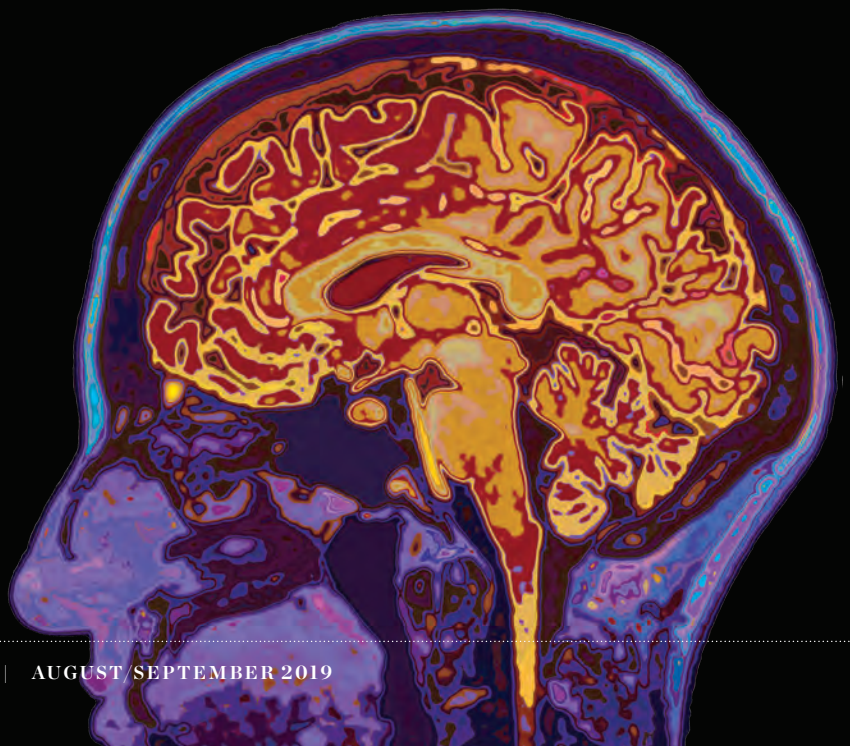
"Case within a Case" Legal Malpractice Claims

Proving Collectibility

BY JESSE BRANT



This article discusses the Colorado Supreme Court's recent decision in LeHouillier v. Gallegos, *where it held that a client-plaintiff bears the burden of proving collectibility in a legal malpractice claim.*

Collectibility is a critical element in a legal malpractice claim premised on an attorney's alleged mishandling of an underlying case. Under Colorado law, a client-plaintiff must prove that he or she would have prevailed in the underlying case had it been handled properly, and the "question of whether the judgment in the underlying case would have been collectible" must be resolved.[1] For example, suppose a plaintiff sustained serious damages in an automobile accident where liability was not disputed and his or her attorney's mishandling of the case resulted in a pretrial dismissal in favor of the defendant. If that defendant was uninsured and had no assets against which to collect a judgment, the attorney's malpractice would not be actionable because the underlying damages were uncollectible.

For over 90 years, who bore the burden of proving or disproving collectibility remained an open question: Was it an element of a plaintiff's case-in-chief, or was it an affirmative defense to be proved by an attorney-defendant? The Colorado Supreme Court recently decided this issue in *LeHouillier v. Gallegos*, holding that a client-plaintiff bears the burden of proving collectibility.[2] This holding lends clarity to the evaluation and litigation of legal malpractice claims.

This article discusses the Court of Appeals and Supreme Court opinions issued in *LeHouillier*. It concludes with lessons learned from this significant case.

The Basics of Legal Malpractice Claims

The crux of a legal malpractice claim premised on an attorney's professional negligence is that the "attorney breached his or her professional duty of care in a way that proximately injured a client."[3] To prevail on this type of claim, a plaintiff must establish that (1) the attorney owed a plaintiff a duty of care; (2) the attorney breached that duty; and (3) the attorney proximately caused damage to the plaintiff.[4] To prove causation, a plaintiff must prove that he or she "should have been successful in the underlying action if the attorney had performed properly."[5] Courts refer to this requirement as the "case within a case."[6]

> "Until *LeHouillier*, however, who bore the burden of proving or disproving collectibility remained open in Colorado."

