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ON THE COVER: Kate Schuster took this photo of Arrowhead Golf Course in Littleton, using a Nikon camera. Schuster is the graphic designer for Colorado Lawyer and the creative manager for the Colorado and Denver Bar Associations.
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Leadership in a Year of Crisis and Growth

BY JESSICA BROWN

This is it: My final President’s Message. What a year this has been. It seems like a lifetime ago that my “leadership mentor”1 Patricia Jarzobski encouraged me to apply for this role. Patty had preceded me as president of the Colorado Women’s Bar Association (CWBA) and went on to serve as CBA president in 2016–17. Notably, she was the first female CBA president in 10 years and only the fifth female president in the Bar’s then 119-year history. These statistics were compelling to me, and I decided to try to follow in Patty’s footsteps—again. I hoped that by throwing my hat in the ring, I might inspire other women to lead, just as she has inspired me.

I was honored when the CBA Nominating Committee chose me as president-elect in 2019, and I quickly went to work on my presidential theme. With help from my other leadership mentor, Attorney General Phil Weiser, I selected Lawyers as Leaders. This was well before any of us had ever heard the terms “COVID-19” and “social distancing” or the names George Floyd and Breonna Taylor. So when things changed rather dramatically last year, I briefly considered whether I needed a theme that was more reflective of the times. But I concluded pretty readily that a leadership theme was more appropriate than ever—to get through these crises, we would need lawyers to step up and lead in so many ways.

Spreading the Message

The need for strong and effective leadership became even more pressing as the year unfolded. In addition to a worsening and prolonged public health crisis and continued racist brutality, we faced unprecedented levels of unemployment, “100-year” wildfires, a divisive election, an insurrection at the US Capitol, a surge in hate crimes targeted at the Asian-American Pacific Islander community (including the Georgia shooting spree), allegations of sexual and gender harassment against the Colorado Judicial Branch, and a mass shooting at King Soopers in Boulder.

Despite (and because of) these many challenges, I promoted the Lawyers as Leaders theme to groups of lawyers and potential leaders all over the state. I talked about leadership at my 25 virtual local bar visits, at my only in-person bar visit in the mountains, in more than 20 meetings and programs (including CLEs and symposiums), on three video messages, and during one podcast.2 In addition, because I had collaborated with our community leaders to develop leadership-themed CLE programs at most of my local bar visits, I put together a Lawyers as Leaders spring series of free CLE programs for CBA members across the state.

During my presentations, I frequently borrowed from Stanford Law School Professor Deborah Rhode’s book Lawyers as Leaders, noting that “no occupation in America supplies a greater proportion of leaders than the legal profession,” a field that naturally attracts people with the “ambition and analytical capabilities to lead.”2 Indeed, lawyers sit at the top of many organizations—law firms, corporations, universities, government agencies, and nonprofit organizations, to name a few. Yet the legal profession “has done little to prepare lawyers to lead”4 through tangible leadership skills development.

This rings true for me: In my 26 years at a large international law firm, I have attended and conducted countless training programs relating to skills development (taking depositions, writing summary judgment motions, etc.) and marketing/client development. These courses have been worthwhile, but none focused on leadership, and very few provided management training. It may be assumed that lawyers have these skills naturally or will learn them through the course of their work. That might be true for some lawyers. But for many of us, management and especially leadership training is an untapped avenue for growth that could help advance the legal profession and our broader community objectives.

Lawyers Stepping Up to Lead

Fortunately, bar associations, including local, diversity, and specialty bar associations, are ideally suited to provide leadership training and experience. In addition to offering opportunities to serve on and lead sections and committees, bar associations offer formal and informal leadership training. For example, the CBA has a first-rate leadership training program called COBALT, and it’s working on a YLD-led initiative to create another statewide program called the Colorado Diverse Attorneys Community Circle (CODACC). CODACC’s goal is to provide diverse attorneys with an avenue to connect with other diverse attorneys throughout the state, but it also includes a leadership component. One of its objectives is to facilitate diverse attorneys taking more leadership positions in their workplaces and in bar associations.

Bar association CLE programs and networking opportunities also help lawyers and law students develop substantive expertise and build relationships, both of which are valuable to aspiring leaders. Bar associations also offer opportunities to lead by participating in various efforts and initiatives, such as legislative reform and access to justice. Leading is not about having a certain title, such as managing partner or committee chair. All lawyers have opportunities to lead.

Below are some of the ways the CBA and its members have been leading this past year. I urge all lawyers (who are able)5 to participate in one or more of these activities.

1. Provide pro bono assistance for individuals and small businesses that are struggling.

I wrote about pro bono service in my October President’s Message6 because the need was so significant in light of the pandemic, and that continues to be the case. We also highlighted pro bono service at our San Luis Valley Bar
visit. There, Colorado Outward Bound Director Lauren Schmidt talked with Court of Appeals Judge Christina Gomez and Melanie MacWilliams-Brooks about opportunities to perform appellate pro bono services, and with former CBA Program Attorney Leslie Kelly about the Federal Pro Se Clinic. In May, Magistrate Judge Kristen Mix led a similar program with Judge Gomez, as well as Magistrate Judge Kato Crews and Danae Woody, who discussed the Federal Limited Appearance Program (FLAP), and Connie Talmage, who talked about Colorado COVID Legal Relief (CCLR). I also invited Senior Court of Appeals Judge Daniel Taubman to join the panel at the El Paso County Bar Association visit to highlight lawyers’ ethical responsibility to do pro bono work. During that visit, we recognized some pro bono stars, including Allen Ziegler and 50-year CBA member Steven Barr.

2. Reach out to friends and colleagues who have struggled mentally or emotionally during this difficult year.

Mental health problems are a significant challenge for our profession even in “normal” times, and both pandemics (COVID-19 and racial violence and injustice) have exacerbated this issue. My November Message addressed this subject in depth, outlining both sources of stress and solutions. The Northwest Colorado Bar Association visit likewise focused on attorney wellness, with presentations from Ryann Peyton, director of the Colorado Attorney Mentoring Program (CAMP), and Amy Kingery, assistant director of the Colorado Lawyer Assistance Program (COLAP). This event took place the day after the schismatic US presidential election, making the topic of emotional and mental well-being particularly timely.

I’ve promoted COLAP at various times throughout the year, including after the Boulder mass shooting, which followed the Atlanta-area shootings by less than a week. I’ve also encouraged bar members to reach out to friends and colleagues for help, or to offer it, because I’ve seen how significantly the pandemic and other stresses of the past year have affected a treasured colleague. Panelists and leading lawyers Loren Brown, William Garcia, April Jones, Ian McCargar, Camila Palmer, and I discussed this issue during our April 2021 program Leading Through Challenging Times: Guiding Your Law Firm Through Uncharted Waters. My hope is that through these types of discussions, we can continue to destigmatize mental health issues within the legal profession. Looking ahead, the Colorado Task Force on Lawyer Well-Being, headed by Justice Monica Márquez with support from several other leading lawyers, will be issuing its report, which should be a tremendous resource for lawyers.
3. Support and defend our Constitution, advance the rule of law, and help restore the public’s faith in our democratic and judicial systems.

The attack at the US Capitol on January 6 shook many of us to our core. Some months earlier, CBA Past President John Vaught had encouraged me to write a President’s Message about lawyers’ obligation to uphold the rule of law, but I just didn’t think I could say it better than he had in 2019. The CBA did, however, work with CBA-CLE and the DBA to host a program in mid-January 2021, where AG Weiser interviewed Congressman Jason Crow on these topics. With more than 800 registrants, it was one of our most successful programs this year, and it was an honor to work with then CBA-CLE Board Chair Qusair Mohamedbhai and DBA president Tyrone Glover to recognize Congressman Crow’s bravery and heroism during the Capitol attack.

To further promote lawyers as leaders in government, AG Weiser joined me for my visits to the Adams Broomfield and 13th Judicial District Bar Associations. We discussed careers for lawyers as leaders in government and public service with Court of Appeals Judge Stephanie Dunn, Senator Pete Lee, head of Judicial Diversity Outreach for the Colorado Judicial Department Sumi Lee, Denver District Attorney Beth McCann, Lauren Schmidt, former legislator Cole Wist, and Attorney Regulation Counsel Jessica Yates. We are replicating that CLE program on June 25 for a statewide audience to close out my Lawyers as Leaders series. Retired Judge Christopher Cross will moderate a discussion with Denver International Airport Chief of Staff Cristal Torres DeHerrera, Senator Lee, DA McCann, and ARC Yates.

With regard to our judicial system, the reports regarding allegations of sexual and gender harassment within the Colorado Judicial Branch also were upsetting to many in our community, although we recognize that a complete investigation report has not yet been released. The CBA urged the Court to issue the report when it is ready and to be as transparent as possible, and the Court responded by inviting a meeting with Bar leaders and taking other affirmative steps to address the allegations. The CBA likewise has taken proactive measures to address these issues in conjunction with the CWBA, including developing and hosting, along with CBA-CLE, another very successful program for nearly 500 registrants, From Bystander to Upstander: How to Respond to Sexual Harassment in the Legal Profession. A follow-up to this program, which was moderated by CWBA board member Kathryn Starnella and featured panelists Magistrate Judge Crews, Ryann Peyton, and Alexis Ronickher from Washington, D.C., is in the works. In addition, I asked Justice Melissa Hart and Court of Appeals Judge David Yun to present a leadership CLE program at my local bar visits to Mesa and Pueblo Counties. They worked with 21st Judicial District Court Judge Valerie Robison and 10th Judicial District Court Chief Judge Deborah Eyler to present Leading Through Crisis and Change: The Colorado Judicial Branch during COVID and Controversy.

4. Set an example of how to lead with empathy and gratitude.

Attorney General Weiser’s remarks at the December Board of Governors meeting inspired me to write a column on empathy. I had asked AG Weiser to speak about leadership because I knew he could deliver a speech that would be unifying, inspiring, and uplifting at a time when those feelings were particularly hard to come by. In an apolitical manner, AG Weiser delivered an impactful message on Leading with Empathy, explaining that “if we as lawyers lead with empathy, rather than judgment, we can build relationships premised on good will and trust in the good faith of others, even during disagreements.” His speech is reprinted in full in my February Message. AG Weiser’s talk also inspired my April column about gratitude. In researching the topic, I was surprised to learn that people are less likely to express gratitude at work than anywhere else. I
therefore suggested a number of ways to express gratitude in the workplace and in life. This was the most personal of all the President’s Messages I wrote. I talked a bit about my childhood, my family, and my anxiety at the idea of losing that which I value so much. And so I was very gratified when a lawyer I did not know reached out to me via email to say, “What a great message this month. In our typically high conflict services industry, it is so important to lead with gratitude. . . . I’m putting your message into practice.”

5. Ensure that our rural communities are not overlooked or left behind.
John Vaught devoted much of his 2018–19 presidency to expanding broadband access across Colorado. He was quite prescient, as COVID-19’s arrival in 2020 dramatically increased our dependence on high-speed internet. Not too long after, John’s efforts bore fruit when the COVID-19 relief package passed with $7 billion in new funding for broadband-related purposes. The CBA is grateful to John and all who contributed to this tremendous effort.

Like her predecessor, CBA Immediate Past President Kathleen Hearn Croshal has done much to address the needs of non-Metro attorneys. Among her initiatives, she created the Greater Colorado Task Force to reduce geographic barriers to participation in CBA programs, leadership, and communication. Task Force Chair Ian McCargar detailed the group’s extensive work in the May President’s Message.

We also held several leadership programs this past year focused on Greater Colorado. At the combined 16th Judicial District and Southwestern Colorado local bar visit in April, Kathleen moderated a program called Colorado’s Legal Deserts: Lawyers Leading Change, featuring Jen Cuesta, a Rural Pro Bono Program attorney at Colorado Legal Services (CLS), Salida family law attorney Julie Katz, Alamosa practitioner Christopher Friesell, and Erin Harris, CLS managing attorney in La Junta and president of the 16th Judicial District Bar Association. At the 7th Judicial District and Delta County bar visit, I worked with former Saguache County Court Judge Amanda Pearson to present a CLE program called Effective Leadership Strategies for Lawyers in Greater Colorado. Judge Pearson is replicating this program for a statewide audience this month, but with panelists this time, including former Colorado Supreme Court Justice Rebecca Love Kourlis, 12th Judicial District Judge Amanda Hopkins, Steamboat Springs practitioner Jenna Keller, and CU Law School Assistant Dean for Employer Relations and Outreach Marci Fulton.

We also started grappling with two issues that intersected with our racial justice, equity, diversity, and inclusivity (REDI) goals: (1) the CBA presidential rotation, which creates a disadvantage for non-Metro lawyers in that they can only apply for the presidency every 12 years (versus every two years for Denver attorneys); and (2) the Award of Merit, which has rarely been awarded to our Greater Colorado or BIPOC (Black, Indigenous, and People of Color) members. We’re engaged in “hard conversations” and won’t stop until we resolve these important issues.

6. Advance our REDI mission, vision, and values.
Of all the areas discussed here, REDI has been the largest area of focus by far and has involved the most significant personal and emotional commitment this year. Even before I became president last summer, I spoke with the CBA Executive Council about forming a working group that later became the REDI Committee, so named because we believed the Bar, our legal community, the state, and the nation have never been more “REDI” for lasting change. At least so far, all of the REDI Committee members also serve on the CBA Executive Council, but we’re looking at what structure makes sense going forward. Jon Olafson, one of our newest Executive Council members, eagerly agreed to serve as chair.

The REDI Committee has been very busy since last summer, but it is nevertheless just getting started. This will be an ongoing endeavor. As CBA Executive Director Amy Larson frequently notes, racial justice, equity, diversity,
and inclusivity is “forever work,” and the Bar is approaching it that way. Some of the work we have done or are doing is outlined below.¹⁹

- development of new Mission and Values statements that commit to the “eradication of racism, discrimination, and any other form of injustice against underrepresented groups” and promise to “promote diversity, equity, inclusion, and the removal of barriers to success within the CBA and the communities we serve”;
- outreach to our diverse members and issuance of external statements in which we have made clear we intend to take action in support of our Mission and Values and expressed support for and solidarity with our diversity bar partners;
- collaboration with the Presidents Diversity Council, the Center for Legal Inclusiveness (CLI), and the Office of Attorney Regulation Counsel to advocate for the new EDI CLE requirement that will take effect on July ¹;²⁰
- collaboration with the CWBA on a CLE program that drew more than 900 registrants on the topic of implicit bias, presented by CLI founder Kathleen Nalty;
- collaboration with the CBA YLD to (1) present a CLE program during the Larimer County bar visit titled, Navigating Leadership Pathways as Diverse Attorneys, featuring Maral Arjomandi, Thomas Dyer, Karen Hen, and Spencer Rubin; (2) promote the Federal Legal Assistance (FLAP) Program³; and (3) develop, fundraise for, and help fund CODACC.
- presentation of a program for Women’s History Month centered on conversations with four women of color, each from a different generation: former Director of the Office of Civil Rights at the Environmental Protection Agency Velveta Golightly-Howell (Baby Boomer); Sheridan Ross shareholder and patent attorney Dr. Rita Sanzgiri (Gen X); Drexler Law attorney and CBA YLD Council member Raquel Hernandez (Millennial); and CU law student Essence Duncan (Gen Z);
- development of the program that launched my Lawyers as Leaders series in mid-April, Lawyers Leading the Way to Anti-Racist Transformation,⁴ featuring CLI CEO Sara Scott, Assistant US Attorney (and author of a powerful op-ed that everyone should read)⁵, Jason St. Julien, Primera Law Group founder and APABA leader Deborah Yim, and 4th Judicial District Court Judge Timothy Schutz of Colorado Springs;
- collaboration with APABA on a bystander-to-upstander program conducted by Hollaback⁶ in response to the rash of hate crimes against Asian-Americans;
- development of a Diversity on the Bench CLE program featuring Judge Gary Jackson, Judge Frances Johnson, Patricia Jarzobski, and Sumi Lee to highlight the importance of having judges who reflect the communities they serve (we also worked with Judge Jackson and Patty to prepare a letter to Senators Bennet and Hickenlooper about the importance of appointing diverse judges to the Colorado federal bench);
- collaboration with the Colorado LGBT Bar Association on an anti-homophobia panel program to be offered as part of the Lawyers as Leaders series in June;
- collaboration among the CBA, DBA, Colorado LGBT Bar Association, Sam Cary Bar Association, South Asian Bar Association of Colorado, and CBA YLD to host a celebratory picnic in mid-June to celebrate Pride Month, Juneteenth, and the ability to come together safely outside to celebrate the diversity in our profession;
- collaboration between the members of the CBA Bylaws Committee (formed by Kathleen Hearn Croshal and chaired by Judson Hite) and the CBA/DBA EDI Joint Steering Committee (chaired by Patricia Jarzobski) on bylaws changes intended to help remove structural barriers to equity in an effort to undertake “anti-racist organizational change”⁷;
establishment of a new Judicial Endorsement Task Force to examine, through a REDI lens, whether the Bar should reconsider its policy of refraining from endorsing (thus preventing CBA Sections from endorsing) judicial candidates; and

- discussions on and the beginnings of a plan to holistically reconsider the CBA’s leadership and award selection processes and criteria through a REDI lens.

In short, we’re working hard to achieve anti-racist transformation within the CBA, and we’re collaborating like never before with our local, diversity, and specialty bars to create an equitable, inclusive environment for our members. I’m excited about where the CBA is headed, and I can’t wait to see the results of these efforts.

A Fond Farewell

Serving as president has been busy, challenging, at times fun, and at times very difficult. I am certain all past CBA presidents would say the same of their experiences. And that is the promise of my Lawyers as Leaders theme: bar associations are places lawyers can go for leadership training and experience. I absolutely grew as a leader this past year, more than I expected to, though I still have a lot of growth and learning to do. And I am thankful to the CBA for giving me that opportunity and to so many of you for your support and collaboration.

With gratitude,

Jessica Brown

NOTES

1. “Leadership mentor” is a term I use to describe someone who inspires me to lead and provides wisdom and guidance about what it means to be a leader.
2. This was the first podcast I ever recorded—or listened to, for that matter. J.P. Box and Erika Holmes of the CBA’s Modern Law Practice Initiative did a great job posing provocative questions to Justice Monica Márquez, Assistant DU Law School Dean Eric Bono, CLI CEO Sara Scott, and me. I also highly recommend the Our Voices podcast series hosted by Linda Moss and Mallory Revel, in coordination with the hard-working Messaging Team of the CBA/DBA Equity, Diversity, and Inclusivity Joint Steering Committee: https://www.cobar.org/Podcast/Our-Voices.
3. Rhode, Lawyers as Leaders (Oxford Univ. Press 2013). Professor Rhode passed away very prematurely this January. I had been working with her on remarks about leadership for the CBA Board of Governors meeting, so her death came as a shock. I asked one of her colleagues, executive director of the Stanford Center on the Legal Profession, Jason Solomon, to do a short tribute to Professor Rhode at the launch of my Lawyers as Leaders series on April 16. Because Professor Rhode devoted so much of her life and scholarship to diversity and inclusivity issues, in addition to authoring Lawyers as Leaders, it seemed very fitting to honor her legacy before kicking off the series with a program on Lawyers Leading the Way to Anti-Racist Transformation.
4. Id.
5. The many crises we have dealt with this past year have affected everyone, but not equally. Those who can’t or haven’t been able to step up and lend a hand or make a difference may be on the receiving end of those efforts now but may be able to pay it forward in the future.
10. Please consider registering for this final program at https://www.cobar.org/Calendar/Event/sessionaltcdd/CBALAL062521.
11. Alexi’s partners represented Dr. Christine Blasey-Ford in the hearings concerning Justice Kavanaugh before he was confirmed to the US Supreme Court. She and I co-presented on the #MeToo movement and its workplace implications at a conference in Austin in 2019.
12. We also were fortunate to hear leadership messages during local bar visits from Justice Richard Gabriel on the topic Herding the Cats: Effective Strategies for Leading Lawyers and Non-Lawyers Alike; Patrick Jarzobski on Inspirational Leadership; and Kevin McReynolds and Catherine Shea on Lawyers as Leaders: Challenges and Opportunities. Some of these leadership programs from my local bar visits have been presented previously at COBALT. But the vast majority were new.
15. Id.
18. We would love to have you join us for this program as well; register at https://www.cobar.org/Calendar/Event/sessionaltcdd/CBALAL06121.
19. Of course, this list doesn’t reflect everything we’re doing at the Bar, nor does it reflect all of the issues the Bar is working on. The CBA, which has now combined its operations with CBA-CLE, has a 70-person staff and 30 sections, each with their own leaders and executive councils, that have done so much more for members this past year than I can do, be involved with, or even know about. This Message just focuses on the challenges, opportunities, events, and programs that I was involved in—and not even all of those.
20. For some background on this topic and why the CBA supports this requirement, see https://cl.cobar.org/departments/leading-the-way-to-a-diversity-focused-cle-requirement; https://cl.cobar.org/departments/from-our-readers-2.
22. The link to this program, which has been requested repeatedly including for organizational training purposes, appears here: http://web28.streamhoster.com/clcino/CBA_VIDEOS/LawyersasLeaders/AntiRacistTransformation_2.mp4.
How We Got Municipal Court Rules

BY JOHN DUNN

Have you ever wondered how we got municipal court rules? Well, probably not. But keep in mind that municipal courts are not constitutional courts; rather, they are statutory courts under CRS § 13-10-104. Each municipality is authorized to have a municipal court, and one might think that the municipalities would provide municipal court rules by ordinance. Maybe some did, but I am guessing many did not. The story of how the Colorado Supreme Court came to adopt rules for statutory courts is an interesting one and, oddly enough, part of the Town of Vail’s history. As a matter of case law, the story appears in abbreviated form at Municipal Court v. Brown, 488 P.2d 61 (Colo. 1971).

