Crossing the Separation of Powers Threshold: Legislative and Regulatory Control of Expert Testimony

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This article considers the effect of and potential legal problems with efforts by state legislatures, administrative agencies, and professional licensing boards to restrict the scope of expert testimony, focusing on the difficult issues that Colorado courts likely will need to address.

In *Federalist Paper* No. 47, James Madison wrote:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

A few state legislatures and professional licensing boards have adopted regulations intended to limit who may testify in court and what they may say, raising separation of powers questions. Recently, the Colorado Board of Licensure for Architects, Professional Engineers, and Professional Land Surveyors rejected such regulations due to serious rulemaking authority and constitutional concerns.

Such regulatory efforts typically arise from complaints regarding the nature and substance of, and qualifications for giving, expert witness testimony, which complaints often are lodged by the very persons criticized by these testifying experts. This article surveys legislative and professional licensing board attempts to regulate the qualifications of testifying experts and the substance of their court testimony. It also identifies legal concerns raised by such efforts, including Colorado constitutional and statutory limits on the scope of legislative authority over the courts' power to determine the requirements for expert qualification and the nature and extent of permissible expert testimony.

Courts have reached varying conclusions concerning the propriety and limits of legislative and regulatory control of expert testimony. Although courts generally are reluctant to allow licensing boards to usurp their authority to govern the admission of expert testimony, they remain sensitive to the legislature's prerogative to speak and act for the people. Where courts have struck down or restricted such legislative or regulatory efforts, they often have done so based on the circumscribed rulemaking authority of licensing boards or separation of powers concerns. First Amendment "free speech" challenges to legislative and regulatory efforts to control expert testimony have succeeded, as well.

Nonjudicial efforts to regulate expert testimony and the concomitant specter of claims and counterclaims of ethical violations by and against testifying experts and the potential loss of their licenses may have a chilling effect on expert witness testimony and the truth-seeking purposes of the judicial system. One commentator has noted that the "legislative motives behind revision of evidence rules is to inferentially influence trial outcomes, rather than to preserve fundamental fairness," and that "[u]nlike its rival branches, the judiciary has generally remained insulated from public political pressures for evidence rule change."[1] Prudential considerations arising from interference with historical court processes and purposes, and the costs associated with the disruptive effect

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of debatable allegations and counter-allegations of ethical violations, may shape courts' separation of powers analysis.

Because conflicts arise when the applicable rules of evidence permit court testimony purportedly "disallowed" by nonjudicial efforts to regulate expert testimony, courts often have to either harmonize the potentially conflicting standards or strike them down if such harmony cannot be achieved.

Although courts presume rules adopted by administrative regulatory agencies to be valid, an administrative rule is invalid if the rulemaking body: (1) violated statutory rulemaking requirements; (2) exceeded its statutory authority; or (3) acted unconstitutionally.[2] If an administrative agency exceeds its rulemaking authority or violates statutory rulemaking requirements, courts will strike the resulting rules without reaching constitutional questions, such as whether the rules violate separation of powers.[3]

Statutory Authority and Rulemaking Requirements

Colorado's Administrative Procedure Act (APA)[4] requires all state agencies to comply with certain formal procedures to adopt new or amended administrative rules. It prescribes very specific requirements for public notice, review by the general assembly, public comment, and public hearing before adoption of any rule. Failure to substantially comply with any of these requirements renders the rule invalid.[5]

Moreover, agency rulemaking may not exceed the scope of authority granted to an agency by the Colorado legislature in the agency's enabling act.[6] The legislature may not delegate to administrative agencies the power to make or define laws, but it may delegate power to promulgate rules and regulations if it provides the agency with sufficient standards for rational and consistent rulemaking and adequate procedural safeguards for effective judicial review of administrative action.[7] In the absence of clear statutory authority, courts may find that an administrative agency, such as a licensing board, bears a heavy burden to establish that a general grant of authority to license and regulate the ethical conduct of a certain profession includes the power to prescribe who among those it regulates may testify in court and what they may say.[8]

Separation of Powers Concerns: Potential for Conflict

In addition to complying with any applicable statutory rulemaking requirements, administrative rules and statutes regulating expert testimony also must pass constitutional muster.[9] The Colorado Constitution provides that the executive, legislative, and judicial departments of government each may exercise only its own constitutionally granted powers, and prevents one branch of government from exercising powers within the exclusive domain of another.[10] Moreover, the Colorado Constitution acknowledges that the Colorado Supreme Court's rulemaking authority is an inherent power essential for the efficient administration of the court system:

> The supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases. . . .[11]

In Colorado, many legislative enactments affecting courts do not, *per se*, violate separation of powers.[12] However, when appropriate, the Colorado Supreme Court will strike down statutes or administrative rules that improperly usurp judicial functions. Colorado courts will permit legislative policy and judicial rulemaking powers to overlap to some extent, as long as the administrative rule or statute does not substantially conflict with a court rule.[13]

