

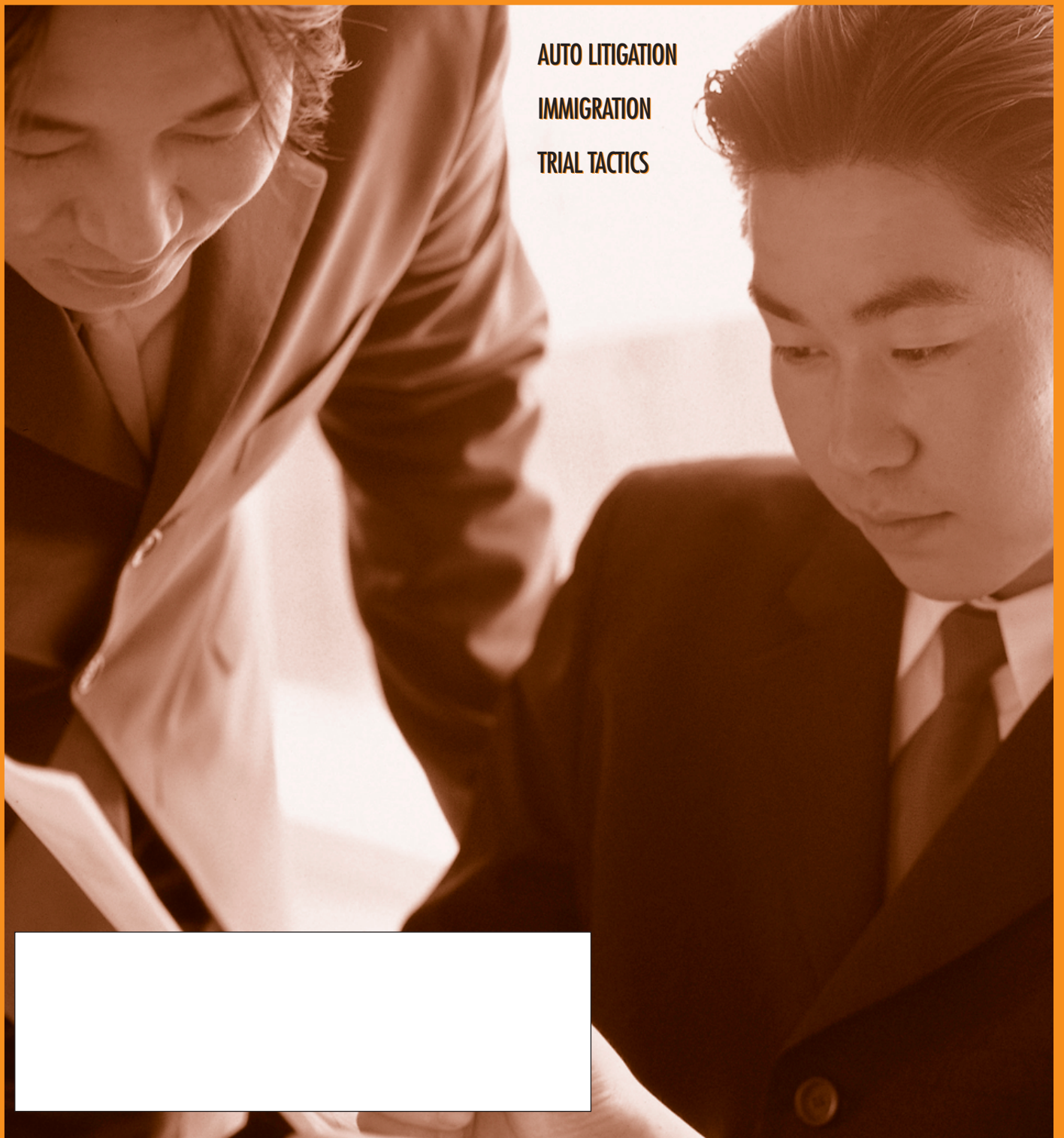
TRIAL TALK

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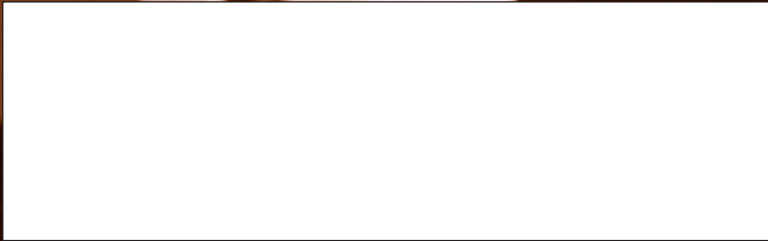
Volume 55 Issue 5



AUTO LITIGATION

IMMIGRATION

TRIAL TACTICS



A Checklist for Motions in Limine and Admissibility of Evidence in Auto (and Other) Cases

By Mac Hester, Esq., and Gary Craw, Esq.

“Limine” does not mean “limit.” It means “threshold.” So motions in limine seek to obtain a ruling on the admissibility of evidence at the threshold of trial in order to gain an advantage or avoid unfairly prejudicial evidence. The advantage may be tangible (substantive evidence is admitted or excluded) or intangible (the “look and feel” of the case presentation is improved; e.g., the plaintiff is or is not portrayed as greedy and seeking jackpot justice). Although most attorneys think that the purpose of motions in limine is to exclude the admission of evidence, this article stresses that motions in limine can also serve the important role of getting favorable evidence admitted.

The admission of evidence is addressed in Part I, the exclusion of evidence is addressed in Part II, and scientific evidence is addressed in Part III. Hearsay and its exceptions are not rigorously examined in this article.¹

I. Admit Evidence of:

Liability Insurance

- Evidence of liability insurance is admissible for *any reason* - except to show negligence or wrongful conduct of the defendant.² A listing of admissible reasons set forth in

Rule 411 includes proof of agency, ownership, control, or bias or prejudice of a witness. The list is non-inclusive. Evidence of insurance may be excluded if unduly prejudicial.³

- The “insurance question” may be asked during voir dire.⁴
- To show bias when there is a substantial connection between the liability insurer and an expert witness.⁵

Impeachment Evidence

- Prior inconsistent statements.
- Contradictions.
- Criminal convictions.
- Prior bad acts.
- Character for untruthfulness.
- Evidence to show the witness’s lack of personal knowledge.
- Unreliability of scientific evidence.
- Bias, prejudice, interest or motive.

Extrinsic evidence within the general areas of impeachment is permitted within the Court’s discretion and subject to Rule 403. However, specific conduct relating to the *truthfulness* of the witness is generally not admissible pursuant to Rule 608. This is to keep the trial from heading off on tangents.⁶ The

credibility of a witness can be attacked by evidence in the form of *opinion or reputation*, but the evidence may refer only to character for truthfulness or untruthfulness.⁷ The truthfulness of a witness may not be bolstered absent an attack on that witness’s truthfulness.⁸

Convictions and Pleas

- Any felony conviction less than 5 years old.⁹
- Guilty pleas constitute admissions and are otherwise admissible under 801(d)(2). But *juvenile adjudication* is not a felony conviction and may not be used to impeach an adult witness.¹⁰
- A plea of guilty to a felony entered pursuant to a deferred sentence, when the terms of the deferred sentence have not yet been completed, is admissible as a prior felony conviction to impeach a witness.¹¹
- A military conviction qualifies as a felony conviction for purposes of impeachment if the maximum penalty applicable to the military offense is substantially equivalent to the punishment reserved for a felony offense in Colorado and the same criminal conduct, if committed in Colorado, would be classified as a felony under Colorado law.¹²

- A felony conviction based on a plea of nolo contendere could be shown to attack the credibility of a witness.¹³
- Traffic code violations by habitual offenders.¹⁴
- Statements made in compliance with a plea agreement are admissible for impeachment if the defendant later breaches the plea agree-

ment so long as the statements were voluntary and reliable when made.¹⁵

Admissions, Statements, Adverse Inferences

- Admissions.¹⁶
- A statement by a party-opponent is not hearsay. It does not have to be against the interest of the party.¹⁷
- Statements against interest.¹⁸

- The finder of fact in a civil case is permitted to draw an adverse inference against a party who claims the 5th Amendment right against self incrimination.¹⁹
- Flight is viewed as an admission by conduct of consciousness of guilt, and flight evidence carries with it a strong presumption of admissibility.²⁰

Habit, Routine, Practice

- Habit of a person.²¹
- Routine practice of an organization.²²

Character

- Character evidence is only admissible if the character of the witness for “truthfulness” has been attacked by another witness and the evidence will be admitted only if it relates to the attacked witness’s character for “truthfulness” or “untruthfulness.”²³
- Rule 608(a) coordinates with Rule 404, which provides that evidence of a person’s character is generally not admissible to prove that he or she acted in conformity with that character or trait on a particular occasion.

