



BOULDER COUNTY BAR ONLINE NEWSLETTER

1942 BROADWAY, SUITE 205
BOULDER, CO 80302

303-440-4758
FAX 303-402-6958

A P R I L 2 0 0 2

POLYGRAPH EXAMINATIONS: ADMISSIBILITY AND PRIVILEGE ISSUES

By Jon Banashek

CONTENTS

• POLYGRAPHS	1
• MEMBERSHIP BENEFITS	2
• BAR FOUNDATION	5
• CALENDAR OF EVENTS	6
• LAF WINE TASTING	7
• ANNOUNCEMENTS	8
• COURT NEWS	10
• PRO BONO PAGE	11
• CLASSIFIED ADS	15

In this article we discuss the issues of whether polygraph examinations are admissible evidence and whether communications between a client and a polygrapher hired by the attorney are covered by either the attorney-client privilege or the work product privilege.

Controversy has surrounded the use of the polygraph since its creation in 1926. Polygraph testing relies on the correlation between changes in blood pressure and heart rate to determine if the subject is lying. The polygraph continuously monitors physical indicators in an individual asked a set of questions. Physical changes in the subject are recorded and evaluated by an examiner who reaches one of three conclusions: the subject was truthful; the subject was deceptive; or the test was inconclusive.

Admissibility - the New Standard

New Mexico is the only state that allows for the admission of polygraph evidence in a criminal trial without stipulation by both parties.¹ Prior to April 23, 2001, established Colorado law determined that polygraph evidence was inadmissible at trial. However, in *People v. Shreck*, the Colorado Supreme Court announced new standards to determine the admissibility of scientific evidence.² The new test is premised on the Colorado Rule of Evidence 702 in conjunction with Rule 403. The new standards for determining the admissibility of scientific evidence replaced the long-standing Frye test.

Under C.R.E. 702 the court must apply a two-tiered analysis. First, the court must determine the reliability and validity of the polygraph evidence. The court should focus on the reliability of the scientific principles the witness relies on and whether the witness is a qualified expert in such matters.³ Second, the court must determine if polygraph evi-

MARK YOUR CALENDARS! FRIDAY, APRIL 26, 2002

WHAT'S NEW IN LAW OFFICE TECHNOLOGY

Learn about the latest in law office technology tools, including hardware, software, and gadgets to increase your productivity and improve your bottom line.

**Speaker: Larry C. Smith, Law Office Consulting Services
8:45 - 11am See page 6 for details**

(continued on page 3)

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
	1	2	3	4 Natural Res.	5	6
7	8	9 Emp.	10 Crim.	11 ADR/CCMO	12	13
14	15	16 Bus./IP	17 Fam.	18	19	20
21	22 Real/Tax	23	24 Pro Bono Lunch	25 Past Pres. Dinner	26	27
28	29	30	31			

MEMBERSHIP BENEFITS

Justice Center ID Card

Our Bar issues a picture ID card for its members, which allows access into the Justice Center "Frisk-Free" (this means no standing in line, no searches, and no X-rays). The ID's are available for \$25 the first time and can be renewed for \$10 each year.

To obtain an original ID send a check for \$25 to the Bar office along with a small passport type photo and a photocopy of your current, valid, Colorado Supreme Court issued Attorney Registration Card. We will laminate it with a current year sticker.

To renew your ID just send a check for \$10 to the Bar office indicating that it is for a renewal. We'll send you a sticker for the next year. Justice Center ID's are for attorneys only, not paralegals or other staff.

Advertising

Members receive discounted advertising rates for Classified Ads and Announcements in the monthly newsletter. Non-member rates are an additional \$10.
\$20 up to 30 words
\$30 up to 40 words

\$40 up to 70 words

\$50 up to 100 words

All deadlines are the 10th of the month or the next business day if on a weekend. Fax or mail a copy of your ad to the Bar office. Payments are due with ad; we do not bill.

Legal Directory

All members receive a free "Legal Directory" which lists Boulder County Bar members. Additional copies are sold for \$10. The 2001 Legal Directory is on the website in the Members Only Section.

Mentor/Mentee Program

The goal of the Mentoring Project is to provide support for new admittees to the practice of law and to acquaint them at an early stage with the highest level of professionalism and ethics and familiarize themselves with the Boulder legal community. Mentees must have been in practice for less than three years. Mentees are required to have passed the Colorado Bar and maintain an appropriate level of malpractice insurance. Anyone wishing to be a mentor should contact the Bar office. Anyone who wishes to be assigned to a mentor

should contact the Bar office and request a "Mentee Application."

Mailing Lists/Labels

The current Bar Association list is available to members for \$50 and non-members for \$75. Mailing labels for members cost \$100 and non-members \$150. Section lists are available free to members and section labels for \$40. For non-members section lists cost \$20 and labels \$60. BCBA membership lists are sold for primarily legal educational purposes that will benefit the BCBA membership. They will not be sold for political, fundraising, or business generation purposes.

