TRIAL TALK

COLORADO TRIAL LAWYERS ASSOCIATION

August/September 2002 | *Lawyers On The Side Of People* | Volume 51 Issue 5

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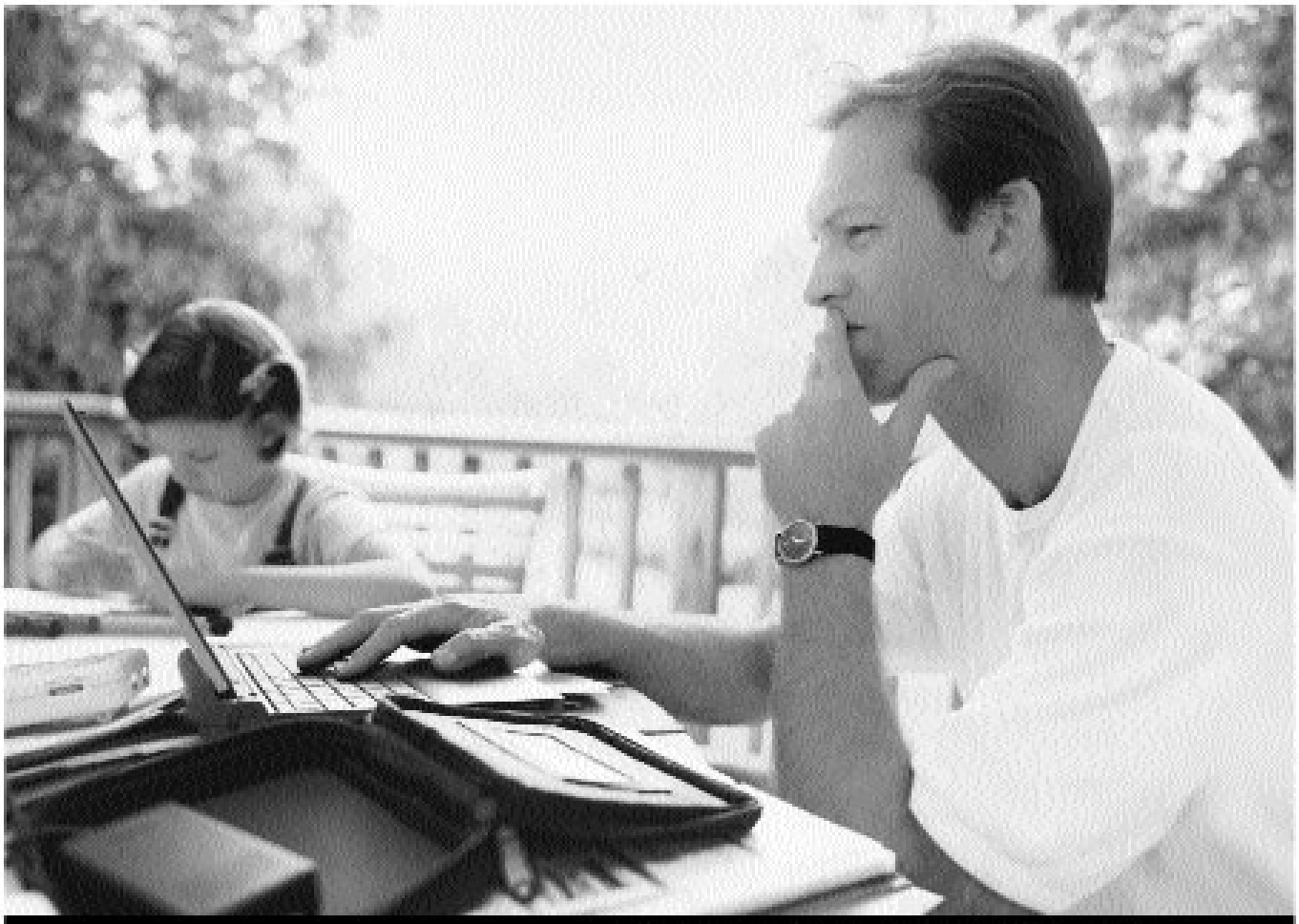

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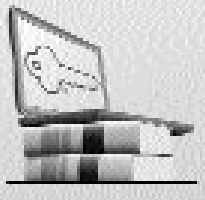

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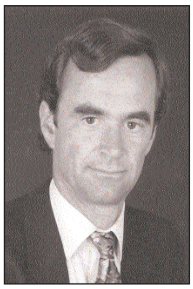

President's Column

By Jim Christoph, Esq.

NORM KRIPKE - A GREAT TRIAL LAWYER

I recently received an "invitation" to join the "The Million Dollar Advocates Forum." This solicitation chided me to join because "[t]he Million Dollar Advocates Forum is the most prestigious group of trial lawyers in the United States." The "prestige" of this group derives from the claim that "membership is limited to attorneys who have won million and multimillion dollar verdicts and settlements." One of the "benefits" of being accepted into this group is that a press release announcing your certification will be issued to local newspapers, legal publications, bar associations etc. All of this for a membership fee of a mere $450.00 with no further annual dues! What is wrong with this picture?

Does recovering a million-dollar verdict or settlement for your client mean you are a great trial lawyer? Does it mean that you have achieved "superior results" as stated in the "invitation?" Does it mean anything? Obtaining a million-dollar verdict or settlement could be an example of legal malpractice. One way to "achieve" a million-dollar verdict would be to *mistry* a five million-dollar case. The Texas expression of "all hat but no cattle" comes to mind with this group's limited definition of what makes a great trial lawyer.

Norm Kripke, on the other hand epitomized the great trial lawyer. He stood for so much more than getting the "big verdict" He was all cattle. He did not need a hat. In the early to mid 90's I was fortunate enough to work with Norm on an environmental case involving uranium mill contamination with more than 500 clients in Cañon City. We worked together on that case off and on for about four years. I also had the honor and pleasure of helping him on a personal injury case in Boulder where I primarily practice. In our numerous car rides to Cañon City to meet with clients he could always be counted on for good company and funny jokes. His way was one of understatement, empathy and kindness.

Norm certainly savored the great trial victories like we all do, but he was so much more and did so much more for our profession, his clients and the community at large. Norm was a founding father of CTLA. Like John Adams and Thomas Jefferson, he was not our first President (he was the fourth) but he was one of a very small group of trial lawyers who saw the wisdom in joining forces to advance the rights of consumers, civil rights and the advocacy skills of trial lawyers. He was a key player in getting CTLA off the ground. Norm wasn't perfect however. The original acronym that was chosen for CTLA was "*CACCA*." (Colorado Association of Claimants Compensation Attorneys) Norm remained a strong supporter of CTLA throughout his life.

In addition to founding CTLA Norm chaired the CBA's litigation section, sat on the Board of ATLA and was a founder of Trial Lawyers for Public Justice. Apart from his great work in the trial bar, Norm served in the Air Force during World War II, worked in the South in the sixties during the height of the civil rights movement and was active in the Anti-Defamation League including serving as its Chairman for four years. What says it all is that CTLA honored Norm in 1996 by establishing "the Kenneth Norman Kripke Award for Lifetime Achievement." That award, given every year to one among us who, like Norm, has demonstrated the skill, dedication and heart of a great trial lawyer. Most of us hope to accomplish something during our lifetimes that will leave this world a better place than we found it. Norm did that in spades. He will be missed.

This is my final President's Column. It has been a privilege for me to serve during this past year. We have all been challenged since September 11th. Notwithstanding the events and aftermath of that day, the basest instincts of the tort deformers continued to manifest themselves in the Colorado legislature. Fortunately with the balanced Colorado Legislature of 2002 and the hard work of CTLA and our lobbyists, not a single bad bill that was introduced (and there were many) landed on the Governor's desk this year.

Make no mistake these barbaric attempts to take away consumer rights and personal responsibility will continue into the foreseeable future. With the downward business cycle, the siren song of an "insurance crisis" is being heard. The anti-democratic forces calls to weaken our civil jury system with more damages caps have predictably begun. There will also undoubtedly be a bill introduced to undo the Supreme Court's courageous decision to strike down releases that immunize wrongdoers who negligently injure children. The upcoming Colorado legislative elections will be critical. Together we must get in the boat and pull hard on the oars of financial sacrifice and hard work to make sure that the voices of victims and consumers continue to be heard and heeded in the legislature.

Without hesitation I can say that the successes we have had this past year have been the result of a group effort. CTLA is fortunate to have a hardworking and talented staff. In addition the officers, executive committee, board members and other volunteers have served us well by unselfishly giving of their time and finances this year.

Ross Buchanan will be a great President. He deals well with people and problems. He is hard working and enthusiastic.

This has been one of the most rewarding and exciting experiences of my life. I sincerely appreciate your confidence and trust in allowing me to serve as your president. I hope that I have met the challenge.

With warmest regards,
Jim Christoph

Jim Christoph, President of the Colorado Trial Lawyers Association, practices law with the law firm of McCormick & Christoph, P.C. in Boulder.

This issue of *Trial Talk*® is dedicated to the memory of Kenneth Norman Kripke, 1920-2002

When Kenneth N. Kripke retired, the Mayor of Denver proclaimed an official "Kenneth Norman Kripke day in the City and County of Denver." Known to his friends as "Norm," he represented people who have been injured including many who could not pay. He served as a leader in the National and Colorado legal community by founding the Colorado Trial Lawyers Association, chairing the Colorado Bar Association's Litigation Section and serving three terms on the board of the Association of Trial Lawyers of America. He was a president of the Western Trial Lawyers Association and served on the Colorado Supreme Court Rules Committee for fifteen years. He was a frequent presenter and faculty member at seminars for various continuing legal education programs.

He spoke out against injustice in any form. He participated as a member of the national Lawyers' Constitutional Defense Committee in the South during the voting registration drive in the hot summer of 1955. He fought against anti-Semitism through his long association with the Anti-Defamation League, including a two year stint as Chair and four years as chair of the ADL Civil Rights Committee. Norm provided leadership in the Jewish Community, including service as Treasurer of the Allied Jewish Federation of Denver. He also provided *pro bono* store front legal services in various counties of Colorado. Norm served his community as a member of Denver's Public Safety Review Commission.

During World War II he served overseas as a cryptographic security officer with the South Atlantic wing of the Air Force Command, where his friends called him "Crypto Krip." His primary overseas assignments were in Brazil, British West Africa, Arabia and Yemen. He achieved the rank of Captain.

After the war, he attended the University of Colorado Law School in Boulder and graduated in 1948. He practiced trial law in Colorado for fifty years. In 1996, CTLA presented the first "Kenneth Norman Kripke Lifetime Achievement Award." It is now presented annually to a deserving Colorado plaintiff's trial attorney.

Norm is survived by his cherished wife of 56 years, Derril, daughter and son-in-law, Marcie and David Gaon; his daughter, Teri Schwartz; three grandchildren and three great grandchildren.

- Derril Kripke

What can one say when asked to compress into a brief statement forty-five years of friendship, admiration and affection for a great trial lawyer like Norm Kripke? I first met him in 1957. As a young professor teaching torts at D.U. Law School, I had the notion, radical then for legal education, that students ought to hear a speck of practical wisdom from real courtroom tort lawyers. Inquiring at the bar who were the most outstanding defense and plaintiffs' trial lawyers, I repeatedly heard of two "Kens." They were Ken Wormwood and Ken Kripke. Both generously agreed to participate in the class and both were terrific.

From that initial contact, Norm asked me to assist him on an appeal and a couple of other cases. His thorough, scholarly approach to the law was indeed impressive. Our friendship grew even closer over the next 45 years until his death on June 19, 2002.

Norm's well-known compassion for society's underdogs and disadvantaged may have been inherited. His grandfather, a Russian Jew, immigrated to America to escape persecution. Ultimately he settled in Toledo, Ohio, where he went into merchandising from a pushcart in the streets. Living the American dream, his son, Norm's father Maurice, owned and operated a successful clothing store.

Maurice's second son, Kenneth Norman, loved school and was an excel-

lent student. His dream was to become an English literature professor. Despite the depression and his family's strained financial circumstances, Norm enrolled at Ohio State University, determined to work his way through. He lived in a dorm in the football stadium, just down the hall from Jessie Owens. At Ohio State from 1937-1941, Norm became a life-long Buckeye fan.

In the spring of 1941, he left college to volunteer for the Army Air Force. Recognizing his intellectual prowess, the Army trained him to be a cryptographic security officer. He was to be assigned to Brazil, and therefore, in true "Catch 22" fashion, the Army gave him a crash course in Spanish. On arriving in Brazil, his hard earned Spanish skills were not very helpful because Brazilians spoke Portuguese. Following the Brazilian stint, he served in British West Africa, Arabia, and Yemen. His Army buddies nicknamed him "Crypto Krip," a title he relished.

After the war, while he was hospitalized in an Air Force hospital, the wife of the airman in the next room came to visit, accompanied by her sister Derril. Within a few months Norm and Derril were married. They enjoyed a very close, loving and mutually supportive marriage for 56 years. They have two daughters, Terri and Marcie, and three grandchildren.

The G.I. Bill, our country's best investment since the Louisiana Purchase, provided Norm's ticket to the University of Colorado Law School. To help make ends meet, he and Derril managed a laundromat, and Norm drove a cab at night. As a team he wrote, she mimeographed and they sold "canned briefs" to the other law students.

Following graduation and admission to the bar, Norm hung out his shingle near the Denver District Court. Jerry Kopel recalls Norm's first office as a seldom used public phone booth where his clients could call him and from which he could contact them.

Young sole practitioners tend to specialize in the type of cases their clients bring. Norm, at first, represented primarily defendants in criminal cases. The legacy of that early experience helped to inspire his commitment to civil liberties and civil rights. Throughout his career he was proud to represent the poor and disadvantaged, often at great personal sacrifice.

Soon Norm's practice evolved into the specialty of personal injury law. Today's plaintiffs' or consumers' attorneys – ever vigilant soldiers in the tort "reform" wars, frequently hear from their elders how much better things were in "the good old days." But the 1950's and '60's were not so great.

Colorado then had a $10,000.00 maximum "net pecuniary loss" restriction for the wrongful death of a breadwinner. There were no solatium damages nor any damages whatever for non-economic losses in death cases.

Under the "guest statute" a non-paying automobile passenger injured by the driver's negligence could not recover damages absent proof that the driver was guilty of willful and wanton misconduct. There was no comparative negligence doctrine in Colorado; rather the defense of contributory negligence prevailed in its harshest form. Thus, an injured victim of a negligent tort-feasor was barred from recovery if his or her own negligence contributed in the slightest degree, *e.g.*, 1%, to causing the injury. Moreover, the common law immunities all applied: governmental immunity, charitable immunity and intra-family immunity.

These ancient rules made difficult a career as a plaintiffs' lawyer. Even strict product liability – absent actual proof of negligence making a product dangerously defective – was slow to arrive in Colorado.

Norm saw these harsh laws as an opportunity to campaign for tort reform, but in a different sense than that term is used today. His exemplary record of law reform through the appeal process speaks for itself, but his dedication to educating the legislature is less well known.

Norm influenced and inspired many lawyers with whom he worked. His first partner was the late Bob McLean who later became an excellent Denver District Judge. He and Bob, with two older lawyers, founded the Colorado Association of Claimants' Compensation Attorneys, affiliated with the national group, NACCA. When NACCA became ATLA, CACCA became the Colorado Trial Lawyers Association.

In the early 1960's, Norm and Dan Hoffman formed Kripke and Hoffman, later Kripke, Hoffman and Friedman. In 1967, Charles Friedman moved to Texas, where he later became a trial judge. Norm and Dan asked me to join the firm and it soon became Kripke, Hoffman and Carrigan.

There followed a stream of partners and associates who, under Norm's tutelage, became accomplished, highly successful trial lawyers. Among them were the late Bob Dufty, Jerry McDermott, Don Medsker, Doug Bragg, Jim Bailey, John Salmon, and Joe Epstein. Later Judge Scott Lawrence and Jim Leventhal practiced with, and learned from, Norm. Other outstanding trial lawyers who began their careers in our offices included Dennis Hartley and the late Penfield Tate, Jr. Norm was a model for all as an honest, dedicated, industrious and ethical professional.

We who were mentored observed Norm's fierce competitive streak. But, while he took his work very seriously, he never took himself seriously. He loved jokes, witty rejoinders and outrageous puns. We learned that in a stressful trial practice, a good sense of humor is almost as indispensable as a good secretary.

When Norm and Derril decided to move to Aspen, he relinquished formal

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partnership in our law firm. But the firm kept an office and phone for his use whenever he was in Denver. In Aspen Norm devoted most of his time to *pro bono* work. Holland & Hart's Aspen branch furnished an office to support his community service.

When Norm tried his early cases, he faced judges selected in partisan political elections, for merit judicial selection, tenure and removal did not arrive in Colorado until much later. Under the prior system we never knew how much a judge's ruling might be affected by awareness of an upcoming election or swayed by the fact an opposing attorney was an influential politician of the judge's party. While there were many very good judges, there were also many so unqualified they would not have been passed by a merit selection panel.

Nor is it true that in the "good old days" the bar was a "kinder, gentler" group. Even then there were hardball lawyers and unethical lawyers – but they were fewer and more easily recognized, because there were far fewer lawyers. Norm's excellent reputation was well known at the bar and bench and he was considered by most as Colorado's leading personal injury lawyer. He served as chairman of the Colorado Bar Association Negligence Law Section.

He also taught in the original NACCA "traveling circus" with the great stalwarts who lectured on tort law and demonstrated trial tactics in every region of the country. These pre-CLE meetings were the first organized efforts to educate lawyers in trial practice.

When ATLA was created, Norm served on its national board of directors representing all six states of the Federal Tenth Circuit. He also was an early President of CTLA and remained until death a loyal, avid and generous supporter. During my last visit with him and Derril in San Diego, Norm presented me the plaque which had recognized our then firm as one of the original founders of the Roscoe Pound Foundation. He was also a founding member of Trial Lawyers for Public Justice. His leadership of the Anti-Defamation League of B'nai B'rith on the local, statewide and national levels reflected the Jewish community's recognition of his energetic devotion to their causes. He championed civil rights and civil liberties for all.

A bright and constant star has left our firmament. We whose lives have been inspired and enriched by his influence shall miss him. But – as the poet John Shirley said, "Only the ashes of the just, smell sweet and blossom in their dust." Farewell, Norm. If your reward is but one-third the happiness you made possible for others, you shall be filled with joy forever.

- Honorable Jim R. Carrigan

I met Norm Kripke in the early 1960's when I became a member of the Colorado Association of Claimant Compensation Attorney's (CACCA). He founded CACCA in the early 1950's, and it later became the Colorado Trial Lawyers Association. We immediately bonded and soon became close personal friends. He was my hero because of his commitment to the jury system, his commitment to representing and obtaining justice for the poor, the injured, the forgotten, the voiceless, the defenseless and the damned, and his commitment to protecting the rights of such people from corporate and government oppression.

During the McCarthyism era, he defended those unjustly accused of being communists. In the 1960's he was actively involved in the civil rights movement and later, in opposition to the Vietnam war. He actively opposed discrimination of every kind: racial, gender, age and religion. He was a man of action, not just words. In the early 1960's, Norm invited 10 or 12 members of CACCA to bring their respective spouses and join him and Derril Kripke in Estes Park. Each lawyer was asked to present an outline or paper that would be shared and discussed with the others present followed by a social evening. It was during this overnight seminar and social gathering that someone suggested that we have a broader based convention of the entire membership the following year. This gave birth to the annual convention of the Colorado Trial Lawyers Association. Norm was almost single handedly responsible for the birth and early development of CTLA.

When Norm was diagnosed with cancer, he fought valiantly until he realized there was no hope. In the fall of 2001, Norm and Derril were discussing what Norm would want in a memorial service or celebration of his life following death. As they discussed the details, Norm could not envision having a memorial service in his absence. He decided he would rather have a gathering of friends in Denver during his lifetime, so that he could be present and say goodbye. Norm was too weak to circulate among those present, but each of us had an opportunity to sit with Norm, reflect on our friendship and life together and for some, to say goodbye.

Norm was admitted to the hospice center near his home in California where he chose to discontinue life-sustaining modalities. I spoke to him as Derril held the phone to his ear and thanked him for being my friend and mentor. Again I told him that I loved him and would never forget him. Cancer had robbed him of his voice, and he gestured to Derril for the pencil and pad to scribble a note. Then he was too feeble to do so. He didn't have to. I knew what the note would say.