Other Similar Incidents

- Rule 404.
- Evidence of other crimes is admissible in administrative proceedings.²⁴
- Prior incidents to show notice of a dangerous condition.²⁵
- Prior incidents to show knowledge by governmental entity.²⁶
- Prior similar acts to show absence of mistake.²⁷
- Reports of prior similar incidents admissible as substantially similar occurrences, business records exception to the hearsay rule, and admissions of a party-opponent.²⁸
- Similar unsuitable investment transactions to show course of conduct.²⁹
- Prior notifications of dangerous condition are admissible on issue of punitive damages.³⁰



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- Prior and subsequent similar acts are admissible to show defendant's disposition, intention, or motive on the issue of punitive damages.³¹
- Prior acts of sexual harassment admissible regarding breach of fiduciary duty and outrageous conduct.³²
- Prior acts of sexual harassment of other employees excluded on issue of liability, but admissible on issue of punitive damages.³³
- Evidence of an insurer's regular late payment of checks was admissible for the purpose of demonstrating an ongoing pattern of purposeful delays in a suit for breach of good faith in processing claims.³⁴

Subsequent Remedial Measures

- Subsequent remedial measures are admissible for impeachment.³⁵
- Subsequent remedial measures are admissible when the defendant contests the feasibility of precautionary measures.³⁶
- Subsequent photograph of safety devices was admissible to impeach testimony of impracticality of safety devices.³⁷
- Rule of evidence regarding subsequent remedial measures does not apply to strict product liability claims based on theory of design defect.³⁸
- Evidence of subsequent remedial measures is admissible in a strict product liability case.³⁹
- Rule 407's prohibition of evidence of subsequent remedial measures applies to the conduct of a defendant; it does not prohibit the admission of subsequent remedial measures of a non-party.⁴⁰

Driving: Lay Testimony

- Lay opinion of speed of vehicle.⁴¹
- Skid marks.⁴²
- Testimony by the driver that he could have seen the motorcycle if its headlights had been on.⁴³
- Testimony of a lay witness regard-

ing observations of a motorist after an accident and whether the motorist was visibly intoxicated was admissible in a case against a bar.⁴⁴

- A lay witness is competent to express an opinion as to a person's intoxication, as long as they have had sufficient opportunity to observe the person's conduct and demeanor.⁴⁵
- Good driving record of victim to rebut defense inference that the accident was the victim's fault.⁴⁶

Driving: Testimony of Law Enforcement Officers

- Police officer's opinion that driver was driving at an excessive speed.⁴⁷
- A highway patrol officer may be qualified to estimate speed from the physical facts at the scene of the accident, if it is shown that, because of the patrolman's experience, education, training, and knowledge of facts, the patrol officer's opinion as to speed would be something more than a mere layman's guess.⁴⁸
- Police officers regularly, and appropriately, offer testimony under the rule regarding admission of lay opinion testimony (RULE 701) based on their perceptions and experiences. However, police officers may not offer expert opinions under the guise of lay opinion testimony.⁴⁹
- When a police officer testifies as to his or her reconstruction of an accident, including matters such as

the vehicle's direction, position, and speed, the officer must be qualified as an expert witness.⁵⁰

Medical Testimony

- A medical opinion is only admissible if founded on reasonable medical probability.⁵¹
- If two separate and distinct specialties have a substantially identical standard of care, and a proper foundation is laid, the expert should be permitted to offer his or her opinion on whether the defendant breached the standard of care.⁵²
- Medical doctors are not the only experts qualified to render opinions on the cause of brain injury. Neuropsychologists are not per se unqualified to testify as to the causation of organic brain injury. It is appropriate for a trial court to allow a neuropsychologist to render an opinion on the cause of a brain injury provided the court has determined that he or she is qualified under Rule 702 to offer such an opinion.⁵³
- Both a paramedic and an investigator for the coroner's office were allowed to give testimony that the victim was dead.⁵⁴
- X-rays.⁵⁵

Medical Expenses and Lay Medical Evidence

- Table summarizing medical bills.⁵⁶
- Medical expenses incurred versus amount paid by insurer.⁵⁷



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- Gratuitously rendered medical services and medical services paid by others are “incurred” and hence compensable.⁵⁸
- Medical expenses are compensable to the extent they are reasonable in amount as well as necessary.⁵⁹
- Lay testimony of injuries and future pain is admissible. Medical testimony is not required.⁶⁰
- Medical testimony is not required to establish permanent injury or future pain. If the evidence would sustain an inference that the effects of the injury have persisted for a number of years and that the plaintiff’s pain will continue indefinitely into the future, then a jury may infer that the future pain will be permanent.⁶¹
- Medical bills are sufficient to support an estimate of future medical expenses.⁶²
- Medical testimony is not necessary on the issue of pain and suffering because the victim is uniquely able to testify about his or her own pain and suffering.⁶³
- Payment, or an offer to pay, medical expenses is admissible to show an agency relationship.⁶⁴

Impairment Rating

- Military disability rating.⁶⁵
- Workers Compensation impairment rating.
- Impairment rating pursuant to American Medical Association Guides.⁶⁶

Real and Demonstrative Evidence

- Real evidence is an actual item involved in the case; e.g., the crashed car, a jury view of the scene. Demonstrative evidence is used to illustrate testimony; e.g., photographs, maps, charts.

Real Evidence

- The proponent of real evidence must establish a chain of custody that insures that the evidence offered is in the same condition as when it was obtained.⁶⁷

[Strictly enforced in criminal cases, but often not in civil - although chain of custody and preservation of condition is still important in civil cases, and probably critical in product liability cases.]

- A motorcycle cable examined three years after the incident cannot be admitted, nor can the expert testimony concerning the cable, in absence of any evidence that the cable was in a condition similar to that at the time of the incident.⁶⁸
- A bloody t-shirt which plaintiff was wearing at the time of the incident that formed the basis of the assault and battery action was properly admitted.⁶⁹
- Jurors may be permitted to examine any property or place.⁷⁰ A view of the scene is within the Court’s discretion.⁷¹

Demonstrative Evidence

Photographs, Videotapes and Audiotapes

- Photographs.⁷²
- “Shocking” photos are admissible.⁷³
- Series of photographs over lifetime.⁷⁴
- Motion pictures.⁷⁵
- Videotapes.⁷⁶
- A videotape may be used to support an expert’s theory in a products liability action through experiments to demonstrate the failure of a ladder.⁷⁷
- Compilation of excerpts of videotapes.⁷⁸
- Videotapes with audio of mother and child.⁷⁹
- Audio portion of videotape showing victim undergoing painful medical treatment is admissible.⁸⁰
- Day in the life videotape.⁸¹
- Spark of life videotape.⁸²

- Audiotapes.⁸³
- Newsreel.⁸⁴

Other Demonstrative Evidence

- Toy cars and a map drawn to scale.⁸⁵
- Drawing of incident scene.⁸⁶
- Police officer’s diagram of traffic accident scene.⁸⁷
- Scale model of asphalt bump was admissible.⁸⁸
- A life sized model of an amusement park ride was admissible.⁸⁹
- Comparative X-rays.⁹⁰
- Facsimile of original.⁹¹
- Voice exemplars.⁹²
- A voice heard over the telephone may be identified by one who hears the voice at any time, including subsequent to the call. Uncertainty as to the identity of a voice reflects on the weight to be given the evidence and not its admissibility.⁹³

See Section III for reconstructions, animations, simulations, and other scientific evidence.