If a conflict exists, the court must determine whether the statute or administrative rule regulates procedural or substantive matters.[14] If substantive, the statute generally prevails; if procedural, it improperly usurps judicial functions and violates separation of powers.[15] The Colorado Supreme Court has explained that one widely recognized test for distinguishing procedural from substantive matters is whether "the purpose of a rule's promulgation is to permit a court to function and function efficiently," or whether the rule

> "conflict[s] with other validly enacted legislative or constitutional policy involving matters other than the orderly dispatch of business."[16]

In its seminal decision upholding the constitutionality of Colorado's "rape shield" law against a separation of powers challenge, the Colorado Supreme Court said:

> While the three branches of our government are separate, equal and coordinate, they are nevertheless branches of one government, and they cannot operate in mutually exclusive, watertight compartments. If government is to serve the people, each branch must seek to cooperate fully with the other two. Confrontations of constitutional authority are seldom in the long-term public interest and therefore are to be avoided where possible. Rather, mutual understanding, respect and self-restraint, the lubricants of good government, are to be sought.[17]

Colorado's judiciary historically has been deferential to the General Assembly. Even

so, legislative or regulatory efforts to control expert witness testimony may test the boundaries of such deference.

Statutory and Regulatory Construction: Identifying Conflicts and Harmonizing Purposes

Recently, a Colorado professional licensing board, the Colorado Board of Licensure for Architects, Professional Engineers, and Professional Land Surveyors (Engineering Board) considered, but refused to adopt, a proposed series of rules seeking to impose multiple restrictions on expert testimony offered by engineers. The accompanying sidebar contains sample restrictions patterned, in part, on some of the rules rejected by the Engineering Board; others are drawn from reported cases; all have been simplified to save space. Ultimately, the Engineering Board rejected the proposed rules because of the Board's significant concerns that its enabling act did not grant the Board authority to adopt the proposed rules, and that the proposed rules unconstitutionally violated the separation of powers doctrine and freedom of speech protections.[18]

Analyzing whether these kinds of proposed regulations exceed the limits of legislative and regulatory authority to control expert witness testimony requires consideration of the applicable evidentiary rules, the aspect of expert testimony sought to be nonjudicially regulated, and whether conflicts between judicial and nonjudicial authority can be reasonably harmonized.

The Rules of Evidence

The Colorado Rules of Evidence (CRE), as construed by the Colorado Supreme Court, govern the qualifications of experts to testify and their competency to render opinions on, for example, what a particular profession's standard of reasonable care was at any particular time or the validity of a particular analytic or testing methodology. CRE 702 governs competence to testify and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In a series of decisions beginning with *People v. Shreck*,[19] the Colorado Supreme Court has held that a trial court's inquiry into the admissibility of an expert's testimony must focus on the reliability and relevance of scientific evidence. This inquiry requires a determination of: (1) the reliability of the scientific principles; (2) the qualifications of the witness; and (3) the usefulness of the testimony to the jury.[20] However, "experience-based specialized knowledge" that is "not dependent on scientific explanation" is not easily susceptible to this kind of admissibility analysis, yet still may be admissible.[21] Moreover, CRE 702's reliability standard does not require proof that the expert's theory is "indisputably correct" or even "generally accepted within the scientific community."[22]

Expert Qualifications: Necessity of Being a Licensed Professional Practicing in Colorado

Colorado courts have addressed, although only in general terms, whether expert witnesses must be licensed in the field in which they are offered to give opinion testimony, and whether experts may testify that they believe a particular industry's standard of practice itself is unreasonable and deficient. Outside Colorado, courts carefully scrutinize licensing board efforts to supplant judicial authority and to control the minimum qualifications of testifying experts.

Generally, Colorado trial courts have broad discretion to accept persons as experts in a field to render opinions pursuant to CRE 702, which allows "a witness qualified as an expert by knowledge, skill, experience, training, or education," to testify in the form of an opinion.[23] Expert witnesses may be qualified by virtue of any one of five factors specified in the rule governing admission of expert testimony; there is no requirement that a proffered expert witness hold a specific degree, training certificate, accreditation, licensure, or membership in a professional organization to testify on a particular issue.[24]

In fact, an expert witness is not disqualified from testifying in Colorado merely because he or she is not licensed in Colorado or does not perform services there, provided that the out-of-state expert has sufficient familiarity with proper standards of care required of Colorado practitioners.[25] In one case,

Potentially Problematic Regulations

- Prescribing Minimum Expert Qualifications
  - prohibiting a non-Colorado resident expert from testifying to the appropriate standard of care within Colorado unless the expert is licensed in and primarily practices within Colorado for a minimum time
- Regulating Communications With a Party's Attorney
  - limiting the nature and substance of communications between counsel and his or her client's expert witness
  - barring attorneys from preparing a draft affidavit for an expert's signature based on an interview with the expert or review of the expert's report, or posing to the expert in question format the issues an attorney wishes the expert to address
- Defining Admissible and Inadmissible Expert Testimony
  - prohibiting the use of a particular methodology that some or many, but not all, experts use to draw what they consider appropriate inferences
  - prohibiting the use of certain analytic techniques that courts previously have approved under the Colorado Rules of Evidence
  - barring an expert from testifying that a licensed professional failed to exercise reasonable care where that professional's conduct comports with the then-prevailing "industry practice," even if the industry practice fails to comport with reasonable care
  - precluding experts from "oversimplifying" matters during testimony
  - requiring that certain experts state their opinions concerning the probability of certain kinds of future damage or injury based on a higher degree of certainty than required by the applicable rules of evidence or differently from other experts testifying about other subject matters

the court held that a psychiatrist in residency properly qualified as an expert in the field of psychiatry where he had completed medical school and been accepted into an approved residency program at a hospital, performed independent diagnoses and provided treatment for mentally ill patients, had performed similar duties at other hospitals, and would sit for examination for licensure as a physician in one month.[26]

