

Colorado Supreme Court June Announcements Good News for Physicians-Patient Safety

Defendant Physician v. Haralampopoulos: Colorado Supreme Court - June 16, 2014

The Colorado Supreme Court today issued an important case decision that will help physicians in the defense of malpractice cases. CMS submitted an Amicus, or friend of the court, brief on behalf of the defendant physicians in the case and helped persuade the Colorado Supreme Court to rule in their favor and clarify Colorado hearsay rules in favor of physicians defending malpractice cases. In addition, CMS recognized the importance of the issue to all physicians and recruited additional organizations to join in the Brief on behalf of the defendant physicians, including the American Medical Association (who contributed financially to the case), the Colorado Chapter of the America College of Emergency Physicians, the Colorado Radiological Society and the Colorado Society of Anesthesiologists. Here are the facts. COPIC played an instrumental role in the defense of the physicians and before the court.

The middle-aged male patient presented with abdominal pain and a CT scan showed a large cystic liver mass. Interventional radiology was asked to perform an ultrasound-guided needle biopsy which diagnosed a hydatid cyst. During the procedure, the patient had a vasovagal response and went into cardiopulmonary arrest. Resuscitation efforts started immediately but took approximately 30 minutes to stabilize the patient. He suffered a severe anoxic brain injury which left him in a permanent vegetative state. At a family meeting one week after the event, the patient's ex-girlfriend discussed with family members outside the presence of the doctors the patient's past cocaine use, but it was not mentioned to the physicians. One week later, the ex-girlfriend told a physician who had been caring for the patient about the patient's cocaine use and asked whether it may have contributed to the cardiac arrest. The physician did not put the information in the medical chart.

The patient filed suit against seven physicians claiming negligence in the recommendation and performance of the biopsy. Five of the seven defendant physicians were dismissed from the case before trial. The radiologist who performed the biopsy procedure and the internal medicine specialist who recommended it were the only defendants at trial. During pre-trial discovery, the ex-girlfriend elaborated that when she dated the patient two years prior to the event he had admitted to cocaine use but claimed he had stopped. She then saw him buying drugs on a street corner. In addition, the patient stayed with her shortly before his hospitalization and told her he saw a friend floating as a white cloud in the hallway. The patient's brother testified that he knew the patient used cocaine and the family tried to get him to stop. In addition, the patient had chronic financial problems.

The defense attorneys retained experts who opined that the patient's arrest and prolonged resuscitation were likely caused by cardiac damage secondary to his cocaine

use. Before trial, the patient's lawyer asked the trial judge to order that the defendants not put on evidence of the patient's past cocaine use or opine that it caused his arrest. The defendants relied on an exception to the hearsay rule which permits the admission of statements made "for purposes of diagnosis or treatment." They argued the statements made to the treating physician after the patient's event were for purposes of diagnosis. The trial Judge admitted the evidence and the experts' opinions. The jury returned a verdict in favor of the defendant physicians.

On appeal, the Colorado Court of Appeals reversed the verdict, holding that the ex-girlfriend's statements about cocaine use could not have been made for diagnosis or treatment purposes because the patient was already in a vegetative state. CMS joined in supporting a Petition for review by the Colorado Supreme Court and the Court agreed to review the case. The case was fully briefed and oral argument occurred on June 12, 2013.

The Colorado Supreme Court held that the ex-girlfriend's statements were made for purposes of diagnosis even though it was after the event. The Court properly recognized, as advocated by CMS and others, that diagnosis of a patient's condition does not end at some defined point, but frequently continues and is refined as more information is received. The example cited by the Court in the decision is pathology results, which by definition are obtained after the patient has had some treatment for a medical condition, but are often used to make a diagnosis. The Court also properly decided that the defense physician experts relied on the information in forming their opinions that the cause of the patient's arrest and prolonged resuscitation was not negligence by the physicians, but the patient's then-unknown cocaine use. So even if the treating physicians did not use the information at the time it was reported, the information was made for purposes of diagnosis.

This decision will assist physicians in defending malpractice claims by permitting the introduction of hearsay evidence in support of alternative causes to negligence for the plaintiff's injuries. In malpractice cases, Plaintiff's must prove that the alleged negligence caused the injury and many times a primary defense of the physicians is that there was a different cause. Sometimes, as in this case, the evidence of that alternative cause may only be obtained from family members or others who know the patient's habits and activities.

**Colorado Medical Board (CMB) v. Office of Administrative Courts (OAC):
Colorado Supreme Court (CSC) Ruling June 23, 2014**

The significance of this decision is that the CSC has reaffirmed professional review in Colorado at a time when courts in other jurisdictions have issued opinions that have had the effect of weakening professional review. The CMB, an executive agency under the leadership of Governor Hickenlooper, challenged an ALJ decision that would have

weakened professional review protections by allowing professional review records to be (1) subpoenaed and discoverable, and (2) admitted in a civil suit.

In this case, Colorado Medical Board (CMB) petitioned the Colorado Supreme Court for review of a district court's ruling. The Colorado Medical Society, COPIC and Colorado Defense Lawyers Association each submitted an Amicus, or friend of the court, brief in support of CMB's position. The Colorado Supreme Court ruled today that the professional review statute protects the records of a professional review committee from all forms of subpoena or discovery. The statute further protects the records from admissibility in civil suits, and the Supreme Court also ruled that the term "civil suit" includes administrative proceedings of an adjudicatory nature. Accordingly, the CMB's records are protected from subpoena or discovery and are not admissible in the administrative hearing regarding the denial of a physician's medical license, and the CMB need not furnish the records at issue in this petition. Here are the facts:

Physician applicant (hereinafter referred to as applicant) applied for a license to practice medicine in Colorado but was denied by the Colorado Medical Board (CMB). Applicant sought review of the CMB's decision. An Administrative Law Judge (ALJ) from the OAC held a hearing to decide whether applicant was wrongfully denied a medical license. During discovery, applicant requested certain Letters of Concern that contained information applicant considered relevant to the denial of the medical license. These Letters of Concern are private letters sent from CMB to licensed physicians when there is an issue that warrants discussion and warning, but not necessarily public disclosure and punishment.

The CMB objected that the Letters of Concern were confidential records protected by the professional review privilege, also known as the peer review privilege, and it stated that it was "not willing to waive peer review confidentiality on all [Letters of Concern] even in a redacted form." The ALJ ordered the CMB to produce the Letters of Concern from the last five years that involved matters similar to applicant. A corresponding protective order from the ALJ required that the Letters of Concern be treated as confidential and that all identifying information be redacted. The CMB sought review of the ALJ's order in the district court to enjoin the ALJ's order on the basis that the Letters of Concern were protected from subpoena or discovery. CMB again argued that it is a professional review committee, and that professional review committees possess a privilege that protects their records from subpoena or discovery and admissibility in any civil suit. These Letters of Concern, the CMB argued, are its "records", and as such, are not subject to subpoena or discovery. The district court concluded that, as a matter of law, the professional review statute protected the CMB's records from subpoena or discovery only in civil suits, which did not include administrative proceedings. The district court held that the ALJ did not violate the statute in ordering that the Letters of Concern be provided to applicant. The CMB petitioned the Colorado Supreme Court for review of the district court's ruling.