Documentary Evidence

Pleadings

- Pleadings in a case.⁹⁴
- Pleadings, minutes, testimony, or verdict in a related case.⁹⁵

Governmental Records

Admissible pursuant to Rule 803(8) and Federal Rule of Evidence 803(8).

- Traffic Accident Report.
- Autopsy report.
- U.S. Weather Service reports.
- Breathalyzer maintenance records.
- Birth, marriage and death certificates.
- Other governmental records.

Safety Codes

- Safety code standards are admissible when offered in support of

expert testimony and when introduced as objective safety standards generally recognized and accepted as such in the type of industry involved.⁹⁶

Business Records

- Admissible pursuant to Rule 803(6).

Personal Documents

- Diaries and journals are generally hearsay and thus not admissible, but a hearsay exception such as state of mind may apply.⁹⁷
- Personal letters are usually hearsay and thus not admissible.⁹⁸

Publications

- Statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.⁹⁹

Other

- Computer printouts.¹⁰⁰
- Computer print-outs of pertinent data of insurance policies may be admitted in lieu of the original policy.¹⁰¹
- Summary of voluminous records.¹⁰²
- Testimony in lieu of original writing.¹⁰³
- Handwriting. Expert testimony is not required.¹⁰⁴
- Mortality table.¹⁰⁵

Damages

- Elements of recoverable damages.¹⁰⁶
- Lay opinion of plaintiff that injuries will result in decline in income.¹⁰⁷
- Damages for “loss of future earning capacity” are compensable even though they may be “uncertain in respect to the amount.”¹⁰⁸
- Evidence of disability is sufficient

to support loss of earning capacity.¹⁰⁹

- Evidence that plaintiff was earning more money after the injury did not preclude an award of damages for diminished earning capacity where there was evidence of permanent injury.¹¹⁰
- Damages for emotional distress based on a reasonable fear of increased risk.¹¹¹
- The jury must compensate the injured party for proven damages.¹¹²
 - Personal Injuries - Adults.¹¹³
 - Personal Injuries - Minor Child.¹¹⁴
 - Personal injuries - Minor Child - Parents’ Damages.¹¹⁵
 - Personal property - Difference in market value.¹¹⁶
 - Personal property - Cost of repairs.¹¹⁷
 - Personal property - Loss of use.¹¹⁸

“Opening the Door”

- When a party opens the door to inadmissible evidence, an opponent may then inquire into the previously barred matter.¹¹⁹

II. Exclude Evidence of:

Convictions

- Traffic conviction.¹²⁰
- Absence of a traffic conviction.¹²¹
- Felony conviction older than 5 years.¹²²
- Once a defendant who pleaded guilty has successfully completed his period of deferred sentence, evidence of the guilty plea is no longer admissible in any civil or criminal action.¹²³
- Absence of a criminal conviction.¹²⁴
- Arrests are not admissible to establish the general character of the witness; however, the circumstances surrounding an arrest may be admissible to contradict the testimony of a witness.¹²⁵

Bad Character

- Rule 404, 608.
- Acts that show “bad character” are not admissible.¹²⁶
- Acts that impugn moral character are not admissible.¹²⁷
- “Greedy” plaintiff.¹²⁸
- Sexual orientation.¹²⁹
- Past use of marijuana.¹³⁰
- Remarriage of the surviving spouse in a wrongful death action.¹³¹
- Alcohol use.¹³²
- Evidence of a witness’s previous indulgence in alcohol and illegal drugs, without more, does not have any probative value on the witness’s character for “truthfulness.”¹³³
- Neither chronic alcoholism nor drug addiction is admissible for the inference that the witness is therefore more likely to lie.¹³⁴
- Shoplifting is not an indicator of truthfulness or untruthfulness, and reference to a conviction of that misdemeanor is inadmissible on cross-examination.¹³⁵

Untruthfulness in Specific Instances

- Rule 404
- Opinion testimony regarding a witness’s truthfulness on a specific occasion rather than concerning the witness’s general character for truthfulness is inadmissible.¹³⁶
- Neither a lay witness nor an expert witness may give opinion testimony with respect to whether the witness was telling the truth on a specific occasion because such testimony invades the province of the jury.¹³⁷
- As a general rule, specific instances of prior conduct may not be proven by extrinsic evidence to impeach the credibility of the witness.¹³⁸

But the decision is

- within the Court’s discretion.¹³⁹ And, evidence of prior specific occasions of giving false statements to law enforcement officers is admissible for impeachment purposes.¹⁴⁰

Other Claims, Law Suits and Settlements

- Other claims and settlements.¹⁴¹
- Other lawsuits.¹⁴²
- Offers to settle or compromise.¹⁴³
- Mediation communications.¹⁴⁴
- Settlement with a defendant or designated non-party.¹⁴⁵
- Prior fraudulent misrepresentation.¹⁴⁶
- Negligence of a third party where the third-party is not properly designated as a non-party-at-fault.¹⁴⁷

Collateral Issues

- Collateral Issues.¹⁴⁸

Personal and Confidential Matters

- Diaries and journals are generally hearsay and thus not admissible, but a hearsay exception such as state of mind may apply.¹⁴⁹
- The diaries or journals may be privileged attorney/client communications (if made by the claimant specifically for his or her attorney) or work product (materials prepared in anticipation of litigation).
- Tax returns.¹⁵⁰

Statements

- Statements to insurance adjusters within 15 days of the injury.¹⁵¹
- Dead Man's Act.¹⁵²
- Self serving statements.¹⁵³

Retention of Attorney

- The date of retention of an attorney is privileged because it inhibits the right to utilize the legal system.¹⁵⁴
- The date an attorney was retained is immaterial and irrelevant.¹⁵⁵
- It is not proper to offer evidence of when an attorney was hired to show that a personal injury litigant is claims minded and to attack credibility.¹⁵⁶
- The slight probative value of the date of retention of an attorney is outweighed by the danger of unfair prejudice.¹⁵⁷

Competency of Witness; Privileges

- Competency.¹⁵⁸
- Religious beliefs.¹⁵⁹
- Privileges pursuant to C.R.S. § 13-90-107(1).
 - (a) Spousal
 - (b) Attorney/Client
 - (c) Clergy
 - (d) Physician/Patient
 - (e) Public officer
 - (f) Certified public accountant/Client
 - (g) Therapist/Patient
 - (h) Interpreter
 - (i) Confidential intermediary
 - (j) Voluntary self-evaluation or environmental audit
 - (k) Victim's advocate
 - (l) Parent/Child
 - (m) Law enforcement or firefighter peer support team
- A personal injury plaintiff's implied waiver of the physician/patient privilege, arising from standard claims for damages, is not a waiver of privilege as to the entirety of his or her medical records. The implied waiver "is limited to those records relating to the cause and extent of the injuries and damages allegedly sustained as a result of the defendant's claimed negligence."¹⁶⁰
- The physician/patient privilege applies equally to in-court testimony and to pretrial discovery of information.¹⁶¹
- Medical records in the plaintiff's PIP file regarding injuries or conditions not at issue in the liability case are privileged.¹⁶²
- The providing of medical records to a health insurer in order to obtain reimbursement for medical expenses does not constitute a waiver of the physician/patient privilege.¹⁶³
- Bare allegations of mental anguish, emotional distress, pain and suffer-

ing, and loss of enjoyment of life arising from generic claims for personal injuries do not amount to an implied waiver of privilege for all mental health conditions.¹⁶⁴