In *City of Aurora v. Colorado State Engineer*, the Colorado Supreme Court held that a party who retained and called an expert engineering witness could properly recover its expert costs even though the expert did not have a professional license for either "work performed in preparation for rendering of expert testimony" or rendering the testimony itself.[27] The court affirmed the lower court's cost award, holding that the award of reasonable costs to the party for the expert's services was not an abuse of discretion, because: (1) the expert did not require an engineering license for her work as an expert; (2) the expert's lack of a license did not render her services or fees unreasonable; and (3) an award of costs for the expert's services was not contrary to public policy.[28] The vast majority of other states also permit nonlicensed experts to testify.[29]

Colorado case law clearly does not require that a professional hold a license, or a license recognized in Colorado, to offer expert testimony on an issue. Nevertheless, no Colorado court has squarely addressed whether a regulatory board or agency may constitutionally impose a more stringent standard by conditioning expert qualification on evidence of Colorado licensure.

However, courts outside Colorado have addressed this or related issues, with inconsistent results. For example, one court held that a statute that merely raises the qualification requirements for experts above the "minimum floor" provided by the rules of evidence does not conflict with the rules and thus does not violate separation of powers.[30] Another court held that a legislative provision defining an "expert" is of "no effect," because "the determination of whether a witness has been so qualified is left with the district court."[31] Because Colorado does not require that a witness hold a professional license to offer expert court testimony, regulations imposing a Colorado licensing requirement may be scrutinized carefully to determine if, as a threshold matter, they exceed the agency's or board's rulemaking authority.

Medical Malpractice Expert Testimony

Several states have adopted statutes or administrative rules limiting who can testify as a medical expert and on what subject matters the expert can express opinions in court.[32] The leading statutory cases, from Michigan and West Virginia, reach different conclusions regarding whether such nonjudicial regulation of expert testimony violates separation of powers.

In *McDougall v. Schanz*, the Michigan Supreme Court considered whether a statute delimiting who qualified to testify to the standard of care in a medical malpractice case[33] and Michigan Rule of Evidence 702[34] could be construed as not conflicting, making it unnecessary to reach the constitutional question.[35] The Court concluded that the two "clearly conflict," and that it must "determine whether the statute impermissibly infringes upon this Court's constitutional authority to enact rules governing practice and procedure," because the law "undoubtedly acts as a rule of evidence."

McDougall then held that "a statutory rule of evidence" violates separation of powers only when "no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified," and "if a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration[,] the court rule should yield."[36] The Court found the statute at issue constitutional, holding that the statute essentially required substantive proof of medical malpractice to "emanate from sources of reliable character as defined by the Legislature," and that the statute addressed the substantive elements of a cause of action for malpractice—matters within the legislature's authority to control—rather than matters of court procedure.[37]

In contrast to *McDougall*, in *Mayhorn v. Logan Medical Foundation*,[38] the West Virginia Supreme Court held that a statute outlining the qualifications of an expert in a medical malpractice case[39] must give way to West Virginia Rule of Evidence 702.[40] Relying on the West Virginia Constitution, which provides that the West Virginia Supreme Court "shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State,"[41] that Court held that the legislature may not delimit when a witness qualifies as an expert, because the Court has "complete authority to determine an expert's qualifications pursuant to its constitutional rule-making authority."[42]

It is significant that *McDougall* and *Mayhorn* involved statutory, not administrative, efforts to regulate expert witness qualifications. It is reasonable to expect that a specific statute, like Colorado's rape shield law, rather than a regulatory board's effort loosely tied to that board's grant of authority, is likely to be given more weight when applying a separation of powers balancing test regarding the validity of the law. This is because when there is a clear conflict between court rules governing witness testimony and nonjudicial efforts to regulate such testimony, a court is likely to give greater deference when provided an unambiguous statutory mandate directly from the legislature rather than an administrative regulation.

Limitations on Standard of Care Testimony

Some legislatures and administrative agencies from other jurisdictions have considered (and in a few cases, passed) statutes or regulations purporting to control expert testimony regarding certain standards of care.[43] The validity of such laws remains to be tested.