Web Page

We are online at <http://www.boulder-bar.org>. The website now has a Members Only Section with Court opinions and continues to grow for your membership benefit. You can be listed in the "Find A Lawyer" Section in your speciality area. Call the bar office to sign up.

POLYGRAPHS (continued from page 1)

dence would assist the jury in its duty as finder of fact. If the court finds the polygraph evidence reliable and useful, then the court must conduct a C.R.E. 403 analysis. Despite the new standard, the court will likely find the evidence inadmissible at trial. At least one Boulder County District Court judge conducted a *Shreck* hearing on the admissibility of polygraph evidence and excluded its admission at trial.⁴

Reliability

In 1998 the U.S. Supreme Court assessed the reliability of polygraph evidence in *U.S. v. Scheffer*.⁵ The Court found polygraph evidence unreliable, stating, "[T]here is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques".⁶ Many state courts have reached the same conclusion in recent years.⁷ Therefore, due to the long standing precedents excluding polygraph evidence, as well as the split of opinions among leading experts concerning its reliability, overcoming the first prong of the C.R.E. 702 test will be virtually impossible without a major shift within the scientific community. However, overcoming

the second prong of the C.R.E. 702 analysis may prove even a greater challenge.

Assist the Trier of Fact

Once the court finds the polygraph evidence reliable, it must then determine if the admissibility of the evidence would "assist the trier of fact to understand the evidence or to determine a fact in issue."⁸ The premise of the entire jury system is that the jurors listen to and observe all of the testimony presented at trial and rely on their own individual abilities to determine the truthfulness of the testimony. Opponents argue that polygraph evidence allows the polygrapher to usurp the jury's function in determining the credibility of a witness as well as the guilt or innocence of the accused. The fear is that if polygraph evidence is admitted at trial, the jury will rely on the subjective testimony of an expert to determine the guilt or innocence of the accused.⁹

continued on page 4

POLYGRAPHS (continued from page 3)

Conversely, proponents argue that polygraph evidence would assist jurors in determining the truthfulness of witnesses. Additionally the weight given to the testimony of the polygrapher would remain in the sole province of the jury, like all other expert testimony. Proponents of polygraph evidence point out the prevalent use of polygraphs throughout the judicial system for such purposes as determining probable cause for arrest, measuring compliance in sex treatment, prison disciplinary proceedings, and parole and probation revocation hearings.

In the many situations where polygraph evidence is utilized, it is merely one of a number of factors used to reach a decision that often substantially impacts the case. Proponents argue that if probation officers, prosecutors, law enforcement, judges and therapists are able to weigh appropriately the results of polygraphs and rely on them, then so should a jury. However, the majority of state courts have found that the admissibility of polygraph evidence interferes with the "evaluation of the demeanor and credibility of witnesses and their testimony" and have excluded polygraph evidence for this reason as well as for its suspect reliability.¹⁰

Finally, if the court determines that the polygraph evidence passes the C.R.E. 702 standard it must apply a C.R.E. 403 balancing test. The test weighs the probative value of the evidence against the danger of unfair prejudice, confusion or misleading of the jury. The analysis under C.R.E. 403 duplicates the analysis under C.R.E. 702. Many of the same arguments and principles are relevant and are applied in both. If a court finds

that polygraph evidence is in compliance and meets the standard of C.R.E. 702, it would be likely that the evidence would also pass the C.R.E. 403 test.

Despite the new *Shreck* analysis, it is clear that until the doubts concerning the reliability of polygraphs are resolved by the scientific community and the courts are willing to trust juries to weigh this evidence, the trend of prohibiting polygraph results in criminal trials will continue in Colorado most other states.

Even if polygraph examinations have not yet been allowed as admissible evidence in Colorado for most purposes, they are still a frequently used tool in the criminal justice community. Given the pitfalls that may be associated with the use of polygraphs, consideration must be given to protecting their confidentiality.¹¹

The Attorney - Client Privilege

A communication is protected by the attorney-client privilege if it reveals a communication between a client and her attorney which was made in order to obtain or deliver legal assistance and which was intended to remain confidential.

This privilege can be extended to communications with third parties through the legal theory of agency. If an attorney has communications with a third party which are directly related to the provision of legal services for the client, the privilege extends and covers those communications as if they had been made between the attorney and the client. This extension of the privilege recognizes that in order to provide fully

effective legal assistance, attorneys may need to consult with third parties.

If communications are made between the attorney and a third party before an actual relationship has been formed with the third party, these communications may nonetheless be privileged, if the nature of the communications is directly related to the legal matter at hand.¹² For example, an attorney's communications with a prospective consultant regarding the potential ramifications of using the consultant would be privileged even if no formal arrangement is ultimately made.