The appellee in Brown was Stewart “Stew” H. Brown, a pretty interesting fellow. Stew was the first lawyer to have an office in Vail. Appropriately enough, it was located on Wall Street. That is the street that now runs from the Children’s Fountain up to Gondola One. Stew arrived in Vail in the mid-60s. Before going to law school, he was an airline pilot. He quit that business, he said, because he didn’t want to learn how to fly jet planes as opposed to prop planes. Law school was easier? Anyway, that was his story.

Stew was also a deputy district attorney in the Fifth Judicial District, which then included Lake, Eagle, and Summit Counties, including the municipalities of Leadville, Frisco, Dillon, Vail, Red Cliff, Minturn, Eagle, and Gypsum. At the time, the Breckenridge and Vail ski areas were in existence, but Leadville was the economic center with about 2,500 employees at the Climax mine. While 2,500 miners could cause some trouble, overall the crime rate was pretty low. So Stew was dividing his time between prosecuting cases in county and district court throughout the judicial district and a private practice in Vail.

Stew nevertheless found himself to be a defendant in Vail Municipal Court in 1967, charged with disorderly conduct, disturbing the peace, or something like that. The rumor was that he had consumed a touch too much to drink in one of Vail’s bars and caused a disturbance. At his first appearance, Stew moved to dismiss based on the absence of court rules, contending that the lack of such rules deprived him of fundamental due process. Of course, in Vail or any other small town, how many rules do you need? Municipal court tends to be a traffic court where you either cut a deal or have a trial to the bench. Rules? Give me a break. Stew’s motion was resisted and denied.

Stew next sought relief from the only district judge in the district back then, Judge Luby. By legend, Judge Luby, an Eagle resident, had been on the bench almost since the county seat of Eagle County was Red Cliff. He couldn’t have been more than 5 feet tall and never wore a robe. He was the terror of out-of-town lawyers who lacked the ability to intuit what he was thinking when he denied a motion for no apparent reason. That said, Judge Luby was a devotee of rules. As an enforcer of the rules of evidence he was without peer. Stew Brown got his writ.

As the Supreme Court notes, there was not much of a record in the case, and the Court was therefore unable to determine on what basis the writ issued. There was no record because there was no hearing. Back in the day, if counsel needed an order, he or she went to the courthouse, asked the court clerk to see the judge about an order, and was promptly escorted into chambers. In all likelihood, that is what Mr. Brown did. It was ex parte although, to be honest, counsel for the municipal court later approached Judge Luby ex parte in an effort to get some explanation for the reason the writ was issued. He was unsuccessful.

The Brown case stands for two important points. First, municipal courts have to have rules. The easy solution to that was the court’s promulgation of the first rules of municipal court procedure, while the Brown case was pending, on April 1, 1970. The text of the first rules is lost to history, the court having promulgated the current rules on June 30, 1988. I am wondering how many of us, at least those of us in the rural parts of the state, have actually read them.

Brown’s second important point is its holding that, while pleading violation of a municipal ordinance is “simplified,” something more than an allegation of the section and title of the ordinance is required. There must be some factual statement of the nature of the violation. Typically, the citation forms used by police officers comply with that requirement.

The Brown case was an important one, and Stew Brown deserves a lot of credit for taking the time to challenge proceedings in municipal court without the benefit of rules. It is a matter of interest that the case has never been cited.

John Dunn has been practicing law for over 55 years. After 15 years in Leadville, he moved over the pass to the Vail Valley. Over that long time, he has specialized in representing local governments throughout the central mountains. Dunn practices law in Vail with Mountain Law Group, LLC. He is a CBA past president and the current chair of the CBA Amicus Briefs Committee.
First responders and essential workers are on the front lines every day. NOW IT IS OUR TURN! The COVID-19 pandemic is unlike any challenge we have ever faced. Coloradans need legal help to navigate these difficult times, but many are unable to afford it. Colorado attorneys can help.

The CBA, in partnership with the Colorado Attorney Mentoring Program, is connecting attorneys with Colorado’s well-established pro bono organizations through CAMP’s Succession to Service portal. Attorneys can now use one website to find their ideal pro bono opportunity.

**Take Your Turn:** Visit Succession to Service to find pro bono opportunities in the areas of greatest need. If you wish to help but are not familiar with areas of need, mentoring, training and other resources are available.

successiontoservice.org
How to Cope in Precedented Times
Becoming a Master of Adaptation

BY SARAH MYERS

"How you gonna ever find your place... Runnin' at an artificial pace?"
—Gin Blossoms

I t’s amazing how quickly phrases like “unprecedented times,” “new normal,” and “reentry” have become imprinted in our psyches. Just hearing them can trigger feelings of exhaustion, apathy, confusion, and unease. But behind these buzz words are some simple lessons: (1) change is the only certainty in life; (2) we must not take anything or anyone for granted; and (3) we’re more resilient, adaptable, and flexible than we thought.

Understanding Our Coping Mechanisms
Clinical and neurological researchers have been telling us for years how stressful sudden and unexpected changes in our environment, routine, and sense of safety can be, and we now have the personal experiential data to back that up. But while we’re all experiencing the same pandemic, the stress of pandemic living has affected us in individual ways. Some of us may be struggling with relationships and communication. Others may be dealing with mental health issues (anxiety, panic attacks, depression, etc.) or struggling with basic self-care (finding it difficult to get enough sleep, eat right, exercise, or clean the house). We may be self-medicating with drugs, alcohol, and other processes (gambling, eating, internet, etc.), or taking our emotions out on others (treating them with less civility, professionalism, and basic common courtesy). If you identify with all or most of these coping mechanisms, you’re not alone.

And yet, we are coping, and we are figuring it out. Yes, every day there is some sort of crisis, either in our personal lives, at work, or in the news, and some of us have become jaded and numb by the atrocities we are seeing and hearing about. We have experienced grief, loss, isolation, despair, and true fear on a regular basis. But do not forget that hope, compassion, love, humor, innovation, and a sense of community and support are also experienced on a regular basis and are fueling our collective drive to improve our responses to this pandemic and its aftermath.

How Humans React and Adapt to Change
We have gone through one of the most extreme shifts in daily life that the developed world has seen in recent generations, and the threat of change continues every day on both macro and micro levels. Thankfully, when the “unprecedented” becomes “precedented,” or, better said, when change becomes the accepted norm, humans adapt. Granted, adaptation is not always a pleasant experience. Our minds rebel against change, and our nervous systems go into high alert, creating anxiety about every detail—how long will we have to wear masks? How long with the vaccine last? Is it safe for the kids to go back to school? Will I be at risk back at the office? What are the new procedures for reentry? What are the new guidelines? Do I need to replan that visit to see my family or friend again? What are my pets going to do if I go back to the office? How am I going to pay the rent/mortgage? The list of concerns grows every day, demanding our attention and causing our bodies to release chemicals as though we were in acute danger. Metaphorically speaking, the amount of adrenaline and cortisol produced by humankind in the past year could probably fuel a rocket to Mars.

Change also creates strange polarities and contradictory tendencies. People feel claustrophobic and agoraphobic at the same time and can become reactive instead of responsive. In addition, our tolerance for discomfort diminishes for a short time, leading to all sorts of self-sabotaging behaviors and tendencies to take our stress out on others. As
METRO VOLUNTEER LAWYERS MAKE A DIFFERENCE

Through the Family Law Court Program, volunteers assist clients with uncomplicated, uncontested dissolution of marriage or allocation of parental responsibility cases. There are two stages where we are in need of volunteers: (1) Client Meetings, where volunteer attorneys, law students, and paralegals assist clients in filling out the documents needed to initiate their cases, and (2) Permanent Orders Hearings, where volunteer attorneys meet with clients to prepare the final documents needed to submit to the court, and then represent the client solely for the duration of the hearing that same day.

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Victor Frankl said, “an abnormal reaction to an abnormal situation is normal behavior.” That is not to say that all the reactions are acceptable; obviously, it’s never okay to physically or emotionally abuse someone. But if at times you have not “recognized yourself” in the past year, that makes sense.

Adapting is about change, and we might be shocked by how we behave or the things we say or think when we are faced with such extreme stressors for such long periods of time. Maybe some of the things you thought were important are not so important in the face of a pandemic, or the type of law you are practicing does not suit the “new normal” or telework, or you have realized you would be happier doing something else. Maybe your relationships need adjusting, considering what you have learned about yourself and your needs. Maybe you are more of an introvert than you thought because it turns out you love working from home. Self-discovery and a shift in priorities are hallmarks of adaptation, often mixed in with moments of confusion and the chaotic feelings that also accompany drastic change.

Allowing Conflicting Feelings
We’re all being forced to adapt and to face these changes. To help our intelligence and cognitive abilities during this time, and to perceive healthy mental and psychological well-being, we need to embrace dichotomies. In other words, we need to give ourselves permission to be “both/and” rather than “either/or.” For example:
- We can go “kicking and screaming,” or we can take the path of least resistance. Some days, it will be both.
- We can accept that everything we knew has been forever changed, or we can long for the “days of yore.” Some days, it is both.

13 Healthy Coping Strategies
Generalities, dichotomies, and rhetoric aside, there are practical things we can do to help our
brains and nervous, immune, digestive, and endocrine systems adapt to change:
1. Get consistent amounts of sleep. Consistency is more important than a specific number of hours each night. And, if you can, catch a 10- to 20-minute nap during the day. If naps are not an option, take at least 5 to 10 minutes to lay down on the floor or a couch, or sit in a meditative position away from your screens, and focus on breathing with your eyes closed. Research shows this can positively impact the brain and nervous system the same way a nap does, and it will prevent afternoon gogginess. Inhale for a count of four, hold for a two-count, and exhale for a count of four.
2. Slow down. Stress hormones cause our minds to race (persevere and ruminate) and our bodies to move quickly, causing us to be clumsier and more forgetful. For example, we might bump into furniture, put our keys in the refrigerator, or wonder why we walked into a room. Slowing down and concentrating on the present moment, or what we are doing in that moment, helps the brain assimilate to change.
3. Carefully plan your to-do lists. Get more strategic about what you take on in a day. During times of change, we need to be cautious with how we spend our mental and physical energy the same way we need to be prudent with our finances. Reserve time for getting sidelined or distracted with last minute to-dos, since they happen every day; do not sabotage yourself by waiting until the last minute to meet deadlines, as that stress compromises your health. Also, take more time to be creative and contemplative with your work when possible.
4. Review your calendar Sunday evening. Don’t go into a Monday without a clear sense of what the week ahead will bring, and be ready and prepared for Monday meetings. Starting your week off feeling put together and prepared relaxes the nervous system, reduces adrenaline and cortisol, and sets you up for success.
5. Set aside one day a week as a “no-work” day. It should be two days a week, but let’s be realistic: that’s not possible for many of us. If you set reasonable goals, you have a better chance of achieving them!
6. Focus on nutrition. Keep a consistent mealtime schedule, plan out your meals, and eat whatever foods make you feel your best. Digestion both drastically impacts, and is drastically impacted by, stress hormones. Eating healthy will help your cognitive skills and your energy levels so you can face changes in your life.
7. Take more breaks during the day and move around. Sitting is an occupational hazard for attorneys, and it is detrimental for cognitive skills, intelligence, and energy levels.
8. Be more forgiving and “cool your jets.” Of course, there is a place and time to be upset. But you cognitively and physiologically cause harm to yourself if you are resentful, outraged, and angry on a regular basis. Channel those emotions into something practical instead.
9. Reduce screen time. Detox from your devices, particularly before bed. The negatives far outweigh the positives!
10. Schedule time to speak with people you enjoy. Who makes you laugh, knows the “real” you, and appreciates you? Who talks as much as they listen and helps you stay positive and motivated? Who listens to your stories, commiserates, and yet does not enable too much negativity? Who demonstrates good boundaries and says “no” when they realize they have too much on their plate? Who models interdependence versus codependence? Who encourages you to take accountability for your moods and actions? Those are the people you want to spend more time with during times of change.
11. Smile more. When having difficulty, “fake it until you make it.” When you smile and laugh, your body releases hormones and chemicals that heal the damage stress has done to your system. You don’t have to do it all the time, or even where others can see; just smile more than you are now.
12. Ditch the perfectionism. When you feel like you don’t know what you’re doing or like you are failing, remember that everyone feels that way. No one feels like they have been the perfect parent, manager, leader, employee, team member, family member, or friend during this time. There is no way to be perfect at anything during times of adaptation or change; that’s the whole point! We’re creating a new paradigm in how we work, communicate, and operate. It’s not about getting things right or perfect; it’s about learning how to do it better the next time we have the opportunity.

Memorize the “Big Three” of Self-Care
If you take nothing else away from this article, Laugh, Breathe, and Hydrate. When in doubt, or when you are being hard on yourself or critical of others, Laugh, Breathe, and Hydrate. When you feel stressed, overwhelmed by the change going on around you, or worried about the future, Laugh, Breathe, and Hydrate. While these three self-care techniques will not make all of the stressors magically disappear, they will help you access the parts of your brain that are critical for good decision-making, and your brain and body will thank you by adapting faster to the changes around you!

If you’re struggling with change and adapting to the stressors you’re facing, contact COLAP at info@coloradolap.org or (303) 986-3345 for a free and confidential well-being consultation.

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S
ome of the saddest and most disturbing criminal cases involve the exploitation of a vulnerable victim. When the perpetrator is related to the victim, the crime is doubly tragic. Such was the case in 1905, when Gerritje Haast was murdered in Yuma County, Colorado.

**Discovery of a Frozen Corpse**

On the morning of December 31, 1905, a Dutch immigrant named Wouterje Van Wyk led her neighbors to a crude, one-room sod shack on an isolated homestead in Yuma County. The shack belonged to Mrs. Van Wyk’s sister, Gerritje Haast, who lived there alone. Mrs. Van Wyk explained that she had tried to enter her sister’s shack but could not get the door open. She asked the neighbors, Edwin B. Ball and his wife, to help her.

When Mrs. Ball tried the door, she had no problem opening it. Inside, she found a grim scene. Gerritje Haast lay dead on her bed, frozen. She was lying on her left side, with her arms crossed over her chest and the covers pulled over her. In the right side of her head was a bullet hole. Ms. Haast was eight months pregnant.

Mr. Ball entered the shack. From outside, Mrs. Van Wyk began calling out questions. Was there a revolver? Mr. Ball replied there was not. Was there a note? Mrs. Van Wyk accompanied this question with a gesture toward an empty can on the bedside table. When Mr. Ball searched the can, he found a manuscript inside. It read:

*Have met a fellow at Parkers dam and he has left me there, and now he has been here again and has raped me and abused me. Follow him as soon as you can and bring him to the prison. Gerritje Haast. I do not know his name.*

A bottle of ink, a pen, and a pen holder were lying on the bedside table. Although several other containers of liquid in the shack were frozen solid, the ink in the bottle was not frozen. A revolver was later found between the bed covers.

**Ms. Haast and the Van Wyks**

The Van Wyks were quick to suggest that the scene seemed to indicate a suicide. But when the authorities began investigating the death, they uncovered some disturbing facts about the Van Wyks that suggested foul play.

Ms. Haast, whom the Colorado Supreme Court later described as “an untutored, weak-minded, and immoral young woman, about 25 years of age,” had arrived at the Van Wyk home near Wray in December 1903. She had no money and could not speak English, so she had been entirely dependent on the Van Wyks. Soon they had her performing most of the hard labor on their ranch, dressed in a ranch hand’s clothing.

In Holland, Ms. Haast had borne a child fathered by her sister’s husband, Gerrit J. Van Wyk, who was decades older than his sister-in-law. On the Yuma County ranch, their intimacy continued. Witnesses described seeing Mr. Van Wyk with his arms around her waist, or her sitting in his lap. About nine months after she arrived at the ranch, Ms. Haast gave birth to her second child, presumably also fathered by Mr. Van Wyk. Disgusted by these events, Mrs. Van Wyk told a neighbor that she “intended to get rid of” her sister.

And there were other disturbing reports. On one occasion Mr. Van Wyk knocked Ms. Haast down with a tamping post, complaining that she had spoiled a post hole. And Mrs. Van Wyk once assaulted her sister so severely that she had to seek her neighbors’ protection.

**Ms. Haast’s Homestead**

Like many immigrants, Ms. Haast was a homesteader. She received her parcel in 1904, but she made no immediate improvements. Then, in November 1905, shortly before her death, Mr. Van Wyk and another man erected a single-room sod shack in an isolated location on the site, on the far side of a canyon where it could not be seen by her neighbors. This was the “cheerless home,” as the Colorado Supreme Court called it, where she was expected to give birth to her third child.

Mrs. Van Wyk escorted her sister to the newly constructed shack in December 1905 and left her there. Ms. Haast stayed just one week and then walked back to the Van Wyks’ house. Mrs. Van Wyk led her back to the shack. She did not tell any of Ms. Haast’s neighbors that her very pregnant, mentally challenged sister was living there.

**Life Insurance and a Will**

The summer before Ms. Haast sat shivering in her shack, the Van Wyks occupied themselves with other matters. They obtained $8,000 worth of life insurance on Ms. Haast’s life, with Mrs. Van Wyk as the beneficiary. Another insurance company initially declined their application, reasoning that Ms. Haast was an unwed mother of two children and that her mother had died of consumption. The Van Wyks went to the agent’s office in Wray and told him they had made a mistake in using the word “consumption.” This appears to have prompted the company to issue a second policy, for an additional $10,000.

In December 1905, Ms. Haast also signed a last will and testament. The will was in English, a language she could not speak or understand. It disinherited her children and left all her worldly goods to her sister, Mrs. Van Wyk.
The First Trial
Given these facts and others described at trial, the state eventually charged the Van Wyks with murdering Ms. Haast. Their alleged motive was to obtain the insurance money on her life.

The Van Wyk case generated much publicity in Colorado. Some of the coverage reflected cultural stereotypes. One pretrial article opined that Mr. Van Wyk should have been “clumping in his wooden shoes somewhere along the Holland canals [sic]” and called his wife “ox-eyed.”

Though the couple were “of common quality, apparently,” the author suggested “it may be shown that behind their ignorance and stolidity, there is a cunning in the criminal craft of the type extraordinary—that they have the minds of fiends and a lust for gold that stopped short of nothing.” But the article also emphasized that the couple had seemed oddly innocent and guileless when its author spoke with them.

After the jury retired at the November 1906 trial, it deliberated for nearly 24 hours. It convicted both Mr. and Mrs. Van Wyk of murder and recommended life sentences for each of them. The Van Wyks’ demeanor at trial had been described as stolid. But they did not react stoically to this verdict. Mrs. Van Wyk collapsed, crying out repeatedly that she was innocent. Mr. Van Wyk went pale, then addressed one of the jurors as he filed out of the courtroom, saying “Shame, and you pretend to be an honest man.”

Within a month, Mrs. Van Wyk’s attorney filed a motion for a new trial. He claimed he had new evidence that established an alibi for Mrs. Van Wyk at the time of the murder. The trial court granted the motion.

The Second Trial
Mr. and Mrs. Van Wyk were retried in January 1907. In a feature reminiscent of the “unmelted ice cream defense” in the O. J. Simpson murder trial, the parties devoted a great deal of time at trial to the significance of the unfrozen ink well found in the shack. Had it been placed there by the Van Wyks after the murder to support their theory that Ms. Haast had written the note (which, incidentally, with its rape accusation, might also deflect suspicion that Mr. Van Wyk was the father of Ms. Haast’s unborn child, and that Mrs. Van Wyk had therefore harbored a jealous hatred for her sister)? Or had the ink simply frozen at a different rate than other liquids found in the shack? The prosecution even called an expert from the government weather bureau to testify about the maximum and minimum temperatures in Wray during the time periods in question, to show when the bottle must have been planted at the scene. The Colorado Supreme Court later dismissed this testimony as “not, perhaps, of great value.”

One gruesome fact, though, may have taken some of the heat off Mrs. Van Wyk. A few days before Ms. Haast was taken to the shack where she died, Mr. Van Wyk purchased several planed boards. After her death, he asked a carpenter to make a coffin for his sister-in-law. To construct the coffin, he offered the planed boards he had bought before she died.