Colorado courts have considered the admissibility of such testimony in one often-litigated context. In *United Blood Services v. Quintana*,[44] the Colorado Supreme Court considered whether, if a professional or industry group, through years of education, debate, analysis, and practical experience, has concluded that a particular way to do something is the most reasonably safe manner to engage in that activity, a member of that group can be liable in negligence for adhering to the standard of practice. *Quintana*, following a line of authority tracing back to English common law,[45] said:

> a plaintiff should be permitted to present expert opinion testimony that the standard of care adopted by the school of practice to which the defendant adheres is unreasonably deficient by not incorporating readily available practices and procedures substantially more protective against the harm caused to the plain-

tiff than the standard of care adopted by the defendant's school of practice.[46]

The Court then held that if the plaintiff offers competent and credible evidence, "the issue of whether the standard of care adopted by the defendant's school constitutes due care is a question for the jury to resolve under appropriate instructions."[47] The Court also held, in accord with CRE 301, that there is a rebuttable presumption that adherence to the applicable standard of care adopted by a profession constitutes due care.[48]

In *Quintana*, the issue was whether the fact that the blood banking community had not, as of 1983, adopted available methods to screen blood for the AIDS virus precluded expert testimony designed to show that this industry practice was unreasonably deficient. The Court held that "the trial court should have permitted the Quintanas to present expert opinion testimony challenging the standard of professional care on which [the blood bank] relied in its operations."[49] Thus, the fact that an entire profession adheres to a particular practice, although relevant, is not dispositive of what constitutes a reasonable standard of care.

This rule has been nearly universally adopted by jurisdictions in the United States.[50] Because the policies underpinning this widely accepted rule—a rule that is intended to allow minority views to be aired and debated and then considered by impartial fact finders—would be impaired by a regulatory board's effort to exert control over such testimony, regulatory boards may be asked to meet a very high burden to establish that the action comports with their rulemaking authority and does not violate separation of powers or free speech rights. As one commentator said, nonjudicial attempts to revise court rules may be viewed skeptically by courts as no more than a "bold attempt to turn the trial forum into an arena of end results for those advocating a particular position."[51]

Limitations on Expert Methodology

Under the Colorado Rules of Evidence, expert testimony must be relevant and reliable.[52] Under CRE 703, an expert may base his or her opinion on facts or data "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." In *People v. Ramirez*,[53] the Colorado Supreme Court recently expounded on these well-settled principles, holding that the reliability standard does not require proof that the expert's theory is "indisputably correct" or even generally accepted within the scientific community.

Rather, the proponent of the expert's opinion must show that the "method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy Rule 702's reliability requirements."[54] Thus, any nonjudicial attempt to impose a more stringent reliability standard may be viewed as inconsistent with or contrary to the requirements imposed by the Colorado Rules of Evidence, thereby exposing any such rule or statute to a potential separation of powers challenge.

Free Speech Concerns Raised by Nonjudicial Regulation of Expert Testimony

The U.S. Constitution provides that no state shall abridge the freedom of speech.[55] Colorado's Constitution offers similar protections.[56] Courts have held that free speech rights can be partly, but not wholly, limited within the context of judicial proceedings to permit courts to ensure the fair, orderly, and efficient administration of justice.[57] Nevertheless, testifying as a witness in judicial proceedings is protected by the First Amendment.[58] This free speech protection extends to expert witnesses.[59]

Some experts have challenged restrictions on their capacity to give courtroom testimony as an infringement of their free speech rights and the right to engage in an occupation of their choosing. In *Hoover v. Morales*, the Fifth Circuit Court of Appeals considered whether two Texas state regulations that prohibited state employees from being expert witnesses or consultants in litigation against the state violated the employees' free speech rights.[60] The court found that the regulations effectively prohibited speech of public concern, and the state's alleged interest in preventing conflicts of interest did not support the speech limitation, concluding, "the State's interest is in preventing state employees from speaking in a manner contrary to the State's interests."[61]

Similarly, in *Swartzwelder v. McNeilly*, the Third Circuit Court of Appeals considered the constitutionality of a general order promulgated by the Pittsburgh Police Bureau providing:

> Except for subpoenas issued by the district attorney's office, no member or employee may respond to any contact, request, summons or subpoena where such contact, request, summons or subpoena is issued in connection with a criminal or civil proceeding for the purpose of seeking an opinion or advice, expert or otherwise, from the member or employee absent express, written authorization from the chief of police.[62]

The chief of police also issued a memorandum to the plaintiff, a Pittsburgh police officer and sometime expert witness on the use of force. The memorandum provided:

> Please be advised that in any case in which you are subpoenaed you should forward copies of any subpoenas or letters retaining your services as a witness to our law department. You should meet with a law department representative who will review the matter in any case involving the City of Pittsburgh. In any case involving another municipality, the law department should also review that information and notify that municipal government. *An assistant city solicitor and the training academy should review the testimony you plan to offer to determine its validity*.[63]

The Third Circuit held the regulations to be unconstitutionally overbroad restrictions on free speech.[64] The City of Pittsburgh claimed the regulations were necessary to preserve confidential law enforcement information and avoid disruption of criminal prosecutions, but could not demonstrate that the regulations at issue were the least restrictive means of addressing the city's legitimate interests.

