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TWO CASES, TWO EXPERT WITNESSES ONE DID IT RIGHT; THE OTHER DIDN'T

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INTRODUCTION

Expert witnesses have a sometimes crucial role in litigation as defined by Rule 702 of the Colorado Rules of Evidence and the similar federal rule. Colorado Rule of Evidence 702 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.

Note that the Colorado rule, like the federal rule, does not limit expert testimony to scientific or technical testimony, but includes the broad stroke of “other specialized knowledge.” Before allowing expert testimony, however, the court must determine that the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” The expert may even testify as to the “ultimate issue” in the litigation. CRE 704 (“Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact”).

In permitting expert testimony, however, courts have raised concern about the possibility that experts may usurp the jury’s responsibility to find the facts or the judge’s role to instruct the jury in the applicable law. This concern is heightened where a lawyer is the expert in question.¹ The use of a lawyer as an expert witness must be carefully choreographed or the result may be the

¹ For an examination of the courts’ handling of this issue, see Cook, *An Opinion: Federal Judges Misconstrue Rule 704 (Or Is That an Impermissible ‘Legal’ Conclusion)*, 1995 Cleve. St. L. Rev. 41 (1995), and Olicker, *The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?*, 42 U. Miami L. Rev. 831 (1988).

striking of the expert's testimony and irritation of the court. This is exemplified in two recent opinions of the Colorado Supreme Court: *People v. Baker*² and *Lawrence v. People*.³

In *Baker*, the testimony of a lawyer expert (the Deputy Securities Commissioner) was held to be inappropriate and inadmissible.⁴ In the other parallel case, *Lawrence*, the testimony of a similar lawyer expert (the Securities Commissioner) was held to be appropriate and admissible.⁵ Both opinions were authored by Justice Gabriel without dissent. As discussed below, the admissibility of a lawyer expert's testimony depends on the scope and presentation of the testimony.

THE SECURITIES FRAUD ISSUES UNDERPINNING THE BAKER AND LAWRENCE DECISIONS

Baker and *Lawrence* each addressed expert testimony in the context of criminal securities fraud under the Colorado Securities Act, C.R.S. § 11-51-101 *et seq.* Both cases involved defendants who were charged with securities fraud under C.R.S. §§ 11-51-501(1)(b) and 11-51-603(1). *Baker* was also charged with violation of C.R.S. § 11-51-501(1)(c).

Section 11-51-501 prohibits fraud and other prohibited conduct in connection with the offer and sale of any security, as follows:

- (1) It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:
 - (a) To employ any device, scheme, or artifice to defraud;
 - (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
 - (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

² *People v. Baker*, No. 19SC975, 2021 CO 29, 2021 WL 1850877 (May 10, 2021).

³ *Lawrence v. People*, No. 19SC556, 2021 CO 28, 2021 WL 1850955 (May 10, 2021).

⁴ *Baker*, 2021 WL 1850877, at *6.

⁵ *Lawrence*, 2021 WL 1850955, at *2, ¶ 3.

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Section 11-51-603(1) sets forth the criminal penalties associated with a violation of C.R.S. § 11-51-501: “Any person who willfully violates the provisions of section 11-51-501 commits a class 3 felony and shall be punished as provided in section 18-1.3-401, C.R.S.”

A basic question in both cases was whether the transaction in question involved the offer or sale of an investment contract, and thus a security as defined in C.R.S. § 11-51-201(17). As discussed in *Lawrence*,⁶ federal and state courts have typically defined the term “investment contract” (at issue in both *Baker* and *Lawrence*) based on *S.E.C. v. W.J. Howey Co.*⁷ where the U.S. Supreme Court adopted a three-part test to determine whether a contract is an investment contract. Under that test, an investment contract is defined as:

- (1) a contract, transaction or scheme whereby a person invests his money,
- (2) in a common enterprise, and
- (3) is led to expect profits solely⁸ from the efforts of the promoter or a third party.