- Psychotherapist/patient privilege falls under the psychologist/patient privilege provided by statute.¹⁶⁵
- A survey conducted by the Joint Commission on Accreditation of Hospitals and the hospital's infection control committee is privileged only if the surveys were furnished to a utilization review committee to satisfy the requirements of state or federal law.¹⁶⁶
- Neither the United States Supreme Court nor the Tenth Circuit has recognized a medical peer review or a medical risk management privilege under federal common law.¹⁶⁷
- The attorney/client privilege exists for the personal benefit and protection of the client who holds the privilege, and it must be asserted by the client; it extends only to confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations.¹⁶⁸
- An incident report prepared by hospital personnel about a patient's injury was not shielded by the attorney/client privilege despite the argument that it was prepared in anticipation of litigation; it was prepared close to the time of the injury but well before a notice of claim was received.¹⁶⁹
- If a lawyer is acting in an investigative capacity or as the equivalent of a claims adjuster and not as a legal counselor with regard to an insurance claim, then neither the statutory attorney/client privilege nor the work product privilege protects communications from the lawyer to the insurance carrier.¹⁷⁰
- Newsperson privilege.¹⁷¹
- Environmental audit reports.¹⁷²

Improper Argument

- Reference to, or comment on, evidence that has not been admitted, and that is not properly before the jury.¹⁷³
- Counsel should avoid personal attacks, offers of inadmissible testimony, and efforts to improperly influence the jury through irrelevant and immaterial facts and arguments.¹⁷⁴
- Sarcastic comments, without pointing to explanatory testimony, are not legitimate arguments.¹⁷⁵
- The use of intemperate language on the part of counsel toward each other is condemned.¹⁷⁶
- While counsel may point out facts that discredits a witness's testimony or credibility, it is impermissible for counsel to express, on multiple occasions, his or her personal opinion that the witness "lied."¹⁷⁷

Experts

- Expert Reports. Cumulative and hearsay.¹⁷⁸
- Biomechanical opinions.¹⁷⁹
- Untimely or deficient expert disclosures.¹⁸⁰

Photographs, Videotapes

- No damage or little damage to vehicle.¹⁸¹
- Surveillance videotapes.¹⁸²

Proof

- Statistical Probabilities.¹⁸³

Damages

- Effect of income tax on damages.¹⁸⁴

Affirmative Defenses

- Affirmative defenses not pled.
- Affirmative defenses lacking a *prima facie* showing.
- Failure of back seat passenger to wear seat belt is not comparative negligence.¹⁸⁵
- Failure of motorcyclist to wear a helmet is not comparative negligence.¹⁸⁶

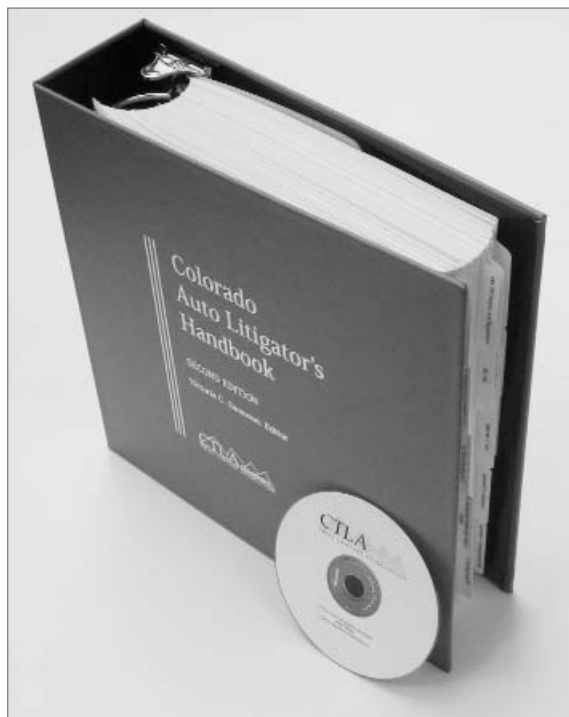


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Collateral Sources

At common law, compensation paid to the plaintiff from a collateral source, independent of the tortfeasor, did not reduce the damages owed by the tortfeasor.

Now, by statute,¹⁸⁷ the trial court will reduce the verdict by the amount of collateral sources - except that the verdict cannot be reduced by compensation paid to the plaintiff *as a result of a contract* entered into and paid by or on behalf of the plaintiff. Quite often this "contract exception" swallows up the general rule of the statute, as shown in the cases below.

Collateral Sources and other payments that do NOT reduce the verdict:

- Health Insurance.¹⁸⁸
- Sick pay.¹⁸⁹
- Pension benefits.¹⁹⁰
- Disability benefits.¹⁹¹ Fireman's disability benefits.¹⁹²
- Contracts for payments (indirect payments for fire insurance).¹⁹³
- Social Security.¹⁹⁴
- Social Security Disability.¹⁹⁵
- Workers Compensation benefits.¹⁹⁶
- Medicare.¹⁹⁷
- Medicaid benefits other than past medical expenses.¹⁹⁸
- Restitution payments as a condition of parole.¹⁹⁹
- Payments by settling defendants.²⁰⁰
- The status of no-fault (PIP) benefits for claims arising after the July 1, 2003 "sunset" of PIP is unclear, with various trial judges entering contradictory rulings.

Payments that DO reduce the verdict:

- No fault (PIP) benefits (prior to the "sunset" of the no-fault statutes).²⁰¹
- Medicaid benefits for past medical expenses.²⁰²
- CHAMPUS benefits.²⁰³
- Veterans' disability benefits in a Federal Tort Claims Act suit.²⁰⁴

- Workers Compensation benefits may be set off against PIP.²⁰⁵

Determinations

- Social Security Disability determination is not admissible. However, factual findings pursuant to a duty imposed by law are admissible.²⁰⁶
- Bankruptcy.²⁰⁷

Parol Evidence

- Parol (oral) evidence is inadmissible to modify, add to, contradict or change provisions of unambiguous written instruments, unless the evidence is offered to establish fraud, mutual mistake or mistake of law.²⁰⁸

Tests

- Polygraph inadmissible.²⁰⁹
- Polygraph inadmissible in civil cases.²¹⁰
- Colorado does not recognize voice print, or sound spectrography, as evidence of voice authentication.²¹¹

III. Scientific Evidence

The admissibility of scientific evidence is governed by Rule 702. Inquiry under the rule focuses on the relevance and reliability of the proffered evidence, and requires the trial court to consider: 1) the reliability of the scientific principles, 2) the qualifications of the witness and 3) the usefulness of the testimony to the jury.²¹² The trial court may, but need not, consider the factors mentioned in *Daubert v. Merrell Dow Pharmaceutical*.²¹³ The trial court may also consider other factors.²¹⁴ The admissibility of scientific evidence based on novel scientific devices and processes or the manipulation of physical evidence continues to be governed by *Frye v. United States*.²¹⁵

- A trial court did not abuse its discretion by excluding a biomechanical expert's opinion that the forces of an auto collision could not have caused the claimed injuries.²¹⁶
- Expert testimony cannot be admitted under the guise of lay opinion testimony.²¹⁷

- The trial court's gate keeping function applies not only to scientific knowledge, but also to technical and "other specialized" knowledge.²¹⁸
- Videotape of car/train collision was admissible with instruction that video was not a recreation of the collision.²¹⁹
- Filmed evidence which is not meant to depict the actual event may be admitted to show applicable mechanical principles provided that it is shown that the experiment was conducted under conditions that were at least similar to those which existed at the time of accident.²²⁰
- Film illustrating motorcycle lean while turning.²²¹
- Videotape of car approaching ramp, becoming airborne, and landing was admissible as a demonstration of principles and not as a recreation.²²²
- A computer animation is admissible if: 1) it is authentic under Rule 901; 2) it is relevant under Rule 401 and 402; 3) it is a fair and accurate representation of the evidence to which it relates; and 4) its probative value is not substantially outweighed by the danger of unfair prejudice under Rule 403.²²³
- Computer simulations. Simulations are distinguished from animations in *Cauley, supra*, but admissibility is not addressed. Animations illustrate general principles while simulations purport to show what actually happened in the incident. Admissibility of simulations remains a matter of first impression under Colorado law. In a simulation, the computer operator inputs data points and assumptions. Naturally, the data points and assumptions should substantially correspond with the evidence. The computer software program then analyzes the inputs and generates outputs. Consequently, it necessarily follows that simulations should be scientifically reliable under Rule 702 and *Shreck*.

