A PRIMER ON MEDICAL MALPRACTICE IN COLORADO

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The Colorado Health Care Availability Act was enacted in 1988. Since then, health care litigation in Colorado has seen many changes. Arguably, the evidence of those changes can be seen in the number of claims being made and the severity of those claims over the years.

The following material is intended to provide a short primer on Colorado’s health care tort reform and how some of the changes in the law have affected the litigation climate over the years.

I. History of Colorado Medical Malpractice Tort Reform

During the 1980s, the Colorado legislature determined that the State was faced with a crisis in the availability of health care, caused by the continually spiraling cost of medical malpractice insurance and the exodus of health care professionals. See § 13-64-102, C.R.S. (1988 Supp.); Scholz v. Metropolitan Pathologists, P.C., 851 P.2d 901, 905 (Colo. 1993). Two years after enacting general tort reform legislation capping the recovery of non-economic damages in personal injury cases, and in response to the crisis in health care, the Colorado General Assembly in 1988 enacted the Health Care Availability Act ("HCAA"). §§ 13-64-102, et seq., C.R.S.

The HCAA is a five part comprehensive statutory scheme which governs the limited area of medical malpractice litigation. It evidences an intent on the part of the legislature to depart from this state's previous jurisprudence in the narrow sector of medical malpractice litigation. See, §§ 13-64-102 and 201, C.R.S. The HCAA, which imposes a number of procedural requirements and damage limitations in medical malpractice actions, is intended to “assure the continued availability of adequate health care services to the people of this state by containing the significantly increasing costs of malpractice insurance for medical care institutions and licensed medical care professionals.” §13-64-402, C.R.S.. Although the HCAA has been criticized as an irrational response to a self-generated insurance crisis, the Colorado Supreme Court has found that “the concerns that prompted the General Assembly to pass the HCAA, as expressed in the declaration of intent as well as the legislative history of the act, reasonably support the passage of the act.” Scholz v. Metropolitan Pathologists, P.C., 851 P.2d 901 (Colo. 1993). There have been a series of constitutional attacks, each of been rejected.

The five parts of the Act are as follows:

1. Legislative Declaration. Establishment of the HCAA and the constitutional underpinnings.
2. Periodic Payments. In certain situations, judgments for future damages are payable by periodic payments. § 13-64-203 (2004), C.R.S. (However, as of 2008, claimant / plaintiff may elect to have a lump sum payment and not periodic payments.)

3. Financial Liability Requirements - Limitations. For the most part, this section deals with damage caps which are discussed below. The statute requires that health care providers be insured, limits the damages recoverable, and mandates that all judgments and settlements, except those involving mental health care facilities (governed by the Department of Public Health and Environment), be reported to the appropriate licensing agency.

4. Procedures and Evidence in Medical Malpractice Cases. In the first part, this section limits those who can testify against a physician in a medical malpractice action. To testify against a physician, an expert must be licensed and “can demonstrate by competent evidence that, as a result of training, education, knowledge, and experience in the evaluation, diagnosis, and treatment of the disease or injury which is the subject matter of the action or proceeding ... he was substantially familiar with applicable standards of care and practice as they relate to the act or omission which is the subject of the claim on the date of the incident.”

Although the section precludes a physician in one medical subspecialty from testifying against another subspecialty, the preclusion is weak if the expert can establish that the standards of care as concerns the subject at issue are similar. The second part is the codification of the Collateral Source Rule, which is discussed in more detail below. Finally, the third part of the section allows for arbitration. Colorado does not mandate the reference of medical malpractice claims to arbitration. It does, however, authorize health care providers to include arbitration clauses in their contracts, so long as agreement to arbitrate is not a condition of service. There are statutorily mandated provisions which must be included for the arbitration clause to be valid. § 13-64-403 (2004), C.R.S.

5. Limitation on Actions. This section precludes actions to recover damages resulting from a genetic disease or disorder, unless the claimant can prove by a preponderance of the evidence that the damage or injury could have been prevented or avoided by care which met the ordinary standard of care.

II. Damages Caps

The heart of the tort reform is that the damage caps that apply to the claims. This is an area that has seen significant modification by the Colorado Supreme Court followed by correction by the General Assembly.