It is important to remember that there is no blanket privilege for all communications between attorney and client; rather, the privilege must be claimed with respect to each specific communication and, in deciding whether the privilege attaches, a trial court must examine each communication independently.

The Work-Product Privilege

Another privilege that may attach to communications between attorneys, clients and third parties is the work-product privilege. As opposed to communications, work-product protects only documents.

The prerequisites for protection under this privilege are similar to those for the application of the attorney-client privilege. There must be an attorney-client relationship at the time the communications are made, the document must be prepared directly for litigation or in the reasonably held belief that litigation is

(continued on page 12)

BOULDER COUNTY BAR FOUNDATION 2002 ANNUAL MEETING AND DINNER

The Boulder County Bar Foundation hosted its Annual Dinner and Meeting at the Flagstaff House on Sunday, March 10. The Foundation celebrated a record number of 11 new fellows this year.

President **Elaine Johnson** presented award certificates to **Andrew Simpson, James Carpenter** and **James Christoph** in recognition of each of their cumulative \$1000 pledges to the Foundation. **Richard Lyons** and **Earl Hancock**, retiring Board of Trustees members, were acknowledged for six years of dedicated service on the Board.

New fellows **Stephen Bushong, George V. Berg, Star Waring, Glenn DeAtley, Stanlee West-Watt, Mark Langston, Christopher Leh, Gwyn Whalen, William Rogers, Kathleen Gebhardt** and **Virginia Chavez** were welcomed.

Martha Ridgway presented the **Community Achievement Award** to **Melody Fuller** for her many outstanding years at Boulder County Legal Services and her contributions to the Boulder County community. Each recipient of the Community

Achievement Award receives \$500 to be donated to the non-profit organization of their choice. Of course, Melody has chosen to donate the funds to BCLS and we wholeheartedly approve.

Jeff Kahn and **Judge Frank Dubofsky** were nominated to serve three-year terms on the Board of Trustees beginning in April 2002. The Foundation members unanimously approved the nominations. Elected 2002-2003 officers were **Sheila Carrigan**, President; **Dan Vigil**, Vice President; and **Jim Christoph**, Treasurer.

Though the Foundation suffered a slight financial loss this year, the Grant Committee worked hard to spread the wealth to assist worthy legally related organizations and programs in Boulder County. Grants were awarded to the following Boulder County community groups:

Boulder High School Mock Trial Team - \$750, Boulder County Legal Services - \$1,000, Heritage Middle School Social Studies Program - \$500, Colorado School Mediation Project, \$500, Center of the American West Legal History Project - \$500, YWCA Divorce and Co-Parenting

Classes - \$500, Longmont Mediation Program - \$350, The Counseling Center for the Safe Exchange Program - \$1,000 and Voices For Children - \$500.

The current Executive Board of Trustees of the Foundation is: **Elaine T. Johnson, President; Gerald C. Sloat, Vice-President; Jim Christoph, Treasurer; and Christine Hylbert, Secretary and Executive Director.** The Trustees are: **Richard Lyons, Dan Vigil, Martha Ridgway, Earl Hancock, Sheila Carrigan and G. Lane Earnest.**

Jacqueline Richman, Psy. D.,
Licensed Psychologist in Boulder
now accepting referrals for
Court-Appointed Special Advocate
Cases at Court Rates
Parenting time and Responsibility
Evaluations at \$100/hr.

Telephone: 303.760.5060 Fax: 303.449.1883

CALENDAR OF EVENTS

Pre-registration is required for BCBA CLE luncheons. Please send a check to the Bar office at least 3 days in advance. You will be charged for your lunch if you make a reservation and do not call to cancel prior to the CLE meeting. BCBA CLE's cost \$12 per credit hour for members and \$18 for non-members unless otherwise noted. CLE credit is \$5 per hour for members of the Young Lawyer Section.

April 4, 2002

**Natural Resources/Environmental
Law Section**

Topic: Takings Update

Presenter: TBA

Noon Brown Bag Lunch

Boulder Justice Center

Courtroom C, CLE \$12

April 9, 2002

Employment Law Section

Topic: Mechanics of Colorado's
Wage Statute

Presenter: Joel Maguire, Martin
and Mehaffy

Noon at Faegre & Benson

1900 15th Street, Boulder

Box Lunch \$10

(Turkey, Veggie or Beef)

CLE \$12

April 10, 2002

Criminal Law Section

Topic: DRE

Presenter: TBA

Noon Brown Bag Lunch

Boulder Justice Center

Courtroom E, CLE \$12

April 11, 2002

**Boulder County Bar Association
Board of Directors Meeting**

in Longmont, 515 Kimbark Street

4:00 p.m.

All are invited to attend the meeting and
Happy Hour at The Pumphouse Brewery
at 5:30 p.m.