This time, the jury acquitted Mrs. Van Wyk. But it again convicted Mr. Van Wyk of first degree murder. His sentence was fixed at life imprisonment. Mr. Van Wyk purportedly muttered, “The jury are liars” and told one of the exiting jurors, “You don’t dare to look me in the eye and say that.”

The Appeal
Mr. Van Wyk appealed to the Colorado Supreme Court. He raised four issues: “insufficiency of the evidence,” “error in the admission and rejection of testimony,” “error in the giving and in the refusing of instructions,” and “misconduct of counsel for the people.”

The Court had no trouble finding sufficient evidence to support Mr. Van Wyk’s conviction. After reciting the facts shown at trial, it concluded that the trial testimony, although...
circumstantial, “points with unerring certainty to the murder of the young woman by the Van Wyks.” The Court opined,

There was preparation for this terrible deed by insuring her life for the benefit of Mrs. Van Wyk, to the exclusion of her children; by the making of her will naming Mrs. Van Wyk as the sole legatee, to the exclusion of her children; by the gruesome act of buying lumber suitable for making a coffin; and by taking this poor creature to a place remote from theirs and leaving her in the dead of winter in a lonely cabin hidden from the view of her only neighbor, and in an unfrequented canyon where foul murder might be done unseen by human eyes. Motive was shown—a sordid motive, the basest of all motives—the lust of gold.

The Court also rejected numerous claims of evidentiary and instructional error. Finally, it rejected Mr. Van Wyk’s claim that the prosecution had committed misconduct with statements during his closing argument about the insurance policies. The Court noted that the prosecutor had been responding to an argument by the defense counsel, which was not included in the record on appeal. Concluding that sufficient evidence supported Mr. Van Wyk’s murder conviction and no reversible error was committed at trial, the Court affirmed his conviction.

Insanity Strikes the Family

Though Mrs. Van Wyk had been acquitted of Ms. Haast’s murder, her troubles were far from over. With her husband in prison and having no source of income, she became a ward of the state. The pressures she faced reportedly drove her insane.

Ms. Van Wyk’s starving children were soon removed from her care after she threatened them. Then, in 1910, within a year after the Supreme Court affirmed her husband’s conviction, she was confined to the state asylum in Pueblo.

A 1915 newspaper article reported that Mrs. Van Wyk remained “hopelessly insane” and her children (who may have included Ms. Haast’s children from Mr. Van Wyk) had been placed first in a state facility, then in private homes. The Dutch consul interviewed her and found her mind “a total blank,” except that she remembered her children and called them by name.

Tragedy continued to haunt the family when in 1912 Ms. Haast’s 7-year-old daughter Gertrude, who had been sent to a facility known as the House of the Good Shepherd after her mother’s death, was herself declared “mentally imbalanced.” She was ordered to be placed in the newly constructed “State Home for Mental Defectives,” where it was hoped she would recover. She became the very first patient at this new facility, which later achieved notoriety as Arvada’s “Ridge Home.”

Mr. Van Wyk Seeks a Pardon

Both Mr. Van Wyk’s attorneys and the Dutch consul in St. Louis, Gerrit H. Ten Broeck, remained convinced of his innocence. Mr. Van Wyk benefited greatly from their efforts over the years. In January 1916 his sentence was commuted from life imprisonment to 24 years and six months. With good time credits, he would complete the sentence and be released on December 19, 1917. But even as that date approached, he sought what he viewed as the vindication of a full pardon. A newspaper article reported that his attorney Ten Broeck had located a new witness: Jan Scholten, who reportedly came to America with Ms. Haast and could allegedly give testimony that would clear Mr. Van Wyk.

Aftermath

It is unclear whether Mr. Van Wyk was released due to a pardon or by expiration of his sentence. But shortly after his release in 1917, both he and Mrs. Van Wyk (who apparently had also been released from the state asylum) moved to St. Louis, where he worked as a laborer in a hat factory. Mrs. Van Wyk died in St. Louis in 1948. Mr. Van Wyk survived until 1957, more than 50 years after the murder, when he died at the age of 97 or 98 in St. Louis.

NOTES

1. Van Wyk v. People, 99 P. 1009 (Colo. 1909) (internal quotation marks omitted). A source indicates the “suicide note” was in Dutch, which would be consistent with reports that it was in Ms. Haast’s handwriting and that she did not speak or write English. See http://www.cogenweb.com/yuma/photos/pioneer/Lansing/VanWyk.htm.
2. Id. at 1015.
3. Id. at 1016.
4. Id.
5. See id.
7. Id.
9. See id.
10. Id.
13. Van Wyk, 99 P. at 1012.
15. Id.
16. Id.
17. Van Wyk, 99 P. at 1011.
18. Id. at 1017.
19. Id.
20. See id. at 1011–14.
21. See id. at 1015.
23. Id.
25. Id.
28. See id.
29. See id.
30. See id.
31. See https://www.findagrave.com/memorial/61309073/wouterje-van_wijk.

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on appeal.21 Concluding that sufficient evidence
had been responding to an argument by the defense
during his closing argument about the insurance
commissioner's misconduct with statements
rejected Mr. Van Wyk's claim that the prosecu-
tion had committed misconduct with statements

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Owner Association Board Member Duties and Liabilities PART 1

BY RONALD M. SANDGRUND, JOSEPH F. (TRIP) NISTICO III, AND JERRY ORTEN
In common interest communities subject to Colorado’s Common Interest Ownership Act (CCIOA) all owner association (association) board members owe legal duties to both the association and its owner-members (owners). Courts carefully examine the conduct of association board members that the community’s developer appoints while the developer controls the board (declarant control period), because conflicts of interest may exist between the developer and the association and its current and future owners.

This three-part article examines case law and articles addressing the relationships among developers, developer-appointed board members, owner-elected board members, associations, and owners generated during the nearly 20 years since publication of an earlier Colorado Lawyer article on this topic.

This part 1 focuses on association board members’ legal duties and liabilities.

**Association Overview**

Under CCIOA an association must be organized no later than when the first unit is conveyed to a purchaser. The association must be organized as a “nonprofit, not-for-profit, or for-profit corporation or as a limited liability company . . . .” Regardless of how it is formed, the board is the body designated in the community’s main governing document, the “declaration,” to act on the association’s behalf. Unless prohibited by CCIOA, the declaration, or the bylaws, the board “may act in all instances on behalf of the association.” Association board member duties are primarily controlled by CCIOA and the Colorado Revised Nonprofit Corporation Act (Nonprofit Act) but other statutes, such as Colorado’s Business Corporation Act (Corporation Act), apply in some circumstances. CCIOA controls if these laws conflict. The association owes many duties under CCIOA. The board is responsible for satisfying these duties as well as any duties set forth in the community’s governing documents. In addition, as discussed below, the Nonprofit Act standard of care arguably applies to the board’s execution of all these duties.

**Fiduciary Duties Generally**

The starting point for analyzing board member duties is determining whether the member owes a fiduciary duty. “A fiduciary is a person having a duty, created by his or her undertaking, to act principally for the benefit of another in matters connected with that undertaking.” A fiduciary’s common law “obligations to the beneficiary include, among other things, a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with the beneficiary.” A fiduciary duty may arise
where a “superior party” assumes a duty to act in a “dependent party’s best interest.”

As discussed below, when and to what extent association board members owe fiduciary duties depends on whether the board member was appointed by the developer or selected by the owners. For purposes of this article, board members selected to fill board vacancies by developer-appointed board members who constitute a majority of the board are treated as developer-appointed board members. Similarly, board members selected to fill board vacancies by owner-elected board members who constitute a majority of the board are treated as owner-elected board members.

**Association Board Member Duties Generally**

Board members may be appointed by the developer during the declarant control period or selected later by the owners, usually by election. Board members’ duties are defined to some extent by statute and often also described in the association’s governing documents. These documents may include the declaration and the community’s plat or map, articles of incorporation, bylaws, rules, regulations, policies, procedures, and architectural guidelines. In the event of any conflict, CCIOA controls.

Board members have common law fiduciary duties, and the common law may inform judicial interpretation of their statutory duties. Courts have imposed common law fiduciary duties on association developers and board members to, among other things, (1) manage and maintain common property with reasonable care, (2) establish proper reserves to fund future repair or replacement needs, and (3) disclose all material facts regarding the condition of property the association is required to maintain.

Board members generally owe fiduciary duties only to the association and its owners (comprising the association membership), and not to the public at large. These baseline duties arise primarily from the Nonprofit Act, whose statutory duties often overlap with, and sometimes preempt, a director’s common law duties. Directors’ Nonprofit Act duties include the broad duties to act

- within the scope of the board member’s statutory authority and as permitted by the community’s governing documents;
- in good faith, with prudence, and in a manner the board member reasonably believes to be in the association’s best interests (duty of good faith or duty of care); and
- with undivided loyalty to the association, only for the association’s benefit, and not for a board member’s own personal advantage (duty of loyalty).

Other duties prohibit directors from

- disclosing information about the association’s activities (unless that information is already known to the owners or to the public, or is a part of the association’s public records, such as its board meeting minutes);
- violating the law or engaging in misconduct;
- improperly transferring or encumbering the association’s assets;
- borrowing money from the association; or
- taking the association’s business opportunities or confidential or proprietary information.

While compliance with the Nonprofit Act’s duties of care sometimes affords a “safe harbor,” CCIOA imposes different and/or additional duties on developer-appointed board members, while providing that owner-elected board members are generally liable only for their willful and wanton acts and omissions.

**Board Members’ Conflicts of Interest**

The Nonprofit Act’s conflict of interest provisions apply to all board members, whether appointed by the developer or elected by the owners. They prescribe how board members are to manage “conflicting-interest transactions.” In addition, all associations subject to CCIOA must adopt and maintain conflict of interest policies or rules for their board of directors.

Generally, an association may not make loans, provide assistance to, or enter into a contract with its board members, their families, or their businesses, and any board member who engages in a conflicting-interest transaction must repay the association for its losses. However, board members are not liable for conflicting-interest transactions if they disclose their relationship or interest to other board members before the board approves the transaction, provided the transaction’s approval is made in good faith. Board members will also not be liable for conflicting-interest transactions to the extent that these are “fair” to the association.

Although CCIOA states that owner-elected board members are liable only for their “wanton and willful acts or omissions,” it has not been decided whether owner-elected board members are personally liable for violating the Nonprofit Act’s separate conflict of interest prohibitions if they do not act willfully or wantonly. Generally, the law frowns upon board members who approve transactions in which they have a financial interest. It is also unclear whether owner-elected and/or owner-appointed board members can be held liable for “wanton or willful acts or omissions” if these acts or omissions were later voided.

**Owner-Elected Board Member Fiduciary Duties**

The Court of Appeals in Woodmoor Improvement Ass’n v. Brenner confirmed that association board members, like other corporate board members, owe fiduciary duties to the association under the common law. In Woodmoor, the Court affirmed the lower court’s exoneration of an owner-elected board member for alleged breaches of fiduciary duties for convincing other board members to approve a satellite dish that the association’s covenants arguably prohibited. The board member did not participate in the board’s vote.

The scope of a board member’s duties varies depending on whether the board member was appointed by the developer, appointed by a developer-controlled board to fill a vacancy, elected by the unit owners, or appointed by an owner-controlled board to fill a vacancy. This question of who chose the board member—the developer, the owners, or the board itself—also affects the standard of care to which the board member is held and the defenses available to members responding to allegations that they breached their fiduciary duties.
Does CCIOA Negate Owner-Elected Board Members’ Fiduciary Duties?

Arguably, by negative implication, CCIOA relieves owner-elected board members of any fiduciary duties, and they are liable only for their wanton and willful acts or omissions, because CCIOA prevails over conflicting statutory and decisional law, including the Nonprofit Act and common law. Colorado’s appellate courts have not squarely addressed this argument, although it appears to conflict with Woodmoor’s holding, as explained below.

Analysis of this argument starts with CCIOA, which provides in relevant part:

(2) Except as otherwise provided in subsection (2.5) of this section:
   (a) If appointed by the declarant, in the performance of their duties, the officers and members of the executive board are required to exercise the care required of fiduciaries of the unit owners.
   (b) If not appointed by the declarant, no member of the executive board and no officer shall be liable for actions taken or omissions made in the performance of such member’s duties except for wanton and willful acts or omissions.

While subsection (2)(a) specifically refers to a declarant (developer)-appointed board member’s fiduciary duties, subsection (2)(b) does not; thus, CCIOA arguably may not impose fiduciary duties on owner-elected board members. Yet four years after Colorado adopted CCIOA, the Woodmoor Court did not hesitate to recognize an owner-elected board member’s fiduciary duties, though it did not discuss CCIOA. Consistent with Woodmoor, the Nonprofit Act itself supports the conclusion that all nonprofit board members owe fiduciary duties; CRS § 7-128-401 describes the duties owed by all nonprofit directors in the same terms as are typically used to describe the types of duties owed by fiduciaries:

(1) Each director shall discharge the director’s duties as a director, including the director’s duties as a member of a committee of the board, and each officer with discretionary authority shall discharge the officer’s duties under that authority:
   (a) In good faith;
   (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
   (c) In a manner the director or officer reasonably believes to be in the best interests of the nonprofit corporation.

Section 401 also states:

(6) A director or officer of a nonprofit corporation, in the performance of duties in that capacity, shall not have any fiduciary duty to any creditor of the nonprofit corporation arising only from the status as a creditor.

By negative inference, subsection (6) suggests that the statute’s other described duties may properly be characterized as fiduciary duties.

“The association owes many duties under CCIOA. The board is responsible for satisfying these duties as well as any duties set forth in the community’s governing documents. In addition, as discussed below, the Nonprofit Act standard of care arguably applies to the board’s execution of all these duties.”

Based on the foregoing analysis, CCIOA’s willful and wanton liability standard arguably does not obviate an owner-elected board member’s fiduciary duty, but only limits the circumstances in which its breach gives rise to legal liability. This analysis also suggests that CCIOA’s express statement—that developer-appointed board members owe fiduciary duties to “the unit owners”—is intended to make clear that such board members must not also serve the developer’s interests where conflicts may exist. As Justice Harlan Stone warned almost a century ago, many mistakes and faults can be ascribed to the “failure to observe the fiduciary principle, the precept as old as holy writ, that ‘a man cannot serve two masters.’”

Developer-Appointed Board Member Fiduciary Duties

As mentioned above, CCIOA provides that developer-appointed board members “are required to exercise the care required of fiduciaries of the unit owners.” And unlike its limitation on the liability of owner-elected board members to wanton and willful acts or omissions in the performance of their duties, CCIOA provides no similar safe harbor under which developer-appointed board members may seek refuge for their allegedly wrongful conduct.

In Semler v. Hellerstein, the Court of Appeals held that developer-appointed board members owe fiduciary duties to both the association and its members when acting in their official capacities as board members or when engaging in transactions involving the association. However, no fiduciary duty exists when board members engage in private transactions with other association members or the general public, and where those transactions do not involve the association.

Board Duties When Investing Association Funds

As discussed above, owner-elected board members (or board members appointed by owner-elected board members constituting a majority of the board), who are subject to CCIOA, are generally liable only for wanton and willful acts or omissions made in the performance of their duties. However, with regard to the
improvement, and emergencies, after payment such as for maintenance, repair, replacement, associations that are set aside for future needs, best interests. Reserve funds are monies held by circumstances, and in a manner the member reasonably believes to be in the association’s best interests. Reserve funds are monies held by associations that are set aside for future needs, such as for maintenance, repair, replacement, improvement, and emergencies, after payment of common expenses has occurred.

The fiduciary duties governing reserve fund investment and the duties in the Nonprofit Act at CRS § 7-128-401 are identical. The common law “business judgment rule” will also likely apply to reserve fund investment, as discussed below. CCIOA’s imposition of special duties on board members pertaining to reserve investments supersedes CCIOA’s “wanton and willful” safe harbor liability provisions.

In discharging their duties regarding the investment of association reserve funds, all board members are entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
- one or more association officers or employees whom the board member reasonably believes to be reliable and competent in the matters presented;
- legal counsel, an accountant, or other persons retained by the association as to matters involving expertise or skill the board member reasonably believes are within such person’s professional or expert competence; and
- a board committee of which the board member is not a member, if the member reasonably believes the committee merits confidence.

However, board members may not rely on such information, opinions, reports, or statements if they have knowledge concerning the matter in question that makes such reliance unwarranted.

The Business Judgment Rule
The business judgment rule generally precludes corporate board member liability where the member acts in “good faith in a manner the member reasonably believes to be in the best interests of the corporation and with such care as an ordinarily prudent person in a like position would use under similar circumstances.” The business judgment rule protects a board’s business decisions and managerial authority from indiscriminate attack, and at the same time, permits the review of improper decisions. However, some conduct appropriate in the business judgment of a for-profit board may not be proper for a nonprofit association board because of their different purposes.

Application to Associations
In Colorado, the business judgment rule has been applied to claims arising from an association’s owner-elected board’s decisions. The business judgment rule arguably does not apply to developer-appointed board members because (1) CCIOA imposes a fiduciary duty on developer-appointed board members that may supplant the Nonprofit Act, and (2) their liability for the breach of this duty is not restricted to willful and wanton conduct. Consistent with this conclusion, one Colorado district court rejected developer-appointed board members’ reliance on the business judgment rule as a defense to association and owner claims. The court found that CCIOA’s express imposition of fiduciary duties on developer-appointed board members effectively preempts the business judgment rule defense by imposing a much higher standard of care on such persons, in part because any other construction would improperly render portions of CCIOA superfluous. As discussed above, CCIOA provides that its provisions prevail in the event of a conflict with the Nonprofit Act, the Corporation Act, and the common law.

Statutory Limitations and Exceptions
When applicable, the business judgment rule offers owner-elected board members (including board members appointed by owner-elected board members who constitute a majority of the board) some protection against liability. But even under the Nonprofit Act’s statutory embodiment of the business judgment rule, there are many avenues through which liability may be imposed if an aggrieved party can establish that the challenged conduct involved one or more of the following:
- lack of good faith,
- intentional misconduct,
- a knowing violation of the law,
- breach of duty of loyalty,
- conduct specified in CRS §§ 7-128-403 (unlawful distributions) or -501(2) (conflicting interest transaction liability), or
- any transaction from which the board member derived an improper personal benefit.

Owner-elected board members may be afforded the additional liability protections described below.
Parallel Nonprofit Board Member Liability Limitations

CRS § 13-21-116(2)(b)(I) provides that nonprofit board members are not liable for conduct occurring in the performance of their duties except for wanton and willful acts or omissions. CRS § 13-21-115.7(2) similarly provides that uncompensated board members of nonprofit organizations are immune from civil liability for damage or injury if they were acting within the scope of their official duties, unless the damage or injury was caused by the member’s willful and wanton conduct. A Colorado district court has ruled that neither of these statutes limits developer-appointed board members’ fiduciary duties and liability under CRS § 38-33.3-302(2).

Association and Owner Remedies for Board Misconduct

Board members owe legal duties to both the association and its owner-members. Various mechanisms are available to seek redress for breach of these duties. For example, owners may be able to pursue administrative/ internal remedies created by the declaration or pursue a derivative action against the board on behalf of the association. The association can also sue board members for damages in its own name or on behalf of two or more unit owners, although this would likely occur only after the alleged bad actors have vacated their board positions, as presumably they would be unlikely to authorize suit against themselves while serving on the board. Sometimes a board will delegate its authority to bring suit to a litigation committee, which may be empowered to sue the board or its individual members.

Conclusion

Association board members are subject to various statutory and common law duties depending on whether they were appointed by the developer, selected by the owners, or appointed by the board itself to fill a vacancy. If appointed to fill a vacancy, the appointing board’s character—whether it is a developer-controlled or an owner-controlled board—determines the applicable standard of care.

The business judgment rule arguably does not apply to developer-appointed board members because (1) CCIOA imposes a fiduciary duty on developer-appointed board members that may supplant the Nonprofit Act, and (2) their liability for the breach of this duty is not restricted to willful and wanton conduct.

Board members appointed by the developer (including board members appointed by developer-appointed board members) will be held to the standard of care of a fiduciary. Board members selected by the owners (including board members appointed by owner-elected board members) must, at a minimum, exercise their judgment in good faith, in a manner reasonably thought to be in the best interests of the association and with the care of an ordinarily prudent person.

If owner-elected board members fail to meet these standards—regardless of whether they are deemed to be fiduciaries—they bear personal liability only for their willful and wanton conduct (except for decisions concerning the investment of association reserves, which are measured against the Nonprofit Act’s business judgment rule), and for loans made to them by the association.

Part 2 will discuss recurring conflicts between the developer and its appointed board members and the association and its owners that may arise during the control period, with a focus on conflicts of interest.

Part 3 will discuss theories supporting a developer’s direct liability, and vicarious liability for its appointed board members’ wrongful conduct. It will also explore how developers and board members can mitigate potential liability risks and examine how they may insure or obtain indemnity against these risks.
controls when it conflicts with other statutes or laws, whether now existing or later enacted. The Nonprofit Act describes the duties of board directors. See CRS §§ 7-128-401, -402, and -403.