- Bill Trine

Though I knew of, and had briefly met, Norm and Derril Kripke prior to my arrival at CTLA, my first CTLA images of Norm revolve around the now extinct CTLA Tennis Tournament held annually at the convention. The Kripkes

> "Norm was, by any measure, a giant of our profession."
>
> *- William R. Gray*

attended the convention every year, usually in the company of their friends, Alvin and Carmen Lichtenstein. Norm and Derril played in the tournament every year and were very hands on in its operation. As the mountain towns became increasingly developed, it became very difficult to find courts that were conveniently located. Norm became frustrated with the distance we would have to travel to play, and after he moved to California the tournament was discontinued because of lack of interest.

This story is illustrative of how Norm could keep things going. If you consider his early vision for CTLA and his perseverance over the years with the Association, and even more particularly, with the stewardship of *Trial Talk*® prior to John Carrol's editorship, you realize that Norm provided the oil that kept these squeaky wheels running.

There was not an attorney out there who was more committed than Norm to CTLA. He maintained correspondence with me to just before his passing. He was not shy to offer suggestions, and he never rested until he got an answer. The level of his love and commitment to us is evident from his bequest to CTLA. He is the only member, who we know of, to consider us in his estate planning. He made CTLA a beneficiary of one of his life insurance policies.

Norm's death has taken a piece of us away. He was our conscious, our mentor and our history. I am certain he is still fighting the good fight.

- John Sadwith

Of the many attributes and virtues that Norm possessed and exemplified the ones the rest of us should most strive for and attempt to emulate are his unwavering principles, his unswerving dedication to his clients and his tenacity in pursuing his clients' interests. We all will be better by remembering Norm and being guided by his example.

- Jerry McDermott

Older members of CTLA know that Norm Kripke was "Mr. Tort Lawyer" of Colorado. If younger lawyers will hit the search key of their legal research provider, they will find the incredible number of appellate cases that Norm contributed to the development of Colorado common law. Scott Lawrence and I once collected all of Norm's cases and had them bound in a volume that would make most appellate judges proud. If these cases were Norm's entire contribution to the bar in Colorado, they would, by themselves, be a powerful legacy. But Norm contributed so much more. He was instrumental in establishing CTLA itself. He was an extraordinary teacher of younger lawyers. Those of us who practiced with him and those of us who attended his CLE presentations are better lawyers because of him. It was the little guy, the underdog, the accident victim whom Norm cherished and fought for for so many years with a zest and a drive that would make you marvel. Colorado is a better place to call home because of Norm. He leaves a legacy, and he leaves a challenge to the members of CTLA to continue what he began. He will be missed, and he will be remembered.

- Joe Epstein

Norm was, by any measure, a giant of our profession. Founder and Past President of the Colorado Trial Lawyers Association, founding member of Trial Lawyers for Public Justice, Past President of the Public Justice Foundation, a long-time member of the Colorado Supreme court Standing Committee on the Rules of Civil Procedure, mentor and inspiration to thousands of plaintiffs' attorneys in Colorado. Lawyers of his stature and accomplishments are truly rare.

- William R. Gray

Dottie and I send you our deepest sympathies on the death of Norm. What a loss! Norm fought for what he believed in and we respected him immensely. Colorado has lost a very valuable resource.

- Richard Lamm (note to Derril Kripke)

Real Estate Broker Liability: Who Is Whose Agent?

By Alan C. Friedberg, Esq.

Real estate brokers and their salespersons[1] solicit business from and offer services to both sellers and buyers. They offer to help sellers list and sell properties. They offer buyers assistance in locating and purchasing property. They are allowed to prepare standard form contracts for the purchase and sale of property without violating the rules against practicing law without a license.[2] Because of the trust and confidence both sellers and buyers place in the real estate brokers with whom each works, it is understandable that sellers would assume that "their" brokers are their agents and buyers would assume that "their" brokers were their agents.

Traditionally, though, virtually all brokers involved in residential sales were legally considered to be agents of the seller. The listing broker was clearly the seller's agent. Where property was listed for sale on a multiple listing service (MLS), other brokers who used the MLS and shared in the commission paid by the seller if they found a buyer were considered "subagents" of the seller, even though they worked exclusively with the buyer. They were generally referred to as "selling agents."

Brokers, who were taught, tested and licensed, presumably knew and understood that they owed fiduciary and other duties to the sellers and not to buyers. But did buyers understand that brokers working with them were legally obligated to prefer the sellers' interests over that of buyers? A broker might spend many hours with a buyer showing numerous properties, advising the buyer about schools and neighborhoods, suggesting to the buyer how much to offer, assisting the buyer in obtaining financing and communicating with the seller or the listing broker on behalf of the buyer both before, during and after closing.

In an article in the July 1986 issue of *The Colorado Lawyer*, G. Lane Earnest[3] commented on then-recent Colorado cases which he characterized as imposing "agency by surprise."[4] Earnest discussed a case in which the Colorado Court of Appeals affirmed a trial court's conclusion that a selling broker was the purchasers' agent because he had assisted the purchasers in the home-buying process. In *Little v. Rohauer*,[5] the purchasers tried to avoid forfeiture of their earnest money deposit on the ground that they had not received a title commitment required by the purchase contract. The Court held that timely delivery of the title commitment to the broker assisting the purchasers met the contract requirement because the broker was the purchasers' agent. Interestingly, the broker was employed by the same brokerage firm as the listing broker.

In another case discussed by Earnest, *Stortroen v. Beneficial Finance Co.*,[6] a Jefferson County District Court held that the purchasers' delivery of acceptance of a seller's counteroffer was not effective because the selling, or "cooperating," broker who obtained the acceptance was an agent of the buyer rather than the seller. The seller was thus free to sell the property to another buyer which had offered more money before the seller actually received the notice of acceptance.

The Colorado Supreme Court granted *certiorari* to review both the Court of Appeals' decision in *Little* and the Jefferson County District Court's decision in *Stortroen*. Chief Justice Quinn wrote the decisions in both cases, reversing the lower courts. The Court held that, in the absence of a written agreement to the contrary, at least in MLS situations, brokers are agents or subagents of the seller even where they provide services primarily to the buyer. Thus, in *Stortroen*, notice of acceptance of the seller's counteroffer given to the broker working with the buyers was effective notice to the sellers, who could therefore not sell to a higher offeror. In *Little*, delivery of the title commitment to the broker working with the purchasers was not delivery to the purchasers. Brokers could not represent

both the seller and the buyer in the same real estate transaction without the parties' knowledge and written consent to that arrangement.[7] The prohibition against undocumented dual agency was also codified in then-current Colorado statutes and real estate commission rules.[8]

In *dictum*, Justice Quinn explained that it might not be to the buyer's benefit to have the selling broker or sales person be the buyer's agent. Quoting from Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*,[9] Justice Quinn stated:

> With the seller-selling agent relationship established, the seller may become liable to the buyer in tort for any misrepresentations of his agent through the ratification doctrine. *See Restatement (Second) of Agency* §§ 82, 92-93, 98-100, 218 (1957). Such liability allows the remedy of rescission against the seller. If there is no agency relationship between the seller and the selling broker, but the agency relationship is between the buyer and the selling broker, this remedy of rescission is no longer available to the buyer because the ratification doctrine would not be applicable, and the buyer's only recourse may be a suit against the broker for damages. In such a situation, the finding of agency between buyer and selling broker may be more harmful to the buyer than beneficial, because the buyer would lose his action for rescission and restitution against the seller. *See Restatement (Second) of Agency* §§ 82, 92-93, 98-100, 218 (1957). Furthermore, if the agent breaches his fiduciary duty to his principal, one of the remedies available to the principal is a return of compensation paid. If the selling broker is the agent of the buyer, it could be argued that the buyer did not pay any compensation to the agent, because the agent was paid by the seller through the listing broker. Again, the finding of an agency relationship between the selling broker and the buyer may not enhance the buyer's legal position.

Justice Quinn also pointed out that even without an agency relationship between the buyer and broker, the purchaser is protected because the broker may still be held liable for wrongful acts and for failing to deal fairly and honestly with the purchaser, citing a number of cases from Colorado and other jurisdictions and Colorado statutes.[10]

Although *Stortroen* and *Little* may have clarified the brokers' agency relationships for the real estate and legal communities, the cases likely did little to disabuse purchasers of the notion that the selling agents with whom they worked owed them fiduciary duties, such as loyalty and confidentiality, and were acting for them rather than the sellers.

The 1994 Act

In 1993, the Colorado legislature enacted a statute, effective January 1, 1994, "to govern the relationships between real estate brokers and sellers, landlords, buyers and tenants in real estate transactions."[11] The legislation, entitled "Brokerage Relationships" (1994 Act), was at least in part a response to the continuing discrepancy between the public's perception of the role of brokers and statutory and case law. The 1994 Act divided real estate brokers into four major categories: single agents of either buyers or sellers, subagents, dual agents and transaction brokers.[12] Colorado Revised Statute §12-61-808 requires disclosures to parties to be assisted of the brokerage relationships available and of the particular role to be played by the broker. Specific written agreements for single agency or dual agency containing a statement that the principals may be vicariously liable for the acts of their agents or subagents is required. A broker assisting a buyer as an agent or a subagent of the seller must provide a written disclosure informing the buyer that the broker represents the seller and is not an agent for the buyer and listing the tasks that the subagent intends to perform.

Any broker who is not a seller's agent or subagent, buyer's agent or subagent, or a dual agent falls into the new cate-

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gory of transaction broker and is not an agent for either party. A transaction broker must also disclose in writing to the party to be assisted that the transaction broker is not acting as an agent for that party.

A. Transaction Brokers

The 1994 Act provides that a transaction broker is "a broker who assists one or more parties throughout a contemplated real estate transaction with communication, interposition, advisement, negotiation, contract terms and the closing of such real estate transaction without being an agent or advocate for the interests of any party to such transaction."[13] Unless a single or dual agency relationship is established in writing, a transaction broker relationship is presumed.[14] This presumption has been said to eliminate the "agency by surprise" problem by creating a default non-agency relationship.[15]

The statute sets out the transaction broker's duties in some detail. It also specifies some things a transaction broker is not required to do and other things the transaction broker is permitted to do.[16] The broker must disclose all actually known adverse material facts to both parties, but may not disclose information which would give one party a bargaining advantage over the other.

Other significant differences between the duties of broker-agents and transaction brokers are listed in the statute. Transaction brokers have no duty to conduct an independent inspection of the property or verify the accuracy or completeness of statements made by the seller.[17] Transaction brokers do not have any duty to conduct an independent investigation of the buyer's financial condition or to verify the accuracy or completeness of any statement made by the buyer.[18] Transaction brokers may list properties which compete with that of the seller and show properties in which the buyer is interested to other buyers.

The 1994 Act states that there shall be no imputation of knowledge between any party and the transaction broker or among persons within an entity engaged as a transaction broker.

B. Single Agents

The 1994 Act expressly provides for single agents. A single agent is "a broker who is engaged by and represents only one party in a real estate transaction."[19] A seller's broker has the duties traditionally required of a real estate agent in that the broker is required to perform the terms of the written agreement, exercise reasonable skill and care for the seller, and promote the business interests of the seller with the utmost good faith, loyalty and fidelity. In exercising those duties, the statute expressly requires the agent to do the following:

a. seek a price and terms which are acceptable to the seller;
b. present all offers to the seller in a timely manner;
c. disclose material adverse facts actually known by the broker;
d. counsel the seller as to any material risks or benefits to the transaction which are actually known to the broker;
e. timely account for all money received by the broker; and
f. inform the seller that the seller may be vicariously liable for the acts of the seller's agent or any subagent when the broker is acting within the scope of the agency relationship.[20]

In addition to the affirmative requirements, the seller's broker is obligated <u>not</u> to disclose the following:

a. that a seller is willing to take less than the asking price;
b. motivating factors behind the decision to sell;
c. that the seller will agree to financing terms other than those offered;
d. any material information about the seller unless failure to do so would be fraud; or
e. any facts or suspicions regarding circumstances which could psychologically affect or stigmatize the property.[21]

The seller's broker does not have any obligation to the buyer, except that the broker must disclose adverse material facts actually known by the broker. Examples of such required disclosures include adverse material facts pertaining to the title, material defects in the property and any environmental hazards which must be disclosed by law.[22]

Buyer's agents have essentially the mirror image of duties the seller's agents have. Buyer's agents are limited agents who must exercise reasonable skill, and promote the interests of the buyer with the utmost good faith, loyalty and fidelity.[23] In dispatching this duty, the broker must, *inter alia*, seek a price and terms acceptable to the buyer, present all offers in a timely fashion, disclose actually known material adverse facts, and inform the buyer that the buyer may be vicariously liable for the broker's acts as well as the acts of the broker's subagent, if any are engaged.[24]

Like the seller's agent, the buyer's agent also has a duty not to disclose certain information. The broker *may not* disclose, *inter alia*, that the buyer is willing to pay more than the asking price, the buyer's motivation for wanting to purchase, or any material information about the buyer unless such disclosure is otherwise required by law.[25] Again mirroring the seller's broker's duties, the buyer's broker owes no duty to the seller except that the buyer must disclose adverse material facts actually known to the broker such as whether the buyer can afford the house or whether the buyer actually intends to use the house as the buyer's primary residence.[26]

On its face, the most significant change in the statute from common law is that the single agent broker need only disclose to his or her principal adverse material facts *actually known* to the broker.[27] However, as discussed below, the duty to exercise reasonable skill and care may still require the broker to disclose adverse facts he or she should have known.

C. Dual Agents

A dual agent is defined as a broker is engaged as "a limited agent for both the seller and buyer . . .."[28] A broker may act as a dual agent only with informed consent of all of the parties, evidenced

by a written agreement pursuant to C.R.S. § 12-61-808(2)(e).[29] In the case of a dual agency relationship, both the seller and buyer must be informed that they may both be vicariously liable for the acts of the dual agent.

In a dual agency relationship, the agent has the duties of both a seller's and buyer's agent, as listed above, with certain exceptions. The statute starts with a position that the dual agent may disclose any information to one party that the agent gains about the other party, and then continues with exceptions to that broad rule of permissive disclosure.[30] Among the information that cannot be disclosed is the following:

(a) that a buyer is willing to pay more than the purchase price;

(b) that the seller is willing to accept less than the asking price;

(c) the buyer's or seller's motivation;

(d) that the buyer or seller is willing to accept financing terms different from those proposed; and

(e) any facts or suspicions regarding circumstances which could psychologically affect or stigmatize the property.[31]

Additionally, the dual agent must disclose information detailed in C.R.S. § 12-61-804(3) and § 12-64-805(3). No cause of action shall accrue for disclosing this information, nor does the broker relationship terminate because the broker has made any required disclosure.[32]

In the single and dual agency contexts, omitting the "knew or should have known" standard in favor of an actual knowledge standard seems to conflict with the requirement that the broker exercise reasonable skill and satisfy a duty of loyalty. By acting skillfully and loyally to either or both parties, a broker exercising reasonable care may have a duty to investigate claims made by the buyer or the seller with respect to material aspects of the property, ability to satisfy financing terms, title restrictions and the like, particularly before making any representations to the seller or buyer based upon statements by the buyer or seller, respectively.

BROKER LIABILITY SINCE THE 1994 ACT

Only a few cases have applied the 1994 Act in the context of real estate broker liability for wrongful acts or omissions.

In *Broderick v. McElroy & McCoy, Inc.*,[33] the Colorado Court of Appeals dealt with a case in which the transaction arose before the 1994 statute. In that case, the buyers sought assistance from the brokers in finding a certain type of property. There was no written or oral agreement regarding agency. The brokers solicited the sellers to sell property which was not yet on the market. "When brokers approached sellers, it was unclear whether brokers were representing sellers or buyers."[34] The subsequent September 1993 purchase and sale contract recited that the brokers represented the sellers and owed "duties

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of trust, loyalty and confidence"[35] exclusively to the sellers. When the appraisal obtained in connection with a financing application valued the property for less than the sale price, the buyers decided to find other property. The brokers assisted the buyers in finding and closing on another property. The sellers sued the buyers for breaching the contract and the brokers for breaching fiduciary duties to the sellers. The trial court found that the brokers had breached their fiduciary duties by transferring their loyalty from sellers to buyers and entered judgment against the brokers for damages. The Court of Appeals affirmed that part of the judgment.

In *Telluride Real Estate Co. v. Penthouse Affiliates, LLC*,[36] a case involving a broker's claim for commission, the plaintiff showed the purchaser a property which the purchaser ultimately bought. However, the purchaser worked directly with the listing broker, who entered into a transaction broker agreement with the purchaser and worked with the transaction broker to acquire and close on the property. The purchaser and defendant brokers argued that the 1994 Act replaced the common law concept of "procuring cause" by completely supplanting prior law pertaining to brokerage relationships. The trial court and Court of Appeals both held that the 1994 Act did not abrogate the common law, particularly the law pertaining to commissions or compensation earned by brokers. Rather, it was intended to protect the public. Plaintiff was therefore awarded a commission under the "procuring cause" doctrine. The Court explicitly did not reach the issue of whether plaintiff had acted as a transaction broker or in some other agency capacity in the absence of any written disclosure or written agreement required by C.R.S. § 12-61-808(2).

In *Baumgarten v. Coppage*,[37] the plaintiff purchasers sued defendant real estate brokers, who acted as sellers' agents under C.R.S. § 12-61-804(3)(a), which provides that a seller's agent owes no duty to the buyer except the duty to disclose all adverse material facts actually known by the broker. The buyers also asserted claims of deceptive practices under the Colorado Consumer Protection Act. The trial court dismissed plaintiffs' claims because plaintiffs failed to file a certificate of review under C.R.S. § 13-20-602. The Court of Appeals reversed in part, holding that the certificate of review was required only for claims alleging that defendants breached a standard of care premised on what they should have known, as opposed to their actual knowledge. Colorado Revised Statute § 12-61-804(3)(a) requires proof of material facts "actually known" by the broker. Colorado Revised Statute § 6-1-105(1) includes as deceptive trade practices both knowingly making false representations and making representations that defendant knows or should know are false. The Court held that expert testimony would be necessary to establish the "should know" standard and thus upheld the dismissal only of claims involving allegations that the defendants should have known that their representations were false. Claims of knowing misrepresentations do not require expert testimony and thus do not require a certificate of review.

Mabry v. Tom Stanger & Co.[38] involved a seller's broker's appeal of dismissal of its counterclaim for commissions against plaintiff sellers. Two groups of sellers marketed property as a single parcel. Because of their separate interests in the property, the broker entered into two separate listing contracts with slightly different expiration dates. The broker obtained a full price offer for the property shortly after one of the listing agreements expired. He then contacted the sellers who had executed the expired listing agreement and, without alerting them to the expiration date, told them that they would have to pay him a commission whether or not they accepted the offer. They accepted the offer with minor changes. The broker then told the second selling group that the first sellers had accepted the offer and that the second group would have to pay a commission whether or not they accepted the offer.

With further modifications, a contract was entered into by all the parties, but the buyer ran into problems with a subdivision application. The contract ultimately terminated because the sellers and buyer could not agree on further extensions of the closing date. After the buyer recorded a notice of claim of interest in the property, the sellers sued the buyer for declaratory and quiet title relief, breach of contract and slander of title. They sued the broker for breach of contract and breach of fiduciary duty. The broker counterclaimed for his commission. The buyer asserted counterclaims for specific performance and breach of contract. Although the trial court awarded the buyer damages, finding that the sellers' conduct amounted to anticipatory repudiation of the contract, it refused to award a commission to the broker. It found, and the Court of Appeals agreed, that the broker, as the listing agent, had breached fiduciary duties of good faith, loyalty and fidelity, and his duties to exercise skill and care on behalf of the seller. By playing one seller against the others and pressuring them to accept the buyer's offer, particularly at a time when the listing contract had expired, and claiming a right to a commission after expiration of the listing agreement, the broker breached his duty of loyalty and forfeited his right to a commission.

The broker also made the imaginative argument that upon expiration of the listing agreements, he had become a transaction broker rather than a seller's agent and thus had no further fiduciary duties to the seller. The Court held that the broker's fiduciary duties did not terminate on the expiration date of the listing agreements, but continued until the deal was completed, pursuant to the express language of C.R.S. § 12-61-809, which states that the relationships set forth in the statute continue until the performance or completion of the agreement by which the broker was engaged.

The last case in which the 1994 Act plays a significant role is *Sussman v. Stoner*.[39] In that case, the Sussmans sold 230 acres of land in Larimer County together with 68 shares of water from the North Poudre Irrigation

Company and two acre feet of Weld County water, to Stoner and Company. Stoner was a principal in Stoner and Company and also a real estate developer and real estate agent. The purchase agreement included a 3% commission to the broker and firm which employed Stoner because Stoner acted as a broker in the transaction. The agreement, apparently entered into in September 1999, contained a contingency period for Stoner and Company's determination that the property was suitable for development. The buyer could waive the contingency on or before December 3, 1999. Closing was set for February 29, 2000.