April 11, 2002

**ADR Section & CCMO of Boulder
Part I**

5th Annual Dialog with the 20th Judicial

District Judges - Civil Issues

12 - 2 p.m., Boulder Public Library

Boulder Creek Room, CLE \$24

April 16, 2002

**Business Law & Intellectual
Property Sections**

Topic: Methods of Doing

Business Patents

Presenters: TBA

Noon at Dolan's in Boulder

Lunch \$13 CLE \$1

April 17, 2002

Family Law Section

Topic: Cross-Examining the Business
Valuation Expert

What divorce lawyers should
know in order to effectively evaluate and
cross-examine business
valuation experts.

Presenter: Eric Critchfield, CPA

Noon Brown Bag Lunch

Boulder Justice Center

Courtroom D, CLE \$12

April 22, 2002

**Real Estate & Tax, Estate Planning
and Probate Sections**

Topic: New and Old Issues Concerning
1031 Exchanges

Presenter: Larry Jensen, 1031

Corporation

12 Noon at Dolan's in Boulder

CLE \$12, Lunch \$13

April 24, 2002

**Boulder County Legal Services Pro
Bono Luncheon**

Trios Grille and Wine Bar

1155 Canyon Blvd., Boulder

12-1:30 p.m.

\$21

April 25, 2002

**Boulder County Bar Association
Past Presidents' Dinner**

Le Chantecler Restaurant, Niwot

6 pm

April 26, 2002

Law Office Technology Update

Speaker: Larry C. Smith, Law

Office Consulting Services

Trios Grille in Boulder

8:45 -11am

\$30 members, \$15 young lawyers

2 hours of CLE credit -ethics and
general applied for

May 2, 2002

**Natural Resources/Environmental
Law Section**

Topic: U.S. Forest Service

CERCLA Actions

Presenter: TBA

Noon Brown Bag Lunch

Boulder Justice Center

Courtroom C

CLE \$12

May 8, 2002

Criminal Law Section

Topic: Juvenile Point/Counter Point

Presenters: Keith Collins, District
Attorney's Office; Renee Doak, Public

Defender's Office

Noon Brown Bag Lunch

Boulder Justice Center Courtroom D

CLE \$12

May 9, 2002

ADR Section & CCMO of Boulder

5th Annual Dialog with the 20th Judicial

District Judges -

Domestic Issues

Trios Grille and Wine Bar

12-2:00 p.m.

CLE \$24

THE 2002 LEGAL AID WINETASTING FUNDRAISER BRINGS IN OVER \$10,000

The wine tasting committee : Heather Holbrooks-Kuratek, Christine Hylbert, Julie Shoenfield,
Sarah Bayko and Mary Street (not pictured).

**JUDICIAL ARBITER GROUP (J.A.G.)
LIQUOR MART and CHAUTAUQUA DINING HALL**

Wine Table Sponsors

**GARLIN, DRISCOLL & MURRAY, LLC BENEZRA & CULVER, LLC
CAPLAN & EARNEST, LLC • DIETZE & DAVIS, P.C.
JOHNSON & REPUCCI, LLP • FAEGRE & BENSON, LLP
HOLLAND & HART, LLP • HUTCHINSON, BLACK & COOK, LLC
PURVIS & GRAY, LLP • GOFF & GOFF, LLC
BERNARD, LYONS, GADDIS & KAHN, PC • CTX MORTGAGE COMPANY
COLORADO IMAGING PRODUCTIONS**

ALSO THANK YOU TO OUR SILENT AUCTION ITEM DONORS

**Gary Cummins (Liquor Mart)
Bruce and Julie Schoenfeld
Dolan's Restaurant
Pan Asia Fusion
The Boulder Cork
Laudisio
The European Café
Trilogy Wine Bar
Trios Grille and Wine Bar
Mateo
Jim and Linda Cooke**

**Sheila Carrigan and Marlin Buse
Chuck Sisk and Terre Rushton
Joan Norman and Kevin McDowell
Lenny Frieling
Robert Gardner
D. Scott Cordova (Cordova Imports)
George Berg
John Purvis
Trey Barlow (Barlow's)
The Wine Merchant
The Counseling Center**

LAWYER ANNOUNCEMENTS

HELEN R. STONE
DAN R. SHEEHY
ANDREW M. ROSEN
and
ANNE N. BYRNE

Are Pleased to Announce
The New Location
of

**STONE, SHEEHY,
ROSEN & BYRNE, P.C.**
4710 Table Mesa Drive, Suite B
Boulder, CO 80305
303.442.0802
fax 303.442.1835

**Advertisers wanted for the
2002 Membership Directory
and/or the monthly
Boulder County Bar Newsletter**

Take advantage of high visibility
in the Directory or the newsletter
to the 1,350 members of the
Boulder County Bar Association.

Very Reasonable Rates

Call the Bar offices for information.