Collectibility has long been essential to a legal malpractice claim.[7] Until *LeHouillier*, however, who bore the burden of proving or disproving collectibility remained open in Colorado. Plaintiffs argued it was an affirmative defense, meaning the defending attorney had to prove that the underlying claim was not collectible. Defendants, in turn, argued it was a sub-element of causation and, accordingly, the plaintiff had the burden to prove collectibility.

LeHouillier Goes to Trial

LeHouillier arose from allegations of medical malpractice and eventually became a legal malpractice lawsuit where collectibility was a central issue.

In 2006, Dr. Steven Hughes, a radiologist, performed a brain MRI on Della Gallegos.[8] According to Gallegos, Dr. Hughes "failed to detect an obvious brain tumor" on the MRI.[9] Three years later, Gallegos had another MRI through a different doctor, who spotted the tumor.[10] During the time between the two MRIs, the tumor had grown three times larger.[11]

Had Dr. Hughes discovered the tumor in 2006, Gallegos "could have undergone noninvasive radiosurgery" to treat it; this treatment was cheaper and less invasive than her ultimate treatment.[12] Because of the delay in discovering the tumor, radiosurgery was no longer a treatment option and Gallegos instead had to undergo three craniotomies "to remove as much of the tumor as possible."[13] The craniotomies "damaged Gallegos's vision, hearing, and memory."[14]

Gallegos ultimately retained an attorney, Patric LeHouillier, to sue Dr. Hughes for medical malpractice.[15] LeHouillier investigated the case but decided not to proceed with a lawsuit because, in his view, it did not make economic sense.[16] Whether he informed Gallegos of his decision is disputed.[17] LeHouillier claimed that he had informed Gallegos "of his decision in a meeting, adding that he would no longer represent her."[18] However, he "did not keep any written records to memorialize what had been discussed" with Gallegos at the meeting, nor did he "send [her] a letter to inform her that he was no longer her attorney."[19] The statute of

limitations for Gallegos's medical malpractice claim against Dr. Hughes eventually ran.[20]

Gallegos then filed a legal malpractice lawsuit against LeHouillier, alleging that he negligently failed to pursue her medical malpractice claim against Dr. Hughes.[21] In a case like *LeHouillier*, where the "client claims that her attorney's malpractice prevented her from prevailing in a lawsuit[,]" a plaintiff "must prove that but for the attorney's negligence, she would have won a favorable judgment against the underlying defendant" to satisfy the case-within-a-case requirement.[22] In addition, "proving the case within a case in an attorney malpractice suit includes resolving the question of whether the judgment in the underlying case would have been collectible."[23]

Gallegos's lawsuit against LeHouillier proceeded to trial. After Gallegos rested her case-in-chief, LeHouillier moved for a directed verdict, arguing that Gallegos "bore the burden of proving that any judgment against Dr. Hughes would have been collectible, and that she had not carried her burden."[24] The trial court agreed with LeHouillier in part, finding that Gallegos bore the burden of proving collectibility, but ruling that she had provided sufficient evidence to present the issue to the jury.[25]

The collectibility evidence Gallegos presented during the directed verdict argument consisted of a 2010 letter LeHouillier sent to Dr. Hughes and circumstantial inferences argued by Gallegos's counsel.[26] In the letter, LeHouillier urged Dr. Hughes to contact his professional liability insurer.[27] Gallegos's counsel argued that "because Dr. Hughes never responded that he lacked insurance, it could reasonably be inferred from his silence that he did carry professional liability insurance."[28] Gallegos's counsel also argued that because a Colorado statute required practicing doctors to maintain professional liability insurance, "Dr. Hughes must have carried insurance[.]"[29]

The trial court found this evidence sufficient and the case went forward.[30] The jury ultimately found that Dr. Hughes had been negligent and concluded "that LeHouillier and his firm had breached their professional duty of care by not pursuing the case against Dr. Hughes."[31] The jury "found that Gallegos suffered over $1.6 million in present and future damages," and the trial court later reduced the jury's verdict to a judgment against LeHouillier for $727,727.86.[32]

After the trial, LeHouillier again raised the collectibility issue, this time through a motion for judgment notwithstanding the verdict, arguing that Gallegos "presented no evidence indicating that any judgment obtained in the medical malpractice action would have been collectible" against Dr. Hughes.[33] The trial court denied the motion, finding that Gallegos had presented sufficient evidence to prove collectibility.[34]