Without the Sussmans' knowledge, the value of the Poudre water began to rise precipitously after the contract was executed. On November 9, 1999, Stoner and Company asked for an extension of the contingency waiver to December 10, 1999. Neither Stoner nor the Sussmans' broker told the Sussmans of the increases in water share prices or the risks or benefits of extending the contract. The Sussmans agreed to the requested modification on November 11, 1999, at which time the Poudre water shares were worth twice the $952,000 at which the Sussmans' agent had valued them in July 1999. On the closing date, February 29, 2000, the shares had risen to about $2,856,000.

The Sussmans alleged that Stoner was a transaction broker under the 1994 Act and that C.R.S. § 12-61-807(2) required him to disclose to them the increased value of the water shares and the effect of the increase on the contract modification. Chief Judge Babcock granted Stoner and his brokerage firm's motion to dismiss the Sussmans' claims for breach of the statutory duty of brokers, fraudulent concealment and professional negligence claims. The Court recognized the statutory characterization of a transaction broker as not being an agent for either party. Although the transaction broker must disclose "adverse material facts actually known by the broker," there is nothing in the statute which addresses whether transaction brokers "have a duty to inform one party that market forces have swung in their favor, and advise on ways to take advantage of that change."[40] To the contrary, the statute says that a transaction broker is not an agent for either party and may not advocate the interests of any party to the transaction. Judge Babcock's order dismissing claims against Stoner and the brokerage firm does not address the Sussmans' claims against the remaining defendants, including their listing broker and an attorney hired to analyze the market and advise them regarding the sale.

THE 2003 AMENDMENTS

On June 1, 2002, Governor Owens signed into law Senate Bill 02-196, amending the 1994 Act, to become effective January 1, 2003 (the Amended Act). The legislation eliminates the categories of subagents and dual agents, leaving only single agents and transaction brokers.[41] It further limits relationships with a buyer or seller to a specific "designated broker,"[42] defined as, "an employing broker or employed broker who is designated in writing by an employing broker to serve as a single agent or transaction broker . . .."[43] The brokerage firm may designate one or more brokers to work with a seller and one or more other brokers to work with the buyer.[44] Under the 1994 Act, as it currently exists, dual agency is established where brokers in the same firm represent both buyer and seller. Under the Amended Act, there is no dual agency.[45] Moreover, none of the "duties, obligations, and responsibilities" of the individual relationships extends to the brokerage firm or any other brokers within the firm who have not been designated as single agents or transaction brokers for a specific transaction.[46]

An individual broker may be designated to work for both seller and buyer in the same transaction as a transaction broker for both, but can only be a single agent for either the buyer or the seller, but not both, as is currently the case.[47] As previously, a designated broker may work with the seller in one transaction and the buyer in another.[48]

The Amended Act also provides that the knowledge of a designated broker will not be imputed to any non-designated employing or employed broker.[49] However, other provisions confirm that an employing broker or firm remains responsible for supervision of its employed brokers and may still have vicarious liability for their acts.[50]

Also added is a specific provision that a buyerbs agent äowes no duty to conduct an independent inspection of the property for the benefit of the buyer or tenant and owes no duty to independently verify the accuracy or completeness of statements made by the seller, landlord, or independent inspectors . . .."[51] As before, the buyerbs agent still has the duties to exercise reasonable skill and care for the buyer and to promote the buyerbs interest with the utmost good faith, loyalty, and fidelity.[52]

Another significant change to the statute is that buyers and sellers are no longer vicariously liable for their brokerbs acts or omissions unless they were "approved, directed, or ratified."[53] This provision seems to stand the law of agency on its head. Would a seller be entitled to specific performance of a contract, even if the buyer had been fraudulently induced by the sellerbs broker to enter into the deal? If brokers knowingly make material misrepresentations which benefit their principals, and if the brokers, for whatever reason, are not able to pay damages to the defrauded party, should the principal be entitled to retain the benefit conferred as a result of the brokerbs wrongdoing?

CONCLUSION

The dearth of reported cases interpreting and applying the 1994 Act leaves open a number of questions concerning responsibilities and liabilities of brokers to buyers and sellers using their services. Because a transaction broker appears to have the fewest agent responsibilities and the most disclaimers, it seems logical that brokers will steer buyers in the direction of choosing that relationship. Based on broker advertis-

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ing and personal relationships developed in the course of looking for and buying a home, buyers will likely continue to expect even transaction brokers to alert them to potential problems and help protect their interests in transactions with sellers and their brokers. Under the statute, there is probably still liability for failing to assist parties with timely title commitments, loan applications, seller's disclosure requirements and other components of transactions.

If buyers choose to use single agent buyer brokers, they have a right to expect them to exercise "reasonable skill and care" and "good faith, loyalty and fidelity" on their behalf. Even though single agent brokers for either buyers or sellers are required by the statute to disclose adverse material facts or material benefits or risks of the transaction "actually known by the broker," the duties to exercise reasonable skill and care and to promote the interests of the buyer or seller with utmost good faith, loyalty and fidelity surely imply a duty to disclose misrepresentations, omissions, or risks which a competent broker should recognize or know in the exercise of reasonable care. No reported case has yet addressed such issues.

The *Colorado Real Estate Manual* prepared by the Colorado Real Estate Commission and published by the Department of Regulatory Agencies contains a good discussion of agency relationships in Chapter 12. It emphasizes that an agent has the duty to use reasonable skill and can be held liable to the principal for any loss caused by lack of care. Importantly, it states that,

> An agent holding out to the public as possessing certain abilities and skills is presumed to possess a level of competence above a non-licensee, and suitable to the agency undertaken. Thus a residential broker must possess specialty skills, or seek the assistance of others, before agreeing to perform commercial or property management agency duties. An agent cannot escape responsibility for negligence or lack of ability by pleading ignorance.[54]

The *Manual* also says that the agent has a duty to keep the principal fully informed of material facts, giving as an example informing the principal of a proposed zoning change which might enhance the property's value.[55]

The *Manual*'s provisions and expert testimony regarding standards of care for real estate brokers should support claims for negligence or breach of fiduciary duty under a "should have known" standard, even in light of the 1994 Act's provisions relating only to disclosure of material facts "actually known" by the broker.

The 1994 Act's mandate to clarify and reduce to writing the broker-customer relationship would, however, appear to resolve issues of the type raised in *Stortroen* and *Little*. In the *Stortroen* situation, the question of whether delivery of an acceptance of an offer or counteroffer is effective upon receipt by a broker will be answered by looking at the broker's classification. However, the Act has provisions requiring each type of broker to present or deliver offers and counteroffers in a "timely manner." "Timely manner" is not defined, and there may be potential liability for not getting an offer or counteroffer to the appropriate party before the deal is lost to someone else. In the *Little* situation, delivery of documents to any broker other than that party's single agent would probably not be effective delivery to a party. The statute provides that knowledge or information will not be imputed between any party and a transaction broker or between any party and a dual agent.

In *Stortroen*, the Colorado Supreme Court held that a broker properly could act as a listing/seller's broker for a customer and at the same time act as a subagent for another seller in helping the first seller find a new home. The 1994 Act expressly allows brokers to act in those two distinct roles with respect to the same customer. The 2003 Amendments appear to limit the duties, and therefore the liabilities, of brokerage firms by eliminating dual agency and legally isolating the "designated broker" from the brokerbs firm and other brokers in the firm. Statutorily absolving buyers and sellers from liability for acts or omissions by their brokers may cause some serious injustices. Even where the principal has no knowledge of, or involvement in, the wrongdoing by an agent, any burden or damage should be borne by the principal rather than the other party. The Amended Act may shift the risk of loss unfairly away from the principal to the party misled by the agent.

It is not hard to imagine that a customer would place trust and confidence in the listing/seller's broker even though that broker is also acting as a transaction broker or other seller's subagent. The broker, too, may feel more loyalty to the first customer than to the second seller. It would not be unreasonable, in appropriate circumstances, for courts to impose liability on brokers for breaches of duties assumed by brokers, even where such duties exceed what the statute requires.

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ENDNOTES

1 For convenience, brokers and salespersons will be referred to collectively as "brokers" in this article.

2 *Conway-Bogue Realty Inv. Co. v. Denver Bar Asso.*, 135 Colo. 398, 312 P.2d 998 (1957); C.R.S. §12-61-803(4).

3 Known to many as "Earnie the Attorney."

4 G. Lane Earnest, *"Agency by Surprise:" the Disclosure Dilemma in Real Estate*, 15 *Colo. Law* No. 7, p. 1185 (July 1986).

[5] *Little v. Rohauer*, 707 P.2d 1015 (Colo. App. 1985), *affbd in part and revbd in part Rohauer v. Little*, 736 P.2d 403 (Colo. 1987).

[6] *Stortroen v. Beneficial Finance Co.*, 736 P.2d 391 (Colo. 1987).

[7] *Finnerty v. Fritz*, 5 Colo. 174, 175-176 (1879).

[8] *Stortroen*, 736 P.2d at 398.

[9] *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767, 773 n.33 (1978).

[10] *Stortroen*, 736 P.2d at 400-401.

[11] C.R.S. § 12-61-801(2).

[12] The 1994 act applies to brokers for landlords and tenants as well as for sellers and buyers. In this article, the term "buyer" includes "tenant" and "seller" includes "landlord."

[13] C.R.S. § 12-61-802(6).

[14] C.R.S. § 12-61-803(2)(a) & (b).

[15] G. Lane Earnest and J. Marcus Painter, *The New Brokerage Legislation: The Demise of "Agency by Surprise,"* 22 COLO. LAWYER No. 9, p. 1919 (Sept. 1993).

[16] C.R.S. § 12-61-807.

[17] C.R.S. § 12-61-807(4).

[18] C.R.S. § 12-61-807(5).

[19] C.R.S. § 12-61-802(4).

[20] C.R.S. § 12-61-804(1)(c)(I)-(VII).

[21] C.R.S. § 12-61-804(2)(a)-(e).

[22] C.R.S. § 12-61-804(3)(a).

[23] C.R.S. § 12-61-805(1)(c).

[24] C.R.S. § 12-61-805(1)(c)(I)-(VII).

[25] C.R.S. § 12-61-805(2)(a)-(e).

[26] C.R.S. § 12-61-805(3)(a).

[27] C.R.S. § 12-61-804(1)(c)(III).

[28] C.R.S. § 12-61-806(2).

[29] C.R.S. § 12-61-806(1). Approved forms containing the required provisions in written consent are available in the *Colorado Real Estate Manual*.

[30] C.R.S. § 12-61-806(3).

[31] C.R.S. § 12-61-806(4)(a)-(e).

[32] C.R.S. § 12-61-806(5)(b) & (c).

[33] *Broderick v. McElroy & McCoy, Inc.*, 961 P.2d 504 (Colo. App. 1997).

[34] *Id.* at 505.

[35] *Id.*

[36] *Telluride Real Estate Co. v. Penthouse Affiliates, LLC*, 996 P.2d 151 (Colo. App. 1999).

[37] *Baumgarten v. Coppage*, 15 P.3d 304 (Colo. App. 2000).

[38] *Mabry v. Tom Stanger & Co*., 33 P.3d 1206 (Colo. App. 2001).

[39] *Sussman v. Stoner*,143 F. Supp. 2d 1232 (D. Colo. 2001).

[40] *Id.* at 1238.

[41] Amended Act, C.R.S. § 12-61-803(1).

[42] Amended Act, C.R.S. § 12-61-803(6)(a).

[43] Amended Act, C.R.S. § 12-61-802(1.5).

[44] Amended Act, C.R.S. § 12-61-803(6)(c).

[45] Amended Act, C.R.S. § 12-61-806(1).

[46] Amended Act, C.R.S. §§ 12-61-803(6)(b) and 12-61-808(2)(g)(I).

[47] Amended Act, C.R.S. § 12-61-803(6)(d).

[48] Amended Act, C.R.S. § 12-61-803(6)(e).

[49] Amended Act, C.R.S. § 12-61-803(6)(f).

[50] Amended Act, C.R.S. §§ 12-61-803(8) and 12-61-808(2)(g)(II).

[51] Amended Act, C.R.S. § 12-61-805(5).

[52] Amended Act, C.R.S. § 12-61-805(1)(c).

[53] Amended Act, C.R.S. § 12-61-803(7).

[54] *Colorado Real Estate Manual*, July 2001, at 12-3.

[55] *Id.*

Affordable Demonstrative Exhibits

By Larry D. Lee, Esq.

I. Introduction

The lawyer's tool kit includes exhibits – but sometimes the exhibits are too expensive. Affordable demonstrative exhibits, whether in the automobile case or the slip/trip fall case, can make a difference. Consider a rule of proportionality: What kind of exhibit does your case warrant? Does your case, with its modest injuries, warrant expensive exhibits? Or would more affordable demonstrative exhibits be appropriate?

II. Demonstrative Evidence

Real evidence and demonstrative evidence are not the same. Real evidence is the actual car involved in the collision or the actual stairway involved in the fall. Demonstrative evidence would be a similar car or a photograph of a similar car. The purpose of demonstrative evidence is to help the witness demonstrate or illustrate his or her oral testimony. Limits to the use of demonstrative evidence are the trial judge's discretion and the trial attorney's imagination.[1] Classic demonstrative evidence ranges from the traffic accident diagram prepared by the investigating officer to the "leg" wrapped in newspaper brought by Melvin Belli.

Demonstrative evidence can help in settlement negotiations and at trial. Our task is to present the account. Our task is to show not only how the incident occurred, but also to interweave the effects of the incident with health, employment and recreational information. A chronology, especially if intertwined with the effects of the injury, can be useful. A simple medical summary is often dull, dry and boring. A more involved, written overview, documenting work, play, healthcare and more, can demonstrate the effect of the incident on the plaintiff. Real evidence may include work attendance records. An inexpensive demonstrative exhibit may juxtapose work attendance records with physical therapy silhouettes showing the location of trigger points and muscle spasms (where the dates coincide with dates on which the plaintiff worked).

Demonstration is not a stack of HCFA forms. Rather, demonstration shows the "before" picture as compared to the "after" picture. A calendar with all the medical appointments before and after the incident may help. Placing a cartoon of the movement sustained by the plaintiff in a rear-end automobile collision next to a real x-ray or a positive of a real x-ray, showing the absence of a normal lordotic curve can suggest that there is an interrelation. Your own sketch, even if only a stick figure, can be useful. Chart, graph, illustrate, cartoon or whatever – but show what you mean. Use medical enlargements to show the site, even the nature of the injury. Use medical records to chart the course of recovery.

III. Why Bother?

The key to success is persuasion – whether persuading the insurance adjuster, the judge or the jury. Persuade through presentation. Be simple, concise and clear. The burden of boredom is greater than the burden of proof. The key to settlement is the same as the key to a jury verdict: persuasion through presentation, combined with a permanent injury. Distinguish your client from the 500 other claimants the adjuster is evaluating - and from those frivolous claims the cynical juror is expecting to see. The adjuster, judge and jury will remember far better what they are told and shown, compared to what you, as the "talking head," drone on about. People remember eight times better what they are both shown and told, compared to just being told.

IV. Available Affordable Demonstrative Evidence

A simple list of affordable demonstrative evidence would include traffic accident reports, diagrams, timelines, chronologies, summaries (whether med-

ical records, medical bills, medications, work records, dates of treatment or otherwise), job description, sketches, photographs, videos, charts from a physical capacity evaluation or a functional capacity evaluation, home videos, bottles (Budweiser, Jim Beam, other), models, demonstrations and more. There are weather maps and charts in the newspaper and on the web. There are tests, experiments and demonstrations (video or animation) whether about accident reconstruction, mechanism of injury, operative procedures or otherwise.

There are articles, diagrams, charts and graphs in the medical literature and in SAE articles. Figures 81, 83 and 84 and others, from the AMA Guides to the Evaluation of Permanent Impairment (3rd edition) are useful in guiding the expert through his opinions and in showing the adjuster, judge and jury the permanent impairment. An epidural needle, surgical instruments or video of the informed consent may get attention. Have your doctor show the injection using the correct type of needle but with a skeleton.[2]

Your notebook computer, when placed precariously close to the edge of the table as if to drop to the floor, demonstrates the fragility of the computer, and perhaps the fragility of your plaintiff. Is the paperwork in the case useable? Have you considered blowing up an answer to an interrogatory or an answer to a request for admission? When you take the deposition, consider using a plat map or an "as-built survey." Perhaps the deponent could demonstrate how little he knows about the scene or about time and distance, or perhaps he could truly give useful information.

Don't be afraid to chart, graph, illustrate or cartoon the matter yourself. Lists, tables, pie charts, graphs and bar graphs are easy to prepare, inexpensive and effective. No computers are needed. Your physical therapist's analog chart/Borg Scale may be useful. Your chiropractor's silhouette with the aches, pains, stabbing and burning may help. Your neuropsychologist can show you a recovery curve or a table of different reserves, or compare the results of the same or similar tests taken one year apart.

Recently, in a rear-end collision case where the plaintiff sustained a mild traumatic brain injury, the plaintiff's attorney bought a cow brain for $15.00 from a local farmer. He found a pathologist to give him a real skull. The neurologist and the neuropsychologist used both, and passed both around the jury box, during their testimony. More mundane examples would be the use of a tape measure in the courtroom to show what 15 feet looks like – especially since the impact from the automobile launched your bicycle 15 feet from the point of impact to where he thudded onto the pavement. One lawyer uses photographs of his client, before and after, to show, sometimes startlingly clearly, how the spark has left his or her face. An injury lawyer from Michigan always uses a series of plaintiff's photos to show the plaintiff, family and friends. He uses simple charts to demonstrate the neuropsychological findings, from the treater and from the Rule 35 examiner, and he gets mileage out of showing that both find the same cognitive deficits. These can be hand drawn or inexpensively made. Sometimes the defense expert issues a report, which has favorable statements, e.g., "…Mrs. Jones was injured in this collision, the question is how badly." That phrase, copied onto a transparency and put on top of an overhead projector, can be very powerful, whether in voir dire, opening statement, cross-examination or closing.

Strive to impact the five senses.[3] The more the better. Live demonstrations (Newton's cradle; the witnesses playing with matchbox cars on a diagram) work. "Hidden pain" or "unseen injury" can be explained by the egg carton or the can of coke. There are websites and chiropractors which will give you a demonstration tape suitable for many cases.

V. More Expensive Demonstrative Exhibit Techniques

The amount of money you can pour into a demonstrative exhibit is without limit. There are opportunities galore. PowerPoint® presentations are very inexpensive, once the computer and the software are purchased. It can create charts, timelines or otherwise. It can highlight and summarize documents. It can add text to photos, show photos, create storyboards, do bullet presentations, show slides of surgery or focus on something in particular (e.g., the neck injury or the defect in the stairway or whatever).

"Day in the Life" videos, if professionally prepared, are expensive; however, it may be possible to obtain a reasonable inexpensive day in the life video. Positives of x-rays and MRIs can be expensive, especially if color coded; however, copies of the x-rays and MRIs themselves are not expensive. Professionally prepared diagrams – whether of the accident scene, timelines or otherwise – are expensive. But PowerPoint® allows an inexpensive timeline. The goal is to show how the incident occurred, the severity of the incident from the plaintiff's perspective, the movement (whether denominated delta v or peak acceleration or otherwise), the injuries and the impact of these injuries on the plaintiff (at home, at work and at play).

VI. Practical Applications

Some of our colleagues are famous for the use of T-bar list charts, pie charts and even cartoons (Janice Kim comes to mind). At least one neuropsychologist has been known to use bar graphs to show the relative comparison between neuropsychological tests, not batteries; bar graphs to show reserves; and timeline recovery curves to show the way in which the plaintiff did or did not, recover. A local lawyer uses stick figures to demonstrate the movement of the injured person. He uses these stick figures for both auto accidents and slip/trip/fall cases. His artistry is inept, yet he never fails to draw a laugh – and indirectly gain favor with the jury.

VII. Tools

Tools include tablets with felt pen, transparencies with an overhead projector, egg carton, coke can, photographs,

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camera (digital or otherwise), inexpensive video camera with VCR (dual tape VCR), data monitor, LCD projectors, laser disc players, Elmo, trial presentation software, PowerPoint®, extension cord and more.

VII. Conclusion

The only limit to affordable demonstrative exhibits is your imagination. You can do as little or as much as you can envision. Remember the rule of proportionality and use exhibits as appropriate for the type of case you wish to present.