- The Tenth Circuit prohibits reconstructions that purport to be an actual recreation of the incident.²²⁴
- The authors believe that Colorado will adopt the four *Cauley* factors with a requirement of scientific reliability under Rule 702/*Shreck* as the standard for admissibility of computer simulations when the issue is eventually presented for determination. Additionally, the authors believe that Colorado will not adopt a blanket prohibition against a recreation of the incident, but will require multiple recreations; i.e., more than one scenario. In other words, the proponent will present his or her recreation followed by alternative scenarios based upon other assumptions along with an explanation of why the other scenarios do not correspond with what probably happened.
- An experiment must be conducted under sufficiently similar conditions to that of the accident to be admissible.²²⁵

Counsel must have motions in limine in mind while choosing experts, while meeting with experts, while preparing expert disclosures, while preparing to depose opposing experts, and while conducting depositions of opposing experts because motions in limine to exclude or limit expert scientific testimony (“*Shreck*” motions) require extensive lead time and preparation in order to be effective. Keep in mind that many trial judges require that *Shreck* motions be filed before the default deadline for pretrial motions; i.e., 35 days before trial pursuant to C.R.C.P. 16(b)(9), and some trial judges have even earlier deadlines, such as 60 days before trial.

IV. CONCLUSION

Motions in limine are powerful, but underutilized, weapons. They have the potential to radically alter the battlefield. But they are often hastily drafted in order to meet the motion deadline with little forethought about

their role in the larger trial strategy. Motions in limine should be an integral part of the case “grand strategy” from the start - not a last minute effort to exclude certain evidence because the case did not settle.

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End Notes

¹ The authors are indebted to Victoria Swanson for writing the COLORADO EVIDENCE HANDBOOK (2005), published by Bradford, which was a valuable reference source. The COLORADO AUTO LITIGATOR'S HANDBOOK (2006), published by the Colorado Trial Lawyers Association and edited by Victoria Swanson, was also a valuable resource.

² Colo. R. Evid. 411.

³ Colo. R. Evid. 403. Note, Rule 411 is almost never the basis for excluding evidence or mention of insurance - although it is often cited as authority for such exclusion. Rule 403 is the real basis for exclusion.

⁴ *Liber v. Flour*, 415 P.2d 332 (Colo. 1966); *Cain v. Wilson*, 506 P.2d 1240 (Colo. App. 1972); *Jacobs v. Commonwealth Highland Theatres*, 738 P. 2d 6 (Colo. App. 1986); *Prudential Prop. Cas. Ins. Co. v. Dist. Ct.*, 617 P.2d 556 (Colo. 1980); *Mayer v. Sampson*, 402 P.2d 185 (Colo. 1965); *Davis v. Roberts*, 395 P.2d 13 (Colo. 1964); *Edwards v. Quackenbush*, 149 P.2d 809 (Colo. 1944); *Johns v. Shinall*, 86 P.2d 605 (Colo. 1939); *Oglesby v. Conger*, 507 P.2d 883 (Colo. 1973); *Smith v. Dist. Ct.*, 907 P.2d 611 (Colo. 1995); *Rains v. Rains*, 46 P.2d 740 (Colo. 1935); *Evans v. Colo. Permanente Med. Group, P.C.*, 902 P.2d 867 (Colo. App. 1995), *modified on other grounds*, 926 P.2d 1218 (Colo. 1996).

⁵ *Bonser v. Shainholz*, 3 P.3d 422 (Colo. 2000); *Conde v. Starlight I, Inc.*, 103 F. 3d 210 (1st Cir. 1997).

⁶ *Wilson v. Muckala*, 303 F. 3d 1207 (10th Cir. 2002).

⁷ Colo. R. Evid. 608(a)(1).

⁸ Colo. R. Evid. 608(a)(2); *People v. Renfro*, 117 P.3d 43 (Colo. App. 2004).

⁹ C.R.S. § 13-90-101.

¹⁰ *People v. Armand*, 873 P.2d 7 (Colo. App. 1993).

¹¹ *Hafelfinger v. Dist. Ct.*, 674 P.2d 275 (Colo. 1984).

¹² *Apodaca v. People*, 712 P.2d 467 (Colo. 1985).

¹³ *Lacey v. People*, 442 P.2d 402 (Colo. 1968).

¹⁴ C.R.S. § 42-4-1713; C.R.S. §§ 42-2-201 through 208.

¹⁵ *People v. Butler*, 929 P.2d 36 (Colo. App. 1996).

¹⁶ COLO. R. EVID. 801(d)(2).

¹⁷ *People v. Meier*, 954 P.2d 1068 (Colo. 1998); *Devenyns v. Hartig*, 983 P.2d 63 (Colo. App. 1998).

¹⁸ COLO. R. EVID. 804(b)(3); *Bernal v. People*, 44 P.3d 184 (Colo. 2002).

¹⁹ *Chaffin v. Wallain*, 689 P.2d 684 (Colo. App. 1984); *Asplin v. Mueller*, 687 P.2d 1329 (Colo. App. 1984).

²⁰ *United States v. Martinez*, 681 F. 2d 1248 (10th Cir. 1982); *Kostal v. People*, 357 P.2d 70 (Colo. 1960); *People v. Bates*, 546 P.2d 491 (Colo. 1976).

²¹ COLO. R. EVID. 406. *Bloskas v. Murray*, 646 P.2d 907 (Colo. 1982); *Denver Tramway Co. v. Owens*, 38 P. 848 (Colo. 1894).