The current status of the caps is as follows:
For claims arising out of acts, errors or omissions prior to July 1, 2003:

$1,000,000 overall damage cap of which no more than $250,000 can be on account of non-economic damages including derivative claims. Damages for physical impairment and disfigurement are not included in the $250,000 cap, but are included in the $1,000,000 overall cap. The court can award damages in excess of $1,000,000 for good cause if the court finds that the present value of past and future lost earnings, medical costs and other health care costs would exceed the limitation, then the court may award the present value of the future lost earnings, medical or other health care costs.

For claims arising out of acts, errors or omissions after July 1, 2003:

$1,000,000 overall damage cap of which no more than $300,000 can be on account of non-economic damages including derivative claims. Damages for physical impairment and disfigurement are included; there is no longer a separate award for those damages. The court can still award damages in excess of $1,000,000 for good cause if the court finds that the present value of past and future lost earnings, medical costs and other health care costs would exceed the limitation, then the court may award the present value of the future lost earnings, medical or other health care costs.

A. Decisions and Legislative Changes

On November 13, 2001, the Colorado Supreme Court issued its opinion in *Preston v. Dupont*, 35 P.3d 433 (Colo. 2001). At trial, the jury awarded the plaintiff $240,000 for noneconomic damages and a separate award of $22,000 for physical impairment. *Preston*, 35 P.3d at 435. On appeal, the defendant argued that the award for “physical impairment” was subject to the HCAA’s $250,000 limitation for noneconomic damages. The Colorado Supreme Court analyzed the language of the HCAA. To clarify the scope of the $250,000 limitation, the HCAA expressly incorporated §13-21-102.5(2)(b), C.R.S., which defines “noneconomic loss” as “nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life.” That definition is part of the general tort reform statute enacted by the General Assembly in 1986, two years before the enactment of the HCAA.

Another subsection of the general tort reform statute indicates that “nothing in this subsection shall be construed to limit the recovery of compensatory damages for physical impairment or disfigurement.” §13-21-102.5, C.R.S. The Colorado Court of Appeals previously interpreted this language as creating a category of damages for physical impairment or disfigurement exempt from the general tort reform statute’s limitations upon noneconomic loss.
Cooley v. Paraho Development Corp., 851 P.2d 207 (Colo.App. 1992). The defendant argued that the General Assembly’s failure to incorporate this exception from the general tort reform statute into the HCAA clearly indicated that awards of damages for physical impairment or disfigurement were subject to the $250,000 limitation for noneconomic loss. The plaintiff, on the other hand, argued that the HCAA should be read in pari materia with the general tort reform statute to exempt damages for physical impairment and disfigurement from the definition of noneconomic loss.

Ultimately, the Colorado Supreme Court agreed with the plaintiff. The court stated that “the fact that the [§13-21-102.5, C.R.S.] physical impairment subsection is not expressly incorporated into the [§13-64-302, C.R.S.] cap is not dispositive.” Preston, 35 P.3d at 439. Even though the physical impairment section was not incorporated into the HCAA, it could still affect the interpretation of the noneconomic damages which may be awarded in medical malpractice actions. Preston, 35 P.3d at 439. Without any direct evidence that the General Assembly intended a different result, §13-21-102.5(2)(B), C.R.S. “must be construed as excluding physical impairment and disfigurement damages from the definition of noneconomic damages as it is incorporated and used in the [§13-64-302, C.R.S.] HCAA cap.” Preston, 35 P.3d at 439.

The effect of the Preston case was that it significantly expanded the potential damages recoverable in medical malpractice actions under the HCAA. Previously, most parties assumed that all damages other than for future economic losses were subject to the $250,000 cap, Preston allowed recovery for a new category of damages for physical impairment and disfigurement beyond this limit. The Court of Appeals later determined that damages for physical impairment and disfigurement remained subject to the $1 million cap. Wallbank v. Rothenberg, 74 P.3d 413 (Colo.App. 2003).

In the next legislative session, the General Assembly overturned Preston by creating a new definition for noneconomic loss or injury which expressly included damages for physical impairment or disfigurement. §13-64-302(1)(a)(II)(A), C.R.S. As part of the same efforts to effect that change, the damages recoverable were increased to $300,000. §13-64-302(1)(c), C.R.S.