LeHouillier Enters the Court of Appeals

LeHouillier appealed to the Colorado Court of Appeals, arguing that the judgment against him should be reversed "because collectibility is an element that a plaintiff must prove in a legal malpractice case" and Gallegos did not prove that any underlying judgment against Dr. Hughes would have been collectible.[35] The Court agreed with LeHouillier in part, concluding "that the record does not contain sufficient evidence that the judgment was collectible."[36] However, it agreed with Gallegos on the primary issue, finding that collectibility was an affirmative defense for which LeHouillier bore the burden of proof.[37] It also found that the trial court should have required LeHouillier to raise collectibility as an affirmative defense and prove that any underlying judgment Gallegos would have received would not have been collectible.[38]

The Court of Appeals' analysis focused on a 1927 Supreme Court opinion, *Lawson v. Sigfrid*, which it described as a "strange case" and a source of "mystery" on one of the primary issues before it—that is, who has the burden of proving collectibility.[39] *Lawson* arose from a dispute over an unpaid debt.[40] In 1919, the creditor hired an attorney to sue the debtor.[41] Four years later, the creditor and her attorney discovered that the trial court had dismissed the case because it had not been prosecuted.[42] The creditor then sued her attorney for "neglect of professional duty."[43] The case was tried,[44] and the trial court determined that, among other things, the creditor had to prove that if she had obtained a judgment against the debtor, the judgment "could have been executed."[45] The trial court found the creditor had failed to prove the judgment could have been executed and, accordingly, directed a verdict in favor of the attorney.[46]

The Court of Appeals analyzed the Supreme Court's opinion in *Lawson*.[47] The Court emphasized what the Supreme Court did, which was to find that collectibility matters in a legal malpractice case, and what it did not do, which was assign the burden of proving collectibility.[48]

The Court of Appeals then turned to post-*Lawson* cases in Colorado, noting that it had not found any Supreme Court case holding that the plaintiff bears the burden of proving collectibility, nor had LeHouillier cited any.[49] It also addressed how other states' courts approached the *Lawson* opinion, concluding that "*Lawson* acquired the reputation of standing for a proposition that it did not decide," which was that the client bears the burden of proving collectability.[50] Finding that it was "writing on a blank slate[,]" the Court of Appeals adopted the rule of "a strong and growing minority of states" and found that collectibility was an affirmative defense that must be raised and proved by an attorney-defendant.[51]

The Court of Appeals cited "seven compelling" reasons in support of its adoption of the minority rule:

1. It is unfair to require a client-plaintiff to prove collectibility because it is a burden created by the negligent attorney.[52] A plaintiff in a legal malpractice case already has to prove negligence twice.[53] For example, in *LeHouillier*, Gallegos has to prove both that Dr. Hughes negligently treated her (by failing to diagnose her meningioma) and that LeHouillier's handling of her medical malpractice case was negligent (by failing to bring a claim within the statute of limitations).[54]
2. Because an attorney should have investigated the defendant's solvency in the beginning of the underlying case, he or she is "in as good a position" as the client-plaintiff to address collectibility.[55]
3. Requiring a client-plaintiff "to introduce evidence of collectibility would often be at odds with evidence rules and case law

generally excluding evidence of insurance coverage[,]" such as CRE 411.[56]

4. The typical delay between the original injury and a legal malpractice claim could hurt the client-plaintiff's opportunity to gather collectibility evidence.[57]
5. An attorney could avoid the consequences of his or her negligent act if the underlying defendant is insolvent.[58] "Because the attorney will benefit from that insolvency, he or she should bear" the burden of proving it, along with the attendant risks and uncertainties.[59]
6. Placing the burden on the attorney would not result in a windfall for the client-plaintiff; "if the attorney proves that a judgment is not collectible, damages could be mitigated or eliminated."[60]
7. For most negligence cases, the plaintiff does not have to prove that a potential judgment will be collectible.[61] To obtain a judgment, a typical plaintiff simply has to prove each required element of a claim. Whether the judgment is collectible or not has no bearing on whether such plaintiff is entitled to a judgment.