DAVID C. WARREN

and

JONATHAN B. BOONIN

Are Pleased to Announce the Opening
of Their New Law Firm

WARREN & BOONIN LLP

1645 CANYON BLVD.
BOULDER, CO 80302
TEL 303.413.1111
FAX 303.413.1122

dwarren@warren-boonin.com
jboonin@warren-boonin.com

DAVID C. WARREN and JONATHAN B. BOONIN,
formerly with the Denver office of Arnold & Porter,
will continue their civil litigation practice in the areas
of business and commercial disputes, employment
law counseling and litigation, products liability
and civil appeals.

With great pleasure
PAUL M. BIERBAUM, JR.

and

ANN B. MYGATT

Welcome the law practices of
IRVIN AND IRVIN
Richard D. Irvin and Ruth K. Irvin
303.543.0337

and

MICHAEL E. MINER
303.447.2055

To the Historic
Heritage House
1443 Spruce Street
Boulder, CO 80302



**THE BOULDER COUNTY BAR ASSOCIATION
ANNUAL MEETING / RECEPTION
WILL BE HELD AT
THE BOULDER MUSEUM OF
CONTEMPORARY ART
1750 13TH STREET, BOULDER**

COCKTAILS AND HORS D'OUVRES

**THURSDAY, JUNE 6, 2002
5-7 P.M.**

\$20 PER PERSON

PLEASE RESERVE A PLACE FOR ME AT THE ANNUAL MEETING

NAME _____

TELEPHONE _____

**PLEASE SEND YOUR CHECK TO THE BAR OFFICES AT 1942 BROADWAY, SUITE 205, BOULDER, 80302
PLEASE RESPOND NO LATER THAN JUNE 3**

20TH JUDICIAL DISTRICT COURT NEWS

Justice Center Construction Update

Excavation of the Boulder Justice Center building site began on February 11, 2002. Construction is scheduled to take at least a year. The Justice Center expansion will include four new courtrooms, two hearing rooms, a jury assembly room and expanded office space for the clerk and probation office.

For the next year or so, this will reduce the parking in the big Justice Center lot across the street, until an expansion of the underground parking to 100 spaces is completed. Removal of the existing parking area and landscaping in front of the Justice Center was to begin on February 24 but began ahead of schedule because of good weather and the availability of equipment. Steps have been taken to insure that the courts are not affected by noise from the construction.

The following steps in construction will occur over the next few steps:

- Construction of caissons and foundations should start in mid-June.
- Existing telephone and fiberoptic cables will be relocated by mid-to late March. No interruption of service is anticipated.
- In late March relocation of existing sanitary and storm sewers will start.

The security entrance will be moved temporarily to the eastern-most door, by the Boulder Municipal Court. The change over to this area should occur in late April or early May. The security entrance will be moved back to its present location when the new wing is complete.

*Article submitted by Amy Waddle,
20th Judicial District Court
Administrator.*

A SPECIAL NOTE OF THANKS

I wish to express my deep gratitude to the Boulder County Bar Association for sponsoring a wonderful party in honor of my retirement as Magistrate in the 20th Judicial District.

My experience on the bench has convinced me not only that we have the best judicial district, but also the best group of lawyers practicing in the courts. I have witnessed so many lawyers doing very wonderful and noble things. I consider it a true honor and a privilege to have served as magistrate.

The retirement party was awesome! I will have great memories that will last a lifetime.

On behalf of myself and my family, I thank you.

Sincerely,
Ed Kingery

CTX MORTGAGE COMPANY

A SUBSIDIARY OF CENTEX FINANCIAL SERVICES

AMANDA SESSA
HOME LOAN CONSULTANT
BRANCH MANAGER

1470 WALNUT STREET, SUITE 100
BOULDER, CO 80302
OFFICE 303 545-9600 877 3 ASK CTX
FAX 303 545-2590 CELL 303 883-8858
EMAIL: AMANDA_SESSA@CTXMORT.COM

PRO BONO PAGE

Twenty-nine cases were referred by BCLAs during the month of February. Thank you to the following attorneys and mediators.

Norm Aaronson
Tessa Alexander
Jack Alexson
Christopher Blakemore
Susan Bryant
Bill Benjamin
Jay Cope
Christina Ebner
Melody Fuller
Kim Gent
Lance Goff
Brad Hall
Rick Kalamaya
Dan Kapsak
Dana Matthews
Ed Navarro
Jim Nelson
Jeff Skovron
Andrew Spiegel
Mary Street
Ben Thompson
Scott Tippet

Thank you to **Jeff Gard** and **Mary Helen Miller** for consultations and mentoring.

Thank you to **Norm Aaronson** and **the students at CU Legal Aid & Defender Program** for accepting 2 pro bono cases.

Pro Se Program volunteers
Shawn Ettingoff
Ann Mygatt
Bev Nelson
Ralph Strebel
Scott Tippet

Boulder County AIDS Project:
Thank you to the following attorneys who accepted pro bono referrals for the Boulder County AIDS Project during the month of February:

Tessa Alexander
Bart Balis
Paul Bierbaum
Gregg Doty

MARK YOUR CALENDARS!