Larry D. Lee practices law in Boulder, CO. He is a member of CTLA's Executive Committee. He is past co-chairman of the Auto Litigation Committee for CTLA. He is past co-chairman of CTLA's Amicus Curiae Committee. Mr. Lee is certified as a Civil Trial Advocate by the National Board of Trial Advocacy and he is a Diplomate of the National College of Advocacy. E-mail: larrydlee@leelawpc.com

ENDNOTES

1 EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 78 (The Michie Company 1980).

2 Thanks to Lisa P. O'Donnell for her example at ATLA's Jazz Fest Seminar in May, 2002.

3 Thanks to Mae Herter who wrote an excellent article entitled "Creative Use of Demonstrative Evidence" for the 2002 CTLA Convention.

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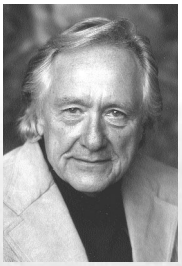

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Who Decides Whether Claims Are Arbitrable: Courts or Arbitrators?

By Alan C. Friedberg, Esq. and Michelle R. Kestler, Esq.

More and more agreements, both in commercial and consumer transactions, contain arbitration provisions. Disputes sometimes arise over whether the arbitration clauses are binding on the parties and, if so, whether the specific disagreements between the parties are within the scope of the arbitration agreement. In general, courts, rather than arbitrators, will decide whether or not a valid, binding arbitration agreement exists and whether it covers the matters in dispute. However, arbitration clauses can provide that arbitrators, rather than courts, will decide what issues are within the scope of the arbitration agreement. In addition, assuming a valid arbitration agreement exists, arbitrators rather than courts will generally decide whether parties initiating arbitration claims have met procedural preconditions or time limitations even where failure to do so might bar certain claims.

Despite the strong federal and state presumption in favor of arbitration, predispute arbitration agreements have generated a great deal of litigation, much of it relating to the issue of who decides whether a particular dispute is arbitrable. Even though arbitration is touted as a speedy and inexpensive alternative to litigation, one party can impose expensive and lengthy litigation on the other before the arbitration begins.

A Brief History

Private arbitration has existed as a means of resolving disputes since ancient Greece, Rome and Israel.[1] Initially, in the United States, however, there was widespread judicial mistrust of arbitration. Many courts refused to enforce mandatory arbitration clauses because they believed that arbitration took jurisdiction away from the courts.[2] In response to the judicial hostility towards arbitration, in 1925, Congress passed the Federal Arbitration Act (FAA).

In passing the FAA, Congress sought to "place arbitration agreements on equal ground with other, more accepted contractual arrangements" and to overcome judicial disapproval of arbitration.[3] According to the House Report accompanying the FAA:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced and provides a procedure in the federal courts for their enforcement.[4]

Section 2 of the FAA, which is the primary substantive provision of the FAA,[5] provides:A written provision in

> any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[6]

This language mandates that arbitration agreements be enforced "as a matter of contract law" by both federal and state courts. Accordingly, the FAA transformed arbitration into a judicially approved method of dispute resolution.[7]

In the U.S. Supreme Court case of

Moses H. Cone Mem'l Hosp., the Court confirmed that the FAA demonstrates a strong federal policy in favor of arbitration, applicable both in state and federal courts.[8] The opinion additionally instructs that any doubts concerning the arbitrability of an issue should be resolved in favor of arbitration. In frequently cited language, the Court stated:

> Federal law in terms of the Arbitration Act governs [the issue of whether the dispute was arbitrable] in either state or federal court . . . . Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act . . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[9]

In 1975, Colorado adopted the Uniform Arbitration Act (UAA).[10] The explicit purpose of the UAA is to validate voluntary written arbitration agreements and to make the arbitration process effective. Like its federal counterpart, the UAA mandates that any issues of whether a dispute is subject to arbitration are to be resolved in favor of arbitration.[11]

The Colorado Supreme Court has noted that the General Assembly determined that the public policy of Colorado encourages resolution of disputes through arbitration.[12] A written arbitration agreement "is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."[13] However, the grounds existing at law or in equity are pretty narrow. For instance, even where one party claims that a contract was induced by fraud, so long as that party is not specifically contesting the validity of the arbitration clause, the issue of whether the contract was fraudulently induced is for the arbitrator to decide.[14] Colorado courts have also held that "termination of a contract does not terminate the effect of an arbitration clause when a dispute arises under the contract."[15]

Federal Law on Who Decides

In 1986, in *AT&T Technologies, Inc. v. Communications Workers of America*,[16] the U.S. Supreme Court set forth the current standard used to determine the issue of who, the courts or the arbitrators, will determine whether a dispute is arbitrable under the terms of a pre-dispute arbitration agreement. In formulating its opinion, the Court relied on a series of cases, decided some 25 years prior, known as the *Steelworkers Trilogy*.[17] The *Trilogy* established the following four principles:

- First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[18] This premise recognizes that arbitrators have authority to resolve disputes only because the parties agreed in advance to submit them to arbitration.
- Second, "the question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[19]
- Third, a court has "no business weighing the merits of the" underlying claim when it reviews the arbitrability issue.[20]
- Fourth, where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[21]

With these principles in mind, the Court determined that it is for the court, not the arbitrators, to decide in the first instance whether the parties intended the dispute to be resolved through arbitration. Any intent of the parties to have arbitrators decide whether or not a dispute is arbitrable must be demonstrated by "clear and unmistakable" evidence. Once it is determined that the parties intended to submit the subject matter of the dispute to arbitration, the arbitrator, and not the court, then determines all procedural questions which grow out of the dispute and bear on its final disposition.[22]

Several years later, in *First Options of Chicago, Inc. v. Kaplan*,[23] the U.S. Supreme Court confirmed the standard for who determines arbitrability in the context of a pre-dispute securities arbitration agreement. In doing so, the Court applied the "clear and unmistakable" standard laid out in *AT&T Technologies*, explaining that "arbitration is simply a matter of contract between the parties," a way to resolve disputes, but only those disputes the parties have agreed to arbitrate.[24] The Court further explained that "the law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.'"[25]

> The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, [citation omitted], one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. [Citation omitted.] On the other hand, the former question — the 'who (primarily) should decide arbitrability' question — is rather

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> arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. [Citations omitted.] And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the lwho should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.[26]

Neither *AT&T Technologies* nor *First Options* clearly defines what constitutes an issue of arbitrability. However, those and other U.S. Supreme Court opinions indicate that the issue of arbitrability is limited to two questions: (1) whether the parties are bound by a valid arbitration agreement, and (2) whether the subject matter of their underlying dispute falls within that agreement. However, arbitrability does not include procedural issues, such as contractual or statutory time limitations. Such issues are instead subject to the general presumption in favor of resolution by the arbitrator.[27]

The "clear and unmistakable" standard for determining the parties' intent that the arbitrators decide issues of arbitrability has caused more difficulty for courts than might at first be imagined. In cases involving securities arbitration, the U.S. Courts of Appeal and state appellate courts have split almost evenly over whether brokerage firm clauses requiring arbitration of "all controversies," including "the construction" of the agreement itself, show clear and unmistakable evidence of intent that arbitrators decide arbitrability under certain time limitations contained in applicable arbitration codes.[28] A reasonable conclusion from reading some of the cases is that only the most explicit written intention to have arbitrators decide arbitrability will suffice.

On the other hand, a recent Second Circuit case, *Bell v. Cendant Corporation*,[29] applying Connecticut law, held that a clause in an "adviser agreement" which provided for arbitration of claims arising out of the agreement as well as "any other matter or thing," provided evidence that the parties "clearly agreed" to submit arbitrability questions to the arbitrators. In that case, the Second Circuit did not require an explicit statement that arbitrability issues were for the arbitrators to decide. It cited a Connecticut case for the proposition that "'all inclusive' language clearly demonstrated the parties' intention to submit the question of arbitrability to the arbitrator."[30]

The "clear and unmistakable" standard for determining the parties' intent that the arbitrators decide issues of arbitrability has caused more difficulty for courts than might at first be imagined.

For a while, it appeared that in Colorado, arbitrators would be given more leeway to decide the scope of arbitration agreements. In 1979, in *Youmans v. District Court*,[31] the Colorado Supreme Court stated that "arguments regarding which claims are properly subject to arbitration are inappropriate because the scope of the arbitration provision is, in the first instance, for the arbitrators."[32] The Colorado Court of Appeals followed *Youmans in Cohen v. Quiat*,[33] a 1987 case. Cohen involved a challenge to an arbitration award on the basis that the arbitrators had "exceeded their powers," making the award appealable under the UAA.[34] The Court of Appeals reversed the district court's conclusion that the arbitrators had exceeded their powers, primarily on the ground that the arbitration clause was broad enough to encompass the matter decided by the arbitrators.

In *Lawrence Street Partners, Ltd. v. Lawrence Street Venturers*,[35] a 1989 case, the Colorado Court of Appeals distinguished *Youmans*, stating that "[t]he *Youmans* line of cases does indicate that the scope of arbitration must be resolved initially by the arbitrator and not the court; however, those cases do not concern situations in which the arbitration agreement expressly prohibits arbitration of certain claims."[36] Similarly, the Court of Appeals, in *State Farm Mut. Auto Ins. Co. v. Stein*,[37] distinguished *Youmans* and *Cohen* because those cases involved "unlimited arbitration clauses." The implication was that a broadly written arbitration agreement clause would allow the arbitrators to determine arbitrability.

In *Eychner v. Van Vleet*,[38] the Colorado Court of Appeals held that "[i]n resolving a motion to compel arbitration, a court must inquire whether there exists a valid agreement to arbitrate between the parties to the action . . . and whether the issues being disputed are within the scope of that agreement."[39]

Not long after the U.S. Supreme Court decided *First Options*, the Colorado Supreme Court decided *City & County of Denver v. District Court*.[40] *City & County of Denver* involved a dispute between Denver and a general contractor hired to construct the terminal building at the new airport. The general contractor subcontracted with another company for installation of flooring. Disputes arose over the work performed and, soon after, the general contractor brought suit against Denver, claiming, inter alia, breach of contract. The subcontractor also filed a claim against Denver. Denver moved to dismiss, arguing that any disputes were required

to be submitted to alternative dispute resolution (ADR) procedures set forth in the contract.[41] The district court denied Denver's motion on the grounds that the subcontractor's claims were not governed by the contract and fell outside the scope of the ADR clause, did not trigger the administrative process, or were inextricably intertwined with claims not subject to the administrative process.[42] Denver sought a writ of prohibition and the Colorado Supreme Court ordered all claims to be heard under the ADR procedures. The Court's opinion provides guidelines, consistent with the U.S. Supreme Court's opinions in *AT&T Technologies* and *First Options*, for addressing ADR provisions.

The first inquiry for the district court is whether the agreement contains a valid and binding ADR clause.[43] If a valid ADR clause is found, the court must then decide who determines whether a particular dispute falls within its scope. Relying on *First Options*, the Court stated that "[i]f the agreement is silent or ambiguous on this question, then the determination should be made by the court, not the ADR decision-maker; otherwise, 'unwilling parties [might be forced] to arbitrate a matter they reasonably thought a judge, not an arbitrator would decide.'"[44] Interestingly, Justice Bender, writing for the Colorado Supreme Court, did not reiterate the *First Options* "clear and unmistakable" standard for evidence of the parties' intent to have arbitrators decide arbitrability of an issue.

The Court stated that factual allegations, rather than the legal cause of action asserted, should determine whether a dispute is covered by the ADR agreement. Thus, "[c]reative legal theories asserted in complaints should not be permitted to undermine the presumption favoring alternative means to resolve disputes."[45]

A valid, enforceable arbitration agreement divests a court of jurisdiction over all issues within the scope of the agreement. Thus, although not specifically addressed by the Colorado Supreme Court in *City & County of Denver*, it is clear that once the court establishes that the arbitrators have jurisdiction of the subject matter, leaving procedural issues such as timeliness or other conditions precedent to filing an arbitration to the arbitrators to decide raises no cause for concern that arbitration is being imposed on a non-consenting party. An example is found in *Rains v. Found. Health Sys. Life & Health*,[46] where the Court of Appeals rejected an argument that the court, rather than arbitrators, should decide whether an insuror should have to pay certain medical expenses because it failed to meet statutory preconditions for coordinating benefits with another carrier. It cited *City & County of Denver* for the proposition that the "court must compel alternative dispute resolution (ADR) unless it can say with positive assurance that [the] ADR clause is not susceptible of any interpretation that encompasses [the] subject matter of [the] dispute."[47]

Miscellaneous Grounds for Avoiding Arbitration

Cecil E. Morris wrote an informative article entitled "A Breach in the Wall of Mandatory Arbitration,"[48] in which he discussed cases in which courts had refused to compel arbitration. Among the grounds relied upon by courts to excuse parties from arbitration even where valid arbitration agreements exist and the subject matter falls within the scope of the agreements are: (1) certain statutory claims are exempt from arbitration, (2) costs of arbitration imposed by the arbitration agreement deny some claimants meaningful redress, (3) an arbitration agreement may improperly limit remedies otherwise available, and (4) an arbitration agreement may be unconscionable and/or an unenforceable contract of adhesion. While Colorado courts have recognized those issues, it appears that only in extreme cases will parties be relieved of an obligation to arbitrate if a court finds a valid arbitration agreement and claims within its scope.

In *Rains*, the Court of Appeals discussed the potentially chilling effect on consumer claims where the agreement provided that the claimant would be responsible for an equal share of the arbitration cost. Citing the U.S. Supreme Court decision in *Green Tree Fin. Corp.-Alabama v. Randolph*,[49] the Court of Appeals did not find sufficient evidence in the record to establish that the costs of arbitration would prevent the claimant from pursuing her claims. The plaintiff in Rains attempted to bring her claims in court as a class action, which of course would have made pursuit of smaller claims more viable. The Court of Appeals held that "arbitration clauses are not unenforceable simply because they might render a class action unavailable."[50]

The *Rains* opinion also rejected arguments that the arbitration clause was unconscionable because (1) it did not assure adequate document discovery, (2) it gave the defendant the initial right to select the slate of arbitrators from which the claimant was allowed to choose one, and (3) the arbitration obligation was not mutual. With respect to the choice of arbitrators, the agreement provided that the health insurance company would give the insured a list of three potential arbitrators from which to choose, obviously giving itself the opportunity to stack the deck. The Court was unmoved, pointing out that the arbitration provision required that the arbitrator be "neutral."

In *Lambdin v. District Court*,[51] the Colorado Supreme Court, in an original proceeding under C.A.R. 21, reversed the trial court's order compelling arbitration of a former Sun Microsystems employee's claims for compensation. The Sun compensation plan required arbitration of claims in California, applying California law. Despite the facts that the compensation plan had been given to *Lambdin* after he began work and had never been signed by him, the trial court apparently found a valid and binding arbitration agreement. In his petition for a writ of prohibition, *Lambdin* did not pursue arguments that the agreement was a contract of adhesion or no agreement at all. Instead, he based his petition on arguments involv-

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ing the Colorado Wage Claim Act, which the district court held precluded arbitration because it provided for civil actions in court for wages and penalties and contained a non-waiver clause.

In a case decided July 5, 2002, *Gergel v. High View Homes, LLC*,[52] the Court of Appeals dismissed for lack of jurisdiction an appeal of an order compelling arbitration. C.R.S. § 13-22-221 allows interlocutory appeals only of orders denying a motion to compel arbitration or granting a motion to stay arbitration. In this case, the appellant sought to void the arbitration agreement as unconscionable because of unreasonable and excessive fees. The Court indicated that the only remedy would be an appeal after an arbitration award of default for a failure to advance fees.

In another relatively recent case, however, the Court of Appeals did impose some limits on the obligation to arbitrate. In *In Re Marriage of Popack*,[53] while generally holding enforceable an agreement to arbitrate dissolution of marriage issues in front of a rabbinical counsel, the Court instructed the trial court to determine whether or not the agreement was conscionable and entered into voluntarily after full disclosure. It also held that, while issues of child custody and support and visitation are arbitrable, the trial court retains jurisdiction to decide de novo all issues relating to children. The *Popack* opinion relies heavily on standards set out in the Uniform Dissolution of Marriage Act, rather than principles of contract law.

An area currently ripe for judicial consideration is the inclusion of arbitration clauses precluding participation in class action lawsuits by consumers. In *Szetela v. Discover Bank*,[54] a Discover credit card customer attempted to bring a class action relating to late charges and over-limit fees. He was compelled by the court to take his $29 claim to arbitration, where he won. He then returned to court, challenging the arbitration agreement as unconscionable and unenforceable and appealed the original order which compelled the arbitration. The California Court of Appeals found both procedural and substantive unconscionability. The agreement was procedurally unconscionable because the consumer had no opportunity for meaningful negotiation and had to "take it or leave it." It was substantially unconscionable because it was "clearly meant to prevent customers . . . from seeking redress for relatively small amounts of money . . ." and was fundamentally unfair and contrary to public policy.[55] In a similar action, *Ting v. AT&T*,[56] a California federal court disapproved AT&T's mandatory arbitration clause requiring its long distance customers to waive class action participation. The California decisions run contrary to the rejection of the class action argument in *Rains*, but involve different circumstances.

Conclusion

In both federal and Colorado cases, there is no question that the courts will decide initially whether or not an enforceable arbitration agreement exists. Courts will also decide whether the claims being asserted fall within the scope of the arbitration agreement, unless the parties "clearly and unmistakably" intended that the arbitrators decide arbitrability. Under *City & County of Denver*, courts will determine arbitrability if the agreement between the parties is "silent or ambiguous" regarding who decides. It remains to be seen if Colorado courts will find broad arbitration clauses encompassing "any" or "all" disputes or "all other matters," including interpretation of the agreement itself, show intent to have arbitrators decide arbitrability.

Because arbitration is based on agreement by the parties, it is only fair and reasonable that the courts be available to decide whether or not an enforceable arbitration agreement exists in the first place. It also makes sense for courts to decide whether the parties intended specific claims to be covered by their arbitration agreement, rather than to let arbitrators decide the extent of their own authority, unless the parties have agreed otherwise. Unfortunately, resort to the courts over these issues frequently will undermine the intended arbitration benefits of speedy and inexpensive resolution of disputes.[57]

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ENDNOTES

1 C. Edward Fletcher, *Arbitrating Securities Disputes*, 12 (PLI, 1990).

2 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 n.4 (1974).

3 H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).

4 *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 n.6 (1985).

5 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

6 9 U.S.C. § 2 (1994).

7 Dennis O'Leary, *PaineWebber v. Elahi: The First Circuit Provides a Return for Investors and Allows Them Their Day in Arbitration,* 32 NEW ENG. L. REV. 553, 560 (Winter 1998).

8 *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

9 *Id.* at 24-25.

10 C.R.S. §§ 13-22-201, *et. seq.*

11 *Wales v. State Farm Mut. Auto Ins. Co.*, 559 P.2d 255, 257 (Colo. App. 1976).

12 *Hughley v. Rocky Mtn. HMO*, 927 P.2d 1325, 1330 (Colo. 1996) and cases cited therein.

[13] C.R.S. § 13-22-203.

[14] *National Camera v. Love,* 644 P.2d 94, 95 (Colo. App. 1982).

[15] *Christensen v. Flaregas Corp.*, 710 P.2d 6, 8 (Colo. App. 1985).

[16] *AT&T Technologies, Inc. v. Communications Workers of* America, 475 U.S. 643 (1986).

[17] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[18] *Warrior & Gulf,* 363 U.S. at 582; *American Mfg. Co.,* 363 U.S. at 570-571.

[19] *AT&T Technologies*, 475 U.S. at 649, *citing Warrior & Gulf*, 363 U.S. at 582-583.

[20] *American Mfg. Co.,* 363 U.S. at 568.

[21] Such a presumption is particularly applicable where the clause is as broad as the one utilized in *AT&T Technologies*, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . .' In such cases, l[in] the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" *AT&T Technologies,* 475 U.S. at 650, *citing Warrior & Gulf*, 363 U.S. at 584-585.

[22] *AT&T Technologies*, 475 U.S. at 651.

[23] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

[24] *Id.* at 943.

[25] *Id.* at 944-945.

[26] *Id.* at 945 (emphasis in the original).

[27] *John Wiley & Sons v. Livingston,* 376 U.S. 543, 555-559 (1964).

[28] *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474 (10th Cir. 1996); *Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956 (10th Cir. 2001), *cert. granted*, 152 L. Ed. 2d 115, 122 S. Ct. 1171, 70 U.S.L.W. 3533 (U.S. Feb. 25, 2002) (No. 01-800).

[29] *Bell v. Cendant Corporation*, 2002 U.S. App. LEXIS 11100 (2d Cir. 2002).

[30] *Id.* at *15, *citing City of Bridgeport v. Bridgeport Police Local 1159*, 438 A.2d 1171, 1173 (Conn. 1981).

[31] *Youmans v. District Court*, 589 P.2d 487 (Colo. 1979).

[32] *Id.* at 489.

[33] *Youmans in Cohen v. Quiat*, 749 P.2d 453 (Colo. App. 1987).

