Client or Defense Lawyer: Controlling Trial Strategy After Bergerud

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This article reviews Colorado case law regarding how to proceed when a major conflict arises between lawyer and client in a criminal case over the presentation of the defense.

Consider the following questions: What does a criminal lawyer do when a serious conflict arises between the lawyer and the client over what defense to present at trial? Does the lawyer need to inform the trial court as to the specifics of a serious strategic conflict? How much can the lawyer reveal about that conflict and the reasons the lawyer has chosen a defense to which the client objects? Can the lawyer continue to function as trial counsel if his or her chosen defense is in direct conflict with the anticipated testimony of the client?

These compelling legal and ethical questions were the subject of the Colorado Supreme Court case of *People v. Bergerud*.[1] *Bergerud* clarified that a criminal defendant has significant authority in choosing the defense that will be presented at trial. The Court held that a defense lawyer could not advance a theory of defense that effectively rendered the client's anticipated testimony a "nullity."[2] Additionally, the Court determined that defense counsel had a duty to respond candidly to questions by the trial court in a situation where a defendant demanded new counsel and claimed that present counsel was violating his rights in the presentation of the defense.[3]

This article explores the strategic issues raised by the *Bergerud* opinion. It also offers suggestions for criminal defense lawyers about how to proceed when the client and the lawyer have entirely different perspectives on how to advance the defense at trial.

Summary of Pre-*Bergerud* Cases: The Captain of the Ship

Colorado case law has long dealt with the question of the control and direction of a criminal case. The traditional delineation of decision making between lawyer and client was perhaps best articulated by Justice Erickson in the seminal case of *Steward v. People*.[4] In *Steward*, the defendant filed a motion for a new trial claiming that his lawyer was incompetent for failing to present certain evidence during the trial. The *Steward* Court held that it was the defense lawyer who made the decisions, in his role as "captain of the ship," as to what evidence to offer and what strategy to employ in the presentation of the defense. The *Steward* opinion cited the *American Bar Association Standards for Prosecution and Defense Function* (*ABA Standards*)[5] regarding the "[c]ontrol and direction of the case." Those standards clarified that, although the client maintained personal control over the decisions of what plea to enter, whether to waive jury trial, and whether to testify, the remainder of "strategy and tactical decisions" ultimately were exercised by the defense lawyer.[6]

Steward went on to observe that where a major conflict arose between the client and the defense lawyer over strategy and tactics, the lawyer was required to inform the trial court of the impasse as soon as practicable. However, the Court did not address the question of whether a client's anticipated testimony

could limit the strategic and tactical decisions that the lawyer would be required to make in the presentation of the case to the jury.

The case of *People v. Curtis*,[7] decided in 1984, held that the decision to testify was a right so fundamental to the defendant that a special hearing with the trial judge was required to establish on the record that the defendant had personally made the decision whether to waive that right. The Court in *Curtis* held that the right to testify was a fundamental constitutional right that could not be waived by counsel. The Court found the right to testify analogous to the right to be present at each step of the felony process, another right that could not be waived by the defense lawyer.[8]

However, the Court observed that as to the other rights associated with a criminal proceeding, the defense lawyer stood as the captain of the ship, with authority to bind the client by the decisions made during the presentation of the defense.[9] The Court drew a line of demarcation between the defendant's right to testify and the classic trial-related decisions that were in the hands of the lawyer: the determination of which witnesses to call, which defenses to present, how to conduct cross-examination, jury selection, and what pretrial motions to submit.

The tension over control and direction of the case was also the subject of the 2007 Colorado Supreme Court case of *Hinojos-Mendoza v. People*.[10] *Hinojos-Mendoza* held that waiver of the right of confrontation and the decision to stipulate to evidence at trial were decisions solely exercised by defense counsel. *Hinojos-Mendoza* involved a drug dispensing prosecution. The defense lawyer was unaware of the dictates of CRS § 16-3-309(5) that required that the defense object before trial to the admission into evidence of laboratory tests without the testimony of the technician who prepared the report. Failure to object pretrial resulted in a waiver of the defendant's right to confront the technician.