This test was intended to embody “a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.”⁹ Notably, in using the definition of an investment contract in *Lawrence*, the Colorado Supreme Court significantly modified the definition of an investment contract it had previously used.¹⁰

Both *Baker* and *Lawrence* involved a promoter who offered an opportunity to persons to invest money pursuant to an agreement. Perhaps needless to say, all of the investors lost money and claimed that the information that they were told about the investments and the use of the funds they invested were significantly different than the facts ultimately showed was the case.

⁶ *Lawrence*, 2021 WL 1850955, at *14, ¶¶ 27-28.

⁷ *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946).

⁸ Notably, case law from both federal and Colorado state courts have not construed the word “solely” in the third prong of the *Howey* test literally. See Lidstone, *The Securities Law Deskbook* (CLE in Colorado, 2018) at § 2.1.4.

⁹ *Howey*, 328 U.S. at 299.

¹⁰ *Lawrence*, 2021 WL 1850955, at *5-7. The Court stated: “we now clarify that an investment contract is a contract, transaction, or scheme whereby people invest their money in a common enterprise and are led to expect profits derived substantially from the entrepreneurial or managerial efforts of others, *on whose honesty and skill the investors have relied to manage their money.*” *Id.* at *6, ¶ 31 (emphasis added). The italicized addition is new, based on most precedent from federal and state law, including *People v. Blair*, 579 P.2d 1133, 1141-42 (Colo. 1978).

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PEOPLE V. BAKER

In *Baker*, the Deputy Securities Commissioner offered her conclusions that the agreements with the investors constituted “investment contracts” and were therefore securities under Colorado law, and that “[b]ased on my review of what the investors reported in the investigation about what the defendant said to them, I believe that there were a series of facts that they understood that were, in fact, material.”¹¹ As described by the Colorado Court of Appeals, the Deputy Securities Commissioner testified “as though [the victim’s] allegations were true, which suggested that she had drawn her own conclusions about the investors’ credibility,” and “she did so even though the facts were largely disputed” by the defendant who claimed “that he never made the alleged statements to the investors.”¹²

The Supreme Court concluded that the Deputy Commissioner’s testimony was inadmissible because she testified in such a way as to opine that certain disputed facts were true and her testimony involved weighing the evidence and making credibility determinations, which matters are solely within the jury’s province.¹³

In reaching this conclusion, the Supreme Court did not focus on the Deputy Commissioner’s opinion that the documents establishing the agreement between the defendant and his investors was a security under Colorado law, but rather on the fact that:

Deputy Commissioner Alves repeatedly opined on the truth of the prosecution’s factual allegations by speaking as though the allegations against Baker were true and the statements made by the purported victims were accurate. Despite the fact that Baker disputed the allegations against him, Deputy Commissioner Alves did not testify that *if* a certain fact was alleged or true, then it would be material. To the contrary, she testified to the allegations contained in the discovery materials and

¹¹ *Baker*, 2021 WL 1850877, at *3, ¶ 14. Continuing, the Court noted that:

...on cross-examination, defense counsel challenged Deputy Commissioner Alves on a number of her assertions as to what, factually, had occurred. She, however, defended her statements and assumptions. For example, when defense counsel asked whether the documentation that had been given to the investors, including the investors’ agreements, mentioned anything about the investor funds being held in escrow, the Deputy Commissioner responded, “No. Again, that was a verbal representation by the defendant.” She likewise confirmed that the documentation that had been given to the investors placed no limit on the amounts that the investors could lose. To the contrary, the documentation stated that the investment was going to be “speculative” and “with a high degree of risk” and that the investors “must be able to afford a complete loss of this investment.

Id. at * 4, ¶ 15.

¹² *Baker*, 2021 WL 1850877, at *5, ¶ 18.