[34] *Id.* at 455; C.R.S. § 13-22-214(1)(a)(III).

[35] *Lawrence Street Partners, Ltd. v. Lawrence Street Venturers*, 786 P.2d 508 (Colo. App. 1989).

[36] *Id.* at 510.

[37] *State Farm Mut. Auto Ins. Co. v. Stein*, 886 P.2d 326, 329 (Colo. App. 1994).

[38] *Eychner v. Van Vleet*, 870 P.2d 486 (Colo. App. 1993).

[39] *Id.* at 489.

[40] *City & County of Denver v. District Court*, 939 P.2d 1353 (Colo. 1997).

[41] The ADR clause required submission of claims to an administrative hearing under certain Denver Municipal Code procedures.

[42] *City & County of Denver*, 939 P.2d at 1360.

[43] *Id.* at 1363.

[44] *Id.*, *citing First Options*, 514 U.S. at 945.

[45] *Id.* at 1364. *See also Austin v. U S West, Inc.*, 926 P.2d 181 (Colo. App. 1996) (factual allegations rather than "legal label" will govern result).

[46] *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249 (Colo. App. 2001).

[47] *Id.* at 1251.

[48] Cecil E. Morris, Jr., *A Breach in the Wall of Mandatory Arbitration*, TRIAL TALK, April/May, 2000, at 6.

[49] *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

[50] *Rains*, 23 P.3d at 1253.

[51] *Lambdin v. District Court*, 903 P.2d 1126 (Colo. 1995).

[52] *Gergel v. High View Homes, LLC*, Case No. 01-CA-1321 (Colo. App. July 5, 2002).

[53] *In Re Marriage of Popack*, 998 P.2d 464 (Colo. App. 2000).

[54] *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Cal. App. 4th Dist. 2002).

55 *Id.* at 867-868.

[56] *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002).

[57] Whether arbitration is actually faster or less expensive than litigation is a question beyond the scope of this article.

Basic Trial Tips – Voire Dire

By Lorraine Parker, Esq.

[*Editor's Note: In a recent Women's Caucus meeting, Lorraine Parker and Natalie Brown discussed tips and lessons learned – both good and bad – during trial. Here, Lorraine summarizes a snippet of that Caucus discussion relating to voir dire.*]

Purpose of Voir Dire

The point of voir dire is to find out how the jurors feel about issues that are important to the case, so it's best to ask them open-ended questions – get them talking! Find out if a juror harbors a bias against the client or if they cannot give the client a fair trial. If they don't talk, they will never reveal their biases. The Colorado rules require state trial courts to allow voir dire, but courts can limit its scope and extent.[1] It's important to remember that although jury reform has prevented jurors' addresses or places of business to be disclosed in open court, the parties and counsel must be permitted access to this information.[2]

During voir dire, ask jurors directly how they feel about the important issues in your case. For example, ask how they feel about lawsuits, whether they feel persons in the defendant's occupation or activity at the time of the incident should be held responsible for lack of reasonable care, or whether they believe someone should be compensated for pain. Listen to their answers and follow up. Do not be afraid of a negative response; thank the uncharitable juror for telling you how he or she feels, and use it as an opportunity to see if anyone else on the panel agrees with the juror. **This is probably the best way to get rid of jurors for cause**. Follow through on their responses until they admit that they cannot be fair, or are unsure whether they can be fair (see case cited below). Do not lecture them – they will stop listening. Do not try to change a juror's mind. A juror's opinions will not be changed through the voir dire process, nor can a lawyer bring them around to his or her point of view by asking leading questions.

Grounds for Challenges for Cause

C.R.C.P. 47(e) contains the grounds for challenges for cause. The critical ones are:

- Rule 47(e)(3), standing in the relation of master and servant, employer and clerk, or principal and agent;
- Rule 47(e)(6), having formed or expressed an unqualified opinion or belief as to the merits of the action; and
- Rule 47(e)(7), the existence of a state of mind in the juror evincing enmity against or bias to either party.

If there is a sufficient reason to question whether the juror could act as an impartial fact finder, the trial court should grant a challenge for cause and dismiss the juror.[3]

Research challenges for cause that could arise in the case and have them ready for the judge in case a juror expresses similar misgivings. For example, the Colorado Appeals Court has held:

> [T]he trial court properly excused three prospective jurors who exhibited a predisposition toward one side of the lawsuit. Mr. B stated that he was prejudiced against people who bring lawsuits and that he was reluctant to award damages unless a plaintiff was completely incapacitated. Mr. F stated that he had a natural bias toward defendants in auto accident cases and that he was unsure whether he could be fair or impartial. Mr. H stated that he had strong feelings against the plaintiffs and that he could not disregard those feelings in a trial.
>
> These statements created sufficient doubt whether these prospective jurors could act as impartial fact finders. Therefore, we conclude the trial court did not abuse its discretion in

dismissing the potential jurors without allowing defendant to question them.[4]

The court may prohibit questioning jurors about their feelings as to the "liability crisis" or "lawsuit crisis," so long as the judge permits questioning the jury's attitudes concerning damage awards generally.[5]

In each of the following cases the courts found that the challenge for cause should have been granted:

- Juror expressed hostility toward the defendant and gave an equivocal answer regarding whether he could be fair ("I guess").[6]
- Juror responded "I think I can" in response the question regarding whether he could be fair, after having already expressed reservations about whether he could be impartial.[7]
- Juror would find it difficult to follow the law – where it is doubtful that the juror will follow the law, the juror should be excused for cause.[8]
- Juror's final position was that there was a serious doubt in her own mind about her ability to be fair and impartial.[9]
- Juror knew a significant witness for the prosecution and would therefore give her greater credibility.[10]
- A combination of factors: the juror's close association with not only the law enforcement establishment, but also with the crime scene and with the co-employee who had attended to the murder victim.[11]
- Juror whose daughter had possible earlier contact with defendant.[12]
- Juror is under any influence of fear, favor, or affection, or has in any way and on any cause made up an opinion as to the merits of the cause.[13]

When a prospective juror is challenged on the basis of a statement that on its face depicts enmity or bias toward either party, the challenge should be sustained unless the subsequent examination of the juror clearly demonstrates that the juror's original statement was the result of mistake, confusion, or some other factor that will have no effect whatever on the juror's ability to render a fair and impartial verdict. If the trial court has genuine doubt about the juror's ability to be impartial under such circumstances, it should resolve the doubt by sustaining the challenge.[14]

On the other side, a juror who initially stated that he or she was unsure whether he or she could be fair, but later was rehabilitated to state that he or she could stand back from his or her emotions and be analytical and that he or she would make every effort to be fair and impartial, did not need to be dismissed for cause.[15]

Peremptory Challenges to Race, Gender or Religion

Consider whether the defendant is likely to strike jurors of a cognizable racial or ethnic group, or gender. Recent cases have removed the ability to make a peremptory challenge based on race,[16] gender,[17] or religion.[18]

A prima facie showing of purposeful discrimination requires demonstrating that the jury selection process provided an opportunity for discrimination and that members of a cognizable racial group were substantially underrepresented on the jury.[19] A group is cognizable if it is defined by race, national origin, religion, or gender.[20]

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ENDNOTES

1 C.R.C.P. 47(a)(3); *People v. O'Neill*, 803 P.2d 164, 169 (Colo. 1990).

2 C.R.C.P. 47(a)(4).

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[3] *Blades v. DaFoe*, 704 P.2d 317, 324 (Colo. 1985).

[4] *Pyles-Knutzen v. Board of County Com'rs of County of Pitkin*, 781 P.2d 164, 166 (Colo. App. 1989).

[5] *Russo v. Birrenkott*, 770 P.2d 1335, 1338 (Colo. App. 1989); *Garcia v. Estate of Wilkinson*, 800 P.2d 1380, 1382 (Colo. App. 1990).

[6] *People v. Sandoval*, 706 P.2d 802, 804 (Colo. App. 1985).

[7] *People v. Brown*, 44 Colo. App. 397, 399, 622 P.2d 573, 575 (1981).

[8] *Morgan v. People*, 624 P.2d 1331, 1332 (Colo. 1981).

[9] *Nailor v. People*, 200 Colo. 30, 31, 612 P.2d 79, 80 (1980).

[10] *People v. Zurenko*, 833 P.2d 794, 796 (Colo.App. 1992), *cert. den.*

[11] *People v. Rogers*, 690 P.2d 886, 888 (Colo.App. 1984), *cert. den.*

[12] *Beeman v. People*, 193 Colo. 337, 340, 565 P.2d 1340, 1342 (1977) ("the most sincere assurances and good faith belief by the juror in her capacity to act impartially cannot compensate for factors which inherently produce prejudice").

[13] *Fitzgerald v. People*, 1 Colo. 56, 58 (1867).

[14] *People v. Russo*, 713 P.2d 356, 362 (Colo. 1986).

[15] *People v. Abeyta*, 728 P.2d 327 (Colo. App. 1986).

[16] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986); *see also Middleton v. Beckett*, 960 P.2d 1213, 1215 (Colo. App. 1998).

[17] *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419 (1994).

[18] C.R.S. § 13-71-104(3)(a); *see also People v. Harlan*, 8 P.3d 448, 501 (Colo. 2000).

[19] *People v. Cerrone*, supra; *see also Valdez v. People*, 966 P.2d 587,589 (Colo. 1998).

[20] *Fields v. People*, 732 P.2d 1145 (Colo.1987).

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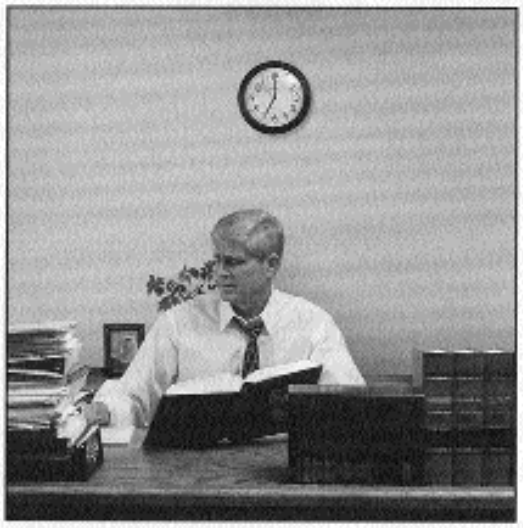

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Honesty in Persuasion

By Bill Trine. Esq.

[Editor's note: Readers should be aware that psychodrama is a skill that not all attorneys share. While these techniques may be valuable, the author has arrived at his conclusions with years of experience and the use of experts in the field].

Honesty is the foundation of persuasion in the courtroom. Without honesty, there is no credibility or trust and a bonding relationship between you, your client and the jury cannot be achieved. "So what?" you might say, "I have always been honest and truthful in the courtroom and have never permitted my witnesses or client to give false testimony." But have you always discovered and presented at trial the real story of what actually occurred and not just the recital of events provided by your client and witnesses? Have you shed your courtroom personality and let the jury see the humanity of who you really are? Have you honestly shared your own fears and the weaknesses of your case with the jury? If not, you have not been as persuasive as you could be in assisting the jury in its search for the truth, a truth that could win your case.

Discovering the Client's Story

The client's story of what occurred is usually only elicited through interviews where the client is asked to describe the important events in the past tense. However, discovering a full accurate story from the interviewing process alone is fraught with difficulties:

- A client's story of the past event is often a mixture of memory of the event, what the client has been told by others about the event, the client's custom or practice and habits, which are associated with the event, and the client's reasoning or rationale on what must have happened at the time. In short, when a client intellectualizes an event by telling a story from memory, he fills in the gaps in memory, often inaccurately, in order to make the story complete.
- If the story of an event produces some memories, which are painful, shameful or embarrassing, that information will often not be disclosed by the client. Information too painful to disclose may not be mentioned in telling the story and a client or witness can have a "selected memory" when the story is told in the past tense, because this is primarily an intellectual exercise. Often, the client does not realize that he or she is suppressing portions of the event, which are too painful to dredge up.

Lawyers have developed techniques to help overcome the problems in attempting to elicit a true and accurate story about a past event:

- Typically, a lawyer will assist the client in attempting to reconstruct an event by providing the client with photographs or documents to refresh memory, by producing the statements of other witnesses or documents, which are inconsistent with the client's memory, by asking the client to paint a mental image of the event and describe it, and other techniques that we are all familiar with.
- A lawyer will typically listen for inconsistencies in the client's story and will assist the client in attempting to separate and identify that portion of the story that is based on post-event reconstruction, custom and habit, and what the client later learned from others. This is a difficult task because the client is intellectualizing in the past tense. *Memory is best triggered by neuromuscular function, which is stimulated by acting out, more than being stimulated by the intellectual function of thinking about the event in the past tense.*

Therefore, a client or witness's recollection of an event is the starting point, rather than the sole criterion for the truth. A client's recollection will almost always be incomplete, inaccurate, and misleading to some extent. Discovering

the underlying truth for later presentation to a jury may require that the client reenact and relive a past event with your assistance as a director.[1]

By reenacting and reliving a past event, which requires a mental, physical, and emotional reconstruction of the event, the event becomes more accurate and real than eliciting information through interviews. In simply telling a story about a past event through the interview process, some people are better than others in painting a mental image of the event as the story unfolds and therefore begin experiencing some of the emotion of that event. Other people find it difficult to go back in time and relive the event simply by talking about it. Using psychodramatic techniques to act out the event is an excellent tool to determine the "truth" of what actually occurred. A reenactment also recreates the emotions experienced by the client during the event.[2]

Once a client or witness has relived the "truth" of the event, which can be videotaped to later refresh memory, the client is better prepared to accurately describe the event in the courtroom or perhaps reenact the event for the jury. This also enables the lawyer to be a better "director" during the direct examination.

You can assist your client in reenacting the events by first setting the scene where the events occurred. You can set the scene by asking the client questions such as: Where is this event taking place? Where are you located in reference to other objects or people involved in this event? The client should then be guided to sit or stand in a spot resembling his or her location with reference to other objects that are identified and strategically placed about the room to symbolize the objects that have relevance to the event to be reenacted. To set the scene, you may want to ask the client questions such as: Where are you? What do you see? What are you wearing? What do you hear? What are you doing? What are others doing? What time of the day is it? What are the lighting conditions? What do you smell? What are the weather conditions?

Setting the scene forces your client to paint a mental image of the event and in doing so, he will begin to recall details that may have long been forgotten.

The client should then be directed to reenact the story in the present tense, e.g., I see the automobile turning the corner; I hear the whistle blowing in the distance; I am looking out of the window; etc. The event can then be put into action as the client relives the story at the moment, speaking in the present and not the past. He or she must act in the "here-and-now" regardless of when the actual incident occurred.

As a director, you can help your client step back in time and vividly relive the event by using all of the senses, e.g., sight, smell, touch, and sound. What do you see? What do you smell? What do you hear?

During the reenactment, you can also bring back the emotions of the event, e.g., show me how you feel? Why do you feel sad? Why do you feel ashamed? Why are you feeling anxiety?

Discovering the client's story is the first step in then presenting that story, honestly and accurately, to the jury.

The Lawyer's Role – Who Are You?

To be persuasive in the courtroom, you must know who you are and then just be yourself – not the imaginary person that you believe will do a better job of persuading the jury. Bill Trine is not Gerry Spence or Peter Perlman, and is obviously not Roxanne Conlin or Milt Grimes. Any attempt to become an actor or actress and be someone that you are not is dishonest, unreal and will be apparent to the jury.

Unfortunately, many of us develop a courtroom personality, which is a façade and hides the person that we really are. To achieve honesty in persuasion, we have to first shed our courtroom personality and become the real person that we hide from the jury.

Why do we develop a courtroom personality? Is it out of fear that the jury will not respect or like me if I display who I really am? Is it because I want to trick the jury or hide something from them and to do that, I must pretend to be someone that I am not? Or is it simply because I cannot answer the question of "Who am I?" "I have tried so hard to be what I am not, that I don't know who I am. I have multiple personalities: one for my wife, another for my partners or employees, another for my grandchildren, and yet another in the courtroom. Who am I?"

Becoming yourself and a "real person" in the courtroom often requires going through an archaeological dig into yourself to discover how the events in your life have impacted and shaped you.[3] This process helps you to discover how much of life's baggage you have not dealt with, baggage which hides your humanity, your kindness, and your ability to love, so that you appear to be a non-entity to the jury – a robot going through the motions, just doing your job.

It takes courage to just be yourself, with all your frailties and weaknesses, in front of the jury. "My God, the jury will see that I am not perfect. They will see that I am human and can make mistakes, or get frustrated, or angry, or cry, or have weaknesses and feelings, just like them. They will see that I am passionate about my client and my case and that I am doing the best that I can." Is that bad, or do the jurors then see you as one of them and assist you in the honest search for the truth?

Motions *in Limine* vs. Honesty

Don't "*in limine*" yourself from telling the jury a persuasive story, which humanizes your client. For example, do not file a motion *in limine* to preclude evidence of a problem that the jury will recognize without the evidence being introduced. This then prevents you from explaining the problem or minimizing its impact because you have precluded the introduction of such evidence.

For example, the jury may strongly suspect that your client is an alcoholic, so why file a motion *in limine* to prevent such testimony. Far better to let

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the client describe the beatings he received as a child from an alcoholic father and his other life misfortunes, which help explain his alcoholism, and let him describe his successful attempts to seek a cure for his problem.

In a case tried in Boulder, Colorado, in the early 1970's, a dirty, barefoot, drunken "hippie" began vomiting blood during a hippie party in the city park. The police responded to a 911 call to take him to the hospital. He resisted and had to be handcuffed because he was kicking, swearing and spitting at the officers. While handcuffed in the back seat of the police car on the way to the hospital, he was kicking at the partition with his dirty bare feet and screaming. The officers pulled over and two of them lost their tempers and assaulted the hippie. Hippies congregating in the local city park were a blemish and a disgrace that the local citizenry would like to see removed.

On voir dire, plaintiff's counsel told the jury that story, explaining that when he first heard the story, he thought his client probably received the beating that he deserved and asked how many of them felt the same way. In short, he gave the defendant's opening statement, which was an honest description of the facts. Many jurors were excused for cause before a jury was impaneled.

In opening statement, plaintiff's counsel then told his client's life story, a story of a child running away from home at age twelve following his mother's death and continual beatings by an alcoholic father; a story of witnessing his best friend killed in Viet Nam and then becoming a drug addict; a story of police brutality in a prison where he served time for drug use; a story of his attempted suicide resulting in damage to his intestines which would bleed when he consumed alcohol. The jury was then told of the brutality of the beating by the police, which fractured his skull and caused brain damage. Jurors were seen crying during the opening statement.

The case was won because the lawyer and his client honestly revealed all of the facts and circumstances, which both humanized the client and established the brutality of the police.

Honesty during Voir Dire Examination of Jury

Honestly discuss with the jurors the most serious problems and weaknesses in your case and the greatest fear or concern that you have about your case. Permit the jurors to interact and discuss these problems and concerns among themselves and with you. How else will you determine whether jurors have strong attitudes or biases that will favor the defendant?

In a proper case, as illustrated in the hippie-police brutality case, consider giving the jury the defendant's opening statement or parts of the defendant's opening statement as an introduction to questions. By honestly revealing the problems and weaknesses in your case, you enhance your credibility with the jury and can weed out the jurors whose prejudice or bias cannot be overcome by the plaintiff's story and case presentation.

Consider revealing something of yourself of a personal nature to the jurors as an introduction to open-ended questions in voir dire. For example, the elderly owner of a small ranch in Colorado brought suit against her neighbor claiming that he trespassed on her property by permitting a fly-by-night timber cutting company to trespass on her land and to cut many old forest trees. The plaintiff's counsel told the jury: "As a young boy playing baseball in the school yard, I hit a home run that bounced in the street and went right through a neighbor's window. Everyone scattered and ran away, including me. I did the wrong thing and never accepted responsibility. Have any of you ever been in a position of accepting or rejecting responsibility for a wrongful act?" One juror explained that as a paperboy on a bicycle, he once threw a paper through a window, but had to accept responsibility because they knew who the paperboy was. Another explained that she was in charge of radiology film storage at a local hospital and if films were missing, she accepted responsibility even though someone else may have been at fault. Another explained that he had been an officer in the Marines and was responsible for everything that those under his command did and "the buck stops here." Nearly every juror had stories to tell, simply because the lawyer was willing to first reveal his own embarrassing story.

Honestly revealing something of yourself followed by revelations from the jurors can result in a bond being formed between the jurors as a group and you and your client. For example, you are representing a fat female client in a job discrimination case who was fired because of her obesity. You are thinking that a jury will not like your client because she is fat, and they will think she is lazy, a person who has no self control. This was your first impression when you met her, but as you became friends, you recognized that she was a truly beautiful person. You mentally reverse roles with her in the courtroom to feel what it is like to be her and see what she is observing from her seat in the courtroom. "Everyone is staring at me, wondering why I am so fat, looking away from me with embarrassment or looking at me with disgust. Even my attorney, whom I trust, is looking at me. I am worried that he won't be able to get the jury to look beyond my weight and see the real person I am."