9. CRS § 38-33.3-319. All references to the Corporation Act include the amendments made effective July 1, 2020, and not predecessor versions of that law.

10. Id. See also Triple Crown at Observatory Village Ass’n, Inc. v. Village Homes of Colo., Inc., 328 P.3d 175, 178 (Colo.App. 2013) (noting that while provisions of the Colorado corporate statutes that conflict with CCIOA will not override it, the court would apply the Nonprofit Act to a matter that CCIOA did not address).

11. See, e.g., § 38-33.3-106.7 (prohibiting unreasonable restrictions on owner energy efficiency measures); CRS § 38-33.3-313 (maintenance of insurance); CRS § 38-33.3-316 (administration and lien foreclosure); and CRS § 38-33.3-317 (record keeping).

12. See CRS § 7-128-401. All references to the Corporation Act include the amendments made effective July 1, 2020, and not predecessor versions of that law.


16. See CRS § 38-33.3-303(3)(a) (“executive board may fill vacancies in its membership for the unexpired portion of any term”); CRS § 38-33.3-306(1)(c) (association bylaws may provide for the “manner of electing and removing, executive board members and officers and the manner of filling vacancies”).

17. In the event of conflict between the declaration and the bylaws, the declaration controls. CRS § 38-33.3-203(3).

18. In the event of conflict between the declaration and the bylaws, the declaration controls. CRS § 38-33.3-203(3).

19. Id.


22. See CRS § 38-33.3-301 (“A unit owners’ association shall be organized no later than the date the first unit in the common interest community is conveyed to a purchaser. The membership of the association at all times shall consist exclusively of all unit owners . . . .”).


24. CRS § 7-128-401(1)(a)-(c). Compliance with these standards may give rise to application of the business judgment defense discussed below.


26. Id.

27. Id.

28. CRS § 7-128-403.

29. CRS § 7-128-501(2).

30. Such misappropriation may constitute civil theft. See CRS §§ 18-4-405.

31. See generally CRS § 38-33.3-303(2)(a) and (b).

32. CRS § 38-33.3-310.5, cross-referencing and incorporating CRS § 7-128-501.

33. Note that so-called “pre-CCIOA” associations are only subject to specified parts of CCIOA as set forth in CRS § 38-33.3-117.

34. CRS § 38-33.3-209.5(1)(b)(II) and (4)(a) (I)-(III). Pursuant to CRS § 38-33.3-209.5(4)(a) (I)-(III), the policy must “[d]efine or describe the circumstances under which a conflict of interest exists”; “[s]et forth procedures to follow when a conflict exists, including how, and to whom, the conflict . . . . must be disclosed and whether a board member must recuse himself or herself from discussing or voting on the issue”; and “[p]rovide for the periodic review of the association’s conflict . . . . policies, procedures, and rules and regulations,” which (as provided for in CRS § 38-33.3-209.5(b)(1)) must comply with CRS § 38-33.3-310.5.

35. The loan or assistance also may not be made to, and the association may not enter into a contract with, an entity in which the board member has a financial interest known and material to the member. See CRS § 7-128-501(1) and (2).

36. CRS § 7-128-501(2).

37. CRS § 7-128-501(3)(a)-(c).

38. CRS § 7-128-501(3)(c).

39. CRS § 38-33.3-303(2)(b). While it might be argued that an association board member could not unintentionally approve a conflicting transaction, there might be rare circumstances where the board member forgets or is ignorant of the conflict.

40. CRS § 38-33.3-303(2)(b) imposes responsibility on board members not appointed by the developer (or board members appointed...
by owner-elected board members comprising a majority of the board) for only “wannt and willful acts or omissions.”

41. See Kim v. Grover C. Coors Trust, 179 P.3d 86, 91 (Colo.App. 2007) (board director bears burden of proving his or her transaction with corporation took place in good faith, was fair, and was accompanied by full disclosure).


43. CRS § 38-33.3-303(2)(a)-(b) (emphasis added).

44. See also Triple Crown at Observatory Vill. Ass’n, Inc. v. Vill. Homes of Colo., Inc., 328 P.3d 275, 278 (Colo.App. 2013) (CCIOA incorporates Colorado corporate law by reference; where CCIOA is silent on the issue, Nonprofit Act provisions apply where they can be harmonized with CCIOA).

45. See CRS § 38-33.3-303(2)(a) (emphasis added).

46. Stone, “The Public Influence of the Bar,” 48 Harv. L. Rev. 1, 8-9 (Nov. 1934) (“those who serve nominally as trustees, but relieved, by clever legal devices, from the obligation to protect those whose interests they purport to represent . . . suggest how far we have ignored the necessary implications of that principle”). See also First Data Corp. v. Konya, 2008 WL 2228657 *5 (D.Colo. May 27, 2008) (“A person cannot serve two masters . . .”).

47. CRS § 38-33.3-303(2)(a). See also Wolf, ed., 8 Powell on Real Property at § 54A.04 (Matthew Bender Supp. 2000) (developer-appointed directors held “to a higher standard of care than unit-owner elected directors.”). CCIOA is based on the 1982 version of the Uniform Common Interest Ownership Act (UCIOA), and Colorado courts look to the UCIOA and its comments for guidance. See Hiwan Homeowners at 135 n.5 (Knoebel), 3 P.3d 1271, 1273 (Colo.App. 2009). UCIOA § 3-103(a) (1994) changed the standard of care from fiduciary to trustee, noting that the law recognizes many kinds of fiduciary relationships, of which “the trustee’s duty is the highest.” Id. at cmt. 5.


49. Semler, 428 P.3d 555.

50. Id.

51. CRS § 38-33.3-303(2)(b).

52. See CRS § 38-33.3-303(2.5) (excepting from subsection 303(2)(b)’s application board member responsibilities and liabilities for investment reserves imposed by subsection 303(2.5), which incorporates the “standards” provided by CRS § 7-128-401 of the Nonprofit Act).

53. See, e.g., CRS § 38-33.3-209.5(b)(IX).

54. See supra note 52.

55. Id.

56. CRS § 7-128-401(2).

57. Hess, ed., supra note 1 at § 2.76. The rule derives both from the common law, Polk v. Hergert Land & Cattle Co., 5 P.3d 402, 405 (Colo.App. 2000) (finding business judgment rule acts to protect from liability corporate directors acting in good faith), and statute, CRS § 7-108-402(1)(a)-(g).


59. See generally Unrau v. Kidron Bethel Retirement Servs., Inc., 7 P.3d 1, 14 (Kan. 2001) (“Conduct and judgments that would be permissible among businessmen may be impermissible for officials of a property owners association.”) (citing Natelson, Law of Property Owners Associations § 10.31 (Little Brown & Co. 1989)).

60. See Colo. Homes, Ltd. v. Loerch-Wilson, 43 P.3d 718, 72-25 (Colo.App. 2001) (with regard to covenant enforcement, board’s conduct generally will be measured against the business judgment rule because the enforcement of restrictive covenants may require the exercise of discretion as to the timing and manner of enforcement). Colo. Homes noted that Rhue v. Cheyenne Homes, Inc., 449 P.2d 261 (Colo. 1969), held that an association’s board’s refusal to approve building plans must be made in good faith and must not be arbitrary, describing, in substance, “the business judgment rule.” Id. at 724. See also Rywall v. Writer Corp., 526 P.2d 316, 317 (Colo.App. 1974) (applying rule to tennis court construction approval); Wright v. Beauvallon Condo. Assoc., Inc., No. 19CA0252 (Colo.App. 2020) (unpublished) (applying rule to making repairs after construction defect lawsuit settlement).

61. See Counts v. Ironbridge Homes, LLC, No. 10 CV 142 (Garfield Cty. Dist. Ct. June 30, 2015). But see Ajax Lofts Condo. Ass’n v. Ajax Lofts, LLC, No. 2011CV7763 at 5–6 (Denver Cty. Dist. Ct. Mar. 13, 2014) (holding that CCIOA does not preempt application of the business judgment rule to declarant-appointed board members, but the court could not determine whether the rule and its rebuttable presumption of good faith applied where disputed facts existed regarding the board members’ interest in the transactions at issue and good faith. Cf. McShane v. Stirling Ranch Prop. Owners Ass’n, 411 P.3d 145, 150 (Colo.App. 2015) (holding CRS § 38-33.3-303(2)(b) grants statutory immunity to executive board members not appointed by the declarant except for wanton and willful acts or omissions), rev’d on other grounds, 393 P.3d 978. See also Millennium Square Residential Ass’n v. 2200 M Street LLC, 952 F.Supp.2d 234, 249 (D.D.C. 2013) (business judgment rule inapplicable to breach of fiduciary duty claim where board members also sat on developer’s or related entities’ boards and were alleged to have acted in bad faith by failing to pursue construction defect claims against their employer; rule does not apply to board members who “lack independence relative to the decision,” do not act in good faith, or act in a way not attributable to a rational business purpose) (internal citations omitted). But see Rywall, 526 P.2d 316, a pre-CCIOA decision suggesting that the business judgment rule applies to all decisions made by nonprofit corporations.

62. See CRS § 38-33.3-319.

63. CRS § 7-128-402(1) (Limitation of certain liabilities of directors and officers.).

64. A former El Paso County district court judge ruled in an arbitration that this statute does not apply to developer-appointed board members. See Northfield Commons Duplex Condo. Ass’n v. North Boulder Residential Dev., Inc., Order Concerning Dispositive Motions (Dec. 19, 2020).


66. See Semler, 428 P.3d 555 (finding developer-appointed owners association board members owe fiduciary duties to both the association and its members).

67. See generally Hess, ed., supra note 1 at § 2.66. But see CRS § 7-126-401 (limiting standing to bring derivative actions to board members and to voting members with 5% or more of the voting power. Sometimes administrative remedies may need to be exhausted before more formal action can be pursued. See also CRCP 23.1, which has both rule-based and decisional law prerequisites to bringing a derivative action).

68. CRS § 38-33.3-302(1)(d) allows an association to bring a lawsuit in its own name or on behalf of two or more owners on matters affecting the community.

69. If a unit owner claims board member wrongdoing, it may be necessary for the accused board members to recuse themselves from the review process or to delegate the review to an independent body. See Greenfield v. Hamilton Oil Corp., 760 P.2d 664, 668 (Colo. App. 1988) (“purpose to be served by any special litigation committee is to substitute its independent, and presumably objective, judgment for the judgment of the directors who have been accused of wrongdoing” (emphasis in original)).

70. See In re Hirsch, 984 P.2d 629, 637–38 (Colo. 1999) (discussing use of special litigation committee and outside, independent counsel to review shareholder complaints).
COVID-19’s Effects on Real Estate Law PART 1
Commercial Leasing in a Post-Pandemic World

BY RONALD GARFIELD
This three-part series examines how COVID-19 and associated legal developments have affected real estate law. Part 1 features commercial leasing, part 2 will cover business interruption insurance, and part 3 will provide an update on eviction law in light of the pandemic.

In his book *Ten Lessons for a Post-Pandemic World*, Fareed Zakaria postulates that the world today and the world to come make pandemics more likely. The continued encroachment of human activity into animal habitats, urbanization, global travel, animal agriculture, climate change, deforestation, and biodiversity loss have created a perfect storm for animal-to-human transmission. Many commentators hypothesize that the COVID-19 virus passed zoonotically from bats to humans, or from bats to an intermediate host species and then on to humans. An alternative theory is that the virus escaped from a laboratory in Wuhan that conducts research on bat coronaviruses. The World Health Organization has not yet endorsed any theories on the source of COVID-19 and continues to investigate. Lessons learned from the COVID-19 pandemic and earlier pandemics, such as the importance of social distancing, masking, and now rapid testing, coupled with our ability to produce vaccines in record time, will certainly make a difference in the fight against future viruses. But these practices provide no assurance that the world is safe from another pandemic.

Hopefully, by the end of the year, the economy will emerge from this pandemic, but it is unknown whether business as usual will return or if relationships such as commercial leasing will change significantly. The possibility of a future pandemic or a wave of a mutated COVID-19 virus beyond the scope of currently available vaccines may affect how parties negotiate leases going forward. Most leases already address the rights of parties regarding potential future events such as condemnation, force majeure, casualty loss, and assignment or subletting. But these provisions are typically silent on pandemics. This has forced parties to seek redress for pandemic losses under force majeure provisions, which has resulted in numerous disputes over the scope of these provisions. It thus makes sense for practitioners to address now the respective rights and obligations of parties to commercial leases in the event of pandemics and similar events.

This article discusses the COVID-19 pandemic’s effect on relationships between landlords and tenants in a commercial setting with a focus on retail tenants, including restaurants. Related topics such as the Payroll Protection Program (PPP), COVID-related litigation, and WELL Building Standards are also covered. Portions of this article may be helpful in considering other lease relationships, such as those for office or residential space, and lender accommodations and insurance coverage for lost rents or profits, but they are not the main focus.

**Pandemic Effects on Leasing**

The COVID-19 pandemic caused a seismic shift in day-to-day workings between landlords and tenants. Governmental actions like shelter in place, lockdowns, capacity limits, required outdoor dining, and moratoriums on evictions became the order of the day. Some tenants simply stopped paying rent because they could not do business. Landlords could not evict tenants for nonpayment of rent because some courts would not entertain eviction actions, and some county sheriffs refused to process or serve any summonses in forcible entry and detainer actions. To address COVID-19 conditions, many leases were amended to forgive or defer rents, or some combination of both.

In the wake of government orders and consumer behavioral changes intended to slow the spread of COVID-19, some estimate that retail sales plunged nearly 20% from February to April 2020, and specific industries such as clothing and accessories and department stores suffered even worse. Restaurants in particular have struggled to stay afloat. In December 2020, the National Restaurant Association (Association) wrote to members of Congress outlining some impacts of COVID-19 on the restaurant industry. The Association reportedly surveyed 6,000 restaurants, 87% of which reported a drop in revenue of at least 36%. The Association also noted its estimate that by December 2020 up to 110,000 restaurants would close permanently or for a long term due to COVID-19 and its attendant impacts on dining out.

The lessons learned during the COVID-19 pandemic will no doubt become a focus in future lease negotiations. Pre-pandemic commercial leases did not concentrate on force majeure provisions, many of which do not even expressly mention pandemics, public health orders, or epidemics. Rather, force majeure clauses typically list events such as floods, labor disputes, acts of God, wars, and civil unrest, with most stating that the occurrence of such events does not excuse timely payment of rent and providing relief only for non-monetary obligations such as business hours. The terrible toll that the pandemic has taken on businesses large and small, many of which were already struggling to compete with internet retailers, will surely give survivors pause if a new lease does not address pandemics as something very different than just another force majeure event. Landlords may also think twice about evicting responsible tenants or soften their attitudes toward tenants who encounter problems not of their own making.

**Congress Responds**

At the outset of the COVID-19 pandemic, Congress responded with a flurry of legislation, including the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Notably, the
CARES Act established the Payroll Protection Program (PPP), which is now into a second round of authorization from Congress and continues to provide qualified small businesses with funds to pay payroll costs, including benefits. Funds can also be used to pay interest on mortgages, rent, and utilities. The funds are provided through grants (i.e., loans to be forgiven) administered by the Small Business Administration.

Some landlords insisted, as condition of rent relief, that eligible tenants apply for a PPP loan and use a portion of their loan proceeds for rent. Yet some of these same landlords simultaneously pursued PPP loans for their own property management companies, making insurance claims for lost rents or seeking loan modifications from their lenders, all without considering how such efforts, if successful, could allow for more equitable treatment of tenants. On the other hand, some tenants demanded that eligible landlords apply for PPP loans to meet their mortgage obligations in the face of rent shortfalls.

**State Approaches**

States also reacted to the pandemic with legislative remedies. Some states, for example California, did not hesitate to legislatate far more aggressively than Colorado to protect commercial tenants. California SB 91, as extended, prohibits landlord legal proceedings to collect past due rent or evict commercial tenants until June 1, 2021; it converts past due rents to a simple civil debt, the nonpayment of which cannot be the basis of an eviction action; and relying on federal funds, it allows landlords compensation for 80% of lost rents if the remaining 20% owed by the tenant is forgiven. Eligibility for these federal funds is based on income and COVID-19 impact: Any unpaid rent must be owed by an individual making less than 80% of the area median income for the calendar year 2020, or at the time of the application, and applicants must attest, under penalty of perjury, that they have suffered hardship as a result of COVID-19. The desired impact of SB 91 is to incentivize local governments to follow the state’s guidelines regarding fund distribution established in the bill. Local governments that opt to establish their own distribution system will not receive any further tenant assistance funding from the state.

There has been no Colorado legislative response for commercial tenants. However, Colorado has provided some landlord relief for qualifying residential properties for qualifying tenants that are unable to pay rent by reason of COVID-19 under the Property Owner Preservation Program (POP). Under POP, landlords apply for assistance on behalf of their tenants only. To qualify, the property must not be in foreclosure, must meet basic health and safety requirements, and must have rents below the PO maximum, which varies by county. For example, the maximum allowable monthly rent for a one bedroom rental in Denver County is $1,874 as compared to Kit Carson County, at the far eastern border of the state, where the maximum is $1,106. Reasonable fees described in the lease are eligible for reimbursement, excluding late fees, legal fees, and fees related to insufficient funds. Landlords and tenants who are not POP eligible. Tenants are also eligible for rent assistance in Colorado through the Emergency Housing Assistance Program (EHAP). EHAP differs from POP in that tenants are responsible for their applications. While POP eligibility is based on number of bedrooms, EHAP eligibility is based on size of the household. To use the same counties for comparison, a single individual in Denver and Kit Carson counties making under $54,950 and $39,800 per year, respectively, is eligible. Units already receiving rental assistance through a voucher program are not EHAP eligible.

**COVID-19-Related Litigation**

Notwithstanding attempts by the federal and state governments to provide economic relief, litigation over leases erupted early on. COVID-19 litigation has primarily concerned three areas: the applicability of force majeure provisions to the pandemic, the enforceability or overreaching of governmental mandates, and claims against insurance companies by landlords and tenants for compensation for lost rents or lost profit coverage. A survey of these cases in Colorado and from other states provides context for crafting future commercial lease provisions to address pandemics.

**Force Majeure Provisions**

Several jurisdictions outside of Colorado have addressed force majeure provisions. Because retail tenants have endured the brunt of the economic impacts precipitated by the pandemic, retail tenants and their landlords should pay particular attention to the results of these cases to better prepare for future national emergencies without the need for judicial intervention.

Force majeure provisions are typically interpreted in accordance with their purpose to limit damages where the parties’ reasonable expectations and the contract performance have been frustrated beyond the parties’ control. Thus, when parties define the events they believe would give rise to relief from contractual obligations, the courts give effect to their intent. Because existing force majeure provisions rarely identify pandemics as force majeure events, the majority of the pending litigation relates to whether broad examples of force majeure events should encompass the COVID-19 pandemic.

For instance, in In re Hitz Restaurant Group v. Pitkin County Department of Public Health, the court determined that the COVID-19 pandemic and the attendant government imposed restrictions allowed the defendant to invoke the force majeure provision because “it cannot be seriously disputed that the COVID-19 pandemic is a natural disaster.” The important takeaway here is not the court’s interpretation of the term natural disaster; rather, practitioners should note that the force majeure provision at issue did not unambiguously define the circumstances in which it could be invoked, so the parties had to resort to expensive litigation.

A related takeaway from recent litigation is the need to address the breadth of relief afforded by, and future performance of, contractual obligations in connection with force majeure events. This is because force majeure provisions in commercial leases typically carve out the payment of rent from the contractual obligations relieved when a force majeure event occurs.
Therefore, even if commercial tenants could successfully argue that a pandemic qualifies as a force majeure event, the tenant’s obligation to pay rent would likely continue. In fact, even where a force majeure provision relieves the obligation to pay rent under a force majeure provision in its lease due to a public health order prohibiting in-person dining. The bankruptcy court nevertheless held that the force majeure provision relieved the restaurant only of its obligation to pay rent to the extent its ability to do so was hindered by the public health order; because the public health order still permitted carry-out, curbside pick-up, and delivery services, the restaurant tenant was not “off the hook entirely.”

**Governmental Mandates**

Since March 2020, based on executive orders from Governor Polis and public health orders from the Colorado Department of Public Health and the Environment (CDPHE), the state, counties, and municipalities have issued emergency orders that have constantly changed the landscape of how businesses can operate, depending on their designation as “critical” and the severity of the spread of COVID-19 both locally and statewide. Businesses across the state have filed lawsuits challenging some of these restrictions, both on constitutional grounds and for violations of rulemaking under the Colorado Administrative Procedure Act. These cases included a variety of claims, including constitutional claims, CRCP 106 review claims, declaratory and injunctive relief claims, and judicial review claims under CRS § 25-1-515.