In a two-to-one decision, the Court of Appeals remanded the case for a new trial and directed the trial court to require LeHouillier to raise collectibility as an affirmative defense.[62] It also directed the trial court to require LeHouillier to "bear the burden of proving that any judgment against Dr. Hughes would not have been collectible."[63]

The Colorado Supreme Court Weighs In

Following the Court of Appeals' opinion, both parties filed cross-petitions for writs of certiorari "to determine which party should bear the burden to prove that the underlying judgment would or would not have been collectible."[64] The Supreme Court granted the cross-petitions and took up the case, beginning its analysis with an overview of Colorado law on legal malpractice and, in particular, the "case within a case" requirement.[65] The Supreme Court noted that proving this requirement "includes resolving the question of whether the judgment in the underlying case would have been collectible."[66]

> "Finding that it was 'writing on a blank slate[,]' the Court of Appeals adopted the rule of 'a strong and growing minority of states' and found that collectibility was an affirmative defense that must be raised and proved by an attorney–defendant."

Like the Court of Appeals, the Supreme Court recognized that prior Colorado cases had not expressly clarified who "bears the burden of establishing that the judgment in the underlying suit would or would not have been collectible."[67] However, the Supreme Court reached a different conclusion than the Court of Appeals on this issue: "Because the collectibility of the underlying judgment is essential to the causation and damages elements of a client's professional negligence claim against her attorney, we now expressly hold that the client-plaintiff bears the burden to prove that the underlying judgment was collectible."[68]

In support of its holding, the Supreme Court first noted that the collectibility of the underlying judgment is connected to both the causation and damage elements necessary to prove a negligence claim.[69] To prove the causation element, a client-plaintiff must show that "but for" the attorney's negligence, the underlying claim would have been successful.[70] In other words, the negligence must be the proximate cause of the damage. This element is satisfied "if the negligent conduct in a 'natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which that result would not have occurred.'"[71] In a case like *LeHouillier*, the amount of the underlying judgment that could have been collected is the measure of damages.[72] A client-plaintiff has no legally cognizable damages if the lost judgment was uncollectible, for example, if the underlying defendant had insufficient assets or had declared bankruptcy.[73]

Next, the Supreme Court addressed the rationale cited by the Court of Appeals, finding that it was neither unfair nor unduly onerous to require a client-plaintiff to establish collectibility.[74] On the fairness issue, it noted that while the need to prove collectibility arises only from an attorney's malpractice, this is no different from the circumstance any plaintiff faces when trying to recover from a negligent actor.[75]

The Supreme Court found that assigning the burden of proving collectibility to a client-plaintiff "is not especially onerous."[76] In the Supreme Court's view, the best evidence of collectibility in a professional liability case would be proof of insurance coverage.[77] It reasoned that if the attorney had inquired about the underlying defendant's insurance coverage, "that information likely would be in the attorney's files and subject to the client-plaintiff's discovery."[78] In reaching this conclusion, the Supreme Court dismissed evidentiary concerns raised by the Court of Appeals, finding that

- CRE 411 policy concerns do not apply in a legal malpractice case because the coverage evidence pertains to the underlying defendant, not the attorney;

- courts could avoid jury confusion by bifurcating the trial on the collectibility issue; and
- a client-plaintiff could depose the underlying defendant or prove collectibility by showing sufficient unencumbered assets through public records, for example, titled assets or real estate.[79]

The Supreme Court also found that treating collectibility as an affirmative defense was not logically sound.[80] It focused its analysis on the difference between the nature of the elements required to prove a particular claim and the nature of an affirmative defense.[81] Collectibility, it noted, is a component of the causation and damage elements a client-plaintiff must prove in a legal malpractice case.[82] An affirmative defense "relies on legal rules or collateral facts to nullify what would otherwise constitute liability" but "does not purport to negate an essential element of a plaintiff's case."[83] For example, a driver who caused a car accident resulting in injuries to another may not have any factual defenses to the elements of a negligence claim, but may be able to raise a statute of limitations defense if the claim is untimely.

Next, the Supreme Court noted that the Court of Appeals' approach could result in a windfall for the client-plaintiff, which is at odds with the central goal of Colorado tort law, to "make the plaintiff whole."[84] With this goal, Colorado law typically (although not always) disfavors damages awards that put a plaintiff in a better position than he or she would have been in had his or her rights not been violated.[85] Treating collectibility as an affirmative defense presents the risk that a client-plaintiff could recover more than his or her actual injury.[86] For example, under the Court of Appeals' approach, if an attorney-defendant failed to prove uncollectibility as an affirmative defense, the client-plaintiff could recover the "case within a case" damages regardless of whether those damages were actually collectible.