By doing that mental role reversal, you can feel as your client feels, that she is an outsider, that she feels she is all alone. This permits you to draw upon an experience in your own life when you felt like an outsider and share that experience with the jury. For example, "I remember when my mother dressed me in coveralls when I started school in the first grade. None of the other boys wore coveralls, and it wasn't long before they were making fun of me during recess. I didn't want to wear coveralls after that, but my mother made me. It was very humiliating and embarrassing." Then ask the jurors if any of them had ever had an experience where they felt that they were on the outside. As some of the jurors begin describing their own life experiences of being left out of groups, cliques or sporting events and feeling like an outsider, a bonding will

often occur between one or more of the jurors, your client and you. Even those jurors who do not share their own life experiences often think of those experiences without verbalizing them and also share in the bonding which takes place.

Magic can happen in the courtroom when you overcome the fear of just being yourself, when you honestly reveal to the jury who you are, and when you discover the true story of the events that brought the client to your office and honestly reveal the client's story to the jury. There can be no better persuasion than simple truth.

Bill Trine is a partner of Trine and Metcalf, PC, Boulder. He is a past president of CTLA and was the first recipient of CTLA's Kenneth Norman Kripke Trial Lawyer of the Year Award.

ENDNOTES

[1] These techniques are taught at the Trial Lawyers College. For information about the College, contact Joane Garcia-Colson, 1387 Verbena, Palm Springs, CA 92262, telephone 760-318-0393.

[2] There are a number of professional psychodramatists with extensive experience who have worked with lawyers and lawyer groups. Five of the best are: John Nolte, Kaitlin Larimer, Don Clarkson, and Kathy St. Clair, who are all associated with the National Psychodrama Training Center, 97 Cumberland Street, Hartfort, CT 06106, telephone 860-953-3961, and Jim Leach, 1617 Sheridan Lake Road, Rapid City, SD, telephone 605-348-5047, a lawyer who is also a certified psychodramatist

[3] Students at the Trial Lawyers College spend several days doing an archaeological dig into their life's events to commence the process of discovering themselves and answering the question, "Who am I?" Making this discovery can be a life-altering experience and can have a profound effect on the ability to bond with clients and the jury. See endnote 1.

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Takedowns: Legendary Successes in Computer Forensics

By Sharon D. Nelson, Esq. and John W. Simek

Take*down (ták/doun/) *adj. Sports*. A move or maneuver in wrestling or the martial arts in which a standing opponent is forced to the floor.

– American Heritage Dictionary
of the English Language
Third Edition

"Takedown" has had a new meaning since the publication of the book by the same name in 1996. The story of infamous hacker Kevin Mitnick, told by the hacker/hunter who finally found him (Tsutomu Shimomura) was a "takedown" heard around the globe. Forever after, "takedown" has developed another meaning – it's a "gotcha" for computer forensic technologists when they find the pivotal electronic evidence that will bring a hacker or other criminal down.

It is difficult to explain the adrenaline rush that comes with a computer forensics case. It is Holmesian in nature: As computer technologists, when we get the call that a hard drive and media are on their way to our office, from a court or from a litigating party, our first anticipatory sensation is that "the game's afoot." Very much like Mr. Holmes, we are always on a timetable and often find ourselves proceeding down dead ends and tracing evidence that has grown cold and a trail that ultimately becomes untraceable. Sometimes what we are asked to find is "elementary, dear Watson." At other times, when we "have excluded the impossible, whatever remains, however improbable, must be the truth." Neither of us plays the violin and there is no 7% solution for inspiration, though there is a bottle of 15-year-old single malt scotch to which we have been known to resort.

Nothing equates to the delight we feel when we find the "smoking gun," whether it is deleted and damning evidence or a carefully hidden industrial espionage program transmitting the computer's secrets to someone else over the Internet. At such moments, we have been known to emulate a unconventional form of the Irish jig, break into a woefully off-key but triumphant rendition of "We Are the Champions" or simply look at one another and solemnly pronounce one reverent and victorious word: "Takedown!"

Computer forensics has become quietly pervasive in the world of law enforcement. Though it is not always front and center in media reports, many of the most notorious cases of our times have hinged on electronic evidence. Here are some of the most highly publicized cases in forensic folklore.

Oliver North – Never the sharpest tool in the shed, Colonel Oliver North set out to conceal his involvement in the Iran Contra affair, doggedly shredding all pertinent papers and deleting all relevant e-mail. Unbeknownst to North, all his diligence was in vain because the government was using IBM's Professional Office System (PROFS) and the mainframe support personnel were backing up his e-mail. All the incriminating e-mails were recovered. **Gotcha Ollie**.

Though Colonel North was convicted of accepting an illegal gratuity, aiding and abetting in the obstruction of a congressional inquiry, and destruction of documents in 1989, the conviction was overturned on appeal because immunized testimony had been used in his trial.

Robert Hanssen – A bizarre combination of low and high tech, the American spy and FBI counterintelligence agent Robert Hanssen favored old-fashioned mail drops to communicate information to his Russian handlers. In February 2001, he was arrested in Vienna, Virginia, while in the process of making a drop in exchange for a $50,000 payment. The arrest culminated a four-month FBI investigation in the which the agency said it used "computer forensic analysis, substantial covert surveillance, court-authorized searches and other sensitive techniques." Though

the precise nature of the surveillance remained murky, reports suggested that the FBI had received court authority to monitor Hanssen's computer usage, as well as to intercept his cell phone calls and to place a wiretap on his home and office phones.

Hanssen had some technical bona fides. According to an affidavit filed by the FBI, Hanssen used encrypted disks, flash memory cards and even a Palm Pilot to pass secrets to his Russian handlers. He could also program in C and Pascal, according to the *Washington Post*, which added that the "technologically sophisticated" Hanssen created a system to automate the teletype at the FBI's Washington offices. *USA Today* reported that Hanssen hacked into the computer of the FBI's top Russian counterintelligence officer in the early 1990s. Ironically, FBI logs showed that Hanssen surfed the FBI computers for references to his name in ongoing investigations.

In July 2001, he pleaded guilty to charges that included conspiracy to commit espionage, 19 counts of espionage, and one count of attempted espionage. Hanssen is currently serving a life sentence without possibility of parole, under a plea agreement in which he pledged full cooperation with authorities.

Wen Ho Lee – Though computer forensics was at the heart of this case, in the end what was NOT known was as fascinating as what was. It was undisputed that Los Alamos scientist Wen Ho Lee had copied certain computer tapes and that they contained information related to building nuclear weapons. Over 40 hours on 70 days in 1993, 1994 and 1997, Lee downloaded 1.4 gigabytes of data, the equivalent of about 400,000 pages, from the secure computer system at Los Alamos. Often working on nights and weekends, and circumventing security safeguards, he moved the data to his office desktop computer and to pocket-sized tapes that look like 8-mm videocassettes, a bit thicker than conventional audiocassettes. He then made copies of some of those tapes.

Lee maintained that the tapes copied were "crown junk" and not a "crown jewel." He said he made the tapes for fear of losing material, although all manner of backups and keystroke logging are available at Los Alamos.

Lee claimed he threw approximately 17 tapes in a trash bin outside the lab in January 1999, after his security clearance was revoked. Although the FBI had this information in September of 2000, it unaccountably waited several months before searching the landfill where the laboratory dumps its garbage. Ten tapes were found in the New Mexico landfill, some of them crushed, but forensics specialists were able to recover much of the data on the tapes. After the entire hullabaloo, it turned out that the ten tapes were unrelated to the case. The tapes have never been found.

Ultimately, Lee admitted he had erased classified files that he had transferred to unclassified computers and removed secret data from three tapes that were later found in his office. He never acknowledged engaging in espionage, but said that he entered into a plea agreement because there was a 5% chance that he could be convicted, and he did want to take that risk.

On September 13, 2000, the government dropped 58 of the 59 charges against Lee and he was sentenced to the nine months he had already served, and given his freedom in exchange for his cooperation with authorities. What emerged clearly in court proceedings was a bungled investigation – upon freeing Lee, U.S. District Judge Jim Parker took the unusual step of apologizing to Lee and sternly reprimanding the U.S. government for the conditions under which he was held.

Larry Ellison – Oracle employee Adelyn Lee won a $100,000 out-of-court settlement against Oracle President, Larry Ellison, after claiming that she had been fired for refusing to have sex with him. Ellison's often colorful behavior made the scenario seem plausible. An old Ellison joke: "What's the difference between Ellison and God? God doesn't think he's Larry Ellison." He was in fact known to lavish gifts on women for, well, whatever. Commentators who reported on court proceedings wryly suggested that his favorite pickup line for female subordinates might have been "Hey, can I buy you a car?" He was an easy target. There had in fact been an off-again, on-again romance between Ellison and Lee and it was undisputed that she was terminated five days after their last date.

One of the compelling pieces of evidence was a 1993 e-mail from Lee's boss, Vice President Craig Ramsey, to Ellison, confirming that Lee had been terminated at Ellison's request. Electronic records revealed that Ramsey could not have sent the e-mail because he was driving (according to cell phone records) at the time that the network recorded the e-mail transmission. As it turned out, Lee knew Ramsey's passwords and sent the e-mail herself. In 1997, she was convicted of felony perjury and the falsification of evidence.

Kevin Mitnick – Few Americans have NOT heard the name of the world's most famous hacker. "Free Kevin" t-shirts and web sites proliferated at an astonishing rate during the height of Kevin's fame. As is so often true, the real Kevin wasn't much of a hero. Mitnick had a real problem distinguishing between fairly simple concepts of right and wrong. Breaking into other people's technology for his own self-interest was something he continually justified. If he wanted free phone time or free computer time, he used his technical skills to trespass on other people's technology and stole it. His rap sheet lengthened over time.

As a teenager, he was a phone "phreaker" making free long distance calls before Pacific Bell caught him stealing computer manuals. He was placed on probation. Mitnick first came to national attention in 1982 when he hacked into the North American Aerospace Defense Command (NORAD). Remember the movie "War Games?" Kevin Mitnick was the inspiration for that movie.

During the 80's, Mitnick also took control of three central telephone offices

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in New York City and ALL the phone switching centers in California. In 1989, he was charged with computer fraud and possession of unauthorized access devices that he used to hack into MCI and Digital Equipment Corp., from whom he lifted $1 million in proprietary software. He was sentenced to and served a year's time. A series of arrests ensued over the next several years and he served two more prison stretches. In 1991, he violated probation by hacking into voice mail systems at Pacific Bell. The government got a warrant for his arrest in 1992, and Mitnick became a fugitive on the run.

Mitnick went behind bars again in February 1995 on a 25-count indictment that included charges of wire fraud and illegal possession of computer files stolen from such companies as Motorola and Sun Microsystems. His arrest followed a national hacking spree that finally earned him a spot on the FBI's most wanted list. Over the 2_ years that preceded his arrest, he hacked into computers, stole corporate secrets, scrambled phone networks, and broke into the national defense warning system. During his years on the run, when he adopted the moniker "Condor" from the Robert Redford film "Three Days of the Condor," he allegedly hacked into computers at Motorola, Nokia Mobile Phones, Fujitsu, Novell, NEC, Sun Microsystems, Colorado SuperNet and the University of Southern California. Damages were estimated to be as high as $80 million.

He was finally found, not by the government, who he successfully eluded time and again, but by computer savant Tsutomu Shimomura. Mitnick finally made a mistake that would prove fatal. He arrogantly broke into Shimomura's home computer network, taunting a man whose skills proved to be more formidable than Mitnick may have imagined. Shimomura, then a security specialist at the San Diego Supercomputer Center, had originally declined to assist authorities. But when Mitnick broke into Shimomura's system, he was infuriated by the intrusion and resolved to find him.

Mitnick had stashed some of his data in a dormant account at *The Well*, an online-forum with 11,000 subscribers, some of whom were well known Net activists. A technical manager there noted a possible hack into the company's systems. The owner of the dormant account recognized one of the e-mail addresses as belonging to Shimomura and noted that the data that had been stashed included serious software hacking tools.

Working with the FBI, Shimomura determined that the hacker was probably Mitnick and that he was making telephone calls with a cellular modem to a Netcom phone bank in Raleigh N.C. The calls were intricately looped from a GTE Corp. office to a Sprint cellular phone switch in such a way that neither company could identify the caller. Shimomura and the investigative team were able to narrow the location to somewhere near the Raleigh-Durham International Airport.

How did they do that? Part of a cellular transmission is an "electronic serial number" of the originating device. The investigation involved searching the communications logs for the ESN and phone number of the caller. The phone number was not assigned to any entry in the cellular databases. By first checking the logs for the phone-switching network and searching on the phony number, it was determined that the call was coming from the Raleigh-Durham area. After determining the switch, each cell attached to the switch was checked to determine the appropriate cellular cell that was receiving the appropriate ESN that was associated with the bogus number.

Arriving in Raleigh, Shimomura, Sprint technicians and the FBI used cellular frequency detection devices to find Mitnick. Armed with the ESN/phone number combination, the hunt was on. Monitoring hardware can track the transmission signals and determine the ESN "tag" associated with the communication session. The detection equipment senses the strength of the signal. Basically, the team drove around in the area until they had a "fix." Mitnick was found and arrested in a nondescript apartment complex, where he was arrested. At precisely the same time as the surveillance team was closing in on Mitnick, technicians at *The Well* recorded the last unauthorized intrusion into their network. **Takedown.**

Mitnick ultimately signed a plea agreement and was released from prison on January 21, 2001, after being incarcerated for five years. He is prohibited from using a computer and from acting as a consultant or advisor in computer-related matters until January 20, 2003.

What is the computer forensic process?

"They say that genius is an infinite capacity for taking pains" ... "It's a very bad definition, but it does apply to detective work."

– Sherlock Holmes,
*A Study in Scarle*t

The careful examination of electronic evidence and the precision with which a forensics technologist must operate can be tedious and exacting. The technologist may be employed to prevent a break-in or afterwards to determine its source. The technologist may be contacted directly by a corporation, or by lawyers for the corporation or a potential defendant, either during the investigative phase or during a court proceeding. Sometimes, the judge in a case appoints the technologist as a court expert. In the latter case, the technologist will receive a call, generally from one of the parties, advising the technologist of the appointment and that one of the parties has been ordered to deliver a hard drive and various media for examination. There is a flurry of paperwork, signing the court order and agreeing to abide by the court-ordered terms of the search and disclosure of results, and to hold the results otherwise in confidence. There is a generally a big hurry to return the hard drive and media. Sometimes, in order to avoid putting a business out of business, the technologist must go to the company to "acquire" the hard drives or the acquisition must be made "over the wire."

Using special technology, hardware and software for data acquisition, such as the legendary *EnCase* and *FastBloc*

from Guidance Software, the data from the target drive(s) is acquired and then searched and/or analyzed in accordance with court or client instructions. At all times, maintaining the chain of custody and the need to preserve and authenticate all evidence permeate the forensics process.

What can computer forensics actually do for my clients? Lawyers frequently ask this question, often befuddled by what computer forensics can – and cannot – achieve for their clients. The headlines in the newspapers suggest a wonderful example.

Suppose your clients are shareholders in Enron and Arthur Andersen. They are not happy campers. In fact, while they are delighted at the thought of "the suits" being taken away in handcuffs and becoming guests of federal wardens, they would like some of the executives' stash to be returned to themselves as the victims of all manner of corporate misdeeds.

It boggles the mind that they would do something as obvious and incriminating as shred paper. The obviously disregard for the law aside, what possible good did they imagine it would do? If they thought they were getting rid of the evidence that would convict them, one has to wonder where they've been in the last decade. Did they have group lobotomies at a corporate retreat?

There are too many local hard drives, server hard drives, back up tapes, laptop hard drives, home computer hard drives, PDAs, cell phones, etc. to ever get it all, even if they were inclined to flaunt the law and try. Did they delete oceans of files and e-mail? More than likely, given the shredding mentality. Can deleted files be recovered? Yes, most of the time. The likelihood of erasing data beyond recovery in ALL the places that data resides is almost nil. Worse yet, typically people who want to hide their trail frequently leave a perfectly visible trail of their botched concealment attempts. There are fingerprints in the electronic world too.

Computer forensic technicians will be poring over electronic evidence for months, perhaps years – the sheer volume of it daunting, but somewhere in that amazing morass they will undoubtedly strike veins of gold, after which $5,000 Armani suits may well be exchanged for prison greens.

Forensic technologists will be there when gold is struck. The endgame for them is ----what else? --- **"takedown."**

FOR THE TECHNOIDS

There are three main methods for data acquisition:

One is a bit-by-bit (RAW) method where a single file is created. The UNIX dd command is typically used for this type of acquisition. The drive or media is scanned in a method that creates a single RAW image file of the contents. *SafeBack* by NTI is also a popular data acquisition program, which creates a single image file and is used by the FBI and IRS. It is only available to law enforcement agencies and not to the private sector.

The second is the way that *enCase* creates the evidence files. The media is also scanned in a bit-by-bit method, but the data is placed into an *enCase* format and can be compressed to various levels to reduce the actual evidence file size. By default, *enCase* creates 640MB evidence file "chunks" so that they can be burned to a standard CD-ROM format for archiving. The actual drive/media contents are preserved and then reassembled when using the enCase software.

The third method is to acquire the drive and store the contents to a larger geometry media. This is what the Media Tools product does. It does a bit-by-bit "clone" of the original media and then "pads" the balance of the destination. The Media Tools method is not as forensically "pure" as to the other two methods; however it does have the advantage of cloning media that to a destination with a different physical geometry. As an example, you can clone a 10 GB hard disk to a 20 GB drive. Previous cloning methods required an EXACT duplicate of the drive size and geometry.In all cases, it is essential that the evidence media be protected from any potential modification. Locking the evidence as "read-only" through software or hardware is the first step in maintaining integrity in any forensics effort.

Essentially, searching is the method of scanning the media contents for a specific pattern of bits. The GREP syntax allows you to specify the grouping of characters to search and can be defined as actual ASCII or hexadecimal values. GREP originated from a UNIX text editor that provided a command sequence of *g/re/p*, which is *global/regular expression/print*. Many forensics products support GREP searching, but make sure you have your beanie and propeller on before typing, as all the options can be a bit cryptic. Some products, such as dtSearch, create an index file of the patterns first and provide a GUI mechanism for search strings. In the search process, the media is scanned for files and/or sections of the media that match the pattern desired in the search.

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Rules 16 & 26 Deadlines

Compiled by Doug Meier, Esq.

Recent amendments to C.R.C.P 16 and C.R.C.P. 26 became effective July 1, 2002. The most significant change is the new "presumptive" Case Management Order. Parties no longer need to file a CMO. Rule 16(b) subsections (1)-(10) shall constitute the CMO and control the case unless the parties modify or amend it pursuant to Rule 16 subsections (c) or (e). Most of the deadlines remain the same, though several have changed. Following is a chronological summary of the deadlines under Rules 16 and 26.