In addition to express limitations of expert testimony by nonjudicial regulations, such regulations also may have an unconstitutional chilling effect on testimony not expressly limited. Regarding legislative and regulatory attempts to limit expert testimony in the medical malpractice context, one commentator has noted:

> Whether by purpose or only in effect, the[se regulations] stem the free flow of testimony to courts, and they impinge protected free speech. Their purpose—promulgated by politically and economically powerful groups to advance economic self-interest—should be suspect.[65]

The same commentator noted the danger to the court system inherent in this chilling effect:

> A witness's apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. . . . A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.[66]

No clear trends have developed to indicate whether courts will strike down nonjudicial regulation of expert testimony on free speech grounds. However, some kinds of regulations of this nature

are at risk of being declared unconstitutional on First Amendment grounds.

Conclusion

Regulatory attempts to limit expert witness testimony may exceed a regulatory agency's or licensing board's rulemaking authority. At a minimum, such efforts run head-first into powers historically consigned to the judicial branch: deciding who can testify and what testimony is admissible.

Such regulatory actions also raise serious separation of powers and free speech concerns. As Thomas Jefferson observed in his *National Bank* opinion:

> [t]o take a single step beyond the boundaries thus specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

The Framers' concerns regarding the importance of maintaining a separation of powers between government branches resonate today. In sum, as one commentator has observed: "trial-evidence rules should be broad in scope, uniform in application, where possible, and flexible in interpretation so that the inherent virtue of judicial discretion to maintain objectivity in the forum can be maintained."[67] Colorado courts face a challenging task balancing this separation of powers if legislative and regulatory bodies try to dictate who may testify in court and what they may say.

Notes

1. Glicksman, "Separation of Powers Conflict: Legislative Versus Judicial Roles in Evidence Development," 17 *T.M. Cooley L.Rev.* 443, 444 (2000).

2. CRS § 24-4-106(7); *Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 217 (Colo. 1996); *Brighton Pharmacy, Inc. v. Colo. State Pharmacy Bd.*, 160 P.3d 412, 415 (Colo.App. 2007); *Amax, Inc. v. Colo. Water Quality Control Comm'n*, 790 P.2d 879, 883 (Colo.App. 1989).

3. *See, e.g., People v. McKenna*, 585 P.2d 275, 278-79 (Colo. 1978) (before ruling on constitutionality of legislative acts, courts should decide case on other grounds, if possible).

4. CRS § 24-4-103.

5. CRS § 24-4-103(8.2). *See also Colo. Ground Water Comm'n, supra* note 2 at 217; *Brighton Pharmacy, supra* note 2 at 415; *Amax, supra* note 2 at 883.

6. *Colo. Ground Water Comm'n, supra* note 2 at 217; *Brighton Pharmacy, supra* note 2 at 415; *Amax, supra* note 2 at 883. *Cf. Fla. Dep't of Heath & Rehab. Servs. v. McTigue*, 387 So.2d 454 (Fla. 1980) (finding administrative agency's rule imposing more requirements for midwife license than Florida statute exceeded agency's statutory authority).

7. *See, e.g., Cottrell v. City & County of Denver*, 636 P.2d 703, 708-9 (Colo. 1981).

8. *Cf. Mo. Bd. of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 443 (Mo.App. 1991) (administrative board could not discipline physician for substance of his trial testimony because testifying as non-treating expert medical witness did not constitute the practice of medicine).

9. CRS § 24-4-106(7) (requiring administrative rules to be constitutional, legal, within agency's statutory authority, and not contrary to any statute); *Colo. Ground Water Comm'n, supra* note 2 at 217; *Brighton Pharmacy, supra* note 2 at 415; *Amax, supra* note 2 at 883.

10. Colo. Const. art. III; *Crowe v. Tull*, 126 P.3d 196, 205 (Colo. 2006).

11. Colo. Const. art. VI, § 21.

12. *See, e.g., Page v. Clark*, 592 P.2d 792, 800-01 (Colo. 1979) (where burden of proof described by statute and common law are the same, no conflict exists implicating separation of powers concern); *Crowe, supra* note 10 at 196, 205-07 (applying Colorado Consumer Protection Act to attorneys does not contradict court's implementation of the professional rules of conduct and does not implicate separation of powers concern); *People v. Buckles*, 453 P.2d 404 (Colo. 1968) (statute prohibiting convicted felons from practicing law did not impinge on judiciary's right to determine the rules and regulations governing practice of law).

13. *McKenna, supra* note 3 at 279 (upholding "rape shield" law); *People v. Montoya*, 942 P.2d 1287, 1294-95 (Colo.App. 1996) (upholding statute governing use of alternate jurors). *Cf. Bd. of Water & Sewer Comm'rs of City of Mobile v. Hunter*, 956 So.2d 403, 426 (Ala. 2006) (engineering licensing amendment defining "practice of engineering" to include giving testimony, but not describing what testimony was permitted or prohibited, did not violate separation of powers).

14. *Montoya, supra* note 13 at 1294.