The damage caps allow for a total recovery within the cap against all defendants, rather than against each individual defendant, § 13-64-302(1)(b) (2004), C.R.S., and non-party tortfeasors are considered “defendants” for the purposes of the HCAA. Garhart v. Columbia/Healthone, L.L.C., 2004 Colo. LEXIS 528 (Colo. 2004). The Garhart court also clarified that the non-economic damage caps must be applied before apportionment of fault. Accordingly, the trial court must first reduce the award in accordance with the caps then apportion fault to the respective parties as determined by the jury. Id.
B. Damage Caps - Non-Medical Malpractice

By way of comparison, the general tort reform statute applies to non-medical personal injury cases in Colorado. For all claims that accrue on or after January 1, 1998 and before January 1, 2008, the total damages recoverable for non-economic loss is capped at $366,250, but can be increased to $732,500 if the court finds justification by clear and convincing evidence. For all claims accruing after January 1, 2008, those limitations increase to $468,010 and $936,030 respectively.

These caps do not apply to limit the recovery of compensatory damages for physical impairment or disfigurement.

C. Agency and Apparent Agency/Corporate Practice of Medicine

There is no debate that a physician is liable for his/her own negligence. There have been some disputes in medical malpractice cases where a plaintiff attempts to make a physician, corporation or institution liable for another’s negligence. For the most part, those disputes have now been resolved.

In Moon v. Mercy Hospital, 373 P.2d 944 (Colo. 1962), the Colorado Supreme Court held that, since a hospital cannot and does not practice medicine, it cannot be liable for the negligence of a doctor on the staff of the hospital. Under Colorado law, only physicians can practice medicine and hospitals cannot be held liable for the negligence of a physician.

When a doctor diagnoses, treats and operates on a patient in a hospital, he is in command of those functions, and the hospital and its employees subserve him in his ministrations to the patient. He has sole and final control in the matter of diagnosis, treatment and surgery. Possessed of this authority, it follows that his actions as doctor are his responsibility.

Moon v. Mercy Hospital, 373 P.2d 944, 946 (Colo. 1962).

Although plaintiffs are attempting to chip away at Moon v. Mercy Hospital, the law remains that the hospital should not be a defendant merely because that is the location of the negligent care by a physician. Estate of Harper ex rel. Al-Hamim v. Denver Health and Hosp. Authority, 140 P.3d 273, 275 (Colo. Ct. App. 2006); Daly v. Aspen Center for Women’d Health, Inc., 134 P.3d 450, 454 (Colo. Ct. App. 2005). There is an exception where the physician is a “public employee,” because the General Assembly of Colorado created respondeat superior liability for public employees through the Colorado Governmental Immunity Act. Sereff v. Waldman, 30 P.3d 754 (Colo.App. 2000).

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The rule enunciated in Moon v. Mercy Hospital does not apply to claims arising out of care and treatment by nurses, therapists and other allied health care professionals. The hospital exercises a more traditional employment relationship with these professionals. Accordingly, the doctrine of respondeat superior may apply to create hospital liability when the nurse acts negligently in the course and scope of her employment. Grease Monkey International, Inc. v. Montoya, 904 P.2d 468 ( Colo. 1995).

The analysis of Moon v. Mercy Hospital was applied for many years to defense of the physician’s professional corporations. Precluding claims against the professional corporation kept the focus of the claim on the care at issue and further protected other physician owners of the corporation. In Pediatric Neurosurgery, P.C. v. Russell, 44 P.3d 1063, 1067 (Colo. 2002), the Colorado Supreme Court drastically altered the landscape. A patient named a physician’s professional corporation as a defendant on the theory that it was vicariously liable for the acts and omissions of its physician employees. In a ruling perceived as a significant departure from the rule enunciated in Moon v. Mercy, supra, the Colorado Supreme Court upheld this theory of liability. The Russell court concluded that under §12-36-134, C.R.S., corporations can "practice medicine" under limited circumstances. Id. This resulted in a flood of new claims against professional corporations in medical malpractice suits, particularly when a physician’s own insurance coverage is perceived as insufficient to cover the damages. On information, this resulted in a significant increase in insurance rates.