For example, a recent case brought in Pitkin County District Court requested judicial review of a public health order that closed all in-person dining within Pitkin County. Among other claims, the plaintiff alleged a claim under CRS § 25-1-515(1), which allows “[a]ny person aggrieved and affected by a decision of a county or district board of health or a public health director” to seek judicial review. CRS § 25-1-515(1) outlines circumstances that constitute prejudice to an appellant, including when the decision violates constitutional rights, is unsupported by substantial evidence, or is arbitrary or capricious. The statute requires a court to review the record upon which the public health decision was based, conduct an evidentiary hearing if needed, and either “affirm the decision or [i] reverse or modify it if the substantial rights of the appellant have been prejudiced...” The plaintiff in the Pitkin County case alleged that the public health order banning in-person dining was unsupported by substantial evidence and was arbitrary and capricious.

Although this and other Colorado cases were voluntarily dismissed before being decided on their merits, likely due to the relaxation of restrictions and plaintiffs’ desire to spend their time and money on their businesses rather than litigation, the relaxation of restrictions and mandates does not render the claims moot under recent US Supreme Court precedent. In *Roman Catholic Diocese of Brooklyn v. Cuomo* the Court considered a request for injunctive relief from capacity limits on religious gatherings imposed by executive order where the same limits were not applied to secular businesses. The Court stated that the regulations “single out houses of worship for especially harsh treatment” and held that even though the restrictions were relieved after the case was filed, “injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange...The Governor regularly changes the classification of particular areas without prior notice.” This case leaves the door open for challenges to government mandates to remain viable despite a change in restrictions.

Businesses in Los Angeles County, California, also succeeded in achieving injunctive relief against the enforcement of public health orders that eliminated outdoor dining and restricted takeout hours on the basis that the Los Angeles County Department of Public Health failed to conduct an appropriate risk/benefit analysis in issuing such orders, and this was an abuse of discretion. Commercial landlords and tenants both benefited thereby as restaurants and bars were able to continue outdoor dining services. Colorado landlords may want to consider supporting such challenges by tenants because successful challenges would ensure that the tenant remains viable. On the other hand, landlords may not wish to have their tenants spending money on legal fees when they are struggling to pay the rent.

**Insurance Claims**

In the wake of COVID-19, many commercial landlords and tenants have looked to insurance coverage to compensate for lost profits. The University of Pennsylvania Carey Law School has tracked 1,557 COVID-19 insurance suits nationwide from March 16, 2020, to February 2, 2021, through an online analytics tool. At the height of these filings in May and June, there were as many as 78 per week, but filings have dwindled because plaintiffs have been largely unsuccessful in their suits. A great number of these suits were dismissed due to exclusionary language in the policy. Of the 1,531 policies that the University of Pennsylvania has been able to code, 859 policies contained either explicit or hidden language excluding virus coverage, 539 policies contained either no virus exclusion language or specific coverage for communicable disease, and only 133 policies contained specific coverage for coverage for communicable disease. Accordingly, 233 cases were fully dismissed with prejudice, 32 cases were fully dismissed without prejudice, 45 motions were denied, and three were partially dismissed with prejudice. Out of the COVID-19 insurance suits filed, 94% sought compensation for lost business income in the form of business interruption insurance. Whether business interruption insurance is approved or denied hinges on whether there is damage to property rendering it unusable. Jurisdictions throughout the United States have been split on whether the damage required needs to be physical or if a COVID-19-related business closure also qualifies for coverage.

To date, the trend nationwide has been for courts to find in favor of insurance carriers. The first ruling on business interruption insurance is believed to have taken place in Michigan on July 2, 2020, where the judge held that physical loss requires more than losing access or the
ability to use the property. The US District Court for the Western District of Texas, District of Columbia Superior Court, and US District Court for the Northern District of Georgia have all followed suit.

On the other end of the spectrum, a New Jersey Superior Court judge held that physical property damage was not required to bring a business interruption claim. The US District Court for the Western District of Missouri and the North Carolina Superior Court have agreed with the New Jersey Superior Court’s position. With no controlling case law in Colorado to date, commercial tenants may be hopeful that the reasoning in Western Fire Insurance Co. v. First Presbyterian Church, where a property was ruled uninhabitable after gas seeped onto the premises, will control. However, this is likely an overly optimistic position because there is no evidence of actual infiltration of COVID-19, thus distinguishing the Western Fire situation from the present COVID-19 circumstances.

One positive result of COVID-19 insurance litigation has been efforts to streamline the litigation process in response to the backlog of pandemic cases. As discussed in a recent Colorado Lawyer article, in August 2020, the US Judicial Panel on Multidistrict Litigation (JPML) denied two 28 USC § 1407 motions to centralize business interruption litigation in the Eastern District of Pennsylvania and Northern District of Illinois. However, the JPML ultimately allowed for a multidistrict litigation to be created for some insurers, such as Society Insurance Co., in October 2020. The result of this action was the transfer of over 30 Society Insurance Co. cases to the Northern District of Illinois. The JPML likely took this action because the cases were already geographically concentrated, spanning over only six states. Efforts to geographically concentrate the caseload of insurers with more of a national presence, such as Cincinnati Insurance Co. and Hartford Financial Services Group Inc. have been unsuccessful so far. Additionally, the Institute for the Advancement of the American Legal Systems (IAALS) at the University of Denver initiated a project in May of 2020 to create streamlined discovery protocols in business interruption suits. The stated goal of introducing these new protocols is to reduce cost and conflict among business interruption suits at the state and federal level. Beyond the disclosure protocols, IAALS is also looking to establish case management guidelines and other case guidance protocols for COVID-19 litigation.

**Landlord Responses**

The landlord response to COVID-19 has ranged from no tenant relief at all, especially where a landlord wanted an early end to an unfavorable lease, to a combination of rent abatement and rent deferral with reasonable repayment provisions, typically without interest, on deferred amounts. Because of COVID-19’s long-lasting effects, some landlords have recently revisited or further extended rent relief. And some landlords that started out offering no relief have softened their attitudes due to the lack of court access described above or the realization that finding a replacement tenant in the midst of the pandemic would be difficult.

Going forward, for retail leasing generally, landlords and tenants may want lease provisions, separate from force majeure provisions, that include a formula to address closures or occupancy restrictions in the event of another pandemic. Suggested optional provisions are included in the Appendix to this article. There are at least two formulas to measure the effect of a pandemic on retail tenants. The first assumes the lease is fixed rent only with common area maintenance, real estate taxes, and the landlord’s insurance costs passed through to the tenant. The second formula addresses percentage rent leases. The suggested provisions can be used together or in part as appropriate.

**Restaurant Tenants**

During pandemic conditions, outdoor dining took on an entirely new meaning. Pre-pandemic outdoor seating was considered a nice amenity that some restaurants could provide, but with the pandemic’s onset, outdoor seating for many restaurants became a matter of survival. Many leases describe the leased premises (especially basement or second floor) without including any areas for outdoor seating or curbside service. When outdoor seating became more important to restaurants, many tenants first had to obtain the landlord’s permission and a lease amendment to expand the areas where restaurant operations could take place.

In addition, in many cases local governmental authorities were also involved to license restaurant operations in public rights-of-way. While obtaining government licenses is beyond the scope of any lease, leases can pre-approve the expansion of restaurant operations and include provisions requiring the landlord to join in or cooperate with obtaining such licenses. Due diligence for any new leases, especially restaurants, should include the ability to expand outdoor seating and the availability of a pickup location for takeout or curbside sales. New construction of street-level restaurants might include a street-level takeout window, and basement or second-floor restaurant space might include a street-level dumbwaiter.

**WELL Building Standards**

Another result of COVID-19 has been an evolving mind-set regarding how commercial real estate should be built. For example, the WELL Building Standard is a performance-based building standard that monitors the health and wellness impacts that real estate has on its occupants based on medical research. The International WELL Building Institute (IWBI), the public benefit corporation that manages and administers the WELL Building Standard, released a publication addressing how to use WELL Standards to address issues related to COVID-19. These strategies include promoting clean contact through larger, more sanitary sinks; improving air quality; maintaining water quality; managing and creating organizational resilience; supporting movement and comfort, including work from home; strengthening immune systems; fostering mental resilience; and championing community resilience and recovery. Highlights of these strategies include using larger sinks in public bathrooms to help prevent the concentration of germs and Circadian-rhythm-friendly lighting designed to aid the occupant’s sleep cycle. One year into the COVID-19 pandemic, many have asked...
themselves what the “new normal” will look like. If this trend continues to grow, an emphasis on occupant health and well-being will be the cornerstone of future real estate developments. Perhaps new construction could include restricted access or locked-off common areas when there are pandemic conditions. Other options might be to locate all bathrooms inside leased spaces rather than having common bathrooms accessed through hallways. Or, given sufficient space, additional construction could emphasize standalone individual spaces that do not require common areas or common bathrooms. And new construction might include internal air handling using ultraviolet air purification systems.

Conclusion
Pandemic conditions are not covered well by typical force majeure provisions. This is because pandemics can affect different types of businesses in different ways, government responses can fluctuate over the course of a pandemic, and, unlike most other force majeure events, a pandemic does not result in physical damage to the premises.

But pandemic-specific provisions can be added to leases to provide for a fair response and minimize disputes between landlords and tenants. The lessons learned the hard way from the COVID-19 pandemic should motivate landlords and tenants to devise equitable rent modifications and other solutions that protect both parties from economic catastrophe. The time to act is now; a pandemic is no longer an abstraction or something that only happens in Hollywood movies.

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Optional Lease Provisions

These provisions are suggested for practitioners interested in treating pandemics or epidemics separately from more general commercial lease provisions. They can be customized to better suit the particulars of any commercial lease negotiations.

Lease Without Percentage Sales

Health Crisis. For purposes of the following provisions, the term “Health Crisis” means a pandemic or epidemic, whether worldwide or limited to a state, county, or locality, of an infectious disease that results in, or could reasonably be expected to result in, governmental action mandating closures, occupancy restrictions, or other restrictions such as limited business hours that, if imposed, would materially and adversely affect Tenant’s business operated in the Premises. All events other than a Health Crisis shall be governed by force majeure provisions appearing elsewhere in this Lease. Upon the occurrence of a Health Crisis and notwithstanding anything in this Lease to the contrary, Rents shall be adjusted as follows:

(a) If closures or restrictions on occupancy levels or hours of operation for the Premises are mandated due to federal, state, county, city, or local action (Occupancy Restrictions), Base Rent shall, so long as the Occupancy Restrictions remain in place and directly affect the Premises, be adjusted proportionally and in lockstep with such Occupancy Restrictions. For purposes of determining the Adjusted Base Rent while Occupancy Restrictions are in effect, Base Rent will be temporarily reduced by the same percentage as the applicable Occupancy Restrictions, expressed as a percentage of the required reduction in physical space or hours of operation due to the Occupancy Restrictions. The calculation is expressed as follows: Base Rent (BR) x Occupancy Restrictions (OR) = Adjusted Base Rent (ABR). For example: A 50% restriction on occupancy mandated by the Occupancy Restrictions would result in ABR equal to 50% of Base Rent until the Occupancy Restrictions are modified or lifted. Similarly, a 40% reduction in business hours would result in ABR equal to a 40% reduction of Base Rent (leases without required business hours or more extensive hours of operations shall be considered to have business hours of 10:00 a.m. to 5:00 p.m.). ABR shall be pro-rated as to the date on which the Occupancy Restrictions commence and the date on which the Occupancy Restrictions end or are modified. If there are Occupancy Restrictions as to both business hours and capacity, both calculations shall be made and the reduction shall be the average of both.

(b) When the Occupancy Restrictions cease, the difference between (1) the ABR actually paid while the Occupancy Restrictions were in effect and (2) the unadjusted Base Rent that was due for the entire time that the Occupancy Restrictions were in effect (collectively, Deferred Rent) shall be calculated and the Deferred Rent will be paid by Tenant to Landlord in equal monthly sums fully amortized, without interest, over the remaining months of the Lease Term, or the next 24 months, whichever is sooner, with the first such payment due on the first day of the month following the month during which the Occupancy Restrictions ceased.

(c) Each time Occupancy Restrictions change, new ABR calculations shall be made to remain in lockstep with the changed Occupancy Restrictions.

(d) Regardless of any rent relief provided herein, at all times during the Lease Term, or any extension, Tenant shall remain obligated to timely pay all other charges that are due.

CONTINUED ON PAGE 34
under the Lease, whether or not considered Rent (including Tenant’s proportionate share of Landlord’s insurance, common area expenses, and real estate taxes). [Alternative provision: So long as Occupancy Restrictions result in ABR, and provided that payments of ABR are timely made, such payments shall also satisfy and be accepted by Landlord in lieu of payment of all other charges that are considered Rent, including but not limited to Tenant’s proportionate share of Landlord’s insurance, common area expenses, and real estate taxes.]

(e) If the Occupancy Restrictions mandate a 100% closure for the Premises (i.e., Tenant is completely restricted from opening its business to the public), Tenant’s obligation to pay the Base Rent shall be completely abated so long as the 100% Occupancy Restriction remains in place and directly affects the Premises (Full Restricted Period). [Optional provision: If the Full Restricted Period exceeds ___ days, commencing on the first day following the day that exceeds ___ days, Tenant shall resume paying ___ % of Base Rent as it becomes due and the remaining ________% of Base Rent shall be deferred (Full Restricted Deferred Amount) until the first day of the month following the month in which the Full Restricted Period ends (Full Restricted Deferral End Date). From and after the Full Restricted Deferral End Date, the Full Restricted Deferred Amount shall be paid commencing on the first day of the following month by Tenant to Landlord in equal monthly sums fully amortized, without interest, over the remaining months of the Lease Term, or over the next 24 months, whichever is sooner.]

[Optional provision (f): During the time that any of the modified rent obligations set forth above are in effect, Tenant shall within 7 days following the end of each month report to Landlord the gross amount of all curbside, home delivery by carrier (e.g., USPS, UPS, FedEx) or other means, and all online sales. From the gross sales reported there shall be deducted credit card charges and sales tax (Net Sales). Copies of any sales tax reports filed with any local governmental authority shall be provided to Landlord during such time. As an additional Rent obligation while modified rent obligations are in effect, Tenant shall pay to Landlord an amount equal to ___% of Net Sales, said payment to be made simultaneously with the filing of any sales tax report or within ___ days following the month end, whichever is sooner. In no event shall percentage rent hereunder plus ABR exceed Base Rent that would be due in the absence of a Health Crisis).]

(g) During the continuance of any Health Crisis, any lease provision regarding business hours, or requirements to keep the premises lighted or to be fully stocked with inventory, shall be waived.

(h) For purposes of these provisions, “Deferred Amounts” shall mean all payments due or to become due to Landlord that are with respect to the Lease: (1) amounts to be paid to Landlord not otherwise provided for under the Lease and (2) amounts that are payable on different or deferred dates than as set forth in the Lease. Without limit to any other rights or remedies, all Deferred Amounts shall be accelerated and immediately become due and payable in full upon occurrence of: (1) a failure to pay when due any Deferred Amounts within 3 business days following written notice from Landlord or (2) as to matters other than Deferred Amounts, any Tenant breach of any representations, warranties, covenants, or Lease terms not cured within a grace or cure period allowed.

[Optional provision (i): To the extent that Landlord or Tenant has insurance coverage for lost rents or profits, such party agrees to timely file and make all commercially reasonable efforts to recover on such claim (Claim). The parties agree that any recovery on the Claim shall be paid or credited as applicable first to make Landlord whole on abated rent, and then as a credit against Deferred Amounts as they become due.]

[Optional add to (i): With respect to any Claim Tenant may have, Tenant hereby appoints Landlord as Tenant’s agent with limited authority to pursue the Claim as Tenant’s agent, and Landlord hereby accepts such appointment and shall keep Tenant timely and fully informed as to Landlord’s efforts in such regard, including by providing Tenant with copies of any correspondence sent to or received from the carrier or any claims manager or adjuster on behalf of the carrier, and notice of any recovery or denial of the Claim. Landlord shall, in Landlord’s sole commercially reasonable discretion but after consultation with Tenant, abandon or settle the Claim on such basis as Landlord shall determine. If the carrier denies the Claim, Landlord may pursue further at Landlord’s expense (including legal fees and costs) litigation or other remedies to obtain a recovery, provided, however, that Landlord shall be under no obligation to pursue such Claim beyond a denial by the carrier. If Landlord elects not to further pursue the Claim, Landlord’s agency on behalf of Tenant shall automatically terminate.]

[Optional provision (j): Should Tenant decide [Tenant shall be required] to pursue any governmental financial assistance that Tenant is eligible to receive as a business affected by the Health Crisis, including from federal, state, city, and local agencies (collectively, Governmental Financial Assistance), Tenant shall keep Landlord informed of all such submittals and progress related thereto. If Tenant obtains any Government Financial Assistance, Tenant shall promptly disclose this to Landlord and fully, accurately, and promptly respond to Landlord’s requests for information relating to the same. If Tenant receives Government Financial Assistance where a portion may be applied to the payment of rent, or if Tenant’s application for such assistance stated or represented that the Governmental Financial Assistance or portion thereof would be used for the payment of rent, such Governmental Financial Assistance shall be applied in the following order of priority: (1) paid to Landlord to the extent of the abated Rent to offset the same, and (2) paid to Landlord to the extent of the difference between the scheduled Rent without any lease modifications and rent as modified herein.]
**Percentage Sale Lease**

*Use the Health Crisis definition and paragraphs (a) through (d) of the Lease Without Percentage Sales and add the following:*

(e) In addition to ABR, Tenant shall pay Landlord monthly Percentage Rent calculated as follows: To the extent that ____% of monthly Gross Sales, less deductions allowed by the Lease, exceed ($____ monthly) [or monthly Adjusted Base Rent], Tenant shall pay such excess to Landlord with such payment due at the same time and with the same reporting as the Percentage Rent would be due absent any Health Crisis. [Alternative provision for payment over time: In addition to ABR, Tenant shall pay to Landlord monthly Percentage Rent calculated as follows: To the extent that ____% of monthly Gross Sales less deductions allowed by the Lease exceed ($____ monthly) (or monthly ABR), such amounts shall be calculated at the end of the Occupancy Restrictions and shall be payable to Landlord commencing on the first day of the following month in equal monthly sums fully amortized without interest over the remaining months of the Lease Term, or over the next 24 months, whichever is sooner. In no event shall percentage rent hereunder plus ABR exceed the Base Rent that would be due in the absence of a Health Crisis.]

[(f) (As an alternative to (e) and in lieu of paying any percentage rent during the Health Crisis, add 10% or some other percentage as the parties may agree to the ABR derived by the paragraph (a) calculation.)

(g) If the Occupancy Restrictions mandate a 100% closure of the Premises (i.e., Tenant is completely restricted from opening its business to the public), Tenant’s obligation to pay the Base Rent shall be completely abated so long as the 100% Occupancy Restriction remains in place and directly affects the Premises (Full Restricted Period) [Optional provision: If the Full Restricted Period exceeds ____ days, commencing on the first day following the day that exceeds ____ days, Tenant shall resume paying ____% of Base Rent as it becomes due and the remaining ____% of Base Rent shall be deferred (Full Restricted Deferred Amount) until the first day of the month following the month in which the Full Restricted Period ends (Full Restricted Deferral End Date). From and after the Full Restricted Deferral End Date, the Full Restricted Deferred Amount shall be paid commencing on the first day of the following month by Tenant to Landlord in equal monthly sums fully amortized, without interest, over the remaining months of the Lease Term, or over the next 24 months, whichever is sooner.]

(h) During the continuance of any Health Crisis, any lease provision regarding business hours, and requirements to keep the premises lighted or fully stocked with inventory, shall be waived.

(i) For purposes of these provisions “Deferred Amounts” shall mean all payments due or to become due to Landlord that are with respect to the Lease: (1) amounts to be paid to Landlord not otherwise provided for under the Lease and (2) amounts that are payable on different or deferred dates than as set forth in the Lease. Without limit to any other rights or remedies, all Deferred Amounts shall be accelerated and immediately become due and payable in full upon occurrence of: (1) a failure to pay when due any Deferred Amounts within 3 business days following written notice from Landlord or (2) as to matters other than Deferred Amounts, any Tenant breach of any representations, warranties, covenants, or Lease terms not cured within a grace or cure period allowed.