- 22 *Columbia Savings v. Zelinger*, 794 P.2d 231 (Colo. 1990); COLO. R. EVID. 803(6).
- 23 COLO. R. EVID. 608(a).
- 24 *Knowles v. Bd. of Ed., School Dist. No RE-1*, 857 P.2d 553 (Colo. App. 1993).
- 25 *Scharrel v. Wal-Mart Stores*, 949 P.2d 89 (Colo. App. 1997); *Millenson v. Dept. of Highways*, 590 P.2d 979 (Colo. App. 1978); *Rodrick v. J.C. Penney Co.*, 505 P.2d 973 (Colo. App. 1973).
- 26 *Morgan v. Bd. of Water Works of Pueblo*, 837 P.2d 300 (Colo. App. 1992).
- 27 *Walter v. Hall*, 940 P.2d 991 (Colo. App. 1997).
- 28 *Jacobs v. Commonwealth Highland Theatres*, 738 P.2d 6 (Colo. App. 1986).
- 29 *Boettcher & Co. v. Munson*, 854 P.2d 199 (Colo. 1993).
- 30 *Bodah v. Montgomery Ward & Co.*, 724 P.2d 102 (Colo. App. 1986); *Churchill v. Norfolk & W. Ry. Co.*, 383 N.E.2d 929 (Ill. 1978).
- 31 *Palmer v. A.H. Robbins Co.*, 684 P.2d 187 (Colo. 1984); *Coale v. Dow Chemical Co.*, 701 P.2d 885 (Colo. App. 1985).
- 32 *Winkler v. Rocky Mountain Conf. of the United Methodist Church*, 923 P.2d 152 (Colo. App. 1995).
- 33 *State of West Virginia ex rel. Tinsman v. Hott*, 424 S.E.2d 584 (W.V. 1992).
- 34 *Southerland v. Argonaut Ins. Co.*, 794 P.2d 1102 (Colo. App. 1990).
- 35 *White v. Caterpillar*, 867 P.2d 100 (Colo. App. 1993); *Martinez v. W.R. Grace Co.*, 782 P.2d 827 (Colo. App. 1989).
- 36 *Duggan v. Bd. of County Commissioners*, 747 P.2d 6 (Colo. App. 1987); *Miller v. Heil Co.*, 745 F. 2d 1297 (10th Cir. 1984).
- 37 *Burr v. Green Bros. Sheet Metal*, 409 P.2d 511 (Colo. 1966).
- 38 *Forma Scientific v. BioSera*, 960 P.2d 108 (Colo. 1998).
- 39 *Huffman v. Caterpillar Tractor Co.*, 908 F. 2d 1470 (10th Cir. 1990).
- 40 *Pau v. Yosemite Park & Curry Co.*, 928 F. 2d 880 (9th Cir. 1991); *Mehojah v. Drummond*, 56 F. 3d 1213 (10th Cir. 1995).
- 41 COLO. R. EVID. 701; *Oglesby v. Conger*, 507 P.2d 883 (Colo. App. 1972); *Sherry v. Jones*, 292 P.2d 746 (Colo. 1956).
- 42 *Cheney v. Hailey*, 686 P.2d 808 (Colo. App. 1984).
- 43 *Kielsmier v. Foster*, 669 P.2d 630 (Colo. App. 1983).
- 44 *Brown v. Hollywood Bar & Café*, 942 P.2d 1363 (Colo. App. 1997).
- 45 *Jones v. Blegen*, 420 P.2d 404 (Colo. 1966).
- 46 *People v. T.R.* 869 P.2d 559 (Colo. App. 1993).
- 47 *Meader v. People*, 497 P.2d 1010 (Colo. 1972); *Bridges v. Lintz*, 346 P.2d 571 (Colo. 1959).
- 48 *Atencio v. Torres*, 385 P.2d 659 (Colo. 1963). Compare to *Simpson v. Anderson*, 526 P.2d 298 (Colo. 1974): testimony of a police officer as to speed was not admissible where counsel did not attempt to qualify the police officer as an expert capable of giving an opinion on speed.
- 49 *People v. Stewart*, 55 P.3d 107 (Colo. 2002).
- 50 *People v. Stewart*, 55 P.3d 107 (Colo. 2002).
- 51 *Thirk v. Ethicon*, 687 P.2d 1315 (Colo. App. 1983); *LaMaire v. U.S.*, 826 F. 2d 949 (10th Cir. 1987).
- 52 *Melville v. Southward*, 791 P.2d 383 (Colo. 1990).
- 53 *Huntoon v. TCI Cablevision of Colorado*, 969 P.2d 681 (Colo. 1998).
- 54 *People v. Nhan Dao Van*, 681 P.2d 832 (Colo. 1984).
- 55 *Intermill v. Heumesser*, 391 P.2d 684 (Colo. 1964).
- 56 COLO. R. EVID. 1006.
- 57 *Arthur v. Catour*, 803 N.E.2d 647 (Ill. App.2004).
- 58 *City of Englewood v. Bryant*, 68 P.2d 913 (Colo. 1937); *Gomez v. Black*, 511 P.2d 531 (Colo. 1973).
- 59 *Kendall v. Hargrave*, 349 P.2d 993 (Colo. 1960).
- 60 *Sours v. Goodrich*, 674 P.2d 995 (Colo. App. 1983); *CeBuzz v. Sniderman*, 466 P.2d 457 (Colo. 1970).
- 61 *Morgan v. Bd. of Water Works of Pueblo*, 837 P.2d 300 (Colo. App. 1992); *CeBuzz v. Sniderman*, 466 P.2d 457 (Colo. 1970); *Lawson v. Safeway*, 878 P.2d 127 (Colo. App. 1994); *Sours v. Goodrich*, 674 P.2d 995 (Colo. App. 1983).
- 62 *Phillips v. Monarch Recreation Corporation*, 668 P.2d 982 (Colo. App. 1983).
- 63 *Anderson v. Watson*, 953 P.2d 1284 (Colo. 1998).
- 64 *Pennington v. Sears, Roebuck & Co.*, 878 P.2d 152 (Colo. App. 1994).
- 65 *Carter v. Rodriguez*, (Colo. App. 2001) (unpublished).
- 66 *Music v. Heeb*, 744 So.2d 1169 (Fla. App. 1999).
- 67 *People v. Atencio*, 565 P.2d 921 (Colo. 1977).
- 68 *West v. Torbuc Corporation*, 517 P.2d 485 (Colo. App. 1973).
- 69 *Bohlender v. Oster*, 439 P.2d 999 (Colo. 1968).
- 70 C.R.C.P. 47(k).
- 71 *Sibley v. Wallrich*, 226 P. 152 (Colo. 1924); *Schnabel v. Waters*, 549 P.2d 795 (Colo. 1976).
- 72 *People v. Loscutt*, 661 P.2d 274 (Colo. 1983); *Millers Nat. Ins. Co. v. Wichita Flour Mills Co.*, 257 F. 2d 93 (10th Cir. 1958).
- 73 *People v. Moreland*, 567 P.2d 355 (Colo. 1977); *People v. Anderson*, 954 P.2d 627 (Colo. App. 1997).
- 74 *Kovacs v. Chesapeake and Ohio Railway Co.*, 351 N.W.2d 581 (Mich. App. 1984).
- 75 *Lanford v. People*, 409 P.2d 829 (Colo. 1966).
- 76 *People v. Avery*, 736 P.2d 1233 (Colo. App. 1986).
- 77 *Koehn v. R.D. Werner Co.*, 809 P.2d 1045 (Colo. App. 1990).
- 78 *Blum v. Rhodes*, 582 S.E.2d 82 (N.C. App.2003).
- 79 *Roberts v. Stevens Clinic Hospital*, 345 S.E.2d 791 (W.Va. 1986).
- 80 *McKown-Katy v. Rego Company*, 776 P.2d 1130 (Colo. App. 1989).
- 81 *Bannister v. Town of Noble, Oklahoma*, 812 F. 2d 1265 (10th Cir. 1987).
- 82 *State of Minnesota v. Al-Naseer*, 678 N.W.2d 679 (Minn. App.2004).
- 83 *People v. Taylor*, 804 P.2d 196 (Colo. App. 1990); *People v. Portley*, 857 P.2d 459 (Colo. App. 1992).
- 84 *People v. Martin*, 670 P.2d 22 (Colo. App. 1983).
- 85 *Small v. Clark*, 263 P. 933 (Colo. 1928).
- 86 *Oaks v. People*, 424 P.2d 115 (Colo. 1967).