The General Assembly in Colorado quickly reversed this change by amending the statute. Effective July 1, 2003, §12-36-134(1)(f), C.R.S., states that “nothing in this article shall be construed to cause a professional service corporation to be vicariously liable to a patient or third person for the professional negligence or other tortuous conduct of a physician who is a shareholder or employee of a professional service corporation.” The damage was done, however, for a period of time. Claims that accrued prior to the effective date of the statute could include a claim against the professional corporation.

III. Captain of the Ship Doctrine

Where a physician is the “captain of the ship,” that physician, rather than the hospital, can be liable in respondeat superior for a hospital employee’s negligence. A physician is a captain of the ship where that physician assumes control over a particular medical procedure including the control of the conduct of those assisting. See Kitto v. Gilbert, 570 P.2d 544 (Colo.App. 1977) (recognizing that a surgeon would be held liable for the acts of nurses and other subservient physicians once he “assumed control” in the operating room). Many defense counsel argued over the years that Kitto and its articulated Captain of the Ship Doctrine was a draconian doctrine no longer applicable since enactment of the Pro Rata Liability Statute. (§ 13-21-111.5, C.R.S. (first enacted in 1986)). Kitto and Captain of the Ship Doctrine were recently resurrected by the Court of Appeals decision in Ochoa v. Vered, 186 P.32 (07 Colo. App. 2008).
Essentially, when the “captain of the ship” doctrine applies, only the physician can be held vicariously liable for another’s alleged negligence. See Kitto, 570 P.2d at 550 (Colorado law restricted potential respondeat superior liability to either the attending physician or the hospital and, when the “captain of the ship” doctrine applies, the physician’s responsibility “supersedes” that of the hospital); Krane v. St. Anthony Hospital System, 738 P.2d 75 (Colo.App. 1987) (attending physician and the hospital cannot both be held liable under respondeat superior for the acts of a hospital employee).

The question that the court must address is whether a physician “had actual authority to direct and supervise others involved in the patient’s care.” Adams v. Liedholt, 579 P.2d 618, 620 (Colo. 1978). At the point where the physician “assumes supervision and direction” over the patient’s care, the “captain of the ship” doctrine applies. Beadles v. Metayka, 311 P.2d 711 (Colo. 1957); Young v. Carpenter, 694 P.2d 861 (Colo.App. 1985). For example, the physician was held responsible where he directed the positioning for a surgical procedure, even though the physician has not yet begun operating. Beadles, 311 P.2d at 714. But see, Bernardi v. Community Hospital Association, 443 P.2d 708 (Colo. 1968) (physician could not be held vicariously liable for a nurse’s improper injection of tetracycline when he was away from the premises of the hospital and had no opportunity to control its administration.).

IV. The Colorado Consumer Protection Act

Discussion of the Colorado Consumer Protection Act (“CCPA”) does not necessarily fit in a discussion of damage caps, except that it represents the current theory of choice by plaintiffs to attempt an end run around the application of the HCAA’s damage caps.

The CCPA is intended to protect consumers from deceptive trade practices. §§ 6-1-101, et seq, C.R.S. In a medical malpractice action, the CCPA can apply to health care providers that advertise their services to the public. The extent of its application is in dispute. We have been successful in dismissing many claims, but less successful in a certain class of claims. These can generally be classified as those licensed health care facilities or professionals who widely advertise their services to the public. From a physician perspective, we have seen CCPA claims survive motions to dismiss against plastic surgeons and ophthalmologists advertising LASIK. These are situations where there is competition amongst providers for a class of private pay patients seeking elective surgery.

To state a claim under the CCPA, the claimant must establish five distinct elements: (1) that the Defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of Defendant’s business, vocation or occupation; (3) that it significantly impacts the public as actual or potential customers of the Defendant’s goods, services, or property; (4) that the claimant suffered injury in fact, to a legally protected interest; and (5) that the challenged practice caused the injury. § 6-1-105 (2004), C.R.S.; Hall v. Walter,
Damages pursuant to the CCPA can be severe. If the plaintiff establishes that the violation was committed in bad faith, defined as fraudulent, willful, knowing, or intentional conduct that causes injury, plaintiff can recover treble damages and attorneys fees. There remains a debate as to whether the HCAA applies to limit these damages. Plaintiffs argue that an action brought under the CCPA is not an action in tort. Since the HCAA applies solely to actions in tort, the caps do not apply. There is no appellate decision clarifying this issue at this time. If the HCAA does not apply, the general tort reform caps would kick in. Additionally, there remains the impact of the trebling (or tripling) affect of the statute in situations involving bad faith and recovery of attorneys’ fees.