Finally, the Supreme Court found that burdening an attorney-defendant with proving uncollectibility would require the attorney to prove a negative.[87] This, in the Supreme Court's view, is a "much more onerous burden than requiring a client-plaintiff to prove collectibility."[88] Under the Court of Appeals' approach, an attorney-defendant would first have to "negate the underlying defendant's insurance coverage."[89] While proving collectibility would essentially be no more difficult for a client-plaintiff than proving the existence of insurance coverage, proving insolvency would be much more onerous for an attorney-defendant, who would have to "reconstruct the underlying defendant's entire financial position, accounting for all of his or her assets and liabilities."[90]

"From the perspective of a client-plaintiff, certainty as to who bears the burden of proving collectibility will guide what types of evidence need to be collected, both pre-litigation and post-litigation."

Lessons Learned

For trial court judges and the litigants before them, the Supreme Court's *LeHouillier* opinion should provide clarity. From the perspective of a client-plaintiff, certainty as to who bears the burden of proving collectibility will guide what types of evidence need to be collected, both pre-litigation and post-litigation. Gathering evidence of collectibility is likely to present challenges for the client-plaintiff.[91] For example, financial discovery is often hotly contested, and it is reasonable to expect that client-plaintiffs will encounter practical and legal challenges when trying to obtain financial information from third parties, particularly when the financial evidence sought could be presented at an open trial.

From a defense perspective, more opportunities may exist for dispositive rulings going forward, saving the client and his or her carrier the cost of defending through trial. For example, now that collectibility is an element of a legal malpractice claim to be proved by a client-plaintiff, this changes the approach to summary judgment motions. Because the client-plaintiff has the burden of proof, an attorney-defendant may satisfy his or her initial burden of going forward on a motion for summary judgment by showing that the client-plaintiff has not disclosed any evidence of collectibility.[92] The burden to avoid summary judgment then shifts to the client-plaintiff, who must present, at a minimum, evidence establishing disputed facts regarding collectibility.

Conclusion

By clarifying the burden of proof on collectibility, *LeHouillier* has resolved years of uncertainty in litigating attorney malpractice disputes. As a result, practitioners may face new challenges as well as new opportunities in litigating these cases, and should adjust their litigation strategies accordingly. CL

Jesse Brant is a partner at Proctor Brant, P.C., an insurance defense and commercial litigation firm in the Denver area. His practice focuses on litigating commercial, construction, insurance, and professional liability cases throughout Colorado. He also handles appeals—(303) 768-8240, jbrant@proctorbrant.com.