The defendant argued on appeal that he had not personally waived his right of confrontation and, therefore, the lab reports should not have been admitted, even though his counsel waived confrontation by failing to timely object. The Court found that the right to confrontation fell into "the class of rights" that the defense lawyer could waive as part of the strategic decisions in the trial. The Court drew a distinction between waiver of a right to confrontation and the waiver of more "fundamental and personal rights," such as the right to testify at trial.

The Court in *Hinojos-Mendoza* specifically cited *People v. Curtis* when noting that the right to testify was of such central importance to a criminal defendant that it could only be waived personally by the defendant and not by defense counsel. By comparison, the *Hinojos-Mendoza* Court categorized the waiver of confrontation as one of the rights intertwined with the function of defense counsel as the captain of the ship. The Court viewed the right of confrontation as the equivalent of choosing how to cross-examine, or stipulating to the admission of evidence. The Court determined that the defendant was bound by the action and inaction of the defense lawyer as to the right of witness confrontation. The Court stated:

> Therefore, where a defendant such as Hinojos-Mendoza is represented by counsel, the failure to comply with the statutory prerequisites of section 16-3-309(5) waives the defendant's right to confront the witness just as the decision to forgo cross-examination at trial would waive that right.[11]

Hinojos-Mendoza held that when a criminal defendant chose to be represented by counsel, the defendant gave up significant control over many crucial decisions in the case that were deemed to be in the purview of the lawyer. *Hinojos-Mendoza* did not deal with the question of whether the client's anticipated testimony could dictate the defense lawyer's strategy.

People v. Arko, the Precursor to *Bergerud*

The Colorado Supreme Court's decision in *Bergerud* was presaged by its opinion in the case of *People v. Arko*.[12] *Arko* held that the decision as to what lesser-included offenses to submit to the jury was a matter of strategy to be made by defense counsel as opposed to a fundamental trial right controlled by the defendant. In reaching that conclusion, the Court discussed at length the line drawn between matters of strategy dictated by the defense lawyer and decisions involving fundamental rights reserved to the defendant.

The issue in the case was whether the decision to request a jury instruction on a lesser non-included offense was controlled by the defendant or by the defense lawyer as part of the trial strategy. The *Arko* Court began the analysis by noting that a defendant controlled three fundamental decisions in a criminal case: what plea to enter, whether to waive the right to a jury trial, and whether to testify.[13] *Arko* stated that the remaining strategic decisions in the case were to be made by the defense attorney under the traditional captain of the ship analysis.[14] The Court identified various strategic decisions that were made by defense counsel during the trial. Those included what witnesses to call, the extent of cross-examination, what pretrial motions to submit to the court, and jury selection.

Arko rejected the assertion that a defendant had the power to dictate what lesser offenses should be submitted to the jury. The Court concluded that the submission of lesser offenses was a strategic and tactical decision to be made exclusively by the lawyer. The Court reasoned that the decision to submit lesser offenses required sophisticated lawyering skills far beyond the grasp of the average criminal defendant. When criminal defendants exercised the right to be represented by counsel, they gave up their prerogative to dictate those decisions.

The *Arko* Court found additional support for its conclusion in Colorado Rule of Professional Conduct (Rule) 1.2(a). The Court found that Rule 1.2(a) enumerated the three traditional decisions that were always made by the defendant, but did not contain any reference to the defendant controlling the decision as to submission of lesser offenses. The Court reasoned that the omission supported the conclusion that the submission of lesser offenses was so much a part of trial tactics that it could not be reserved to the defendant.

Arko also closely reviewed the third edition of the *ABA Standards*. That treatise reserved the decision regarding lesser offenses to the defense lawyer after consultation with the client, reversing previous editions that had left that decision to the client. The specific change in the practice standards was seen by the Court as further evidence that the choice of lessers was an area so uniquely part of trial strategy that it could not be exercised by the defendant.