The Annual Pro Bono Luncheon and Awards Ceremony will be held at Trios Grille on Wednesday, April 24 12:00 to 1:30 p.m.

Trios promises a new menu and improved services! The cost is \$21. Call BCLS now to make your reservations. 303.499.7575

BCBA Professionalism Committee On-call Schedule

April 1	John Miller	772-0165
April 8	Karen Burns	443-4660
April 15	Helen Stone	442-0802
April 22	Curt Rautenstrauss	666-8576
April 29	Chuck Saxton	776-6911

POLYGRAPHS (continued from page 4)

imminent and there must be an intention that the documents remain confidential.¹³

Communications with Polygraphers

Polygraphers, if hired by the attorney to assist in the preparation of the case, will be treated as agents of the attorney, and this will fall within the attorney-client privilege. There are nuances of this general proposition of which one should be aware. In *People v. Johnson*,¹⁴ the defense sought to enforce a plea agreement whereby the defendant stood to receive a considerable sentence reduction if he passed a polygraph examination performed by an agent of the prosecution.

When the defendant appeared to take the polygraph, the prosecution expert asked if he had taken any prior polygraph tests, claiming that this information was necessary for him to administer a reliable test.

The defendant refused to divulge that information, resting on claims of attorney-client and work-product privilege.

Johnson held that the defendant was under no obligation to provide privileged information, but that he could not assert the privilege as a sword to enforce the favorable plea agreement. The court was not convinced that fundamental fairness or the expectations of the plea agreement were violated, given the stipulation that determination of whether the defendant met the condition precedent in the sole discretion of the prosecution's polygrapher. Thus, the court found that the prosecution acted in good faith.

How the Privileges Can Be Waived

The attorney-client privilege is not absolute, and may be waived by the client.¹⁵ Waiver must be demonstrated by evidence that the client, through words or conduct, has expressly or impliedly forsaken her claim of confidentiality with respect to the information in question and thus consented to its disclosure.

For example, if a communication to which the attorney-client privilege has previously attached is subsequently disclosed to a third party, protection afforded by the privilege is impliedly waived. The burden of establishing that there has been a waiver of the privilege rests with the party seeking to overcome the privilege.

This concept of waiver was put to the test in *Perez v. People*.¹⁶ The defense claimed that the prosecution's use of a defense-retained handwriting expert during its case-in-chief

violated the Sixth Amendment right to effective assistance of counsel as well as the attorney-client privilege. There the defendant pleaded guilty but withdrew his plea prior to sentencing based on ineffective assistance of counsel and ultimately went to trial with a second attorney.

The defendant's handwriting expert was retained by his original attorney. Prior to the guilty plea the expert reached a tentative conclusion that the questioned documents were probably not written by the defendant. The attorney representing the defendant on the post-conviction remedy called the handwriting expert to testify at the hearing to withdraw the guilty plea.

Later, after examining several "course of business" writings from the defendant, the expert changed his opinion. Unfortunately for the defendant and without authorization, his expert contacted both the prosecutor and the prosecutor's expert, revealing a change of heart. The expert did not tell the defense attorney about these contacts until the day of trial. Over defense objection, the trial court permitted the expert to testify during the prosecution's case-in-chief.

Perez held that calling the handwriting expert to testify at a post-conviction hearing did not constitute a waiver of the defendant's right to object to the prosecution's use of the defense expert during the prosecution case-in-chief in a subsequent trial. The court stated: "it has long been established that it would be intolerable that one constitutional right should have to be surrendered in order to assert another."¹⁷

(continued on page 14)

2002 COLORADO HIGH SCHOOL MOCK TRIAL COMPETITION

The 2002 Mock Trial Competition was a big success thanks to generous support from BCBA volunteer attorneys and judges. Rounds I and III of the Mock Trial were hosted by Christine Hylbert at the Boulder County Justice Center; Round II at the new Adams County Courthouse under the direction of David Juarez. Student teams from Skyline, Boulder, Holy Family, Broomfield, Brighton and Northglenn High Schools were impressive in their diligent preparation and understanding of the intricacies of a court trial.

The Mock Trial Competition could not have taken place without the participation and expertise of the following volunteer scoring and presiding judges:

Rick Dyson
Lance Goff
Ron Jung
Mike Ruderman
Rachael Doan
Anton Dworak
Jane Printz
Peter Dietze
Kenneth Kupfner
Keith Collins
Alex Garlin
Bruce Fest
Rob Gunning
Paul Bierbaum
Seth Benezra
Gary Sandblom
Chad Hemet
Virginia Chavez
Andrew Spiegel

Lenny Frieling
John Barrett
Judge Dan Hale
Judge Care Enichen
Judge Morris W. Sandstead, Jr.
Magistrate Lisa Hamilton-Fieldman
Magistrate Fred Clifford
Magistrate Norma Sierra

A special thanks to Patrick Murphy for coaching teams at Broomfield High School and Rick Marsh for coaching a team at Skyline. Larry Mertes and Pat Furman also helped the Boulder High team prepare for the trials at the Colorado State Competition, where one of the teams placed 3rd overall in the state.

