discovery

In re District Court, City and County of Denver[42] involving legal negligence contentions, is a significant supreme court determination, that defines the necessary analysis in this state with regard to a "right of privacy" challenge pertaining to document production in civil litigation. This case, in effect, takes into account both the analysis defined in *Martinelli v. District Court,*[43] with regard to personnel files maintained by the Denver Police Department, and *Stone v. State Farm Mutual Automobile Insurance Co.*,[44] regarding cases involving requests for tax returns, and combines them to create a much better defined and comprehensive analysis applicable to all cases where there are "discovery requests implicating the right to privacy."

In *District Court*, the underlying claim was a claim for legal negligence and breach of fiduciary duty. The plaintiffs had requested the production of documents identifying a law firm member's compensation from the firm and how the firm determined the member's compensation. When the firm and the member refused to produce the documents, a motion to compel was filed with the trial court which was granted. This led to a direct appeal to the supreme court. In these types of situations, there has always been confusion with regard to what the proper analysis should be, i.e., whether it should be the analysis set forth in *Martinelli* or *Stone*, or some variation of the two. Further, to add to the confusion, *Martinelli* spoke in terms of a demonstration of a "compelling state interest," which seemed entirely irrelevant in non-civil rights claims. As noted by the supreme court: "choosing which test to apply has proven difficult. . . . Further, the facts of some cases do not lend themselves to analysis under either test."[45]

The supreme court defined the test to be applicable with regard to situations where a party opposes discovery on the grounds that it would "violate his right of privacy," which in the supreme court's mind "protects 'the individual interest in avoiding disclosure of personal matters,'" and "includes 'the power to control what we shall reveal about our intimate selves, to whom, and for what purpose.'"[46] The supreme court noted numerous types of information that requires such an analysis based upon the right to privacy. These included personnel files in *Corbetta v. Albertson's, Inc.*,[47] computers in *Cantrell v. Cameron*,[48] sexual history in *Williams v. District Court*[49] and tax returns in *Stone*[50] and *Alcon v. Spicer*.[51]

When this type of legitimate "right to privacy" is shown by an opponent of production, combining both the *Martinelli* and *Stone* tests as well as extensive federal court guidance, the court prescribed that the requesting party must thereupon prove:

1. That the information is "relevant to the subject matter of the action;"[52]
2. That the disclosure is required to "serve a compelling state interest or that there is a compelling need for the information;"[53]
3. That the information sought is not available through other discovery or from other sources;"[54] and
4. That the requesting party is using the "least intrusive means" to obtain the information.[55]

Since the trial court did not use this type of analysis in its determination, and specifically did not consider elements two and four, i.e., "compelling need" and "least intrusive means to obtain the information," the matter was remanded back to the trial court for proceedings consistent with the opinions set forth in the supreme court's decision. The precedential value of this case however is significant, with there now being good definition of the necessary analysis for this type of frequent contention. ▲▲▲

Francis V. Cristiano is a long time CTLA member and a member of its Board since 2003. His offices are in the Denver Technological Center, and his practice emphasizes professional negligence. He is Trial Talk's professional negligence editor. He can be reached at 303-407-1777.

Endnotes

[1] *Day v. Johnson*, 255 P.3d 1064 (Colo. 2011).

[2] Opening Brief for Petitioner-Appellant at 12, *Day v. Johnson*, 255 P.3d 1064 (Colo. 2011) (No. 09SC879).

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

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

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

[6] *See, Logan v. Greenwich Hosp. Ass'n,* 465 A.2d 294 (Conn. 1983); *Sleavin v. Greenwich Gynecology*, 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. Dist. 3 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 Emergency Med. Assoc.*, 290 S.E.2d 820 (Vir. 1982).

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

[8] *Day*, 255 P.3d at 1068.

[9] *Id.*

[10] *Id.* at 1072 (emphasis added).

[11] *Foose v. Haymond*, 310 P.2d 722, 727 (Colo. 1957)

[12] *Day*, 255 P.3d at 1071-2 (emphasis in the original).

[13] *Estate of Ford v. Eicher*, 250 P.3d 262 (Colo. 2011).

[14] *People v. Shreck*, 22 P.3d 68 (Colo. 2001).

[15] *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007).

[16] *Ford*, 250 P.3d at 266.

[17] *Id.* at 267-268; *see also Schreck,* 22 P.2d at 77-78.

[18] *Ford*, 250 P.3d at 269.

[19] *Id.* at 266

[20] *Id.* at 270.

[21] *Id.*

[22] *Garrigan v. Bowen*, 243 P.3d 231 (Colo. 2010).

[23] *Id.* at 237.

[24] *Id.* at 240.

[25] *Haralampopoulos v. Kelly*, ___ P.3d ___, 2011 West Law 4908743 (Colo. App., October 13, 2011).

[26] *Id.* at *5; *see also, Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1330-31 (Colo. 1986) and *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993).

[27] *Clark v. People*, 86 P.2d 257, 259 (1939).

[28] *Haralampopoulos,* 2011 West Law 4908743 at *6

[29] *Id.* at *7

[30] *Clark*, 86 P.2d 257.

[31] *Haralampopoulos,* 2011 West Law 4908743 at *10.

[32] *Id.* at *11.

[33] *Allen v. Steele*, 252 P.3d 476 (Colo. 2011).

[34] Colo. RPC 1.18.

[35] *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver*, 892 P.2d 230 (Colo. 1995).

[36] *Allen v. Steele*, 226 P.3d 1120 (Colo. App. 2009).

[37] *Allen,* 252 P.3d at 485.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 486, n.7.

[41] *Id.* at 486

[42] *In re Dist. Ct.,* 256 P.3d 687 (Colo. 2011).

[43] *Martinelli v. District Court*, 612 P.2d 1083, 1091 (1980).

[44] *Stone v. State Farm Mut. Auto. Ins. Co*., 185 P.3d 150, 159 (Colo. 2008).

[45] *In re Dist. Ct*., 256 P.3d at 691.

[46] *Id.* at 690.

[47] *Corbetta v. Albertson's, Inc*., 975 P.2d 718, 720-21 (Colo. 1999).

[48] 195 P.3d 659, 661 (Colo. 2008).

[49] *Williams v. Dist. Ct*., 866 P.2d 908, 912 (Colo. 1993).

[50] *Stone*,185 P.3d at 155.

[51] *Alcon v. Spicer*, 113 P.3d 735, 743 (Colo. 2005).

[52] *Stone* at 152.

[53] *Id*.

[54] *Martinelli*, 612 P.2d at 1089.

[55] *Id*. at 1092.