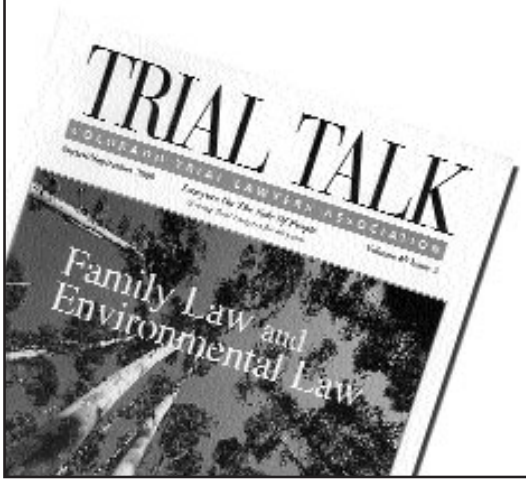
Doug Meier is a partner at Meier & Giovanini. As a former property insurance adjuster, his practice emphasizes insurance bad faith

DEADLINES UNDER RULES 16 & 26

15 days after case at issue:	Counsel to confer about nature and basis of claim/defenses; matters to be disclosed pursuant to Rule 26(a)(1); and whether a Modified CMO is necessary. *[Rule 16(b)(3)]*
30 days after case at issue:	Rule 26(a)(1) disclosures due. *[Rule 16(b)(5)]*
30 days after case at issue:	Responsible attorney to set case for trial. *[Rule 16(b)(4)]*
35 days after case at issue:	Parties to explore possibilities of prompt settlement *[Rule 16(b)6)]*
45 days after case at issue:	Certificate of Compliance to be filed by responsible attorney. *[Rule 16(b)(7)]*
45 days after case at issue:	Deadline for filing proposed (stipulated or disputed) Modified CMO if changes to presumptive CMO are sought. *[Rule 16(c)(1)&(2)]*
45 days after case at issue:	Discovery may commence. *[Rule 16(b)(10)]*
	Discovery allowed by Rule 26(b)(2):
	Depositions: 1 deposition of each adverse party and of two other persons, exclusive of experts.
	Interrogatories: 30
	Requests for Production: 20
	Requests for Admission: 20 plus 50 pertaining to genuiness of documents

DEADLINES UNDER RULES 16 & 26

120 days after case at issue:	Deadline for all motions to amend pleadings and to add additional parties. *[Rule 16(b)(8)]*
120 days before trial:	Expert disclosures due by claiming party.*[Rule 26(a)(2)(C)(I)]*
90 days before trial:	Expert disclosures due by defending party. *[30 days after claiming party's disclosures but no earlier than 90 days before trial as per Rule 26(a)(2)(C)(II)]*
******	Claiming party's rebuttal expert disclosures.*[20 days after disclosure by defending party as per Rule 26(a)(2)(C)(III)]*
75 days before trial:	Deadline for motions pursuant to Rule 56.*[Rule 16(b)(9)]*
50 days before trial:	All discovery to be completed [*Rule 16(b)(10)]*
40 days before trial:	Counsel to exchange drafts of lists of witnesses and exhibits. *[Rule 16(f)(2)(B)]*
35 days before trial:	Deadline for pretrial motions.*[Rule 16(b)(9)]*
30 days before trial:	TMO to be filed. *[Rule 16(f)]*
25 days before trial:	Designation to be provided if preserved testimony is to be used at trial. *[Rule 16(f)(3)(VI)(D)]*
10 days before trial:	Other parties to provide designation of preserved testimony. *[Rule 16(f)(3)(VI)(D)]*
10 days before trial:	Trial briefs (if any) to be filed. *[Rule 16(f)(3)(IV)]*
5 days before trial:	Proponent of preserved testimony to provide reply designations. *[Rule 16(f)(3)(VI)(D)]*
3 days before trial:	Copy of preserved testimony with designations or statement why designations not feasible to be submitted to the Court. *[Rule 16(f)(3)(VI)(D)]*
3 days before trial:	Proposed jury instructions & verdict forms filed with Courtroom clerk. *[Rule 16(g)]*



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Trial and Practice Anecdotes: Bloopers in Our Profession – Part II

By Brilliant, But Anonymous, Attorneys
Edited by Samuel Barfield, Esq. and Morgan Carroll, Esq

INTRODUCTION

What follows is Part II of the collection of anecdotes, examples and advice from members of the Colorado Trial Lawyers Association. The authors' names have been redacted. Some of the facts, names, dates and events may have been changed or modified for learning purposes. This is intended as a learning tool for lawyers to learn from one another so that we can benefit from the collective wisdom among us. This, of course, should not be taken as legal advice, but merely to make you think about some of the many pitfalls to avoid in our profession.

On behalf of the new lawyers and all other CTLA attorneys who will benefit from this information, we wish to thank all of the lawyers who kindly took the time to share their experiences and wisdom.

EXPERT WITNESSES

Seek Court Intervention with Expensive Experts *- In a medical malpractice case against the University of Colorado Medical Center, I had a defense expert who was an infectious disease sub-specialist who charged $1,000 per hour. I paid with speed-reading questions for one hour, thinking I would destroy the greedy person and at trial he would come off as pompous, but the jurors indicated during interviews that he must have been really good because he was so expensive.* ***Get the court to set an order to avoid paying too much****, rather than thinking at trial you will destroy him.* ***Morgan, I'm trying to rewrite the bold part near the end to make it clearer, but again I'm struggling.***

Will Your Expert Be in Court? - I thought we had an excellent expert in a controversial constitutional law case. He was a fairly young guy who seemed to have his act together. A week before trial he deserted us. It put us in a position where we needed to settle. I never got an explanation but I think the controversy scared him off.

Helpful Witnesses That Hurt Your Case! - In my second or third trial, I met with my client's primary care provider, who was a family doctor. He assured me that he knew the basis and had testified many times before. I took him at his word and was rushed anyway, needing to get on to the next witness to prepare. I went through what I believed was the usual Q & A routine with him. I felt confident that he was organized and knew the game plan and objectives of his testimony. At trial, he came in with his patient's chart, a file about 3-4 inches thick. I thought – that's impressive! This very nice well-intentioned man came across as a babbling idiot. He was not the "same" person that I had worked hard (or thought I did) to prepare. He spent most of his time fumbling through his disorganized, unfastened chart that probably went back to when my client was born. He ended up spilling his file in 52 card pick-up fashion and was beyond my capabilities to smooth things out. All I could think of was how do I get this guy out of here! Moral: It's better to sweat before trial than during trial! Be sure your witness is comfortable. Do not believe it when the doctor says he or she knows how to testify. You know the doctor will be referring to *relevant* notes so organize those records for the doctor if necessary.

Stay In Contact with Your Treating Doctors! - Stay in touch with your treating docs - when it comes to trial time, they can surprise you by backing down from their opinions about causation, future care or impairment. They can also become disinterested in actually appearing at trial. Make certain you know their fees and scheduling procedure. Give them a full set of medical records before any deposition or trial testimony.

Clearing Schedules with Your Expert Witnesses - Schedule experts as soon as you return to your office after the Case Management Order Conference. You know when the trial is, and you know you'll have to reserve their time for trial testimony and preparation. If your treating experts have a busy clinical practice, they will appreciate the advance knowledge of potential scheduling conflicts.

Leading the Expert - I had finished presenting my case in a two-week railroad grade crossing trial in California. The railroad's lawyer called one of its expert witnesses to the stand. The defense attorney was asking one leading question after another. I let it go during the preliminary stuff and although it was aggravating, I decided to let it go on rather than continuously object. When the defense attorney got to the substantive questions and continued to lead the witness, I got up and said confidently, "Objection, your Honor, leading." The judge overruled my objection even though it was clearly a leading question. I sat down frustrated. The defense attorney continued to ask leading questions. I objected again stating that the attorney was clearly leading his witness. The judge sternly overruled me again. I sat down fuming. My local counsel had been sitting next to me through all of this. At the next recess I asked why the judge was allowing the defense attorney to ask leading questions on direct examination of his own expert witness? My local counsel replied: "Because under the California Rules of Evidence, you are permitted to ask leading questions on direct examination of your own expert witness."

EXHIBITS

Handle with Care - I had a ceramic exhibit that was relevant to the business that was at issue. However, during the course of cross-examination, the ceramic exhibit broke into several pieces. Next time I will store something like this in a box, not a plastic bag.

Are You Helping Opposing Counsel? - The case involved the explosion of a tire while it was first being mounted onto a wheel in the tire shop, injuring the installer. The defense's expert had testified that the manufacturer "always" provides huge instructional charts to "every" tire shop, showing the right and safe way to install tires, and that the charts "clearly say" that use of a steel safety cage is mandatory. This shop had no safety cage. I stood up to cross-examine. First, I locked him in to his absolutist positions. Then I got him to admit that the front-line workers have no say in whether safety cages are used. Then he even admitted that the tire store did not have any instructional chart posted (the shop owner had already admitted there was no chart). I then pulled out of my bag of tricks a copy of

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the very same chart he had been saying was always provided and always used, and which supposedly mandated use of a safety cage. (The chart came from earlier investigation - it had not been produced in discovery or listed by either side as potential evidence in the case). After making him admit that it was the same chart, I demanded that he show me where it said anything at all about safety cages. He spent several uncomfortable minutes - in front of a very amused jury - flipping it over and upside down, looking forlornly for information that clearly was not there. He finally admitted, in a very soft voice, that the chart just didn't say what he had claimed. Did I stop? Would this be a good story if I had stopped? Without thinking, but with a dramatic flourish, I ended the cross-examination by offering the chart into evidence. Defense counsel leaped to his feet and spoke the words which revealed my blunder, "No objection." My heart sank as I realized that the chart had never been disclosed by the defense nor listed as an exhibit. Since it had never been posted in the tire shop, the defense had no way to offer it, much less get it into evidence. The defense clearly could not use it to sway the jury. Only I could do that for them. Subsequent interviews with the jurors - after the defense verdict - disclosed that the chart (even though they knew it had not been posted in the tire shop) was the central focus of their discussion, and had led them to conclude that the other safety precautions and good mounting practices outlined in the chart were so obvious and common-sense that only an idiot could trigger an explosion of a tire. Moral: quit when you are ahead.

The Importance of Editing - Do not set up numerous television sets to display a video deposition if you have **not** had the tape edited in advance to remove objectionable materials.

SCHEDULING & TIMING

Pay attention to the dates you set your trials and hearings - I once set a case against the Salvation Army as Defendant for the 3rd week in December. Try not to sue a non-profit charitable corporation during the holidays.

Be Aware of Relevant Historical Events - One of my personal gaffes was to schedule my clients who were Americans of Japanese ancestry for a trial to begin December 7th. I was too dim-witted to realize what I had done. Fortunately my clients were awake, pointed out my stupidity and saved the day.

When Does Court Convene/Adjourn? - Make sure you find out what time court **really** convenes and adjourns if you have never been in that court before. During a jury trial, I came back from lunch recess at 1:30 p.m., the time all other courts in that county re-convened. Unknown to me, this particular judge always re-convened 15 minutes early, at 1:15 p.m. When I arrived, the jury, judge and opposing counsel were already seated. The judge reprimanded me in front of the jury. The jury returned a defense verdict. I think they lost confidence in me.

Don't Assume Your Case Will Be "Bumped"! *- The Friday before my first trial, I called the court (at the advice of a partner) to see where I was on the docket. I was told that* ***I was eighth and none of the seven trials in front of mine.*** *Assuming I would never try this case, I relaxed. On Monday a.m., I presented for trial call to discover that others had done what I could not: settled. I asked for a brief recess, went to the restroom and vomited. Moral: never assume.* ***Morgan I assume that none of the seven trials had settled, but could you verify.***

DEADLINES

Watch for Date Errors on Statute of Limitations! - The accident report noted the date of the incident as December 17. I carried this date on all correspondence and other documents. Negotiations proceeded back and forth, but there was no settlement. The statute of limitations was getting close, but I thought I had until December 17 to file the case. Out of the blue, my client called me on December 15 at 1:00 p.m. to talk about the case. I told him that I would file the case in the next two days. He told me he was sure that the accident was on December 15 because it was his son's birthday. The accident report was wrong. The case was filed at 4:45 p.m. on December 15. It eventually settled. The defense counsel and adjuster knew all along it was on December 15 and were just waiting for the statute of limitations to run. Moral: check your dates with more than one source!

Verify the Statute of Limitations in Every Case! - Colorado has a three-year statute of limitations for auto cases. Some of your clients were injured in out-of-state accidents. Check that state's statute of limitations, and if it is one or two years, mark this **all over** your file, because you might otherwise miss it. Even better, retain co-counsel in that other state.

SETTLEMENT & NEGOTIATIONS

Don't Lose the Deal After It's Made - Many times you reach terms of settlement, and think the matter is over. However, when settlement papers come, terms that had been agreed upon are often missing, or there are additional "standard" clauses inserted that change the meaning of the agreement.

Witnesses At Mediation - It can be effective to have an expert or lay witness on a pivotal issue available to talk with a mediator at a settlement conference either by phone or in person. You may want to allow defense counsel to listen to their input. This has been an effective tool in getting cases to settle.

Is the Adjuster Present with Settlement Authority for Policy Limits? - When you attend a mediation/settlement conference, it's important not only to be sure an adjuster is present, but be sure that the adjuster has authority to policy limits. At a minimum, if the adjuster with limits authority is not present, he or she must be available by telephone.

JURISDICTION AND VENUE

Check Venue - I learned about C.R.C.P. Rule 98 (venue) the hard way. I served papers on the respondent in a divorce case (before my personal injury life) at his new home across the state. His successful motion to change venue followed.

DISCOVERY MATTERS

Remember to Request Updated Discovery Material Before Trial! - In my first trial in my first year of practice with my first witness on my first day, a former president of the Colorado Defense Lawyers began the cross-examination of the plaintiff by asking if she had ever been treated for back injuries before the accident. I knew my client had no prior injuries. Guess what? The defense counsel got her to admit, as she did in deposition, that she never treated for back injury before. But then he produced prior records of treatment at an emergency room for a back injury. I had never seen them before. My objection for failure to disclose was overruled. Moral: write a simple letter before every trial and ask opposing counsel to update all interrogatories and requests for production. Tell him or her you will object to all documents not produced during discovery.

Never Allow a Non-Party to "Sit In" On a Deposition! - Never allow anyone who is not a party to "sit in" on a deposition. My client was a 10-year-old boy with craniosynostosis plates on his skull (a true "egg shell skull" case). His plates were exposed by a school bus driver who gave him a "noogie"). The defendant was deposing my client's 10-year-old friend, who witnessed the "noogie" and the exposed plate. Before the deposition, the witness' mother (who does have the right to sit in), asked if the witness' 7-year-old sister could sit in, as well. The mother said she had to bring her daughter to the deposition because her babysitter backed out. I made the mistake of saying "OK, as long as she sits quietly, and doesn't interrupt." All of the deposition testimony came in exactly as planned. The case was looking good. At the end of the deposition, the defense counsel thanked the little girl for sitting so quietly, saying "I know how hard it is to sit by while your big brother gets all the attention." Without missing a beat, while still on the record, the little sister blurted out, "You're welcome, but I really don't know what all of the fuss is about. I saw the whole thing and let me tell you how this really happened….!" Moral: the case was dismissed with prejudice shortly thereafter.

Importance of Pre-Existing Medical Records - Make sure you have all medical records that the defense attorney has — and that testifying doc has reviewed (or at least been told about) client's complaints **before** the accident.

Sealed Depositions – Don't open the sealed copies of the depositions unless you're in court.

Request Admissions on Basic Elements in a Claim - UM/UIM - Make sure your uninsured motorist carrier admits that the uninsured motorist was uninsured. We had all proceeded for two years assuming a valid uninsured motorist claim. We went to arbitration and the insurer asserted that there was no evidence that the negligent driver was uninsured. The only evidence was the police report and citation issued to the driver for no insurance. We sent a letter to the uninsured motorists carrier requesting that they admit that the driver was uninsured.

Wrongful Death - One of my solo trials was a wrongful death dram shop action against two local bars. My client's son was killed in an automobile accident by an individual who had been served at both bars while visibly intoxicated. The intoxicated driver was both uninsured and in prison. Thus, the only possible sources of recovery were the liquor claims against the bars. I tried this case against two of CTLA's finest who represented the two bars. One of them was successful in convincing the judge to strike my policeman witness as a penalty for my very skimpy disclosures. In addition, I had failed to ask my colleagues for a stipulation to the admissibility of the decedent's death certificate or even to the fact that he had been killed. On the first day of trial I was "mortified" (pun intended) to find out that I had no obvious way of proving that my client's son had been killed in the auto accident. No cop and no way to get the death certificate into evidence. At this point my client could tell something was very wrong. Much to the amusement of the judge and defense counsel, I was forced to ask my client such questions as "how do you know your son is dead?" She responded, "because I saw him in his coffin," and "we put him in the ground." After quite a bit of fumbling around, the judge let me off the hook by sending me the signal that I had offered enough testimonial evidence to allow a jury to conclude that my client's son was actually dead. Moral: if you are going to pursue a wrongful death case, you must be able to prove that someone is dead.

Control and Fair-Play in Deposition – Don't hesitate to stop a deposition and call the court if defense counsel will not play by the rules.

Obtain and Read All Articles by Disclosed Authors! - In a jury trial on a low speed rear-end type automobile accident, Jerry Odgen testified the forces were not sufficient to cause a low back injury. The defense attorney offered a previously undisclosed demonstrative exhibit. Because I was familiar with the exhibit and the article on which it was based, and because I thought the exhibit was actually helpful, I decided not to object. The exhibit showed movement of the pelvis during a low speed rear-end collision. When I asked Odgen about the exhibit on cross, he explained that the author, in a later article, had explained that the appearance of movement was caused by the camera bouncing and that the pelvis never actually moved. I wished I had objected to the exhibit, and I wish I had found all of the articles by all authors identified in

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Bloopers in Our Profession – Part II - continued from page 45

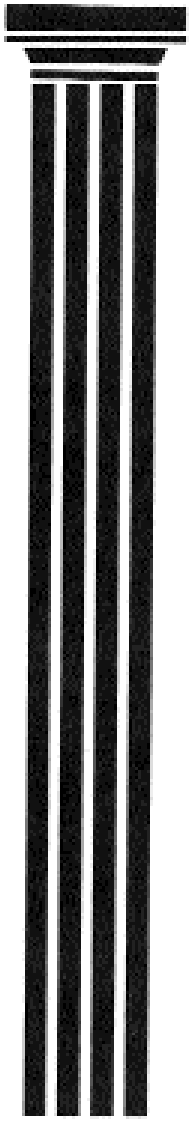
Odgen's disclosures.

OBJECTIONS & PREJUDICIAL DEFENSE ARGUMENTS

Object to Implications that Defendant Is Uninsured and Will Pay out of Pocket for Verdict - Some years ago, in one of my first PI trials, during closing argument, the defense counsel told the jury: "If you give the plaintiff damages as she requests, you will be giving her Mr. Defendant's life savings - money he has saved for his retirement, and you will leave him destitute in his old age." I was shocked by the blatant implication that the defendant had no insurance, when we all (except the jury) knew that he had $100,000 in coverage from State Farm. During the argument, I could not think of an objection or a response that would not violate the rule against disclosing liability insurance. After the jury came back with a low verdict, I filed a motion for a new trial, which was denied. With more experience and hind sight, I know that I should have objected and asked for a bench conference. Since the defense opened the issueI could then request permission from the court to talk about the defendant's insurance coverage during my rebuttal closing argument.

How Much Money Do You Want? - At trial, the defense attorney asked my client how much he wanted for his case. I objected, claiming that it was irrelevant and invaded the province of the jury. The judge overruled my objection and ordered my client to answer. My client thought awhile and said, "I don't know, but more than you offered me."

Approach Deposition Questions as if All Defense Objections May Be Sustained! - I was taking a videotaped



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MEETINGS

Peer Support Meeting

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Central Presbyterian Church,
16th and Sherman, Denver

Lunch Meeting

Every last Friday at noon
Edelweiss Restaurant
34 East Ramona, Colorado Springs
800-432-0977
303-832-2233
WWW.CLHP.org

deposition to preserve testimony. At one point, the defense lawyer made an objection. I thought it was the stupidest objection I ever heard. In chambers before the trial, the judge, who had a momentary brain lapse, sustained the objection and ordered the question and answer stricken. Moral: in doing a preservation deposition, anticipate that every objection will be sustained. Come around the question from a different angle.

If You Are Going to Cause a Mistrial, Do It Early - Clarify the "insurance question" in advance. In my very first trial, I started *voir dire* with the "insurance question." I asked if anyone was an employee, director, etc. of State Farm. No one was. I then said, "The defendant is insured with State Farm…." "Objection! Move for a mistrial." The case law says you can inquire into prejudice about the "parties' insurance." I thought it was implied that this meant you could discuss the defendant's insurance within the parameters of the "insurance question." I was wrong. Fortunately, I did it so early in the trial, we were able to impanel another jury and complete the trial as scheduled. The defendant had four out-of-state experts. I had no idea what risk I had created in terms of costs. I do remember calling my dad on the way home saying….This is your son, Clarence Darrow…I got to my second question before a mistrial!

Who Makes the Objection, Anyway? - I was second chair in a personal injury trial. We had divided labor so that each of us took certain witnesses to direct and cross. Defense counsel was cross examining my partner's witness in a way I felt was more prejudicial and inflammatory than probative. I objected. The judge looked at me, before the jury, and said, "Counsel, was this your witness?" "Uh, no." "Well, then it's not your place to make an objection. An objection must be made by the attorney directing the witness." His irritation was apparent. I felt stupid. I learned the hard way that the attorney who asks the questions of a witness on direct must be the one prepared to make objections or cross-examination.