¹³ *Baker*, 2021 WL 1850877, at *7, ¶¶ 35-37.

investigative reports that she had reviewed, opined that Baker had in fact made the misstatements and omissions asserted therein, and went so far as to opine that the statements in the Attorney General's investigator's interview reports accurately reflected what Baker had told the investors.¹⁴

LAWRENCE V. PEOPLE

The second Colorado Supreme Court opinion issued on May 10, 2021, *Lawrence v. People* reached the opposite conclusion. In that case, the Securities Commissioner "testified regarding the general purposes of the securities, laws, what qualifies as a security (including an investment contract), and the obligation of sellers of securities to provide investors with full and fair disclosures of all material facts."¹⁵ On the last point of materiality, the Commissioner "explained to the jury the kinds of facts that would be material, including, for example, the background and personal affairs of the persons running the business."¹⁶

The Supreme Court concluded that this testimony did not improperly usurp the jury's role because, among other things:

"Commissioner Rome never expressed an opinion of the applicable law or legal standards. Rather, he simply provided a general overview of the applicable law and offered examples to help explain the concepts."¹⁷

"Commissioner Rome did not opine that Lawrence committed any crime or that there was a particular likelihood that he did so."¹⁸

"Commissioner Rome did not express an opinion that the omissions in this case were material. Indeed, the trial court precluded him from offering such an opinion. Instead, he simply expounded on the general principle of materiality, and he provided hypothetical examples of the types of misrepresentations or omissions that might be material."¹⁹

¹⁴ *Baker*, 2021 WL 1850877, at * 7, ¶ 36.

¹⁵ *Lawrence*, 2021 WL 1850955, at *4, ¶ 15.

¹⁶ *Lawrence*, 2021 WL 1850955, at *4, ¶ 15.

¹⁷ *Lawrence*, 2021 WL 1850955, at *9, ¶ 52.

¹⁸ *Lawrence*, 2021 WL 1850955, at *10, ¶ 54.

¹⁹ *Lawrence*, 2021 WL 1850955, at *10, ¶ 54.

SIMILARITIES AND DIFFERENCES

In both *Baker* and *Lawrence*, the respective experts testified that the writings used by the defendants were “investment contracts” and therefore securities under the Colorado Securities Act. In neither case was that found to be inadmissible.

The significant difference between the two cases occurs with respect to the testimony as to the ultimate facts – whether the facts pled by the prosecution were in fact accurate. As stated in *Baker* and as quoted in more detail above, “the Deputy Commissioner repeatedly opined on the truth of the prosecution’s factual allegations by speaking as though the allegations against Baker were true and the statements made by the purported victims were accurate.”²⁰

By contrast, the Securities Commissioner in *Lawrence* “never expressed an opinion of the applicable law or legal standards” but rather “simply provided a general overview of the applicable law and offered examples to help explain the concepts.”²¹ The Commissioner also “did not opine that Lawrence committed any crime or that there was a particular likelihood that he did so.”²²

CONCLUSION

The parallel *Baker* and *Lawrence* cases—both of which were handed down by the Colorado Supreme Court on May 10, 2021—exemplify the fine line between admissible and inadmissible expert testimony from a lawyer expert. In both cases, the Supreme Court said that it was a “close question.”²³ In both cases the Court based its analysis on *People v. Shreck*²⁴ and *People v. Rector*.²⁵ The determining factor is in *how* the expert presents his or her testimony. Where an expert explicitly or implicitly offers opinions on the veracity of evidence or the credibility of witnesses, the expert’s testimony crosses the line from admissible to inadmissible, and the expert’s testimony will likely suffer the same fate as that of the Deputy Security Commissioner in *Baker*.²⁶

²⁰ *Baker*, 2021 WL 1850877, at * 7, ¶ 36.

²¹ *Lawrence*, 2021 WL 1850955, at *26, ¶ 52.

²² *Lawrence*, 2021 WL 1850955, at *26, ¶ 54.

²³ *Lawrence*, 2021 WL 1850955, at *9, ¶ 49; *Baker*, 2021 WL 1850877, at *2, ¶ 9.

²⁴ *People v. Shreck*, 22 P.3d 68 (Colo. 2001).

²⁵ *People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011).

²⁶ It is also important to note that *Baker* and *Lawrence*, like *Shreck* and *Rector*, are criminal cases. As is continuously proven by civil litigators filing *Shreck* motions to exclude or limit expert testimony in civil actions, the same principles should apply to civil cases as well.