[j] (Optional provision (j): To the extent that Landlord or Tenant has insurance coverage for lost rents or profits, such party agrees to timely file and make all commercially reasonable efforts to recover on such claim (Claim). The parties agree that any recovery on the Claim shall be paid or credited as applicable first to make Landlord whole on abated rent, and then as a credit against Deferred Amounts as they become due.]
NOTES
2. See, e.g., Rasmussen, “On the origins of SARS-CoV-2,” Nat. Med. 27, 9 (2021), https://doi.org/10.1038/s41591-020-01205-5 (“Despite much noise to the contrary, there is no credible evidence that SARS-CoV-2 was ever known to virologists before it emerged in December 2019, and all indications suggest that, like SARS-CoV and MERS-CoV, this virus probably evolved in a bat host until an unknown spillover event into humans occurred.”).
3. Segreto et al., “Should we discount the laboratory origin of COVID-19?” Environ Chem Lett (2021), https://doi.org/10.1007/s10311-021-02121-0 (“While a natural origin is still possible and the search for a potential host in nature should continue, the amount of peculiar genetic features identified in SARS-CoV-2’s genome does not rule out a possible gain-of-function origin, which should be therefore discussed in an open scientific debate.”).
4. This article was prepared primarily based on information available as of February 2021 and thus presents information available at that time. Case law, legislation, governmental mandates, and findings by scientists and health officials regarding COVID-19 remain in a state of flux. Therefore, this article should not be treated as the final word on commercial leasing in a pandemic-driven recession, https://www2.deloitte.com/us/en/pages/consumer-business/articles/retail-recession.html.
10. Id.
11. Id.
13. Id.
14. Id.
16. Id.
17. Infra note 12.
19. Id.
20. Id.
22. Infra note 18.
25. Id.
26. Id. See also In re Hitz Rest. Grp., 616 B.R. at 377–78 (analyzing whether stay at home orders qualified as governmental action as the term was used in a force majeure provision).
29. Id.
30. See, e.g., 4842 Morrison Rd. Corp v. Tri-County Health Dept.; No. 20CV13347 (Arapahoe Cty. Dist. Ct. Jul. 8, 2020) (challenging the restriction that performers had to remain 25 feet from the audience); Bandimere v. Polis, No. 20CV31073 (Jefferson Cty. Dist. Ct.) (constitutional challenge based on freedom of association and expression for orders limiting the capacity and sales at Bandimere Motor Speedway on July 4, 2020); Cookies & Crema, LLC v. CDPHE, No. 20CV30407 (Douglas Cty. Dist. Ct.) (challenging rulemaking authority as ultra vires); The Tavern League of Colo. v. Polis, No. 20CV32484 (City and Cty. of Denver Dist. Ct.) (challenging capacity requirements for restaurants as having no relationship to public health and safety).
32. CRS § 25-1-515(1).
37. Id.
38. Id.
39. Id.
40. Id.
42. Harckham, supra note 41.
43. Id.
50. Kaufmann and Meyer, supra note 46 at 53.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id. at 54.
56. Id.
57. Id.
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Privacy in a Time of Drones

BY RONALD M. SANDGRUND
Big Brother has been a concern since Orwell’s 1984, but today it’s Big Business and the 12-year-old kid next door flying a drone who may pose an equal threat to our privacy.

Drones afford many benefits, some quite extraordinary, including assisting with aerial mapping, education, real estate and cropland management, urban planning, power line and pipeline inspection, wildfire management, disaster response administration, emergency medicine deliveries, telecommunications, movie filming, journalism, doorstep package delivery, refinery monitoring, and recreational fun. They also present some potential societal deterrents, serving as accomplices in drug smuggling, terrorism, assassination, and voyeurism. Even their lawful use comes with some invasion of privacy risks.

This article focuses on the risks drones present to our solitude and sanctuaries; potential tort liability arising from drone use; remedies for non-governmental invasions of our privacy, person, and place; and practical considerations that might guide lawyers who work in this novel and evolving field. The article briefly describes the history of federal and state drone regulation and preemption issues; discusses the intersection of Colorado privacy, trespass, and nuisance laws and drone activities; and examines the lingering legal uncertainties accompanying drone technology advances.

Tort liability for physical injury to property or bodily injury to persons is beyond this article’s scope. Similarly, the article does not discuss Fourth Amendment warrant, search, and privacy concerns relating to government drone deployment.

**Drones Today (and Tomorrow)**

Drones are improving technologically at the speed of smartphones, not airplanes. In fact, by the time you read this article, drone technology will have advanced significantly since this piece was conceived during the 2020 pandemic summer.

Today’s drones serve as platforms for “intelligent sensor suites, high-definition gigapixel cameras, live-streaming media, global positioning systems, facial recognition and biometric programs.” Some drone features are only readily accessible to governmental actors, such as the military, law enforcement, and their contractors, due to the feature’s cost and technical complexity. Facial recognition has already been integrated into many security camera systems. While drones incorporate a Global Positioning System (GPS) as part of their autopilot mechanisms, their GPS serves the same purposes as that found in cell phones, although most drone GPS systems are more accurate.

Drone laws will change as drones and their satellite technologies change. Reality will steer these changes as drones become as ubiquitous as cell phones. In April 2021, an estimated 872,000 drones were in use in the United States, about 43% commercially and 57% recreationally, with over 222,000 Federal Aviation Administration (FAA) certified remote pilots. One commentator urges that “there is no other technology that is as accessible to the general public and poses as tangible a threat to privacy and safety as the drone.” Others would argue that this is a gross overstatement and that smartphones and other personal electronic devices, which are widely used and generally not feared, pose a much graver privacy threat.
Still, drones the size of insects—micro-aerial vehicles (MAVs)—outfitted with cameras and microphones are already in use, and not just in James Bond films, although their use is typically limited to the military due to their cost and complexity. Before long we may miss some drones’ bothersome whirring, which alerts us to the drones’ presence and that we might be filmed or recorded. Flying micro-drones may make noise indistinguishable from flying insects or make no perceptible sound at all.

Overview of Drone Regulation

Federal, state, and local laws regulate drones and other unmanned aerial vehicles (UAV) and unmanned aircraft systems (UAS). These regulations are likely to evolve, not only in response to drone-related technological progress, but also with experience, as drones become a part of the fabric of our lives.

Federal Law and Regulations

In the mid-20th century, the US Supreme Court held that for property owners to fully enjoy their land, they “must have exclusive control of the immediate reaches of the enveloping atmosphere” and “own[] at least as much of the space above the ground as [they] can occupy or use in connection with the land.”11 The Court left open the parameters of these “immediate reaches.” Drone technology has brought this issue to the fore.

In 2016, the FAA finalized its initial drone regulations, including what is commonly referred to as Part 107.12 On October 5, 2018, President Trump signed the FAA Reauthorization Act of 2018 (the Act).13 Building on the 2016 regulations, the Act primarily addresses recreational and commercial use of UAVs, including pilot training and FAA remote pilot certification (and waiver of the same); airspace authorization;14 UAV registration; maximum and minimum height, weight, clearance, speed, and line of sight requirements; limits on operating over other persons; risk-based consensus safety-standards; and airport safety and air-space hazard mitigation, among other topics.15 The FAA declined to expand its jurisdiction over safety to encompass privacy issues, deferring to existing state law and other privacy protections.16 The Act is a work in progress, as industry stakeholders, interest groups, and the federal government lobby to shape this law through consensus regulation, drawing on everyday testing and experience.

In January 2021, the FAA released for publication its final remote identification (Remote ID) regulations.17 Remote ID will provide information about drones in flight, such as the drone’s unique identity, location, altitude, and control station or take-off location. Authorized public safety organization employees can request the identity of a drone’s owner from the FAA. These features may help provide answers to questions like, “Where is that annoying buzzing coming from?”18 While the ordinary person might view this rule as offering pushback to a drone led invasion of their privacy, drone operators see it as an invasion of their privacy. Thus, it is expected that any FAA regulations will generally focus on safety, not privacy.19

Congress has indicated a desire for close cooperation between federal and state authorities over drone regulation. The federal government wants local resources to help enforce federal drone laws. The needs of interstate commerce, and preferences of the Amazon.coms of the world, will influence and shape not only federal law, but also any working partnership between and among state and federal governments. Therefore, tort liability protections are likely to arise.

The Colorado Regulatory Scheme

Colorado presently has no statutes specifically regulating drone activity, although one regulation makes it unlawful to use drones “to look for, scout, or detect wildlife as an aid in the hunting or taking of wildlife.”20 Colorado’s “Peeping Tom” law also may apply to some drone-based surveillance.21 Local ordinances in Aurora, Boulder, Cherry Hills Village, Denver, Louisville, and Telluride govern recreational and/or commercial drone use, and other municipalities are considering adopting their own laws.

Federal and State Law Preemption

The legal framework for drone use must account for federal preemption of state and local laws, which occurs when: (1) Congress expresses a clear intent to preempt state law; (2) there is an outright or actual conflict between federal and state law; (3) compliance with both federal and state law is physically impossible; (4) there is an implicit barrier within federal law to state regulation in a particular area; (5) federal legislation is so comprehensive as to occupy the entire field of regulation; or (6) state law stands as an obstacle to the accomplishment and execution of Congress’s full objectives.22 Similarly, Colorado statutes may preempt local law.23

As drones become more embedded in everyday business and residential life, and their impact on interstate commerce rapidly expands, the need for a uniform regulatory framework and consistent and effective enforcement increases. The potential for conflict among federal, state, and local commercial needs and privacy expectations will similarly increase. Industry is likely to push for statutorily explicit or implied preemption of local regulation; this has already occurred with regard to FAA regulation of drone use within certain geographic and altitudinal parameters. Drone operators complain anecdotally of situations where FAA regulations require drones to fly below 400 feet, yet some local regulations require them to fly at or above 500 feet.24

Critically, if Colorado’s and other states’ statutory and common law remedies for drone intrusion and abuse prove inadequate, people may “take matters into their own hands.”25 And “where the law is perceived as a fairly blunt tool, people will increasingly resort to self-help remedies.”26 While criminal statutes offer some protection from electronic “listening in,”27 they offer much less protection from “looking in.” Presently, there are few easy remedies concerning intrusive drone activity.28 Because the FAA considers drones to be aircraft, 18 USC § 32 prohibits damaging or destroying drones, and using a firearm to attempt the same may violate other laws. Similarly, electronically jamming a drone may violate federal law.29

Colorado Tort Law and Drone Operations

Colorado recognizes various torts for which drone operators may bear civil liability where
their drone operations invade or interfere with the privacy or solitude of others. The torts involving invasion of privacy and trespass and nuisance are potentially applicable in addressing rapidly evolving drone technology.

**Invasion of Privacy**

Colorado recognizes the tort of invasion of privacy. Three species of this tort are presently actionable: invasion of privacy by intrusion, invasion of privacy by public disclosure of private facts, and invasion of privacy by appropriation (Colorado has declined to recognize invasion of privacy by placing a person in a false light). Only the first two variations are discussed here as generally relevant to drone monitoring.

**Invasion of Privacy by Intrusion**

To prove invasion of privacy by intrusion, a plaintiff must establish that (1) the defendant intentionally invaded the plaintiff’s privacy, (2) the invasion would be very offensive to a reasonable person, (3) the plaintiff suffered damages, and (4) the invasion was a cause of the plaintiff’s damages. Only a natural person may assert a claim for invasion of privacy, and other than a claim for appropriation, the right is personal and cannot be assigned.

Invasion of privacy by intrusion does not require physical intrusion, publicity, or general communication to the public. The essence of the tort is interference with the plaintiff’s solitude, seclusion, or private affairs and concerns. Entering the plaintiff’s premises, electronic eavesdropping or spying, unauthorized access to the plaintiff’s postal mail or email, or repeated hounding or harassment may satisfy applicable standards. Potential damages for intrusion include compensation for (1) harm to a plaintiff’s privacy interest resulting from the invasion, (2) mental suffering, (3) special damages, and (4) nominal damages if no other damages are proven.

A private cause of action is available for violation of federal illegal wiretapping laws, and relief may include adequate compensation. No Colorado case has thus far recognized such a right under Colorado’s wiretapping law. However, Colorado wiretapping and eavesdropping laws may help courts and juries define what constitutes a reasonable expectation of privacy that supports recovery in tort.

There is no liability for reviewing publicly available information or observing or photographing someone in a public place. Generally observing and videotaping a plaintiff’s premises from outside the property's perimeter is not an actionable intrusion, even if a high-powered lens is used to magnify the view of what can be readily seen. Typically, a plaintiff must have a possessory or proprietary interest in the property into which the intrusion is alleged. The interest of a tenant, a hotel guest, or a storage locker lessee may also provide standing. A “legitimate expectation of privacy” is a key element in evaluating the propriety of the intrusion.

Aggrieved parties may allege that drone owners and operators invaded their privacy by a drone listening in, looking in, or merely “invading their space.” Whether an actionable invasion of privacy has occurred will depend on the circumstances and societal privacy expectations.

**Invasion of Privacy by Public Disclosure of Private Facts**

To prove invasion of privacy by public disclosure of private facts, a plaintiff must establish that (1) the defendant made a fact about the plaintiff public; (2) the fact was private before disclosure; (3) a reasonable person would find the disclosure highly offensive; (4) at the time of the disclosure, the defendant acted with reckless disregard of the private nature of the fact disclosed (i.e., the defendant knew or should have known that the fact disclosed was not of legitimate concern to the public); (5) the plaintiff suffered damages; and (6) the public disclosure of the fact was a cause of the plaintiff's damages.

Generally, the disclosure must be of a previously private matter; it cannot involve information that was already public, that was available from public records, or that the plaintiff left open to the public. The public disclosure requires "communication to the public in general or to a large number of persons, as distinguished from one individual or a few." However, a defendant may bear liability if it...
appeal. When a defendant raises a First Amendment
reservation, natural catastrophes, disease, and other
crimes, suicides, accidents, is disclosed to a large number of persons. " 50
Because the public disclosure element involves
the right to circulate truthful information to the
public, it implicates federal and state constitu-
tional freedoms of speech and press. 53 The First
Amendment protects the disclosure of highly
offensive private facts if those facts have “some
substantial relevance to a matter of legitimate
public interest.” 54 Such matters might include
murders and other crimes, suicides, accidents,
fires, natural catastrophes, disease, and other
topics of real, even if more appalling, popular
appeal. 55 When a defendant raises a First Amend-
ment privilege, the individual’s right to keep
information private must be balanced against
the press’s right to disseminate newsworthy
information publicly. 56
Aggrieved parties may allege that people
privy to information accessed by drones invaded
their privacy by a drone listening in, looking
in, or otherwise gathering data from or about them and then publicizing those facts. Whether
an actionable invasion of privacy has occurred
will depend on the nature of the information,
changing societal expectations of what constitutes
private information and a highly offensive dis-
closure of the same, and any free press privileges
accompanying such disclosure.

Affirmative Defenses
In addition to the constitutional First Amend-
ment free speech privileges and immunities
discussed above, consent or waiver may serve
as an affirmative defense to an invasion of
privacy claim. This defense applies if the plaintiff,
by words or conduct, led the defendant to
reasonably believe the plaintiff had authorized
or agreed to the defendant’s conduct, and the
defendant acted in a manner and purpose
consistent with the scope of such authorization
or agreement. 57 While no Colorado case has yet
addressed what statute of limitations applies
to invasion of privacy claims, the two-year
limitations period in CRS § 13-80-102 for tort
claims is a likely candidate.

Remedies
Remedies for invasion of privacy may include
statutorily capped non-economic damages for
personal humiliation, mental and physical anguish
and suffering, inconvenience, impairment of
quality of life, reputational injury, and impairment
to a plaintiff’s credit standing, as well as loss of
income. 58 Damages for the cost of taking mitigation
measures, such as hiring a public relations
firm to help manage or negate the fallout from
the public disclosure of private information,
may be compensable. 59 Nominal damages may
be properly awarded. 60 In an appropriate case,
punitive damages may be available. 61

Trespass and Nuisance
Trespass and nuisance claims do not directly
implicate a landowner’s right of privacy, but the
liability exposure they present may discourage
privacy intrusions. Trespasses and private
nuisances typically involve the invasion of or
interference with a person’s private property
rights, while a public nuisance often requires a
balancing of a property owner’s versus others’
economic interests, weighing the gravity of the
harm against the utility of the conduct.
Trespass claims have traditionally been
limited to the intentional physical entry or
intrusion upon or under another’s property
causing physical damage to the property, or an
intentional intangible intrusion with resulting
physical damage, but (so far) not simply entry
into the airspace above the property. 62 In con-
trast, nuisance claims may involve noise, light,
shadow, and odor conditions affecting another’s
use and enjoyment of their property without
accompanying physical damage. 63 If drone
activity physically damages private property,
a claim for trespass likely would accrue and
would not require proof of the violation of an
applicable standard of care relevant to a
negligence claim, because all that is required
is an intent to enter or to cause another to enter
another’s property, or to do an act that in the
natural course of events results in the intrusion. 64

“ Colorado recognizes various torts for which
drone operators may bear civil liability
where their drone operations invade
or interfere with the privacy or solitude
of others. The torts involving invasion of
privacy and trespass and nuisance are
potentially applicable in addressing rapidly
evolving drone technology.

”
**Private Nuisance**

A private nuisance is a non-trespassory invasion of another’s interest in private use and enjoyment of his or her land. To prove a private nuisance, a plaintiff must establish a substantial invasion of a plaintiff’s interest in the use and enjoyment of his property when such invasion is (1) intentional and unreasonable, (2) unintentional and otherwise actionable under the rules for negligent or reckless conduct, or (3) so abnormal or out of place in its surroundings as to fall within the principle of strict liability. Stated another way, a nuisance is an intentional, negligent, or unreasonably dangerous activity resulting in the unreasonable and substantial interference with a plaintiff’s use and enjoyment of her property. “To maintain a successful nuisance claim, a plaintiff must establish that the defendant has unreasonably interfered with the use and enjoyment of her property.” Unreasonableness is a question of fact that requires the fact finder to weigh the gravity of the harm against the utility of the conduct causing that harm. Generally, to be unreasonable, “an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient.”

**Public Nuisance**

A public nuisance involves “the invasion of public rights, that is, rights common to all members of the public.” In contrast, “[a] private nuisance is a tort against land and the plaintiff’s actions must always be founded upon his interest in the land.” Public nuisance suits are typically brought by governmental bodies seeking injunctive relief and often are based on a statutory prohibition.

**Aerial Trespass and Nuisance**

“Aerial trespass” assumes a property owner’s possessory right to some portion of the airspace above the owner’s property. Presently, whether an aerial trespass has occurred and is actionable depends on how courts construe Colorado’s applicable statute and its common law of trespass, and whether and how federal law and regulations might preempt these laws. CRS § 41-1-107 provides that “[t]he ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft.” Two Colorado cases have considered this statute in the context of claims arising from overflights emanating from Denver International Airport (DIA), but the statute did not have much bearing in either one, and neither case concerned “aerial” trespass or nuisance claims. Nevertheless, the cases may offer some insight into how such claims may be treated in the future.

In *Claassen v. City and County of Denver*, the Colorado Court of Appeals addressed a compensation claim by several landowners under the Colorado and US Constitution’s “taking” and “damaging” clauses arising from aircraft overflying their property while taking off and landing at DIA. The Court held that “navigable” airspace is in the public domain, and the plaintiff landowners had no property rights in the airspace. Because the overflights occurred, by and large, more than 500 feet above the plaintiffs’ property per FAA regulations, the trial court ruled that “there had been no physical entry into plaintiffs’ property and no physical ouster of the plaintiffs from their property.” And because CRS § 41-1-107 subjects the ownership of airspace by landowners to the “rights of flight of aircraft,” *Claassen* applied FAA “minimum safe altitude” regulations for “uncongested areas” to resolve the plaintiff’s claims.

The Court stated that “absent a physical invasion into the airspace above plaintiffs’ property that is below the navigable airspace, there can be no physical taking within the meaning of Colo. Const. art. II, § 15.” It held that “because plaintiffs had no protected property interest in the navigable airspace in which the aircraft here flew, the trial court correctly found that plaintiffs had sustained no compensable physical taking within the meaning of the federal and state constitutions.”

If drones are treated as aircraft, their freedom of flight should track that of commercial and private aircraft. However, FAA regulations require drones to fly below navigable airspace (not more than 400 feet from ground level) for safety and other reasons. This means that there is a 400-foot zone between ground level and the authorized ceiling where federal regulations require drones to fly that may encroach on a landowner’s “ownership of space above the lands . . . subject to the right of flight of aircraft.”

Thus, many questions persist as to when drone operation might constitute an actionable trespass or nuisance. The Uniform Law Com-
mission sought to initially redefine property rights by drafting a rigid per se aerial trespass rule that "cuts the commercially exploitable airspace in half, potentially stifling innovation if adopted." Industry reacted unfavorably to that draft and its later revisions, and none of the proposed rules was adopted.

**Limits of Tort Law in the Face of Evolving Drone Technology**

Colorado’s common law torts of trespass and intrusion upon seclusion are largely premised on the proximity of the wrongful conduct to private property. However, drones can operate at significant distances from their targets in nearly undetectable fashion. This undetectability may effectively preclude some claims, so as presently conceived, Colorado tort law may need to evolve to address 21st-century drone activity wrongdoing. Areas ripe for reexamination include how Colorado law treats the airspace above private property. For example, a statute or judicial decision could create a privacy "bubble," extending private property rights into this airspace and imposing liability for remote sensory intrusions into that bubble. But ironically, while personal expectations of privacy may expand in light of enhanced remote sensing devices, societal expectations of privacy may diminish due to the sharing culture reflected by the proliferation of social media, the gig economy, the voluntary submission to location and data aggregation services, and people consciously leaving electronic footprints of their daily routines.