V. Types of Damages

A. Compensatory Damages

Colorado law recognizes three types of legally cognizable injuries in medical malpractice actions: (1) non-economic damages; (2) physical disfigurement and impairment; and (3) economic damages. As noted above, medical malpractice damage caps combine (1) and (2) for all claims accruing on or after July 1, 2003.

Non-economic damages are generally thought of as damages for the “pain and suffering” that the patient incurred as a result of the physician’s negligence. §13-21-102.5, C.R.S., defines “non-economic loss or injury” as:

Nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life.

One important limitation upon non-economic damages is that the Colorado courts normally will not allow a patient to recover damages for emotional distress without any evidence that the patient has suffered a physical injury or was in imminent danger of suffering a physical injury. *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978). Hurt feelings and emotional distress alone generally will not support a medical malpractice claim, but that general rule can change when a medical professional intentionally causes a patient to suffer a severe emotional injury.

The jury may also award economic damages to a patient injured by a physician’s negligence. Economic damages compensate patients for their “out of pocket” losses including medical bills, wage losses, and future medical care. Plaintiffs will generally claim as damages any other economic loss for which they are able to put forth expert testimony asserting that the loss was caused by the alleged negligence.
B. Punitive Damages

A claim for punitive damages cannot be included in the initial complaint and can only be filed after substantial discovery is completed and leave of court is requested to amend.§ 13-21-102(1.5)(a), C.R.S..

The Plaintiff can recover exemplary damages if “the action complained of was attended by circumstances of fraud, malice, or willful and wanton conduct.” § 13-64-302.5(4)(a), C.R.S..

The terms “fraud” and “malice” and not defined by the statute. The “circumstances of fraud” referred to in the instruction are identical to the elements of a claim based on fraud. See, e.g., Berger v. Security Pac. Info. Sys., Inc., 795 P.2d 1380 (Colo.App. 1990) (jury’s finding that elements of fraud were established also established the “circumstances of fraud” required for punitive damages). Although “fraud” clearly comes with a level of intent, the same may not be true for term “malice.” However, the court in Miller v. Solaglas Cal., Inc., 870 P.2d 559 (Colo.App. 1993), cert. denied (1994), declined to apply a “knew or should have known” standard in determining whether an award of punitive damages was justified.

"Willful and wanton conduct” means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff. § 13-21-102(1)(b), C.R.S..

Punitive damages may not be awarded if there is insufficient evidence to support them. Tri-Aspen Constr. Co. v. Johnson, 714 P.2d 484 (Colo. 1986) (conduct “that is merely negligent . . . cannot serve as the basis for exemplary damages”, and to justify such an award, it must be demonstrated, beyond a reasonable doubt, that the defendant acted with “an evil intent or wrongful motive . . . or created and then purposefully disregarded a substantial risk of harm . . .” to the plaintiff); Pizza v. Wolf Creek Ski Dev. Corp., 711 P.2d 671 (Colo. 1985) (to recover punitive damages, plaintiff must show beyond a reasonable doubt that the defendant knew or should have known that injury would probably result from his or her actions, or that the defendant acted with an evil intent and with the purpose of injuring the plaintiff or with such a wanton and reckless disregard of the plaintiff’s rights as to demonstrate a wrongful motive); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984) (defendant purposefully performed action complained of with an awareness of the risk and in disregard of the consequences); Miller v. Byrne, 916 P.2d 566 (Colo.App. 1995), cert. denied (1996) (“willful and wanton conduct means conduct purposefully committed which the actor must have realized is dangerous, done needlessly and recklessly, without regard to consequences, or the rights and safety of others, particularly of the plaintiff”). Webster v. Boone, 992 P.2d 1183 (Colo.App. 1999), cert. denied (2000).
Plaintiff’s burden of proof is beyond a reasonable doubt. § 13-64-302.5(4)(a), C.R.S.; § 13-25-127(2), C.R.S.