Coordinating Editor: Jennifer Seidman, jseidman@burgsimpson.com

NOTES

1. *LeHouillier v. Gallegos*, 434 P.3d 156, 159 (Colo. 2019).
2. *Id.* at 157.
3. *Id.* at 159 (citation omitted).
4. *See Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999) (citations omitted).
5. *Miller v. Byrne*, 916 P.2d 566, 579 (Colo.App. 1995) (citation omitted).
6. *Id.*
7. *See, e.g.*, *Lawson v. Sigfrid*, 262 P. 1018 (Colo. 1927).
8. *See Gallegos v. LeHouillier*, 434 P.3d 698 (Colo.App. 2017).
9. *LeHouillier*, 434 P.3d at 157.
10. *Gallegos*, 434 P.3d at 700.
11. *Id.*
12. *Id. See also LeHouillier*, 434 P.3d at 157.
13. *Gallegos*, 434 P.3d at 700.
14. *LeHouillier*, 434 P.3d at 157.
15. *Id.*
16. *Gallegos*, 434 P.3d at 700. *See also LeHouillier*, 434 P.3d at 157.
17. *LeHouillier*, 434 P.3d at 157.
18. *Gallegos*, 434 P.3d at 700.
19. *Id.*
20. *Id.*
21. *LeHouillier*, 434 P.3d at 158.
22. *Id.* at 159–60.
23. *Id.* at 160.
24. *Gallegos*, 434 P.3d at 700.
25. *LeHouillier*, 434 P.3d at 158.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. While LeHouillier's letter was admitted into evidence, the jury was not informed of the Colorado statute requiring practicing doctors to maintain professional liability insurance. *Id.*
31. *Id.*
32. *Id. See also Gallegos v. LeHouillier*, Second Amended Order of Judgment, El Paso Cty. Dist. Ct. Case No. 2013CV32156 at 2–3. The total amount awarded to Gallegos was reduced because of the jury's finding that Gallegos was comparatively at fault for her damages.
33. *Gallegos v. LeHouillier*, Defendant's Motion for Judgment Notwithstanding the Verdict, El Paso Cty. Dist. Ct. Case No. 2013CV32156 at 2.
34. *LeHouillier*, 434 P.3d at 158.
35. *Gallegos*, 434 P.3d at 700–01.
36. *Id.* at 701.
37. *Id.*
38. *Id.*
39. *Id.* at 702. *See also Lawson*, 262 P. 1018.
40. *See Lawson*, 262 P. at 1018.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *See Gallegos*, 434 P.3d at 702–03.
48. *Id.* at 703.
49. *Id.*
50. *Id.* at 705.
51. *Id.* at 705–06.
52. *Id.* at 706.
53. *Id.*
54. *Id.*
55. *Id.* at 706 (quoting *Schmidt v. Coogan*, 335 P.3d 424, 428 (Wash. 2014)) (other citation omitted).
56. *Id.* (citations omitted).
57. *Id.* (citation omitted).
58. *Id.* (citation omitted).
59. *Id.* (quoting *Lindeman v. Kreitzer*, 775 N.Y.S.2d 4, 8 (2004)).
60. *Id.* at 706 (citations omitted).
61. *Id.* at 706–07 (citation omitted).
62. *Id.* at 708. Judge Webb concurred in part and dissented in part. *Id.* at 708–15. He agreed with the majority's view of *Lawson*, but dissented from its holding that "relegates collectibility to a mere affirmative defense, to be pleaded and proved by the defendant attorney." *Id.* at 708. Judge Webb concluded that the jury was properly instructed and that Gallegos failed to present any evidence of collectibility, so he "would reverse the judgment against Mr. LeHouillier and dismiss the case." *Id.* at 713.
63. *Id.* at 708.
64. *See LeHouillier*, 434 P.3d at 159.
65. *Id.* at 160.
66. *Id.*
67. *Id. See also Gallegos*, 434 P.3d at 703.
68. *LeHouillier*, 434 P.3d at 159.
69. *Id.* at 162.
70. *See Boulders at Escalante LLC v. Otten Johnson Robinson Neff and Ragonetti P.C.*, 412 P.3d 751, 759 (Colo.App. 2015) (citations omitted).
71. *Smith v. State Compensation Ins. Fund*, 749 P.2d 462, 464 (Colo.App. 1987) (quoting *Stout v. Denver Park & Amusement Co.*, 287 P. 650 (Colo. 1930)).
72. *See LeHouillier*, 434 P.3d at 162.
73. *Id.*
74. *Id. See also Gallegos*, 434 P.3d at 706–07.
75. *See LeHouillier*, 434 P.3d at 162–63.
76. *Id.* at 163.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 164 (quoting *Stamp v. Vail Corp.*, 172 P.3d 437, 448 (Colo. 2007)).
85. *Id. But see Volunteers of America Colorado Branch v. Gardenswartz*, 242 P.3d 1080, 1082–83 (Colo. 2010) (discussing Colorado's common law collateral source rule).
86. *LeHouillier*, 434 P.3d at 164.
87. *Id.* (citation omitted).
88. *Id.*
89. *Id.*
90. *Id.*
91. That may not be the case for future legal malpractice claims arising from an attorney's handling of an automobile accident personal injury claim. In late April of this year, the Colorado legislature passed HB 19-1283, which Governor Polis signed in May. This law, which takes effect on January 1, 2020, requires automobile liability insurers to provide the following information to a claimant or a claimant's attorney within 30 calendar days of a request: (1) the name of the insurer; (2) the name of each insured party; (3) the limits of the liability coverage; and (4) a copy of the policy. HB 19-1283, § 2, CRS § 10-3-1117(1) to (2). Presumably, attorneys who represent personal injury claimants will use this approach and, accordingly, the liability policy and related information should be in the attorney's file.
92. *See, e.g.*, *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987) (citation omitted).