WESTGATE OFFICE PARK



Call Paul Nygren
Colorado Group-East, Inc.
Telephone: 303-665-6500
Direct phone: 303-666-4161
pauln@coloradogroupeast.com

- Two buildings for sale
- Several offices for lease
- 6324 sf + 2285 sf basement
- First building available in March
- Ideal location on South Boulder Rd.
- Several unique features

POLYGRAPHS (Continued from page 12)

Although the *Perez* decision was based on effective assistance of counsel and the court declined to address the attorney-client privilege issue, it did discuss the practical effect that a court-imposed waiver would have on the retention and use of experts: "our finding a waiver in these circumstances would merely encourage ... gamesmanship by defense counsel to protect the confidentiality of their pre-trial investigations."¹⁸

Similar to *Perez*, in dicta, *Johnson* stated: "Although the attorney-client privilege is not itself a constitutional doctrine, in the criminal context preservation of the privilege may implicate a defendant's Sixth-Amendment right to counsel."¹⁹

However, instead of embarking on the analysis used in *Perez*, *Johnson* impliedly distinguished that case by stating: "The essence of a plea agreement is the waiver of important rights - often including constitutional rights - in exchange for the agreed-upon disposition."²⁰

The *Perez* and *Johnson* cases provide insight into how diverse theories of waiver can be raised. Under Colorado law, as a general proposition, communications with a polygrapher hired by an attorney are protected by both the attorney-client and work-product privileges and perhaps even the Sixth Amendment. Of course, these protections are subject to waiver and must be guarded accordingly. Furthermore, it is important that an attorney obtain the client's consent before disclosure.

Jon Banashek is a partner in the firm of Banashek & Talkington, LLP and a co-chair of the Criminal Law Section with Keith Collins.

Footnotes

1. *U.S. v. Scheffer*, 523 U.S. 303 (1998).
2. *People v. Schreck*, 22 P.3d 68 (Colo. 2001).
3. *Brooks v. People*, 975 P.2d 1105 (Colo. 1999), at 1114.
4. *People v. Wallace*, 01CR1227, Boulder County District Court, December 18, 2001
5. *U.S. v. Scheffer*, 523 U.S. 303 (1998).
6. *Id.* at 309.
7. See *Capano v. State*, 781 A.2d 556 (Del. Supr. 2001); *Shannon v. State*, 753 So.2d 148 (Fla. App. 2000); *People v. Johnson*, 740 N.E.2d 457 (Ill. App 2000); *Sate v. Countryman*, 573 N.W.2d 265 (Iowa 1998); *Com. v. Hall*, 14 S.W.3d 30 (Ky. App. 1999); *Jackson v. State*, 997 P.2d 121 (Nev. 2000); *People v. Mastin*, 690 N.Y.S.2d 801

- (N.Y.A.D. 1999); *State v. McHoney*, 544 S.E.2d 740 (W. Va. 2000).
8. Colorado Rules of Evidence 702
9. *People v. Anderson*, 637 P.2d 354 (Colo. 1981)
10. *Id.* at 360
11. Colorado Revised Statutes §13-9-107 (b); Colorado Rules of Professional Conduct 1.6 (a)
12. *Miller v. District Court*, 727 P.2d 834 (Colo. 1987).
13. *Kay Laboratories Inc. v. District Court*, 653 P.2d 721 (Colo.1982); *Hawkins v. District Court*, 638 P.2d 1372 (Colo.1982).
14. *People v. Johnson*, 999 P.2d 825 (Colo. 2000); see also, *Brown v. Indiana*, 448 N.E. 2d 10 (Indiana 1983) (Attorney-Client privilege attaches to communications between Defendant and polygrapher, but privilege waived when polygrapher called by Defense to testify at Juvenile "Waiver Hearing").
15. As a general proposition, an attorney may not reveal confidential information, and there are only limited circumstances where an attorney may abrogate the privilege, see Rules of Professional Conduct 1.6.
16. *Perez v. People*, 745 P.2d 650 (Colo.1987).
17. *Perez* at 653, quoting *Simmons v. US*, 390 U.S. 377 (1968) (A defendant's testimony at a suppression hearing, used to protect his Fourth Amendment rights, could not later be used against him at trial, in violation of his Fifth Amendment right against self-incrimination.)
18. *Perez* at 653.
19. *Johnson* at 832.
20. *Johnson*, 999 P.2d at 832 (citing *People v. Kyler*, 991 P.2d 810, 816 (Colo.1999)).