15. *Id.*

16. *McKenna, supra* note 3 at 277, *quoting* Joiner and Miller, "Rules of Practice and Procedure: A Study of Judicial Rule Making," 55 *Mich. L.Rev.* 623, 629-30 (1957). *Accord Montoya, supra* note 13 at 1295-96; Levin and Amsterdam, "Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision," 107 *U. Pa. L.Rev.* 1, 30 (1958) (arguing separation of powers doctrine's protection of judicial rulemaking function preserves judges' power to effectively resolve judicial controversies).

17. *McKenna, supra* note 3 at 275.

18. *See* January 24, 2008, Engineering Board Memorandum. A copy of the Memorandum can be obtained from the authors. The relevant text of the rejected rules can be found in Benson, ed., 2 *Colorado Construction Law* § 14.13.9 (CLE in Colorado, Inc., 2007).

19. *People v. Shreck*, 22 P.3d 68 (Colo. 2001).

20. *Id.* at 75.

21. *Id.* at 77, *followed in Masters v. People*, 58 P.3d 979 (Colo. 2002) *and People v. Ramirez*, 155 P.3d 371 (Colo. 2007).

22. *Ramirez, supra* note 21 at 371.

23. Qualification of an expert witness is within the trial court's discretion and the exercise of such discretion will not be disturbed on review un-

less a clear abuse of discretion is proven. *See, e.g., People v. Dist. Ct.*, 647 P.2d 1206, 1209 (Colo. 1982); *People v. Anderson*, 518 P.2d 828, 831 (Colo. 1974); *People v. Deluna*, 515 P.2d 459, 460 (Colo. 1973); *People v. Drumright*, 507 P.2d 1097, 1098 (Colo. 1973); *McCune v. People*, 499 P.2d 1184, 1187 (Colo. 1972); *People v. Hankin*, 498 P.2d 1116, 1118 (Colo. 1972); *White v. People*, 486 P.2d 4, 6 (Colo. 1971); *Brewer v. Am. & Foreign Ins. Co.*, 837 P.2d 236, 239 (Colo.App. 1992); *People v. Tidwell*, 706 P.2d 438, 439 (Colo.App. 1985); *Stone v. Caroselli*, 653 P.2d 754, 757 (Colo.App. 1982).

24. *Huntoon v. TCI Cablevision of Colo., Inc.*, 969 P.2d 681, 690 (Colo. 1998).

25. *Corcoran v. Sanner*, 854 P.2d 1376, 1382 (Colo.App. 1993) (out-of-state architect called to testify to an in-state architect's breach of the applicable standard of care).

26. *People ex rel. Martinez*, 841 P.2d 383 (Colo.App. 1992).

27. *City of Aurora v. Colo. State Eng'r*, 105 P.3d 595, 625 (Colo. 2005).

28. *Id. See also Bainbridge, Inc. v. Bd. of County Comm'rs*, 55 P.3d 271, 274 (Colo.App. 2002) (expert witness need not hold a valid professional license for work performed in preparation for expert testimony).

29. *See, e.g., Coca Cola Bottling Co. v. Gill*, 100 S.W.3d 715 (Ark. 2003); *Grigerik v. Sharpe*, 699 A.2d 189, 201 (Conn.App. 1997), *rev'd on other grounds by Grigerik v. Sharpe*, 247 Conn. 293 (1998); *Thompson v. Gordon*, 851 N.E.2d 1231 (Ill. 2006); *State v. Edgman*, 447 N.E.2d 1091 (Ind.App. 1983); *Bandstra v. Int'l Harvesting Co.*, 367 N.W.2d 282 (Ia.App. 1985); *Dickey v. Corr-A-Glass*, 601 P.2d 691 (Kan.App. 1979); *Hitchcock v. Dickerson*, No. 99-CI-00249, 2005 WL 2467777 at *1 (Ky.App. Oct. 7, 2005); *Malcomb v. Humphries Motors*, 347 So.2d 1 (La.App. 1977); *Bourke v. N. River Ins. Co.*, 324 N.W.2d 52, 54 (Mich.App. 1982); *Boylan v. Bd. of County Comm'rs*, 105 N.W.2d 329 (N.D. 1960); *Alliance for Disabled in Action, Inc. v. Cont'l Props.*, 853 A.2d 328 (N.J. Super. Ct. App. Div. 2004); *Baerwald v. Flores*, 930 P.2d 816, 819 (N.M.App. 1996); *Howlett v. Mayo's*

Inc., 100 P.2d 263 (Okla. 1940); *Lance v. Luzerne County Mfrs. Ass'n*, 77 A.2d 386, 388 (Pa. 1951); *Owens v. Payless Cashways, Inc.*, 670 A.2d 1240, 1243-44 (R.I. 1996); *State v. Northborough Ctr., Inc*, 987 S.W.2d 187, 194 (Tex.App. 1999); *S. Burlington Sch. Dist. v. Calcagni-Frazier-Zajchowski Architects, Inc.*, 410 A.2d 1359 (Vt. 1980).