The amount of punitive damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party, § 13-21-102, C.R.S., but the court may increase or decrease that limit based on the proof submitted. The court has discretion to increase an award to a sum not to exceed three times the amount of actual damages if it is shown that: (a) the defendant continued the behavior or repeated the action in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case, or (b) the defendant acted in a willful and wanton manner during the pendency of the action which further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation. § 13-21-102(3), C.R.S. The court may reduce or disallow the award of exemplary damages to the extent that: (a) the deterrent effect of the damages has been accomplished, (b) the conduct which resulted in the award has ceased, or the purpose of such damages has otherwise been served. § 13-21-102(2), C.R.S.

Punitive damages may be awarded against a corporation for the actions of its agent if the agent was employed in a managerial capacity and was acting within the scope of his or her employment. If the agent was acting in a managerial capacity, the corporation need not actually authorize or ratify the act to warrant an award of punitive damages. Roget v. Grand Pontiac, Inc., 5 P.3d 341, 346 (Colo.App. 1999), citing, Jacobs v. Commonwealth Highland Theatres, Inc., 738 P.2d 6 (Colo.App. 1986). For non-managerial employees, however, the corporation can be still be held liable if plaintiff can prove an additional connection to the corporation. “The principal cannot be held liable in exemplary damages for the act of an agent, unless it is shown that it authorized or approved the act for which exemplary damages are claimed; or, that it approved of or participated in the wrong of its agent; or, that it failed to exercise proper care in selecting its servants.” Holland Furnace Co. v. Robson, 402 P.2d 628, 631 (Colo. 1965), citing, Great Western Railway Co. v. Drorbaugh, 134 P. 168 (Colo.App. 1913); Restatement, (Second), Agency § 217C.

Insuring punitive damages is contrary to public policy in Colorado.

VI. Pro Rata Liability / Joint and Several Liability

Generally, defendants in personal injury or wrongful death cases are not liable for an amount larger than their percentage of the judgment as determined by the jury. See, The Pro Rata Liability Statute, § 13-21-111.5(1), C.R.S., enacted in 1986. The jury is required to make special findings apportioning the fault among the defendants. § 13-21-111.5(2), C.R.S. Where non-parties at fault are identified, then the jury will be asked to assign a percentage of fault, if any, to the non-party as well.
One way to circumvent this rule is if the plaintiff alleges and proves that the defendants “consciously conspired and deliberately pursued a common plan or design to commit a tortious act.” § 13-21-111.5(4), C.R.S. In that situation, the defendants are joint and severally liable for the entire award. This is rarely seen.

VII. Certificate of Review

The certificate of review statute is intended to act as a screening tool to prevent the filing of claims against licensed professionals and claims arising out of the conduct of licensed professionals which have no merit.

In actions against licensed professionals (including Veterinarians), a plaintiff must file a certificate of review within sixty days after service of the complaint on the defendant. In that certificate, the plaintiff’s counsel must certify that he/she has consulted with an expert and that the expert reviewed the known facts, including the documents found to be relevant, and concluded that the filing of the claim does not lack substantial justification. § 13-20-602, C.R.S. The expert must be competent to express an opinion as to the alleged negligent conduct.

To testify as an expert against a Veterinarian, it is presumed that the expert must generally be licensed to practice veterinary medicine and can demonstrate that, as a result of training, education, knowledge, and experience, that he/she is substantially familiar with applicable standards of care and practice as they relate to the act or omission at issue in the lawsuit. We have had some success disqualifying physicians from testifying outside their subspecialty fields of practice, but less success where the fields overlap, i.e. family practice and internal medicine.

The consulting expert does not need to be identified to the opposing party. Id. By statute, the failure to file a certificate of review is supposed to result in the dismissal of the complaint. § 13-20-602(4), C.R.S. The statute does include, however, a provision allowing an extension of the deadline for good cause shown. As such, the judiciary is rarely inclined to strictly enforce the 60-day limit and will give the plaintiff every opportunity to comply before dismissal is entered.

Challenges to the sufficiency of a certificate of review is rarely requested and less frequently granted. Where the defense believes that grounds exist to challenge the certificate, the court may require the plaintiff to disclose to the court, in camera, the identity of the reviewer and documents confirming the authenticity of the review.