A tortfeasor’s intent in an invasion of privacy case may also need to be reconsidered. High-tech drones may take extremely high-resolution photos of high-rise bedroom windows, capturing some residents in *flagrante delicto*, but without any intent to view, use, or disseminate the images. How should such conduct be addressed? And in shaping the future of tort law, courts will need to consider the extensive statutory, regulatory, and best practices drone operations framework likely to develop over time.

**Some Thought Experiments**

It is helpful to consider the following actual or potential drone characteristics to identify where the problematic intersections of tort law and technological advances in drone technology may be found:

- **Drones** the size of gnats emit no noticeable sound and can take high-resolution photographs and make low-decibel recordings.
- **Drones** can intercept wi-fi signals within a home and conduct thermal imaging.
- **Drones** can take high-resolution photos, collect directional low-decibel sound recordings, and conduct and collect remote infrared sensor data and images through walls, from low-space altitudes.
- **Some drones** are linked to facial recognition programs.
- **Interconnected drones** can track people and cars en masse.
- **Landed drones** are able to direct lasers at windows from a great distance and detect and record conversations inside.

Do any of these activities constitute an invasion of the property owner’s privacy? As to each, should it matter to establishing an invasion of privacy claim if the information is simply anonymized, collated, and shared with third parties?

Issues lawyers might consider from a consumer-client perspective include:

- When requesting delivery, do consumers implicitly waive certain privacy rights? Are express boilerplate waivers of such rights enforceable?
- Most of us are used to receiving digital images of delivered packages on our front steps. May the retailer or delivery service also visually or aurally monitor and catalogue the recipient’s home and home-related information, and then aggregate and/or sell the data?
- Even if a retailer’s use and storage of a drone’s image and sound recordings are proper and regulated, what if hackers commandeer these systems for their own nefarious uses? Should retailers and delivery vendors take steps to prevent such efforts and, if so, how extensive should their obligation be?

Issues lawyers might consider from an industry perspective are:

- Should consumer contracts include waivers of privacy rights and/or liability
limitsations associated with a business’s drone use, and indemnity against claims brought by other household occupants?
• Should consumer contracts require the consumer to consent to certain types of surveillance as a condition to receiving services that use drones?
• Should businesses who use third parties to supply them drone services insist on indemnity from those third parties against drone-related liabilities?
• Should businesses obtain liability insurance that covers potential invasion of privacy and trespass/nuisance exposures for drone-related activities? (Such insurance is discussed in more detail below.)

The Future of Privacy Law
As technology and reasonable expectations of privacy change, so does the law. Within the last decade the US Supreme Court held that the Constitution’s prohibition against unreasonable governmental searches originating in 1791 extends to a law enforcement officer’s placement of a GPS tracking device in a car. Compared to GPS, the “breadth and scope of information that can be amassed by aerial surveillance tracking large numbers of people is far greater.” As drone technology advances, privacy law will be shaped by and evolve with these changes.

Liability Insurance Coverage
Assuming some drone activities lead to tort liability, current liability insurance policies may offer protection, while future policies may be tailored to expand this protection. Most current commercial general liability (CGL) policies include coverage for “personal injury,” as distinguished from “bodily injury.” Typically, personal injury is defined to include “invasion of the right to privacy” and “wrongful entry,” but such coverage is subject to various exclusions for, among other things, knowing violations of the rights of others, intentional harms, contractual liabilities, and criminal acts. These terms usually are not further defined, so courts will give them the broadest reasonable construction favoring coverage.

The Colorado Court of Appeals has held that an insured who tape-recorded a sexual encounter committed an intentional tort, and allegations of negligent invasion of privacy will not avoid an insurance policy’s intentional harm exclusion. It may seem odd that an insurance policy would confer coverage for invasions of privacy but exclude coverage for intentional harms, where most privacy claims require proof of intentional conduct. However, such coverage was not deemed illusory in the context of a claim arising from an insured’s alleged use of a date-rape drug.

Conclusion
Advances in drones and other UAVs, computer hardware and software, information aggregation, nano-electronics, remote sensing, acoustics, digital imagery, disc storage, and more are constantly occurring, if not accelerating. These developments, when combined with a legal system that is regularly playing catchup with technological progress and being employed against a background of ubiquitous boilerplate contracts and unread waiver/consent forms, raise a lot of uncertainty. State and federal regulations may help curb drones from intruding into our private worlds, but they may also stifle drone innovation. Drone delivery services can be expected to secure, buy, lease, or license over-flight rights above public and private property. The law will no doubt evolve and seek to strike a balance among competing concerns.

In the meantime, before you click on “I accept all terms and conditions” for your first Walmart, Amazon, or Zappos drone delivery, you may want to consider the words of an infamous paranoiac: “I trust no one, not even myself.”

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NOTES
4. de Pascale Jr., “Path to Dystopia: Drone-Based Policing and the Fourth Amendment,” 34 Crim. Just. 26, 29 (2020) (“almost every state has at least one public safety agency with drones, but most have no relevant regulations in place”). In some instances, drone restrictions may implicate First Amendment concerns. See Brobst, supra note 2 at 773–74 (Ag-Gag laws may test the limits of the “First Amendment rights of journalists and activists to surveil and reveal injustice,” while artistic (using drones to make art) and religious expression (certain belief groups consider recording certain sites sacrilege) rights may be implicated as well). See also O’Dorisio, “The Current State of Drone Law and the Future of Drone Delivery,” 94 Denv. L. Rev. Online 1 (2016) (cataloguing predicted economic impacts as the drone industry evolves).
5. Ravich, supra note 1 at 14.
6. See Farber, supra note 3 at 360 (“There are endless civil applications for drones, and the possibilities will continue to grow at even higher rates as the technology develops and becomes more accessible to the public”). See also O’Dorisio, “The Current State of Drone Law and the Future of Drone Delivery,” 94 Denv. L. Rev. Online 1 (2016) (cataloguing predicted economic impacts as the drone industry evolves).
8. Farber, supra note 3 at 379.

10. Presently, the term “unmanned” is a bit misleading as almost no drones operate fully autonomously. See McNeal, “Drones and the Future of Aerial Surveillance,” 84 Geo. Wash. L. Rev. 354, 366 (2016). The term “unmanned” as used by the FAA means there is no one on board to direct the aircraft. It offers little helpful meaning in the context of a UAS.

11. United States v. Caussy, 328 U.S. 256, 263-64 (1946). Caussy rejected the ancient doctrine of cuius est solum, ejus est usque ad cœlum, meaning roughly “to whomsoever the soil belongs, he owns also to the sky and to the depths,” as having “no place in the modern world.” Id. at 260-61. Caussy effectively divided navigable airspace into two domains: a “public highway” from which property owners could not exclude flying aircraft; and the airspace below, extending down to the surface, from which property owners had some right to exclude aircraft. See McNeal, supra note 10 at 380. Colorado, by statute and case law, adheres to the common law rule. See People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979) (holding that the public has no right to use “waters overlying private lands for recreational purposes” without the owner’s consent; id. at 1030).


14. In Class G (Uncontrolled) Airspace, an aircraft (such as a UAV) may be flown from the surface to not more than 400 feet above ground level and must comply with all airspace restrictions and prohibitions. See FAA Advisory Circular 91-57B at 71.6 (May 31, 2019), https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_91-57B.pdf. UAVs cannot fly in controlled airspace without an FAA authorization. Id. at § 71.5.2.

15. Many of these limitations have been criticized as arbitrary and unmoored from the realities of this new and expanding technology, especially with regard to package delivery. See O’Dorisio, supra note 6 at 4-5.

16. Ravich, supra note 1 at 15.


18. Sound emitted by some drones is not readily perceptible. And drone-mounted lasers, effective from miles away, can theoretically beam invisibly onto windowpanes and capture conversations inside remotely, if the drone is powered down sufficiently to eliminate airframe vibration and resulting interference.

19. Kohler, “The Sky is the Limit: FAA Regulations and the Future of Drones,” 15 Colo. Tech. L. J. 151, 174–75 (2016) (drone privacy concerns generally have been addressed at the state and local level). One commentator urges that drone-specific privacy regulations will be cumbersome, unworkable, and stifl e innovation. See generally McNeal, supra note 10 at 415. Instead, he proposes broader information collection, storage, and dissemination regulation, combined with accountability, transparency, and oversight measures. Id. at 416.

20. 2 Colo. Code Regs. § 406-0-IV-004(C). In 2017, CRS § 24-33.5-1228 was amended to create a Colorado firefighting air corps to “[e]stablish and support a Colorado wildland fire prediction and decision support system.” CRS § 24-33.5-1228(2.5)(b)(IV), and to create “a center of excellence” to “conduct a study concerning the integration of unmanned aircraft systems within state and local government operations that relate to certain public-safety functions.” CRS § 24-33.5-1228(2.5)(c)(I).

21. Presently, the term “unmanned” is a bit misleading as almost no drones operate fully autonomously. See McNeal, “Drones and the Future of Aerial Surveillance,” 84 Geo. Wash. L. Rev. 354, 366 (2016). The term “unmanned” as used by the FAA means there is no one on board to direct the aircraft. It offers little helpful meaning in the context of a UAS.


25. Farber, supra note 3 at 365. 26.

27. See CRS § 18-9-303, 304 (generally, using an electronic device to listen to or record a phone line or private conversation or communication, or doing so while not visibly present, without the consent of at least one participant, is a crime, with certain statutory exceptions). Accidental interceptions are not a crime, but it appears that such conduct may become criminal if the listener persists. A person who “[k]nowingly uses any apparatus to unlawfully do, or cause to be done, any act prohibited by the statute or aids, authorizes, agrees with, employs, permits, or intentionally conspires with any person to violate” the statute is liable as well. CRS § 18-9-303(1)(f).

28. Stalking (CRS § 18-3-602) and harassment (CRS § 18-9-111) laws may offer help. Reports also can be made to a local FAA Flight Standards District Office. Drone operators can be fined if they violate FAA rules. One drone pilot was fined $182,000 for multiple violations. See Rattigan, “FAA Fines Drone Pilot $182,000,” JD Supra (Dec. 24, 2020), https://www.jdsupra.com/legalnews/faa-fines-drone-pilot-182-000-27676.

29. See 47 USC § 302(a).


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32. See CJI-Civ. 28:4 for more information on invasion of privacy by appropriation.
34. CJI-Civ. 28:1.
37. Id. at 1067.
38. Id. at 1066.
39. See 18 USC § 2520.
40. See CRS § 18-9-303(1) (a). Cf. Quigley v. Rosenthal, 327 F.3d 1044, 1073 (10th Cir. 2003) (interception of private telephone conversations qualifies as an intentional intrusion into one’s seclusion or solitude, but the later use of the intercepted conversation would not constitute a further intrusion after the interception was complete).
41. Cf. People v. Lesslie, 939 P.2d 443, 446 (Colo. App. 1996) (finding that bar restroom occupants in proximity to listening device had objectively reasonable expectation of privacy and stating that whether a legitimate expectation of privacy exists in a particular case depends on the “facts and circumstances, with the actual expectation manifested by a party being a question for the factfinder and the objective reasonableness of the expectation being determined for the particular circumstances as a matter of law”).
43. Id. at 1350.
44. Id. (providing examples of who can consent to a property search, but also noting that “mere ownership” may not suffice, citing People v. Breidenbach, 875 P.2d 879 (Colo. 1994)).
45. Id. (citing People v. Oates, 698 P.2d 811, 814 (Colo. 1985)). Oates discussed this test in the context of evaluating the reasonableness of the warrantless placement of a beeper in a drum of chemicals allegedly used to manufacture drugs. The court held that “any governmental action intruding upon an activity or area in which one holds such an expectation of privacy is a ‘search’ that calls into play the protections of the Colorado Constitution.” Oates, 698 P.2d at 814. Oates also held that “[w]hether an expectation of privacy is ‘legitimate’ is determined by a two-part inquiry. If any actual expectation exists that the area or activity subjected to governmental intrusion would remain free of such intrusion, and whether ‘that expectation is one that society is prepared to recognize as reasonable.’” Id. (quoting People v. Spoorleeder, 666 P.2d 135, 140 (Colo. 1983)).
46. “Highly sensitive” means that the disclosure would cause emotional distress or embarrassment to a reasonable person, and such determination is usually a question of fact. Ozer, 940 P.2d at 377-78.
47. Id. at 377 (“facts related to an individual’s sexual relations, or ‘unpleasant or disgraceful’ illnesses, are considered private in nature and the disclosure of such facts constitutes an invasion of the individual’s right of privacy”). See also CJI-Civ. 28:5.
48. Ozer, 940 P.2d at 377-79. See also CJI-Civ. 28:5. Notes on Use 6 (citing Restatement (Second) of Torts § 652D cmt. b (Am. L. Inst. 1977)).
49. Ozer, 940 P.2d at 377.
50. Id. at 379 n.7.
51. See id. at 378. See also CJI-Civ. 28:9.
53. See generally Cox Broad. Corp. v. Cohn, 420 U.S. 469, 489 (1975). See also Ozer, 940 P.2d at 378 (privacy rights may clash with free speech and free press rights guaranteed by the US and Colorado Constitutions). Something is newsworthy if the information disseminated is for “purposes of education, amusement or enlightenment,” and “the public may reasonably be expected to have a legitimate interest in what is published.” Id. (citing Gilbert v. Medical Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981) (quoting the Restatement (Second) of Torts § 652D cmt. j (Am. L. Inst. 1976))).
54. Ozer, 940 P.2d at 378.
55. See CJI-Civ. 28:5. Notes on Use 6 (citing Restatement (Second) of Torts § 652D cmts. d-f (Am. L. Inst. 1977)). Even with regard to such matters, however, there may be some intimate personal details that a plaintiff is entitled to keep private. Id. at 379.
60. See Doe, 972 P.2d at 1066.
61. See CRS § 13-21-102 (where injury “is attended by circumstances of fraud, malice, or willful and wanton conduct,” exemplary damages may be awarded).
62. See Burt v. Beautiful Savior Lutheran Church, 809 P.2d 1064, 1067 (Colo.App. 1990) (describing elements of claim); Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377, 390-91 (Colo. 2001) (holding that because intrusion of electromagnetic fields, radiation waves, and noise emitted from power lines do not cause physical damage, they will not support a trespass claim). See also CJI-Civ. 18:1. Geophysical trespasses are actionable. See Malton Oil Co. v. Bowen/Edward Assocs., Inc., 965 P.2d 105, 110 (Colo. 1998). See also Restatement (Second) of Torts § 158, cmt. i (Am. L. Inst. 1965) (“The actor, without himself entering the land, may invade another’s interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it.”) (Emphasis added), cited with approval in Pub. Serv. Co. of Colo., 27 P.3d at 389).
66. Van Wyk, 27 P.3d at 391 (citing Restatement (Second) of Torts § 822).
67. Id.
68. Id.
69. Id.
70. Id.
has the exclusive right to exclude others from trespassing in the airspace. Violators who infringe that airspace may be prosecuted for criminal trespass (as in this case), sued for damages or both.” People v. Emmert, 597 P.2d 1025, 1032 (Colo. 1979) (Carrigan, J., dissenting). In 2020, the American Bar Association’s House Delegates adopted Resolution 111, urging various governmental bodies and agencies to protect privacy rights that may be affected by UAS. Reynolds, “ABA House of Delegates passes resolution on drones; delegate calls it ‘a hot topic,’” ABA J. (Feb. 17, 2020), https://www.abajournal.com/news/article/resolution-111. In 2011, the Professional Society of Drone Journalists was formed with the purpose of “developing small drones and exploring best practices for their use in investigative, weather, sports, and other types of reporting,” as quoted in Conn, “Who’s Protecting Whom? An Analysis of the Newest Federal Aviation Administration’s Unmanned Aerial Vehicle Regulations and Restrictions and their Hindrance to Technological Advancement,” 20 J. High Tech. L. 304, 306-07 (2020) (internal quotations omitted).

92. “Technologies such as wi-fi sniffers, license plates readers, night vision cameras, facial recognition technology and other biometric devices, and high-powered telephoto lenses make distance a fairly blunt obstacle to the collection of information.” Farber, supra note 3 at 389. Colorado’s Consumer Data Privacy Act, CRS §§ 6-1-713 et seq., requires “covered” entities collecting or monetizing data to use reasonable and appropriate measures to protect Colorado residents’ personally identifiable information,” such as biometric data. See generally McIntosh, “Privacy Basics for Colorado Lawyers: The Colorado Consumer Data Privacy Act and the California Consumer Privacy Act,” 48 Colo. Law. 26 (Sept. 2019).

93. See generally Ohm, “The Fourth Amendment in a World Without Privacy,” 81 Miss. L. Rev. 1303, 1313-20 (2010) (noting that “the one device” + “the cloud” + “the social [media]” + “Big Data” = the surveillance society, which may lead to the death of privacy). See generally Farber, supra note 3 at 408-09 (describing ongoing regulatory efforts and goals). See also Kaminski, “When the Default Is No Penalty: Negotiating Privacy at the NTIA,” 93 Denw. L. Rev. 926, 935-49 (2016) (discussing drone privacy “best practices” debate and stakeholder concerns with the Dept’t of Commerce’s Nat’l Telecomms. and Info. Admin. (NTIA’s) regulatory model). Per the NTIA, these best practices include practices to “restrict continuous collection of data about individuals, require drone operators to collect minimize both operations and surveillance over private property, and encourage drone operators not to share information for marketing purposes without consent.” Id. at 939-40. The American Civil Liberties Union and other individual rights advocates criticized these practices for “allowing drone operators to collect private data without consent; allowing persistent, continuous surveillance without consent, even in traditionally private spaces; and allowing the use of the data for certain purposes without consent.” Id. at 940.
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“I Do?”

Common Law Marriage and a “Refined” Look at *People v. Lucero*

BY AMY K. ROSENBERG
This article discusses factors courts consider when determining whether a common law marriage exists. It focuses on three recent Colorado Supreme Court decisions.

The Lucero Framework

For 33 years Lucero provided the framework for determining whether a common law marriage exists and, if so, when it arose. In Lucero, a court was called on to determine the marital status of a criminal defendant and the woman alleged to be his wife to assess whether she could testify against him. But Lucero’s identification of factors to consider in a threshold determination of marriage have spread beyond that fact pattern and become critical to the administration of decedents’ estates and to actions for dissolution of marriage. In probate matters, individuals often claim to have been married to a decedent at common law and, accordingly, entitled to the statutory benefits provided to a surviving spouse in the absence of any contrary agreement. In family law matters, a claimant who can prove to a court the existence of a common law marriage may, in the dissolution of that marriage, become entitled to ongoing support and a portion of the couple’s marital property.

Under Lucero, common law marriage exists only where the parties intended and agreed to have a lawful marriage as evidenced by their open assumption of the marriage and their repute in the community as married. In construing Lucero, the Colorado Supreme Court’s most recent rulings expand the factors to be considered in family law and probate matters associated with contested common law marriages. In doing so, they address a larger reckoning about due process, equal protection, and the future of common law marriage itself.

The Demographics Background

Lucero and its progeny must now be applied in light of the growing numbers of unmarried adults residing together and the recognition that same sex couples may legally marry. The number of unmarried cohabitants living together in the United States is greater than ever; from 1996 to 2017, the number nearly tripled, from 6 million to 17 million. Cohabitation without marriage is sometimes seen as an alternative to marriage for members of economically marginalized groups, but cohabiting adults today are older, more racially diverse, better educated, and financially better off than before. In 1996, only 2% of those cohabitants were 65 or older; by 2017, the number rose to 6%, and more of those partners had been previously married. By 2017, 28% of unmarried cohabitants had a bachelor’s degree or higher educational level compared to 16% in 1996.

Meanwhile, marriage rates have fallen in the United States. The National Center for Health Statistics reports that marriage began a long decline starting in the mid-1980s and hit an all-time low of 6.5 marriages per 1,000 persons in 2018. Whether unmarried cohabitation has increased because it is more acceptable or because it offers potential cost savings—shared expenses while avoiding liability for a spouse’s medical expenses, protecting assets such as pensions, continuing spousal support from a previous marriage, or preserving wealth for children of a previous relationship—the demographic landscape is markedly different from the one the Lucero Court encountered.

In re Marriage of Hogsett and Neale

In re Marriage of Hogsett and Neale, announced on January 11, 2021, was the lead case that considered Lucero. Hogsett and Neale were same sex partners in a 13-year relationship that began in 2001. When they broke up in 2014, they jointly petitioned the district court for a dissolution of their marriage, seeking approval of their property division agreement and Neale’s agreement to pay maintenance to Hogsett.

After the initial status conference, when the parties learned that the court would need to find that a marriage existed before it could dissolve it, the parties agreed to dismiss the petition. Hogsett then attempted to enforce the agreement regarding the property division and maintenance, but Neale maintained that no marriage had existed. Hogsett moved to reopen the dissolution case. When the court denied that motion, Hogsett moved to dissolve a civil union, but then withdrew the petition and filed a second petition to dissolve what she alleged was the couple’s common law marriage. Neale moved to dismiss the second petition, arguing not only that the relationship did not meet the Lucero test but also that she and Hogsett, as a same sex couple, could not have legally married during their relationship because Obergefell v. Hodges, which held that states cannot deprive same sex couples of the fundamental right to marry, had not yet been decided. Accordingly, she argued, the court could not determine that she and Hogsett had been married retroactively as of the date that same sex marriage became legally recognized.