Procedural History of *Bergerud*

Charles Bergerud was charged with two counts of first-degree murder and two counts of assault on a police officer. There were two jury trials in the case. In the first trial, Bergerud's privately retained lawyer argued that because of Bergerud's low IQ and intoxication, he was unable to form the intent required for first-degree murder. Critically, the jury in the first trial was not instructed on any lesser homicide offenses; it was all or nothing as far as the murder counts went. The first jury was unable to reach a verdict after several days of deliberation. Private counsel was permitted to withdraw because Bergerud could not afford the fees for a second trial, and the court appointed the Public Defender's Office to represent him.

In the second trial, defense counsel indicated in the opening statements, much like private counsel did in the first trial, that the defense would endeavor to show that Bergerud was so intoxicated and suffering from such severe psychological and medical conditions that he was unable to act with deliberation in killing the two victims and, thus, should not be convicted of first-degree murder. The defense went on to claim that Bergerud might not actually know how the events had transpired on the night of the killings. Defense counsel stated that Bergerud might have "convinced himself" of an alternative version of the facts.[15] The defense lawyer described how one of the police officers had pulled Bergerud from his truck after the exchange of gunfire with the officers, and that Bergerud gave a nonsensical version of what had taken place. The defense pressed this point by telling the jury that Bergerud's statements to the emergency medical staff also appeared illogical and irrational.[16]

When Bergerud heard this opening statement, he requested new counsel on the ground that his attorneys had refused to pursue and present the self-defense theory he desired, and about which he was planning to testify. Bergerud's criticisms of his court-appointed counsel provoked a series of *ex parte* sessions with the trial court while the jury waited for the trial to proceed. The trial court denied Bergerud's motion for new counsel, and Bergerud elected to proceed to trial *pro se* to present his theory of self-defense. Bergerud was convicted of one count of first-degree murder, one count of second-degree murder, and both counts of assault on a police officer.

Bergerud claimed on appeal that the content of his lawyer's opening statements and the denial of his motion for substitution of counsel violated his constitutional right to representation. The court of appeals agreed, reasoning that the lawyer's opening statement to the jury was tantamount to a guilty plea to lesser homicide offenses over Bergerud's objection. It remanded the case for a new trial.[17]

The Colorado Supreme Court reversed. It concluded that the content of the opening statements of counsel did not rise to the level of pleading guilty to a lesser offense. However, it remanded the case to the trial court to make findings as to whether the defense lawyers had "impermissibly appropriated" Bergerud's right to testify by refusing to advance his self-defense claim.[18]The Court also directed the trial court to ascertain whether Bergerud's defense lawyers had refused out-of-hand to investigate the self-defense claim that had been demanded by their client.

The question framed by the Court was whether Bergerud's court-appointed counsel had violated his constitutional right to testify by unilaterally rejecting Bergerud's theory of innocence. The Court reasoned that if the lawyers violated his right to testify, Bergerud could not have made a knowing waiver of his right to counsel pursuant to *Faretta v. California*.[19]

On remand, the Bergerud trial court determined that the defendant was fully advised by his lawyers as to why self-defense was not viable, given the facts and that Bergerud was in agreement with his lawyers' strategy at the commencement of the trial. The defense lawyers were called to testify and related their discussions with Bergerud. The public defenders also produced a letter they had sent to Bergerud before the trial reviewing the discussions that had taken place with him regarding the choice of defenses.