CLASSIFIED ADS

CAPLAN AND EARNEST, LLC, a Boulder firm, seeks **CORPORATE / REAL ESTATE TRANSACTIONAL PARALEGAL**. Responsible for corporate /real estate transactional work, business entities, banking/loan, real estate transactions and landlord/tenant work. Minimum 6 years corporate paralegal experience required. Fax resumes to: 303.440.3967, Att: HR Director.

HISTORICAL RESEARCHER SEEKS NEW CLIENTS. 25 years experience in library and courthouse records. Experienced expert witness. Looking for people, properties, mines, roads, or titles? Call Silvia Pettem, 303.459.0193 or pettem@earthlink.net.

CATHY SCHULTHEIS, an established ADR Provider for your civil and domestic cases, is offering a special until tax day, April 15, 2002. A referral to me saves your client 10% off on the first session. If you have never referred a case to me for ADR, your client will save 20% off on the first session. Offering reasonable rates - \$110/hour for mediation and \$125/hour for arbitration. Call 303.652.3638.

LOUISVILLE PROFESSIONAL OFFICE SUITE space for lease, available immediately. One office, phones available, use of conference room and copier, kitchen, locker rooms, parking. \$650 per month. Call 303.664.9106.

OFFICE SPACE: Street front office available in single story commercial building. 308 E. Simpson Street in Old Town Lafayette. 350 sq. feet. Call Cyndi Kennedy at 303.604.1600.

OFFICE SUITE AVAILABLE IN LOUISVILLE. One or two offices with reception area and shared conference room available in Louisville. Balcony, mountain views. Shower, storage area, plenty of parking. One office \$950/month, two offices \$1800/mo. Easy access off Hwy 36 at McCaslin Blvd. Call Garlin, Driscoll and Murray at 303.926.4222

OFFICE SPACE near downtown Boulder. Very nice, bright office. One wall is a window overlooking Boulder Creek. Fax, copier, receptionist, coffee service, mail pickup and delivery and two conference rooms in newly remodeled building with covered parking. \$1000/mo. includes phone, fax and T-1 line. Contact Howard at 303.302.6453.

OFFICE SPACE for one attorney available in south Boulder. Includes shared use of reception area, conference room, work area with copier, fax and kitchen. Plenty of parking. Convenient to Boulder, Denver and Jeffco Courts. Call Bruce Fest or Peggy Jessel at 303.494.5600.

BEAUTIFUL DOWNTOWN OFFICE SUITES with great views available as a suite or by individual offices. Call 303.938.9494 or 303.444.6830

WINDOW OFFICE in suite with 4 attorneys, 1/2 block off of Pearl Street Mall. \$650 per month. Call 303.440.5098.

LAW OFFICE RENTAL - Established downtown Boulder law firm, one block west of the Pearl Street Mall, has one office plus secretarial station for rent. Includes ability to share conference room, library, and on-site parking. First class space in new building. Call 303.443.6800 for information.

CLASS A OFFICE SPACE for rent. Possible office share. 1200 sq. ft., 3 years left on lease. \$14.5/sq. ft. NNN \$5/sq. ft. CAM Includes free phone & voice mail system. 1790 38th Street, Suite 205, Boulder, Building is 7 yrs. old, office decorated 1 yr. ago. Call 303.915.3772

PRACTICE FOR SALE Experienced Criminal Attorney to take over very lucrative Northern Front Range, turn-key office, flexible terms. Reply to: forswell@earthlink.net

THE BOULDER COUNTY BAR ASSOCIATION NEWSLETTER IS PUBLISHED MONTHLY BY THE BOULDER COUNTY BAR ASSOCIATION. ARTICLES BY GUEST LAWYERS MAY NOT BE REPRODUCED WITHOUT PERMISSION FROM THE AUTHORS. DEADLINE FOR ARTICLES IS THE 1ST OF THE MONTH AND DEADLINE FOR ADS IS THE 10TH OF THE MONTH PRIOR TO PUBLICATION.

Phone: 303-440-4758
Fax: 303-402-6958
1942 Broadway, Suite 205
Boulder, CO 80302
E-mail: bcba@bsuites.com
<http://www.boulder-bar.org>

**Executive Director and
Newsletter Editor
Christine Hylbert
Executive Assistant
Heather L. Holbrooks-Kuratek
Barry Satlow, Editorial Assistance**

**Board of Directors
2001-2002**
President: Bruce Fest, 303-494-5600
Past President: Alex Garlin, 303-924-4222
President Elect: Seth Benezra, 303-716-0254
Sec./Treasurer: Virginia Chavez, 303-572-1919
Rachael Doan, 303-928-2315
Pat Furman, 303-492-8126
Fern O'Brien, 303-546-1300
Melody Fuller, 303-449-2946
Tony Dworak, 303-776-9900

Boulder County Bar Association
1942 Broadway, Suite 205
Boulder, Colorado 80302

Return Service Requested

PRESORTED STANDARD
U.S. POSTAGE
PAID
PERMIT #661
BOULDER, CO