- 87 *Starkey v. Bryan*, 441 P.2d 314 (Colo. 1968).
- 88 *Martinez v. W.R. Grace Co.*, 782 P.2d 827 (Colo. App. 1989).
- 89 *Roland v. Langlois*, 945 F. 2d 956 (7th Cir. 1991).
- 90 *Intermill v. Heumesser*, 391 P.2d 684 (Colo. 1964).
- 91 *People v. Smith*, 682 P.2d 493 (Colo. App. 1983).
- 92 *People v. Czemerynski*, 786 P.2d 1100 (Colo. 1990).
- 93 *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).
- 94 *Hohertz v. People*, 35 P.3d 713 (Colo. 2000).
- 95 *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986).
- 96 *Miller v. Solaglas California*, 870 P.2d 559 (Colo. App. 1993).
- 97 *Kehm v. Proctor and Gamble Manufacturing Co.*, 724 F. 2d 613 (8th Cir. 1983); *Shoemaker v. Crawford*, 603 N.E.2d 1114 (OhioApp. 1991). See also *Corbetta v. Albertson's*, 975 P.2d 718 (Colo. 1999).
- 98 *Pendley Quality Trailer Supply v. B & F Plastics*, 578 S.E.2d 915 (Ga. App.2003).
- 99 *Prestige Homes v. Legouffe*, 658 P.2d 850 (Colo. 1983); Colo. R. Evid. 803(18).
- 100 *People v. Huehn*, 53 P.3d 733 (Colo. App. 2002).
- 101 *Benham v. Pryke*, 703 P.2d 644 (Colo. App. 1985), *rev'd on other grounds*, 744 P.2d 67 (Colo. 1987).
- 102 Colo. R. Evid. 1006; *People v. McDonald*, 15 P.3d 788 (Colo. App. 2000).
- 103 Colo. R. Evid. 1004(1).
- 104 *Westland Distributing v. Rio Grande Motorway*, 555 P.2d 990 (Colo. App. 1976); *Lewis v. People*, 483 P.2d 949 (Colo. 1971).
- 105 C.R.S. § 1-25-102.
- 106 *Thompson v. Tartler*, 443 P.2d 365 (Colo. 1968); *Van Schaack & Co. v. Perkins*, 272 P.2d 269 (Colo. 1954).
- 107 *Pyles-Knutzen v. Bd. of County Commissioners*, 781 P.2d 164 (Colo. App. 1989).
- 108 *Brittis v. Freeman*, 527 P.2d 1175 (Colo. 1974); *Martinez v. Shapland*, 833 P.2d 837 (Colo. App. 1992).
- 109 *Kitto v. Gilbert*, 570 P.2d 544 (Colo. 1977).
- 110 *Jones v. Cruzan*, 33 P.3d 1262 (Colo. App. 2001).
- 111 *Boryla v. Pash*, 960 P.2d 123 (Colo. 1998); *Salazar v. American Sterilizer Co.*, 5 P.3d 357 (Colo. App. 2000).
- 112 *Villandry v. Gregerson*, 824 P.2d 829 (Colo. App. 1991); see also *Peterson v. Tadolini*, 97 P.3d 359 (Colo. App. 2004).
- 113 C.J.I.-Civ. 4th 6:1.
- 114 C.J.I.-Civ. 4th 6:2.
- 115 C.J.I.-Civ. 4th 6:3.
- 116 C.J.I.-Civ. 4th 6:11.
- 117 C.J.I.-Civ. 4th 6:12.
- 118 C.J.I.-Civ. 4th 6:13.
- 119 *People v. Miller*, 981 P.2d 654 (Colo. App. 1998).
- 120 C.R.S. § 42-4-1713, 1714; *Ripple v. Brack*, 286 P.2d 626 (Colo. 1955).
- 121 *Jackson v. Moore*, 883 P.2d 622 (Colo. App. 1994).
- 122 C.R.S. § 13-90-101.
- 123 *Hafelfinger v. Dist. Ct.*, 674 P.2d 375 (Colo. 1984).
- 124 *People v. Goldfuss*, 98 P.3d 935 (Colo. App. 2004).
- 125 *U.S. v. Jones*, 965 F. 2d 1507 (8th Cir. 1992).
- 126 *People v. Barker*, 538 P.2d 109 (Colo. 1975).
- 127 *People v. Turner*, 680 P.2d 1290 (Colo. App. 1983).
- 128 Colo. R. Evid. 404(a), 401, 402, 403; *Szterling v. Hintz*, Lexis 11654 (N.D.Ill. 1995); *DeLott v. Roraback*, 426 A.2d 791 (Conn. 1980); *Mathews v. CTI Container Transport International*, 871 F. 2d 270 (2d Cir. 1989); *People v. Nunez*, 973 P. 1260 (Colo. 1999); *People v. Dist. Ct.*, 869 P.2d 1281 (Colo. 1994).
- 129 *People v. Miller*, 981 P.2d 654 (Colo. App. 1998).
- 130 *People v. Saldana*, 670 P.2d 14 (Colo. App. 1983).
- 131 *Swartwood v. Burlington Northern*, 669 P.2d 1051 (Colo. App. 1983).
- 132 *Baldwin v. Schipper*, 393 P.2d 363 (Colo. 1964).
- 133 *Bennett v. Longacre*, 774 F. 2d 1024 (10th Cir. 1985).
- 134 *U.S. v. Neeley*, 980 F. 2d 1074 (7th Cir. 1992).
- 135 *People v. Jones*, 971 P.2d 243 (Colo. App. 1998).
- 136 *People v. Tallwhiteman*, (Colo. App. No. 03CA0211, March 10, 2005) (unpublished).
- 137 *People v. Higa*, 735 P.2d 203 (Colo. App. 1987).
- 138 *People v. Caldwell*, 43 P.3d 663 (Colo. App. 2001).
- 139 *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).
- 140 *People v. Gilbert*, 12 P.3d 331 (Colo. App. 2000).
- 141 *Bruckman v. Pena*, 487 P.2d 566 (Colo. App. 1971).
- 142 *Westfall v. Town of Hugo*, 851 P.2d 299 (Colo. App. 1993).
- 143 Colo. R. Evid. 408.
- 144 *American Guaranty & Liability Ins. Co. v. King*, 97 P.3d 161 (Colo. App. 2003).
- 145 *Greenmeier by Redington v. Spencer*, 719 P.2d 710 (Colo. 1986); *Smith v. Zufelt*, 880 P.2d 1178 (Colo. App. 1994).
- 146 *Hock v. New York Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994).
- 147 *Chavez v. Parkview Epis. Med. Ctr.*, 32 P.3d 609 (Colo. App. 2001); *Thompson v. Colorado & Eastern Railroad Co.*, 852 P.2d 1328 (Colo. App. 1993).
- 148 *Williams v. Continental Airlines, Inc.* 943 P.2d 10 (Colo. App. 1996); *People v. Rudnick*, 878 P.2d 16 (Colo. App. 1993); *Gizewski v. People*, 239 P. 1026 (Colo. 1925).
- 149 *Kehm v. Proctor and Gamble Manufacturing Co.*, 724 F. 2d 613 (8th Cir. 1983); *Shoemaker v. Crawford*, 603 N.E.2d 1114 (OhioApp. 1991). See also *Corbetta v. Albertson's*, 975 P.2d 718 (Colo. 1999).
- 150 *Payne v. Howard*, 75 F. R.D. 465 (D.D.C. 1977); *Federal Sav. & Loan Ins. Corp. v. Krueger*, 55 F. R.D. 512 (N.D.Ill. 1972); *Cooper v. Hallgarten & Co.*, ___ F. R.D. 482 (S.D.N.Y. 1964); *Losavio v. Robb*, 579 P.2d 1152 (Colo. 1978); *Griffin v. Western Realty Sales Corp.*, 665 P.2d 1031 (Colo. App. 1983); *Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005).