Facts Supporting the Defense Lawyers' Theory

A review of the facts in *Bergerud* provides ample explanation of why Bergerud's lawyers selected a defense that attacked the mental state element of first-degree murder and effectively conceded his guilt as to lesser-included offenses of homicide. The evidence at trial showed that Bergerud shot his ex-girlfriend and her male companion, and then exchanged gunfire with police officers before being shot and apprehended. The record demonstrated why Bergerud's appointed counsel concluded there was no colorable claim of self-defense: the number of victims, the absence of any evidence of provocation, the

implication that Bergerud was motivated by jealousy, the use of a firearm to commit the killings, and Bergerud's act of firing on police officers who responded to the scene. Rather than pursue what certainly would have been a losing strategy of self-defense, Bergerud's appointed counsel, like his private counsel, chose instead to challenge the counts that required specific intent. That decision effectively conceded the conviction of Bergerud on lesser homicide counts that contained a reduced mental state.[20]

Defense counsel's opening statements should not have been a surprise to Bergerud. Bergerud's lawyers signaled early on that they planned to pursue the same defense that had been advanced in the first trial by the issues they raised at pretrial hearings. In addition, Bergerud's mental state was the focal point of the defense *voir dire* as prospective jurors were questioned regarding their experiences with mental illness and addiction. However, as framed by the Colorado Supreme Court, the question was not whether the lawyers had crafted an intelligent, thoughtful, and compelling defense, but rather whether that defense had so compromised Bergerud's right to testify that counsel could not proceed without either Bergerud's—or at least the trial court's—consent.

The Lawyers' Refusal to Respond to the Court's Inquiry

The *Bergerud* Court was highly critical of the refusal of defense counsel to respond to specific questioning by the trial court as to the nature of the conflict. The Court noted that during the *ex parte* proceedings with the trial court, Bergerud's lawyers did not comment on the "nature of their disagreement with their client" and, further, did not provide the trial court any "account of their reasoning . . . concerning . . . the development of Bergerud's defense."[21]

The only position taken by the defense lawyers during the *ex parte* hearing was to assert that they would not withdraw as counsel for Bergerud. The Court specifically found that the trial court gave the court-appointed lawyers ample opportunities at that time to justify their reasons for not adopting the defense their client claimed he had requested.

The Court cited the *ABA Standards* stating that, if a "significant disagreement" developed between defense counsel and the client regarding tactics or strategy, the lawyer was required to make a record regarding the facts of the conflict, the advice given by the lawyer, the reasons for that advice, and the "conclusions reached."[22] The Court also found that the attorney–client privilege was waived for purposes of candidly stating the nature of the conflict. The Court observed that under the *ABA Standards*, a defendant "impliedly" waived the attorney–client privilege for purposes of facilitating the inquiry by the trial court as to "a claim or defense that focuses on advice given by the attorney."[23]

The Court determined that the failure of defense counsel to outline the conflict made it impossible for the trial court to assess whether Bergerud's constitutional rights had been violated. The Court observed that the defense lawyers' "reticence was unwarranted and ultimately inhibit[ed the Court's own] review."[24]

The Court specifically found that the obligations of a lawyer to preserve client confidences must "yield to the court's need to investigate the nature of the attorney-client dispute."[25] The Court further held that a defendant's request for new counsel resulted in "a limited waiver of the attorney-client privilege."[26] The Court stated that the defense lawyer had a duty to respond to the specific questions posed by the trial court as to the conflict with the client, and to inform the trial court as to the lawyer's "reasoning surrounding pertinent trial decisions."[27]

The Court also observed that the absence of candor by Bergerud's lawyers obstructed "an evaluation of whether Bergerud meaningfully retained his constitutional right to testify. . . ."[28] The Court observed that the trial court's *Curtis* advisement would have had little meaning if defense counsel had contradicted the advice given by the trial court during a recess.[29]

Acknowledging that the record was insufficient to determine whether Bergerud's lawyers had violated his constitutional right to testify, the Court observed that "the record 'strongly suggest[ed]' that Bergerud's attorneys would have wholly undermined his testimony if offered."[30] Additionally, the Court found that the record was unclear as to whether the defense lawyers had adequately investigated the self-defense claim, as alleged by Bergerud. The Court pointed out that there was a "troubling indication . . . that Bergerud's attorneys failed to adequately investigate his desired theory of self-defense."[31]

The Court blamed Bergerud's lawyers for the absence of record as to that issue, finding that they "neither refute[d] nor recast his account of their discussions" wherein Bergerud claimed his lawyers rejected the self-defense claim and "ignored" Bergerud's statements to them as to the events surrounding the killings.[32] Finding that the record was insufficient to determine those questions of fact, the Court remanded on the issues of whether Bergerud's right to enter a plea had been usurped by his lawyers and whether his lawyers failed to reasonably investigate the self-defense claim.