30. *N.J. State Bar Ass'n v. State*, 888 A.2d 526, 563 (N.J. Super. Ct. Ch. Div. 2005). *See also McDougall v. Schanz*, 597 N.W.2d 148, 156 (Mich. 1999) (state statute requiring licensure to qualify as expert medical witness was substantive law and did not violate separation of powers doctrine); *Hunter, supra* note 13 at 403 (Ala. 2006) (applying test that subsequent legislative enactment controls over prior court rule and finding licensure requirement for experts did not violate separation of powers doctrine).

31. *In re SRBA Case No. 39576*, 912 P.2d 614, 626 (Idaho 1995). *See also Mayhorn v. Logan Med. Found.*, 454 S.E.2d 87 (W.Va. 1994) (legislature may not outline when a witness qualifies as expert; court has "complete authority to determine an expert's qualifications pursuant to its constitutional rule-making authority").

32. *See, e.g.*, Ala. Code § 6-5-548 (2007); Alaska Stat. § 09.20.185 (2007); Ariz. Rev. Stat. Ann. § 12-2604 (2007); CRS § 13-64-401; Conn. Gen. Stat. § 52-184c (2007); Del. Code Ann. tit. 18, § 6854 (2007); Fla. Stat. Ann. § 766.102(5)-(8) (2007); Ga. Code Ann. § 24-9-67.1(c) (2007); Idaho Code Ann. § 6-1013 (2007); Iowa Code § 147.139 (2007); Kan. Stat. Ann. § 60-3412 (2007); La. Rev. Stat. Ann. § 9:2794 (2007); Md. Code Ann. Cts. & Jud. Proc. § 3-2A-02 (2007); Mich. Comp. Laws Ann. § 600.2169 (2007); Miss. Code Ann. § 11-1-61 (2007); Mont. Code Ann. § 26-2-601 (2007); N.J. Stat. Ann. § 2A-53A-41 (2007); N.C. Gen. Stat. Ann. § 8C-1, Rule 702 (b)-(d) (2007); Ohio Rev. Code Ann. § 2743.43 (2007); 40 Pa. Cons. St. Ann § 1303.512 (2007); R.I. Gen. Laws § 9-19-41 (2007); Tenn. Code Ann. § 29-26-115; Tex. Civ. Prac. & Rem. Code § 74.401 (2007); Va. Code Ann. § 8.01-581-20 (2007); W. Va. Code § 55-7B-7. Several additional states have similar proposed legislation pending.

33. Mich. Comp. Laws § 600.2169 (1986), providing, in relevant part:

(1) In an action alleging medical malpractice, if the defendant is a specialist, a person shall not give expert testimony on the appropriate standard of care unless the person is or was a physician licensed to practice medicine or osteopathic medicine and surgery or a dentist licensed to practice dentistry in this or another state and meets both of the following criteria:

(a) Specializes, or specialized at the time of the occurrence which is the basis for the action, in the same specialty or a related, relevant area of medicine or osteopathic medicine and surgery or dentistry as the specialist who is the defendant in the medical malpractice action.

(b) Devotes, or devoted at the time of the occurrence which is the basis for the action, a substantial portion of his or her professional time to the active clinical practice of medicine or osteopathic medicine and surgery or the active clinical practice of dentistry, or to the instruction of students in an accredited medical school, osteopathic medical school, or dental school in the same specialty or a related, relevant area of health care as the specialist who is the defendant in the medical malpractice action.

(2) In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:

(a) The educational and professional training of the expert witness.

(b) The area of specialization of the expert witness.

(c) The length of time the expert witness has been engaged in the active clinical practice or instruction of medicine, osteopathic medicine and surgery, or dentistry.

(d) The relevancy of the expert witness's testimony.

(3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

34. Michigan Rule of Evidence 702 is, in all material respects, identical to CRE 702.

35. *McDougall, supra* note 30.

36. *Id.* at 156 (internal quotations omitted), *quoting* Joiner and Miller, *supra* note 16 at 635, 650-651. In so holding, the court relied, in part, on the analytic framework of *McKenna, supra* note 3 at 277.

37. *Id.* at 159.

38. *Mayhorn, supra* note 31.

39. *See* W. Va. Code § 55-7B-7 (1986), providing:

The applicable standard of care and a defendant's failure to meet said standard, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court. Such expert testimony may only be admitted in evidence if the foundation, therefor, is first laid establishing that: (a) The opinion is actually held by the expert witness; (b) the opinion can be testified to with reasonable medical probability; (c) such expert witness possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert opinion testimony is addressed; (d) such expert maintains a current license to practice medicine in one of the states of the United States; and (e) such expert is engaged or qualified in the medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient.

40. West Virginia Rule of Evidence 702 is identical to CRE 702.

41. W. Va. Const. art. VIII, § 3.

42. *Mayhorn, supra* note 31 at 94.

43. *See, e.g.*, Conn. Gen. Stat. § 52-184c(a) (2007); Fla. Stat. Ann. § 766.102(1) (2007); Idaho Code Ann. § 6-1012 (2007); La. Rev. Stat. Ann. § 9:2794(D) (2007); Md. Code Ann. Cts. & Jud. Proc. § 3-2A-02(c) (2007); N.C. Gen. Stat. Ann. § 90-21.12 (2007).