- 151 C.R.S. § 13-21-301.
- 152 C.R.S. § 13-90-102.
- 153 *Stone v. Union Fire Insurance Co.*, 107 P.2d 241 (Colo. 1941).
- 154 *Carlyle v. Lai*, 783 S.W.2d 925 (Mo. App. 1989); *Travis v. Vandergraff*, 384 S.W.2d 936 (Tex. App. Waco 1964); *Martinez v. Williams*, 312 S.W.2d 742 (Tex. App. Houston 1958).
- 155 Colo. R. Evid. 401 and 403; see *Travis v. Vandergriff*, 384 S.W.2d 936, 938 (Tex. App. 1964) (the question as to when claimant hired a lawyer was wholly immaterial and irrelevant to the issues in a personal injury case; i.e., liability, causation, and injuries).
- 156 *Martinez v. Williams*, 312 S.W.2d 742, 752 (Tex. App. 1958); *Houston & TC Ry. V. Johnson*, 127 S.W. 539, 541 (Tex. 1910).
- 157 *Southern Truck Leasing Corp. v. Manieri*, 325 S.W.2d 912, 916 (Tex. Civ. App. 1959).
- 158 C.R.S. § 13-90-101; Colo. R. Evid. 601.
- 159 C.R.S. § 13-90-110; Colo. R. Evid. 610.
- 160 *Weil v. Dillon Companies*, 109 P.3d 127 (Colo. 2005); *Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005).
- 161 *Weil v. Dillon Companies*, 109 P.3d 127 (Colo. 2005); *Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005).
- 162 *Devenyns v. Hartig*, 983 P.2d 63 (Colo. App. 1998).
- 163 *Devenyns v. Hartig*, 983 P.2d 63 (Colo. App. 1998).
- 164 *Weil v. Dillon Companies*, 109 P.3d 127 (Colo. 2005); *Johnson v. Trujillo*, 977 P.2d 152 (Colo. 1999).
- 165 *Hoffman v. Brookfield Republic*, 87 P.3d 858 (Colo. 2004); C.R.S. § 13-90-107.
- 166 *Sherman v. Dist. Ct.*, 637 P.2d 378 (Colo. 1981).
- 167 *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990); *Atteberry v. Longmont United Hospital*, 221 F. R.D. 644 (D.Colo. 2004).
- 168 *Law Offices of Bernard D. Mosely, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).
- 169 *Kay Laboratories v. Dist. Ct.*, 653 P.2d 721 (Colo. 1982).
- 170 *National Farmers Union v. Dist. Ct.*, 718 P.2d 1044 (Colo. 1986); *Munoz v. State Farm Mut. Auto. Ins. Co.*, 968 P.2d 126 (Colo. App. 1998).
- 171 C.R.S. § 13-90-119.
- 172 C.R.S. § 13-25-126.5(3).
- 173 *Johns v. Shinall*, 86 P.2d 605 (Colo. 1939); *Grant v. Varney*, 40 P. 771 (Colo. 1895).
- 174 *O'Brien v. Wallace*, 324 P.2d 1028 (Colo. 1958).
- 175 *Buchhalter v. Myers*, 276 P. 972 (Colo. 1929).
- 176 *Thomas v. Mahin*, 230 P. 793 (Colo. 1924).
- 177 *Combined Communications Corp. v. Public Service Co.*, 865 P.2d 893, 900 (Colo. App. 1983).
- 178 *Nat'l Canada Corp. Dikeou*, 868 P.2d 1131 (Colo. App. 1993).
- 179 *People v. Shreck*, 22 P.3d 68 (Colo. 2001); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000); *Kling v. City & County of Denver*, 335 P.2d 876 (Colo. 1959).
- 180 *Todd v. Bear Valley Apartments*, 908 P.2d 973 (Colo. 1993). *Carlson v. Ferris*, 58 P.3d 1055 (Colo. App. 2002); *Svendsen v. Robinson*, 94 P.3d 1204 (Colo. App. 2004).
- 181 *Davis v. Maute*, 770 A.2d 36 (Del. 2001).
- 182 *Quinn v. Wal-Mart Stores*, 774 So.2d 1093 (La. App. 2000).
- 183 *Blancha v. Raymark Industries*, 972 F. 2d 507 (3d Cir. 1992).
- 184 *Marlow v. Atchison, Topeka & Sante Fe Railway*, 671 P.2d 438 (Colo. App. 1983); *People v. Pratt*, 759 P.2d 676 (Colo. 1988); *People v. Kramer*, 795 P.2d 1371 (Colo. App. 1990); *McKnown-Katy v. Rego*, 776 P.2d 1130 (Colo. App. 1989).
- 185 *Miller v. Solaglas California*, 870 P.2d 559 (Colo. App. 1993); See Gary S. Craw, *Unbuckling Colorado's Seat Belt Defense*, 28 Trial Talk, Aug./Sept. 2001, at 28.
- 186 *Dare v. Sobule*, 648 P.2d 169 (Colo. App. 1982).
- 187 C.R.S. § 13-21-111.6.
- 188 *Publix Cab Co. v. Colo. Nat'l Bank of Denver*, 338 P.2d 702 (Colo. 1959); *Jones v. USAA Cas. Ins. Co.*, 952 P.2d 819 (Colo. App. 1997).
- 189 *Jones*, 952 P.2d 819.
- 190 *Moyer v. Merrick*, 392 P.2d 653 (Colo. 1964); *Van Waters & Rogers v. Keelan*, 840 P.2d 1070 (Colo. 1992).
- 191 *Van Waters & Rogers*, 840 P.2d 1070.
- 192 *Keelan v. Van Waters & Rogers*, 820 P.2d 1145 (Colo. App. 1991).
- 193 *Frost v. Schroeder & Co.*, 876 P.2d 126 (Colo. App. 1994).
- 194 *Combined Community Corp, Inc. v. Pub. Serv. Co.*, 865 P.2d 893 (Colo. App. 1993).
- 195 *Barnett v. Am. Fam. Mut. Ins. Co.*, 843 P.2d. 1302 (Colo. 1993).
- 196 *Combined Community Corp., Inc.*, 865 P.2d at 901-902.
- 197 *Powell v. Brady*, 496 P.2d 328 (Colo. App. 1972). aff'd *Brady v. City and County of Denver*, 508 P.2d 1254 (Colo. 1973); *Berg v. U.S.*, 806 F. 2d 978 (10th Cir. 1986).
- 198 *Ark. Dept. of Human Serv. v. Ahlborn*, 126 S. Ct. 1752 (2006).
- 199 *Kahn v. Quintana*, 811 P.2d 458 (Colo. App. 1991).
- 200 *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486 (Colo. App. 1994); *Smith v. Vincent*, 77 P.3d 927 (Colo. App. 2003); see *Smith v. Zufelt*, 880 P.2d 1178 (Colo. 1994).
- 201 *Martinez v. Shapland*, 833 P.2d 837 (Colo. App. 1992).
- 202 *Ahlborn*, 126 S. Ct. 1752. See *Rose Med. Ctr. v. State Farm Mut. Auto Ins. Co.*, 903 P.2d 15 (Colo. App. 1973) for law in Colorado prior to *Ahlborn*.
- 203 *Mays v. U.S.*, 806 F. 2d 976 (10th Cir. 1986).
- 204 *Steckler v. U.S.*, 549 F. 2d 1372 (10th Cir. 1977); *U.S. v. Gray*, 199 F. 2d 239 (10th Cir. 1952).
- 205 *Barnett v. Am. Fam. Mut. Ins. Co.*, 843 P.2d 1302 (Colo. 1993).
- 206 *Leiting v. Mutha*, 58 P.3d 1049 (Colo. App. 2002); Colo. R. Evid. 803(8)(C); cf. *Carter v. Rodriguez*, (Colo. App. 20010 (unpublished) (holding that it was reversible error to refuse to admit an Army disability rating evaluation showing that an MVA plaintiff was 10% disabled, as such was admissible under the COLO. R. EVID. 803(8)(C) public records exception to hearsay and was clearly relevant to the showing that the

- plaintiff suffered permanent injuries.
- 207 COLO. R. EVID. 403.
- 208 *Light v. Rogers*, 242 P.2d 234 (Colo. 1952); *Boyles Bros. Drilling v. Orion Ind.*, 761 P.2d 278 (Colo. App. 1988).
- 209 *People v. Anderson*, 637 P.2d 354 (Colo. 1981); *People v. Aalbu*, 696 P.2d 796 (Colo. 1985).
- 210 *Valley Nat'l Bank of Cortez v. Chaffin*, 718 P.2d 259 (Colo. App. 1986).
- 211 *People v. Drake*, 748 P.2d 1237 (Colo. 1988).
- 212 *People v. Shreck*, 22 P.3d 68 (Colo. 2001).
- 213 *Daubert v. Merrell Dow Pharmaceutical*, 113 S. Ct. 2786 (1993).
- 214 *Shreck*, 22 P.3d 68.
- 215 *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000). *See also Brooks v. People*, 975 P.2d 1105 (Colo. 1999) (distinguishing between hard science with "complex scientific trappings" and social science or experience-based opinions).
- 216 *Schultz*, 13 P.3d 846.
- 217 *People v. Stewart*, 55 P.3d 107 (Colo. 2002).
- 218 *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).
- 219 *Montag by Montag v. Honda Motor Co.*, 75 F. 3d 1414 (10th Cir. 1996); *Robinson v. Mo. Pacific R. Co.*, 16 F. 3d 1083 (10th Cir. 1994); *Sanchez v. Denver & Rio Grande W. R. Co.*, 538 F. 2d 304 (10th Cir. 1976).
- 220 *Four Corners Helicopters v. Turbomecca*, 979 F. 2d 1434 (10th Cir. 1992).
- 221 *Brandt v. French*, 638 F. 2d 209 (10th Cir. 1981).
- 222 *Bannister v. Noble, Okla.*, 812 F. 2d 1265 (10th Cir. 1987).
- 223 *People v. Cauley*, 32 P.3d 602 (Colo. App. 2001); *Clark v. Cantrell*, 529 S.E.2d 528 (S.C. 2000).
- 224 *Robinson*, 16 F. 3d 1083.
- 225 *States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990); *Koehn v. R.D. Werner Co.*, 809 P.2d 1045 (Colo. App. 1990).

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