The Limitation on a Defense Lawyer's Opening Statement

The *Bergerud* Court found as a general proposition that the opening statement presented by a defense lawyer could not extinguish the evidentiary value of the client's testimony. In short, the lawyer could not assert to a jury that the client was either incapable or unwilling to testify accurately. *Bergerud* also reasoned that a defense lawyer could not concede the client's guilt as to a lesser-included offense over the objections of the client. However, the Court held that the representations in the opening statement had to rise to the level of a "judicial admission" before it would constitute a violation of the defendant's trial rights.[33]

While noting that the opening statement in Bergerud's case focused exclusively on a theory of intoxication and mental impairment, the Court concluded that the defense lawyers had stopped short of "a concession of guilt."[34] The Court's analysis of the opening statement determined that nothing in the presentation blocked the defense from later asking the jury to acquit Bergerud of all charges. However, the Court stated that a defense lawyer had a "constitutional duty" to structure the opening statement so as not to violate the client's right to testify.[35]

The *Bergerud* Court did limit the authority of a defendant to control the content of the opening statement, finding that the accused could not dictate specific strategies as to the presentation of the defense. The Court further stated that a defense lawyer's strategy could be "in tension with the substance of the defendant's desired testimony" and present an "alternative to the thrust of the defendant's testimony."[36]

The Court held that a lawyer's presentation could not "reduce [the] client's constitutional right to testify to a nullity."[37]According to the Court, Bergerud, after meeting with his lawyers off the record, stated unequivocally that his lawyers had informed him that they "could not help him."[38] The *Bergerud* opinion specifically found that the trial court had told the lawyers that, by virtue of their theory, the court did not know what the defense would do if evidence of self-defense arose during the trial.

Neither the Colorado Supreme Court nor the Colorado Court of Appeals has issued an opinion since *Bergerud* addressing any of the specific issues in that case. The court of appeals did hold in the case of *People v. Krueger*[39] that defense counsel—not the defendant—had the right to decide whether the defendant would testify at a pretrial hearing. The decision distinguished pretrial testimony from trial testimony, noting that the decision to pursue pretrial issues was a strategic one left to the defense lawyer. The court of appeals reasoned that testifying at a pretrial hearing did not carry the same constitutional significance as asserting one's innocence in testimony during the trial.

Lessons for the Practitioner

The major principle established by the *Bergerud* opinion is that a fundamental conflict in trial strategy is not a *per se* basis for removal of defense counsel. The defense lawyer has an obligation to independently and effectively present the defense. Although defense counsel has an obligation to consult with the client and involve the client in that process, the fact that the client and lawyer are at odds over the chosen defense does not itself require that the court remove defense counsel. No competent defense lawyer would have adopted Bergerud's theory of self-defense, and had counsel simply explained that to both the trial court and to Bergerud—outside the hearing of the prosecution—the lawyers might have been able to avoid the unfortunate result that ultimately occurred.

The most significant lesson of *Bergerud* is that defense lawyers must be attuned to the possibility that their strategy might conflict with their client's right to testify. These issues should be discussed with the client before trial. They should be discussed again before the *Curtis* advisement, to ensure that any decision to waive the right to testify is an informed one (or, more to the point, that the client's decision to take the stand and testify in a manner that contradicts counsel's chosen trial strategy is an informed one). Much of this tension between trial strategy and a client's constitutional rights to force the prosecution to prove the case (even as to lesser offenses) and to testify (even when the client's version is unbelievable) can be resolved by getting the issue out in the open and discussing it. Had Bergerud's counsel simply explained to him that his opening statement might sound like he was admitting guilt on the lesser offense, but that he really was not, it is possible this dispute could have been avoided.