44. *United Blood Servs. v. Quintana*, 827 P.2d 509, 520-21 (Colo. 1992).

45. *See, e.g., In General Cleaning Contractors v. Christmas*, 1953 A.C. 180 (House of Lords 1953). In *Christmas*, the plaintiff window cleaner was in-

jured when the lower sash of a window fell. He claimed his employers negligently failed to adopt precautions to avoid injury. The defense argued that the trade took no such precautions. Lord Reid said, "even if it were proved that it is the general practice to neglect this danger, I would hold that it ought not to be neglected and that precautions should be taken," because the hazard was so evident and because it was apparent that the danger could very easily be avoided, for example by wedging the window.

46. *Quintana, supra* note 44 at 521. The Court added:

> If a standard adopted by a practicing profession were to be deemed conclusive proof of due care, the profession itself would be permitted to set the measure of its own legal liability, even though that measure might be far below a level of care readily attainable through the adoption of practices and procedures substantially more effective in protecting others against harm than the self-decreed standard of the profession.

Id. at 520.

47. *Id.* at 521.

48. *Id.*

49. *Id.* at 526.

50. *See, e.g., In re T.J. Hooper*, 60 F.2d 737, 740 (2nd Cir. 1932) ("[t]here are precautions so imperative that even their universal disregard will not excuse their omission. . . . [I]n most cases reasonable prudence is . . . common prudence; but strictly it is never its measure"); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 64 (N.M. 1995) ("[w]e hesitate to embrace a standard that would allow an industry to set its own standard of reasonable care and to determine how much product-related risk is reasonable"); *Cassanova v. Paramount-Richards Theaters*, 204 La. 813, 825-29 (La. 1944) (although generally poor lighting was industry standard, due care required better lighting); *Restatement (Second) of Torts* § 295A, cmt. c ("[n]o group . . . or trade can be permitted, by adopting careless and slipshod methods . . . to set its own uncontrolled standard at the expense of . . . the community"). *See also Tex. & Pac. Ry. Co. v. Behymer*, 189 U.S. 468, 470 (U.S. 1903) ("[w]hat usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence"); *Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 382-83 (9th Cir. 1992) ("following the standards of its industry does not necessarily immunize that defendant from liability").

51. Glicksman, *supra* note 1 at 458.

52. *Shreck, supra* note 19 at 77.

53. *Ramirez, supra* note 21.

54. *Id.* at 378 (internal quotation and citation omitted).

55. U.S. Const. amend. I and XIV.

56. Colo. Const. art. II, § 10 ("[n]o law shall be passed impairing the freedom of speech").

57. *See, e.g., Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005) (courtroom is a "forum in which First Amendment rights . . . are at their constitutional nadir . . . within its confines, courts regularly countenance the application of even viewpoint-discriminatory restrictions on speech"). *Compare United States v. Barry*, Nos. 90-3149, 90-3150, 90-3151, 1990 WL 104925 (D.C. Cir. July 5, 1990) (limiting exclusion of certain person from courtroom for symbolic speech to defined situations) *and State v. McNaught*, 713 P.2d 457 (Kan. 1986) (holding that spectators wearing "mothers against drunk driving" (MADD) and "students against drunk driving" buttons during a drunk-driving trial properly permitted to remain in courtroom) *with State v. Franklin*, 327 S.E.2d 449 (W.Va. 1985) (holding that presence of spectators wearing MADD buttons during a drunk-driving trial was prejudicial and mandated their exclusion).

58. *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987).

59. *Kinney v. Weaver*, 301 F.3d 253, 282 n.24 (5th Cir. 2002) (fact that parties "testified as expert witnesses does not diminish the First Amendment interest in ensuring that the speech is uninhibited."), *aff'd in relevant part*, 367 F.3d 337 (5th Cir. 2004) (*en banc*).

60. *Hoover v. Morales*, 164 F.3d 221 (5th Cir. 1998). The first policy at issue was a Texas A&M University regulation prohibiting "university professors from taking employment as consultants or expert witnesses when doing so would create a conflict with the state." *Id.* at 223. The second was part of the Texas legislature's 1997 appropriations bill, and provided, "none of the funds appropriated by this Act shall be expended in payment of salary . . . of any state employee who is retained as or serves as an expert witness or consultant in litigation against the state." *Id.*

61. *Id.* at 225-26.

62. *Swartzwelder v. McNeilly*, 297 F.3d 228, 232 (3d Cir. 2002).

63. *Id.* at 233 (emphasis added).

64. *Id.* at 238.

65. Peck and Vail, "Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice," 51 *N.Y. L. Sch. L.Rev.* 323, 335-36 (2006–07) (citations omitted). *See In re Lustgarten*, 629 S.E.2d 886, 892 (N.C.App. 2006) (finding substantial evidence did not support finding that physician made bad faith accusation when he opined, during testimony for plaintiffs in medical malpractice action, that medical notation made by defendant doctor was not credible).

66. Peck and Vail, *supra* note 65 at 336.

67. Glicksman, *supra* note 1 at 458. ■