MASTER CALENDAR

Date	Event	Place
August		
Wed 8/28	New Lawyers Committee Meeting 2 CLE Credits	Denver City Bldg Court Room 100K
September		
Tue 9/3	Medical Malpractice Meeting	CTLA
Wed 9/11	New Lawyers Committee Meeting	TBD
Thur 9/12	Bad Faith Litigation Group	CTLA
Thur 9/26	Auto Litigation Committee Meeting	Holland & Hart
October		
Tue 10/1	Medical Malpractice Meeting	CTLA
Wed 10/9	New Lawyers Committee Meeting	TBD
Thur 10/24	Auto Litigation Committee Meeting	Holland & Hart
November		
Tue 11/5	Medical Malpractice Meeting	CTLA
Wed 11/13	New Lawyers Committee Meeting	TBD
Thur 11/14	Bad Faith Litigation Group	CTLA
December		
Tue 12/3	Medical Malpractice Meeting	CTLA
Thur 12/5	Auto Litigation Committee Meeting	Holland & Hart
Wed 12/11	New Lawyers Committee Meeting	TBD
January 2003		
Wed 1/8	Legislature Convenes	
March 2003		
3/6-7	MARK YOUR CALENDARS	TBD
April 2003		
4/24	Spring Dinner (Tentatively)	

For times and more information about CTLA's events, please contact Tracy Wampler at CTLA: 1888 Sherman Street, Suite 370, Denver, CO 80203, or telephone (303) 831-1192 or (800) 324-2852 (in Colorado), or visit the calendar on CTLA's website at www.ctlanet.org.

For more information about ATLA's continuing legal education events, contact: Education Department, 1050 31st Street, N.W., #DM, Washington D.C. 20007, or call (202) 965-3500 ext. 612, or 1-800-NCA-1791 (U.S.).

Fighting Unnecessary Court Secrecy

By Rebecca E. Epstein, Esq. Leslie A. Brueckner, Esq.,
Arthur H. Bryant, Esq., and Stuart A. Ollanik, Esq.

The judicial branch, like the executive and legislative branches, functions better in the light of fact as opposed to the darkness of secrecy . . . [1]

As most trial lawyers know, secrecy pervades our civil justice system. Despite court rules and case law that purport to restrict the use of protective and sealing orders, much of the civil litigation in this country is taking place in secret at all stages of the process. Cases are filed under seal, discovery is governed by overbroad protective orders, exhibits and court records are sealed and cases are settled in secret. Given the high rate of pretrial settlement and adjudication, the right of public access to trials does not compensate for the lack of openness during earlier stages of litigation.

In 1989 Trial Lawyers for Public Justice launched a special project - Project ACCESS - dedicated to fighting unnecessary secrecy nationwide. We have won many victories, but the problem continues to grow. For example, in *Foltz v. State Farm*, we are fighting for public access to a federal court file in Oregon that was erased from the public record as part of a settlement, despite the evidence it contains that State Farm systematically cheated many of its policyholders. In *Frankl v. Goodyear Tire & Rubber Company*, we are battling to unseal evidence in a New Jersey case about Goodyear tires that are linked to a pattern of fatalities and serious injuries.

The Causes and Dangers of Unnecessary Secrecy

Unnecessary secrecy exists because plaintiffs, their lawyers, and judges do not contest defendants' demands for confidentiality. Although cases sometimes involve information that legitimately deserves protection, defendants rarely limit their requests for secrecy to this type of data. Instead, they routinely seek to keep non-confidential information secret to protect their financial interests. Secrecy prevents victims from learning that they have legitimate claims against the defendant, while artificially preserving the defendant's reputation and preempting scrutiny by the press. In addition, secrecy ensures that the government will not develop or enforce laws addressing the dangerous product or unfair practice. Stock prices are protected, and there is no incentive to invest in developing safer products or better practices. Another perverse result of secrecy is that it allows corporations to demand tort reform, while preventing the public and government from learning the actual results of litigation.

While most plaintiffs and their counsel would prefer openness, they often feel compelled to stipulate to secrecy. Typically, defendants make secrecy a condition of settlement, or a prerequisite to compliance with plaintiffs' discovery requests. Injured plaintiffs in financial need frequently feel that they have no choice but to agree. And judges often fail to scrutinize requests for secrecy because of their over-burdened schedules, or because they view their role as resolving the narrow disputes before them, without considering the public interest.

The social costs of this cycle are intolerably high. Secrecy perverts our system of justice by weakening public confidence in the judiciary and by forcing judges to decide duplicative discovery disputes. Secrecy also hides dangers to public health and safety, resulting in wholly avoidable injuries and deaths. And it undermines our democratic system, since it hides the information that is needed to determine whether laws should be changed.

Fight Unnecessary Protective Orders

Protective orders should not be entered unless they are justified and appropriately limited. Under Federal Rule of Civil Procedure 26(c) and many of its state counterparts, defendants must show "good cause" to justify protective orders.

1. Stress the Presumptive Right of Public Access to Discovery Materials.

The corollary of the good-cause requirement to justify protective orders is that there is a presumptive right of access to discovery materials. Proponents of secrecy can only overcome this presumption by making specific factual demonstrations of significant harm. Conclusory statements or general allegations are insufficient.

2. Rebut Any Showing of Good Cause by Learning the Facts.

Frequently, a defendant cannot prove that information it claims is confidential actually qualifies for protected status. A defendant's supposedly confidential procedures, for example, may actually be standard practice in the industry. Consult plaintiffs' attorneys with similar cases, appropriate experts, professional groups and fact witnesses to undermine defendants' claims for secrecy.

Most often, defendants claim that documents contain trade secrets, and that disclosure of the information would cause competitive harm. Make sure to hold defendants to their burden of proof on these claims. The information must fall within the definition of trade secrets, which is generally set forth in the Restatement of Torts, and must have current competitive value. The defective or hazardous nature of a product is not a trade secret; nor is stale data, information that can be reverse engineered, or material that is of general knowledge.

3.Urge the Court to Weigh the Public Interest in Determining Whether to Issue a Protective Order.

Even if good cause is established, a protective order should not be issued if the public interest in access outweighs the need for confidentiality. Courts have held that even trade secrets do not receive automatic protection from disclosure if the public's need to know is particularly strong. Thus, in *Frankl v. Goodyear*, TLPJ intervened and persuaded the court that, to evaluate Goodyear's attempt to impose secrecy, it must balance the public interest in the tires' safety against the corporate interest in secrecy.

4. If You Are Forced to Agree to a Protective Order, Minimize Its Adverse Effects.

• Demand a Sharing Provision.
Protective orders that forbid the sharing of information among plaintiffs' attorneys thwart the efficient administration of justice. Many courts have found that sharing provisions must be included in protective orders to prevent the needless obstruction of the litigation process.

• Ensure that Defendants Make at Least a Threshold Showing of Good Cause to Justify Any Umbrella Protective Order.
Defendants often attempt to obtain broad "umbrella" protective orders, under which they may unilaterally designate any discovery information as confidential. Under Rule 26(c), defendants must make at least a threshold showing of good cause to justify these orders. At a minimum, they should be required to identify the categories of documents they claim are entitled to protection and to prove good cause for keeping those categories secret.

• Insist That Any Umbrella Protective Order Contain a Mechanism to Challenge Confidentiality Designations.
The party receiving discovery must be able to contest confidentiality designations made under umbrella protective orders. Such challenges trigger the producing party's burden to demonstrate specific good cause for the contested document to be kept secret. This kind of provision has been instrumental in our work in *Frankl*. In that case, the plaintiffs' attorney, Christine Spagnoli of Santa Monica's Greene, Broillet, Taylor, Wheeler & Panish, L.L.P, alleged that certain information designated by Goodyear was not confidential, and that it revealed a significant safety hazard that Goodyear failed for years to remedy. Her pleadings have been crucial to TLPJ's fight to disclose the contested documents in this now-settled case.

• Limit the Terms of Any Protective Order to the Discovery Phase of Litigation.
Defendants commonly try to include provisions to automatically seal court records containing discovery information produced pursuant to a protective order. Such provisions are illegal because an even higher standard applies to justify the sealing of court records, as detailed below.

• Fight Any Provision that Requires Discovery Materials to be Returned to the Producing Party.
An ABA resolution condemns protective orders that require the return of discovery materials at the conclusion of the case. Documents must at least be preserved by the producing party to ensure future availability to government agencies or other litigants. Be sure that you do not become the last person to view materials that prove a defendant's misconduct!

Challenge Unnecessary Sealing Orders

While Rule 26(c)'s good-cause standard generally applies to discovery, parties attempting to seal records must meet a significantly higher standard: they must demonstrate a *compelling* basis for secrecy based on *specific* facts. If this burden is not met, secrecy is unjustified.

To vindicate this principle, TLPJ is battling in *Foltz v. State Farm* to overturn a federal court order sealing hundreds of court records about State Farm's misconduct. The judge even ordered the case erased from the court's computers and allowed State Farm to remove the entire case file from the courthouse. After TLPJ intervened, the case file was returned, but court records remained sealed without justification.

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Fighting Unnecessary Court Secrecy - continued from page 45

We recently argued our appeal before the U.S. Court of Appeals for the Ninth Circuit.

Fight Secret Settlements

Secret settlements can also wreak enormous damage, since they prevent the public from learning about defendants' wrongdoing and other important issues addressed in litigation. *The New York Times* recently reported a plaintiffs' lawyer's remorse about secret settlements reached in three of his lawsuits, which alleged sexual abuse by priests. After learning of similar accusations and the criminal conviction of a defendant named in two of these suits, the lawyer conceded that secrecy had been "a terrible mistake." Today, he simply refuses to discuss confidentiality agreements in settlement negotiations. Adam Liptak, *A Case That Grew in Shadows*, N.Y. TIMES, March 24, 2002, at Section 4, p. 4. Especially in cases involving public health and safety, TLPJ strongly urges you to refuse to enter into secret settlements.

Seek Our Help

TLPJ's Project ACCESS challenges unnecessary secrecy nationwide, especially in cases that implicate public health and safety or involve outrageous wrongdoing. If you need help in opposing unnecessary secrecy orders, please call TLPJ at (202) 797-8600, and check out our legal briefs at www.tlpj.org. We can all benefit from working together.

Rebecca E. Epstein and Leslie A. Brueckner are Staff Attorneys at Trial Lawyers for Public Justice, a national public interest law firm. Arthur Bryant is TLPJ's Executive Director. Stuart A. Ollanik is Colorado State Coordinator for The TLPJ Foundation, the non-profit membership organization that supports TLPJ's public interest litigation. If you have any questions regarding TLPJ or a potential case, contact Stuart, at 303-431-1111 or sollanik@auto-law.com.

ENDNOTES

[1] *Phillips v. General Motors*, 126 F. Supp. 2d 1328, 1332 (D. Mont. 2001).

Case Name: *Stephanie Graves and Stephen Newkirk v. Carolyn Howard*
Court Name: Not filed
Case Number: Not filed
Trial Judge: N/A
Trial Dates: N/A
Date of Settlement: April 10, 2002, settlement reached
Settlement Amount: $1,300,000
Mediator/Arbitrator Name: None
Facts of Case: Ms. Howard, outside of Estes Park, drove her car over the middle line and struck the motorcycle driven by Stephen Newkirk upon which Stephanie Graves was a passenger. Mr. Newkirk lost his leg and Ms. Graves had severe injuries to her left leg. No significant economic damages existed. There were significant subrogation interests by health carrier.
Unique Issue: State Farm paid seven figures without suit and bad faith pressure. In addition, we obtained excess funds from Defendant before State Farm even agreed to pay their limits.
Plaintiff's Attorney: Steven A. Shapiro, Fleishman, Sterling, Gregory & Shapiro, P.C., Denver, CO
Defense Attorney: None
Plaintiff's Expert(s): None
Defendant's Expert (s): None
Insurer: State Farm

Case Name: *Heritage Village HOA v. WW Construction, et al.*
Court Name: Jefferson County District Court
Case Number: 1997CV1730
Trial Judge: Honorable Stephen M. Munsinger
Date of Decision: February 28, 2002
Verdict Amount: $10,854,000
Mediator/Arbitrator: Steve Mains
Facts of Case: Construction defect case involving windows, roofs, siding, drainage and asphalt
Plaintiff's Attorney: Douglas W. Benson and Jesse Witt, Burdman & Benson, Arvada CO
Defense Attorney: Darryl Collett, Godin & Baity, Denver CO
Plaintiff's Experts: Carl Mangone, Fay Engineering, Denver CO, structural engineering issues; Bruce Barnes, Knott Labs, Denver CO, architectural issues; Bob Rogers, REI, Evergreen CO, asphalt; John Lacoteur, Hydrocivil, Denver CO, drainage.
Defendant's Experts: Tony Merlo, Merlo Consulting, Denver CO, structural issues; Dave Davis, Davis Architecture, Denver CO, architectural issues; Joe Cesare, Cesare Engineering, asphalt
Insurer: Zurich

Case Name: *Vail Commons v. Warner Development, Inc.*
Court Name: Eagle County District Court
Case Number: 99-CV-571
Trial Judge: Richard Hart & Terry Ruckriegle
Date of Decision: April 1, 2002
Settlement Amount: $1,125,000
Mediator/Arbitrator: Steve Mains
Facts of Case: 53 Unit condo case in Vail with window, drainage, roofing problems. Damages Claimed/Amounts: Plaintiff claimed damages of approximately $2,000,000. Defense cost of repair approximately $300,000
Unique Issues: an affordable housing project built in conjunction with the Town of Vail
Plaintiff's Attorney: Douglas W. Benson and Heidi Storz, Burdman & Benson, Arvada CO
Defense Attorney: Ed Godin, Godin & Baity, Denver CO
Denver Plaintiff's Experts: Gary Ludden, GW Consulting, roofing, Trinidad, CO; Bruce Barnes, Knott Labs, grading drainage and windows
Denver Defendant's Experts: Dave Davis, Davis Architecture, windows and roofs, Denver, CO; Michael West, drainage, Denver, CO
Insurer: Zurich

Case Name: *Jane Doe v. Episcopal Diocese of Colorado*
Court Name: N/A
Case Number: N/A
Trial Judge: N/A
Date of Decision: May 2002
Settlement Amount: Approximately $148,700.00 for Plaintiff; separate payment by Defendant for attorney fees in the amount of $15,000
Mediator/Arbitrator: N/A
Facts of Case: Episcopal priest with prior problems placed in small town whose inappropriate conduct damaged marriage and caused financial loss
Injuries/Damages Claimed/Amounts: Settlement negotiations focused on what was needed to help Plaintiff become self-sufficient, personally and in employment
Unique Issues: Negligent Hiring/Supervision of priest by Diocese
Plaintiff's Attorney: Mari C. Bush (Boulder, CO) and Bruce J. Kaye (Denver, CO)
Defense Attorney: Martin Nussbaum (Colorado Springs, CO)
Plaintiff's Experts: Helen Woodard, Lakewood, CO -LifeCare Planning; treating therapists
Defendant's Experts: N/A
Insurer: N/A

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CASE ASSISTANCE CATALOG ENTERS 21ST CENTURY

The case assistance catalog is finally on-line and searchable. Find those motions in limine, pleadings and briefs that you will help you win your case. Visit the Members Only section of the website and click on Case Assistance Catalog to begin your search.

This "beta" version of the catalog is not yet inclusive of all case assistance material currently available at CTLA, but we want to make this as useful as possible. Please send your comments or suggestions to Holly Bennett at hollyb@ctlanet.org. We will update regularly

AMICUS

Date Requested	Case Name	Attorney or court requesting	Main Issue(s)	Appealed to?	Appealed from?	Accepted by committee? If yes, date.
10/1/2001	*Cooper v. Aspen Skiing Co.*	Jim Chalat (wrote brief to Ct. of Appeals)	Whether a parent's "fundamental liberty interest' in rearing his or her child grants the parent an unfettered power to execute an enforceable release of the claims of his or her minor child for possible future injuries from a recreational activity?	Colorado Supreme Court	Colo. Ct. of Appeals	yes, brief filed 11/26/01
10/11/2001	*Silva v. Basin Western*	Supreme Court	Whether documents containing reserve info and settlement auth. are relevant to the subj. matter of the action and thus discoverable, when such docs were generated by the defs' insur carrier prior to suit being filed; whether docs generated by insur co prior to containing reserve info and settlement auth are protected from discovery by the work product doctrine.	Colorado Supreme Court	Denver District Ct.	10/18/2001
1/3/2002	*Kallage v. Tabuteau*	Anthony Crosse	Whether a requirement that factual predicates for subject matter jurisdiction under the Colo. Governmental Immunity Act must be proven "by a preponderance of the evidence" violated the rights of Colo. Citizens to due process guarantees; highlights the difficulties of separating issues of subject matter juris. under the CGIA from the underlying merits of the case	Ct. of Appeals	District Ct.-Fremont	1/18/2002

Date Requested	Case Name	Attorney or court requesting	Main Issue(s)	Appealed to?	Appealed from?	Accepted by committee? If yes, date.
1/14/02	*Giampapa v. American Family Mutual Insurance Company*	Supreme Court	Whether the longstanding rule for mental anguish damages should remain intact; whether the rule that damages for mental anguish are recoverable for willful and wanton breach of contract should be expanded to include other kinds of noneconomic damages	Colorado Supreme Court		1/21/02
2/11/02	*Hansel-Henderson v. Mullens*	Ben Aisenberg/ Greg Fasing	Whether the Colorado Court of Appeals erred in holding an attorney, who has satisfactorily completed a retention in the good faith belief that he had an enforceable contingency fee agreement, and the client fully paid the fee and accepted settlement funds without complaint, must later refund the fee when, long after the cases ended, the client first complained only that the fee contract was not in writing.	Colorado Ct. of Appeals	Colorado Supreme Court	2/11/02
6/26/02	*JoAnne Monday vs. Robert Anderson*	Robert J. Anderson	Whether in every contingent fee case a jury should determine the reasonableness of attorney's fees with the burden of proof on the attorney.	Colorado Court of Appeals	4th Judicial District Ct.	yes 7/8/02

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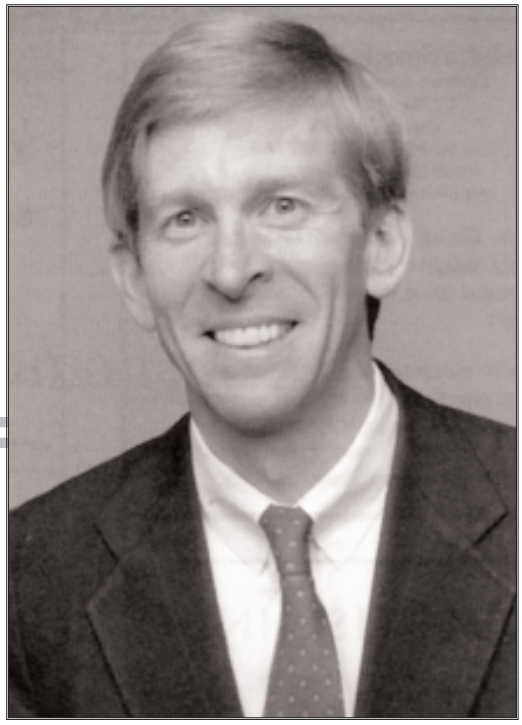

"[T]he skills needed for effective appellate advocacy are not always found – indeed, perhaps, are rarely found – in good trial lawyers. . . . Appellate advocacy is, in short, a specialty all to itself."

— The Honorable Laurence H. Silberman, United States Court of Appeals for the District of Columbia Circuit

Walter Sargent is an appellate advocate, and an effective one. In the Colorado appellate courts, he has achieved excellent results representing plaintiffs and defendants, appellants and appellees, in matters as diverse as personal injury, lender liability, municipal law, breach of trust, corporate governance, real estate brokerage, secured transactions, common-law contracts, and school law. In the federal appellate courts, he has successfully represented individuals and entities in high-profile matters in the Third, Sixth, Ninth, and Tenth Circuits, and has successfully represented both petitioners and respondents in the Supreme Court of the United States.

In January 1996, after eight years at a large Denver-based firm, Mr. Sargent left to open his own appellate shop. The new firm was founded on a simple set of premises: that appellate practice is a specialty all to itself, that there is a need for appellate specialists in Colorado, and that – freed from the encumbrances and constraints of a larger firm – a first-rate appellate practice can offer cost-effective services to a wide range of clients. With the flexibility to provide appellate services through a variety of fee structures – from traditional hourly rate structures to contingent fees – the firm seeks to arrive at working relationships that are economically and professionally satisfying to all involved. If you are interested in finding out more about the firm's services, please call or write Mr. Sargent at his office in Colorado Springs.

Walter Sargent is a graduate of the Massachusetts Institute of Technology, where he received degrees in philosophy and computer science, and Harvard Law School, where he was a John M. Olin Fellow of Law and Economics, winner of the Olin Prize for outstanding writing in the field of law and economics, and articles editor for The Harvard Journal of Law & Public Policy. Mr. Sargent cofounded the Colorado Bar Association's subcommittee on appellate practice and, in 1998, was selected to chair the 850-member Appellate Practice Committee of the American Bar Association's Section of Litigation.