The second lesson of *Bergerud* is that when the dispute cannot be avoided—when the client's rights to the presumption of innocence and to testify actually might be compromised by the defense lawyer's chosen strategy, and when the conflict cannot be resolved in discussions between the two of them—counsel has an obligation to be candid with the trial court and to explain why his or her chosen trial strategies should prevail over the client's insistence to tell his or her own story. This will no doubt feel unnatural and uncomfortable to defense lawyers, but candor is required and often will be in the client's best long-term interests. After all, because of counsel's lack of candor, Bergerud was permitted to fire counsel and represent himself. Had counsel been candid, there is a possibility that the trial court could have been convinced that Bergerud's presumption of innocence as to the lesser offense was not compromised by opening statement, and that his proposed self-defense theory would have been so profoundly ineffective that his lawyer's right to choose a more effective strategy must take precedence over his right to testify.

Conclusion

The *Bergerud* opinion provides a roadmap as to how to present a defense that conflicts with the client's wishes. The*Bergerud* Court found that the portions of the opening statement that highlighted the facts negating deliberation did not violate Bergerud's right to assert self-defense in his testimony.
The *Bergerud* Court sanctioned a procedure where defense counsel could pursue the defense of the case dictated by the facts while presenting the version of events embraced by the defendant through the defendant's direct examination. After presenting that testimony, defense counsel was free to return to the

theory of the case dictated by the facts and the law. In essence, a middle ground was carved out between the right of the client to plead not guilty and to testify, and the lawyer's right to exercise independent professional judgment. The availability of that middle ground will depend on counsel's ability to convince the client of it and, failing that, counsel's ability to convince the trial court of it.

Notes

1. *People v. Bergerud*, 223 P.3d 686 (Colo. 2010).

2. *Id*. at 702.

3. *Id*. at 703.

4. *Steward v. People*, 498 P.2d 933 (Colo. 1972).

5. *American Bar Association Standards for Prosecution and Defense Function* (3d ed., ABA, 1993), available at www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_toc.html.

6. *Id.* at 934-35.

7. *People v. Curtis*, 681 P.2d 504 (Colo.1984).

8. *Id., citing Penney v. People*, 360 P.2d 671 (Colo. 1961).

9. *Id., citing Steward*, 498 P.2d at 934.

10. *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007).

11. *Id.* at 670.

12. *People v. Arko*, 183 P.3d 555 (2008).

13. *Id., citing Curtis*, 681 P.2d at 512 and Colo. RPC 1.2(a).

14. *Id., citing Steward*, 498 P.2d at 934.

15. *Bergerud*, 223 P.3d at 701.

16. *Id.* at 702.

17. *People v. Bergerud*, 203 P.3d 579 (Colo.App. 2008).

18. *Bergerud*, 223 P.3d at 706.

19. *Faretta v. California*, 422 U.S. 806 (1975).

20. *See People v. Duran*, 272 P.3d 1084, 1096 (Colo.App. 2011) (extensive discussion of the lesser-included offenses raised by a charge of first-degree murder).

21. *Bergerud*, 223 P.3d at 692.

22. *Id.* at 698.

23. *Id*. at n.7.

24. *Id.* at 702.

25. *Id.* at 703.

26. *Id.*

27. *Id.*

28. *Id*.

29. *Id.*

30. *Id.*

31. *Id*. at 704.

32. *Id*. at 704-05.

33. *Id.* at 700.

34. *Id.*

35. *Id*. at 702.

36. *Id*.

37. *Id*.

38. *Id*.

39. *People v. Krueger*, 296 P.3d 294 (Colo.App. 2012). n