In its hearing on the second petition, the trial court heard conflicting testimony about the significance of the parties’ exchange of rings. According to Hogsett, it occurred during...
a "very intimate close marriage ceremony" at a bar, but Neale described it as an exchange of commitment rings without the presence of family members or friends. In addition to that testimony, the trial court considered that the parties referred to each other as "partner"; they had joint banking and credit card accounts; they worked together with a financial advisor; they purchased a custom home together; Hogsett listed Neale as a primary beneficiary and domestic partner on her 401(k) plan, and as next of kin and "life partner" on a medical record; Hogsett certified on a health insurance form that she was "not married"; Neale testified that she did not believe in marriage and did not believe that she and Hogsett were married; and Neale mistakenly believed that the parties needed to have the approval of a court to divide their property.14

The district court acknowledged that it had the authority to recognize a valid same sex common law marriage that arose before such marriages were legally recognized in Colorado. Nevertheless, it ruled that no valid marriage existed.

The Court of Appeals found that the trial court had properly applied the Lucero factors to conclude that the parties had no common law marriage and noted that a court may find a same sex common law marriage existed under Lucero based on the parties’ conduct before Obergefell was decided. It agreed that many of the evidentiary factors established in Lucero to determine whether a common law marriage existed were not available to the parties because of the unconstitutional laws forbidding same sex marriage in effect during their relationship, and the trial court properly had given less weight to those indicia during the parties’ pre-Obergefell relationship.15

Lucero Refined: The New Test
In affirming the Court of Appeals decision, the Supreme Court in Hogsett acknowledged that Lucero’s usefulness in distinguishing between marital and nonmarital unions has eroded over time, and its factors may be overinclusive of couples who do not intend to be married or underinclusive of genuine marriages outside of a "traditional model."16

Some of Lucero’s evidentiary factors may still be relevant, such as the parties’ cohabitation, reputation in the community as spouses, joint banking and credit accounts, purchase and joint ownership of property, filing of joint tax returns, and use of one spouse’s surname by the other or by children raised by the parties. But the Court added the following factors as germane: evidence of shared financial responsibility, such as leases in both partners’ names, joint bills, or other payment records; joint estate planning, including wills, powers of attorney, and beneficiary and emergency contact designations; symbols of commitment, such as ceremonies, anniversaries, cards, gifts, and the couple’s references to or labels for one another; and the parties’ “sincerely held beliefs regarding the institution of marriage.”17

Hogsett also noted the importance of a couple’s intent, stating that common law marriage may be “established by the mutual intent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement.”18 The key question is "whether the parties mutually intended to enter a marital relationship, that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation."19 There must be some manifestation of that consent and a flexible inquiry into the totality of the circumstances. Therefore, in assessing whether a common law marriage has been established, a court should accord weight to evidence reflecting a couple’s express agreement to marry, but in the absence of such evidence, the parties’ agreement to enter a marital relationship may be inferred from their conduct. The agreement to marry need not take a particular form, and a couple’s decision not to marry formally does not reflect a lack of intent to enter a common law marriage.20

Conduct manifesting the parties’ agreement to marry need not take the form of mutual public acknowledgment or open marital cohabitation in every case. In some cases, especially those involving same sex partners, the parties’ choice not to “broadly publicize” the nature of their relationship may be explained by reasons other than lack of mutual agreement to be married; in such cases, “a general requirement to introduce

In construing Lucero, the Colorado Supreme Court’s most recent rulings expand the factors to be considered in family law and probate matters associated with contested common law marriages. In doing so, they address a larger reckoning about due process, equal protection, and the future of common law marriage itself.
‘some objective evidence of the relationship’ will sufficiently guard against fraudulent assertions of marriage.” Thus, parties asserting a common law marriage need not prove that they had detailed knowledge of and an intent to “obtain all the legal consequences” of marriage; in the absence of evidence of a couple’s express agreement to marry, mutual intent may be inferred from their conduct, judged in context.

The opinion acknowledges the Lucero Court’s observation that common law marriage has served to protect the interests of parties who acted in good faith as “husband and wife,” and it pointed to common law marriage as a potential “path to marriage” for marginalized groups such as undocumented immigrants who may wish to avoid divulging information about their marital status to government authorities, as well as to same-sex partners who may only now marry formally.

Notably, Hogsett acknowledges the additional ambiguity implicit in the Court’s revised standards, stating that it is “more difficult today to say that a court will know a marriage when it sees one.” At worst, this difficulty raises the possibility that common law marriage can be imposed in the absence of a clear mutual agreement and intent to be married.

**In re Marriage of LaFleur and Pyfer**

Timothy Pyfer filed a dissolution of marriage action in 2018, alleging that he and Dean LaFleur established a common law marriage in a November 30, 2003 ceremony conducted by an officiant before the couple’s family and friends. The parties did not live together consistently following the ceremony and before Pyfer initiated the dissolution action.

The district court’s order acknowledged that although the parties’ ability to marry in Colorado was not recognized until 2014 or later, the right to be married had existed before that time. It evaluated evidence that Pyfer proposed to LaFleur; testimony that the parties did not regularly wear wedding rings; Pyfer’s testimony that he held himself out as married to family and friends and to the person with whom he had an “extramarital-extrarelationship affair”; LaFleur’s nondisclosure of the marriage to his coworkers; LaFleur’s trial testimony that he never intended to be married and would not have participated in the ceremony if it were to be recognized as a lawful marriage and legally binding as to his assets; and LaFleur’s apparent knowledge that Pyfer had identified him as a spouse. Even if LaFleur did not want all of the legal obligations attendant to marriage, the court determined that he intended to be joined with Pyfer “for the rest of his life” on the ceremony date and that he had “acquiesced” when he accepted the proposal and participated in the ceremony.

LaFleur appealed the district court’s determination that the parties were married at common law. Pyfer appealed the district court’s allocation of marital assets and marital debt and its award of maintenance. LaFleur argued that the parties could not have been married pursuant to the 2003 ceremony because, as a matter of law, same-sex marriages were illegal in Colorado until October 7, 2014. He cited his testimony that he had made clear to Pyfer his intent never to marry; that Pyfer had told a third party that LaFleur would “absolutely have no part of a wedding”; and that if same-sex marriages had been recognized in 2003, he would not have had the ceremony. LaFleur also asserted that he made his intent clear to Pyfer, that he agreed to participate in the commitment ceremony because it was not a wedding, and that he edited the ceremony’s script to remove any references to “marriage.” Pyfer had testified that the parties did not take each other’s surnames or share bank accounts, real estate, vehicles or other assets; cover each other on health insurance; or file taxes as married. LaFleur did not refer to Pyfer as a spouse when LaFleur refinanced his home in February 2012 and again on October 14, 2014. The second refinance, he argued, was significant because same-sex marriage had been legal only a week before the second refinance was concluded. Finally, in deciding whether to apply Obergefell retroactively to same-sex cohabiting parties, LaFleur argued, the Court should give equal consideration to his fundamental right not to be married and Pyfer’s right to choose to enter into a marriage.

The Supreme Court accepted jurisdiction under C.A.R. 50 and addressed the issue of the inception of a valid same-sex common law marriage in light of Obergefell. The Court found that a court may recognize a common law same-sex marriage that arose in Colorado before the state recognized the partners’ right to marry because (1) Obergefell struck down state laws prohibiting same-sex marriage, and statutes declared unconstitutional are void ab initio; and (2) to the extent that Obergefell did not merely recognize an existing fundamental right to marry, but also announced a new rule of federal law, the decision applies retroactively to marriages (including common law marriages) predating that decision.

Having found that Pyfer and LaFleur were not barred from being married in 2003, the Court applied the new Hogsett standards. It found the following factors persuasive as evidence of an express agreement to marry: the parties had a ceremony “officiated by a reverend”; family, friends, and attendants were present; the parties wore tuxedos; they exchanged vows and rings; and they signed a “Certificate of Holy Union.” Further, a mutual agreement to enter a marital relationship could be inferred from their cohabitation and LaFleur’s financial support of Pyfer. While it would have been significant if one had used the other’s surname, their failure to do so did not suggest that they did not intend to be married. Similarly, the parties’ failure to file joint tax returns was not instructive because they could not have filed jointly at that time under federal law. And while Pyfer held himself out as married to family and friends with LaFleur’s knowledge, but LaFleur did not tell his coworkers that he was married, testimony reflected that LaFleur worked in an environment that did not welcome same-sex couples, so his failure to make his relationship known in his workplace did not necessarily support any lack of mutual agreement to be married.

The Court upheld the district court’s finding that the parties had a valid common law marriage but reversed the division of property and award of spousal maintenance, remanding those issues for further proceedings.

**The Dissent**

Justice Samour dissented, criticizing the majority’s approach as “at best, strained beyond the breaking point, and at worst internally inconsistent,” “legally untenable,” and “likely
to foster further confusion in this area of the law.” He noted that because same sex marriage was prohibited in 2003, the parties could not possibly have “intended or agreed to enter the legal relationship of marriage.” Accordingly, in his opinion, the majority failed to meaningfully embrace the requirement that married individuals must agree to enter into a legal marital relationship and downgraded that requirement to one that affords preeminence to an intent and agreement to enter into any type of marital relationship (legal or otherwise). He added that the majority “curiously rules that, while it is true that the parties must have intended and agreed to enter into the legal and social institution of marriage, they need not have intended and agreed to incur the consequences of a legally sanctioned marriage.”

**In re Estate of Yudkin**

In re Estate of Yudkin addressed common law marriage in the context of a probate proceeding. Yudkin died intestate in 2016 survived by his former wife, Shutman, the mother of Yudkin’s only biological child. Shutman applied for appointment as personal representative of Yudkin’s estate and was appointed without notice to Dareuskaya, who objected, claiming she was Yudkin’s surviving common law spouse and thus entitled to statutory priority to serve as personal representative and to inherit his estate.

Yudkin and Dareuskaya had lived together in Yudkin’s home for eight years before his death. Dareuskaya testified that, six years before Yudkin’s death, he presented her with a wedding ring and told her they could be husband and wife if she agreed, and that she agreed, she wore the ring, and she and Yudkin held themselves out as married. The magistrate found that most of the community members called as witnesses provided credible evidence that the two “agreed to and did hold themselves out to be married.”

Based on other evidence, however, the magistrate concluded that no common law marriage existed. The couple maintained separate bank accounts; they did not jointly own automobiles or real estate; and they filed their state and federal income taxes separately in every year of their purported marriage. The magistrate did not find credible Dareuskaya’s testimony that she did not believe she could represent to the government that she was married.

Dareuskaya argued in the Court of Appeals that once the magistrate found an agreement to be married and repute to be married in the community, he could not consider evidence related to how the parties owned their property or filed their taxes. The Court agreed, finding that once the magistrate made these findings “the inquiry ends there,” and no further inquiry should be made into the parties’ conduct.

On appeal to the Supreme Court, Shutman argued that the Court of Appeals misapplied Lucero in that cohabitation and reputation in the community are not necessarily dispositive of the parties’ agreement to be married at common law, and that the magistrate never factually found the parties had agreed to be married. The Supreme Court could not determine whether the magistrate found that Yudkin and Dareuskaya mutually agreed to enter into a marital relationship and whether the factors the magistrate applied under Lucero’s standards accounted for legal and social changes to marriage under the newly acknowledged Hogsett elements. The magistrate found that the parties had “agreed to and did hold themselves out to be married to the community of their non-family coworkers, friends and neighbors” but that it was unclear from the phrasing of the order whether the magistrate had separately concluded that the parties had agreed to be married.

The Supreme Court thus remanded the matter with instructions to return the case to the trial court for reconsideration in light of Hogsett’s standards.

**What Now?**

While Lucero and its progeny formulated a detailed factual inquiry for determining the existence of common law marriage in Colorado, the more fundamental question of whether common law marriage should continue to be recognized looms large. Hogsett’s majority opinion alludes to whether common law marriage remains a sustainable construct, acknowledging that Colorado and only nine other jurisdictions continue to allow for its formation. Justice Hart’s special concurrence with the Supreme Court majority calls for the prospective abolition of common law marriage.
and Judge Furman’s special concurrence in the Court of Appeals opinion similarly advocates for abolishing common law marriage, citing, among other factors, the significant costs associated with legal proceedings to determine whether parties are married.

However, even if common law marriage is abolished prospectively, the number of disputes over property rights between current or former living cohabitants and decedents’ surviving cohabitants will almost certainly increase, if only as the result of increasing numbers of individuals who live together, often without express agreements regarding their property rights. And in probate matters, notwithstanding the existence of common law marriage, claimants could still assert legal or equitable rights to a decedent’s estate based on contractual and equitable theories. In other civil litigation, courts would likely continue to see disputes based on similar theories. But if common law marriage were abolished, to the extent such disputed matters arise, courts would be freed from wrestling with the threshold determinations of a couple’s marital status and its attendant fact-laden inquiries.

Meanwhile, the opinions discussed above do not alter Lucero’s imposition of the preponderance of the evidence burden of proof on the party who claims the existence of a common law marriage. On the other hand, neither do they impose an affirmative duty on parties to a relationship to publish that they are not married. But more subtly, they raise the question whether a party to a relationship will be required to make repeated public affirmations of the party’s status as unmarried to establish that the relationship is not a marriage, and whether affirmations by only one party are sufficient to do so. Given that many individuals choose not to be married to address their own financial welfare, avoid the criminal and civil consequences of failing to support a spouse, or avoid negative entanglements with public assistance programs, requiring parties to a relationship to defend themselves from misperceptions that they are married raises the question whether common law marriage is a protective or punitive construct and whether it can be applied predictably.

Probate courts will continue to address claims brought by individuals who hold themselves out as spouses following a cohabitant’s death, and those claimants may or may not find the new landscape under Hogsett to be more friendly to their assertions. The party with the greater resources is exposed to claims of varying merit, while the party with fewer resources is vulnerable to a partner’s “sincerely held” beliefs that he or she did not believe in marriage or intend to be married.

**Educating Clients**

In light of the Court’s refined test for common law marriage, attorneys must educate clients about the hazards of ambiguous relationships and their rights and obligations as unmarried cohabitants, including statutory rights, such as those conferred through beneficiary designations or joint tenancy, and their exposure to equitable causes of action involving unjust enrichment and implied contracts.

For individuals who do not intend to be married, cohabitation agreements should specifically state the parties’ intent and understanding regarding their marital status. Such an agreement can include a statement that a婚姻, if it occurs in the future, will be a statutory rather than a common law marriage. If a cohabitation agreement provides that it will serve as a marital agreement in the future if the parties marry, it should be drafted in light of the requirements the Uniform Premarital and Marital Agreements Act, including financial disclosures and required advisory language.

Married individuals or those planning to be married according to either a statutory or common law form should have marital agreements that establish their rights and obligations. Marital agreements should include agreement on the date the marriage arose to avoid disputes over the inception of marital property rights and spousal rights to a decedent’s estate. Evidence of the marriage and its date can be confirmed by filing pertinent information in the public record.

Hogsett and LaFleur in particular make it clear that public perceptions continue to matter. Individuals who do not intend to be married are well advised to avoid formal ceremonies that look like weddings unless there is a contemporaneous public acknowledgment that the parties are not entering into a marriage. Ceremonies
can carry significant evidentiary weight, even if the parties to them have different views of their import. While factual similarities exist between *Hogsett* and *LaFleur* in terms of the parties’ different recollections of ceremonies and ring exchanges, distinctions can be made between an experience that occurs without witnesses and an occasion featuring the trappings of a wedding, however the parties’ community defines that particular convention.

**Conclusion**

The Supreme Court’s most recent rulings have increased challenges for judges who must resolve contested common law marriage disputes and for the litigants and attorneys who appear before them. Cohabitants need to understand the expanded evidentiary elements applicable to a determination of common law marriage and the hazards of treating common law marriage as a polite social fiction.

Married or not, cohabitants should have written evidence of their agreements regarding their marital status and should consistently live out the terms of their agreements. Cohabitants who forego such written agreements risk generating multiple and varied perceptions of their status within their communities. Some cohabitants may believe that their interests are recognized for persons who wish to marry to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex.”

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**NOTES**

1. In re Marriage of Hogsett and Neal, 478 P.3d 713 (Colo. 2021); In re Estate of Yudkin, 478 P.3d 732 (Colo. 2021); In re Marriage of LaFleur and Pyfer, 479 P.3d 869 (Colo. 2021).
2. People v. Lucero, 747 P.2d 660, 663-65 (Colo. 1987). Common law marriage is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship. The Court has almost uniformly required that such consent or agreement be manifested by conduct giving evidence of the parties’ mutual understanding. Conduct in the form of mutual public acknowledgment of the marital relationship is not only important evidence of the existence of the mutual agreement but is essential to the establishment of the marriage.
3. Hogsett, 478 P.3d at 715.
4. CRS §§ 15-11-102, -202 et seq.
5. CRS §§ 14-2-201 et seq.
6. Colorado legalized same sex marriage on October 7, 2014. *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D.Utah 2013), aff’d, 755 F.3d 1193, 1229–30 (10th Cir. 2014). The Tenth Circuit Court of Appeals found that, pursuant to the US Constitution’s Due Process and Equal Protection Clauses, “those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex.”
12. Id. at 717.
13. Id. at 723.
14. Id. at 724–25.
15. Id. (emphasis added).
16. Id. at 727 (emphasis in original).
17. Id. at 726.
18. Id. at 724 (emphasis added).
19. Id. at 719.
20. Id. at 724.
21. Id. at 720.
22. Id. at 718.
23. Id. at 717.
24. Id. at 724.
25. In re Marriage of LaFleur and Pyfer, No. 2018DR030057, Transcript of District Court Order at 4–6 (July 31, 2018). The Court noted that Pyfer listed LaFleur as his spouse on one vehicle, and Pyfer testified he had to obtain LaFleur’s Social Security number for that purpose.
26. Id. at 7.
27. In re Marriage of Pyfer and LaFleur, No. 18 CA 2252, Opening Answer Brief of Respondent-Appellee at 10, 22.
28. Id. at 16. LaFleur’s assertions about the nature of the ceremony were made public to a *Westword* reporter. When Pyfer suggested a commitment ceremony, LaFleur went along because, in his words, “it wasn’t legally binding. I thought, what could it hurt?” He readily admitted that the ceremony looked like a wedding, “Even the decorations were called into question, LaFleur recall[ed]. Like, ‘Aren’t those wedding bells hanging over your head?’ But how do you decorate for a commitment ceremony? It was just a decoration.”
29. Id. at 884.
30. Id. at 889.
31. Id. at 888 (emphasis in original).
32. Id. at 889. (emphasis in original).
33. Yudkin, 478 P.3d at 735. See CRS § 13-90-102, which may prevent a witness from testifying as to a decedent’s oral statements.
35. Yudkin, 478 P.3d at 736-737. (emphasis in original).
36. Hogsett, 478 P.3d at 720.
37. CRS § 14-6-110 provides that willful failure to provide reasonable support for a spouse or willful failure to provide proper care for a spouse who is ill constitutes a class 5 felony. CRS § 14-6-110 provides that spouses, or either of them, are liable for “expenses of the family and education of the children” and can be sued jointly or separately for them. Medicaid regulations as to the Community Spouse Resource Allowance treats a married couple’s assets as jointly and equally owned and may result in a required “spend down” of the half allocated to the spouse who is applying for long-term care services. See Colorado Medicaid Eligibility for Long Term Care: Income and Asset Limits (Dec. 7, 2020), https://www.medicaidplanningassistance.org/medicaid-eligibility-colorado.
38. CRS §§ 14-2-301 et seq.
Family Law Institute
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News from the CBA, Local Bars, and More

BY JESSICA ESPINOZA-MURILLO

Bar News is a monthly compilation of news from the CBA, including sections and committees, administration, and local and specialty bar associations. It also includes notices of activities—past, present, and future—from local and national law-related organizations and groups.

Honk if You’re Grateful—Drive Thru Celebrates Pro Bono Attorneys

On April 16, The Justice Center of the El Paso County Bar Association, in partnership with Colorado Legal Services and the Civil Pro Bono Project (4th Judicial District), hosted a drive-thru appreciation event to recognize volunteers who provide pro bono services through their organizations. Despite the cold and windy weather, Judge Timothy Schutz led a cheer line of local judges in welcoming volunteers to the event with pom-poms. After being greeted, volunteers drove their vehicles through the parking lot, where staff and board members from The Justice Center and Colorado Legal Services provided gift bags, a warm cup of coffee, and certificates acknowledging their service.

1 Deborah Hamilton, board chair for The Justice Center and law librarian for the Pikes Peak Library District, hands a goodie bag to Amber Blasingame, an immigration attorney volunteer.
2 Britt Kwan of The Justice Center and Sarah Lipka of Colorado Legal Services chat with volunteer Paul Haller.
3 Local judges greet attendees.
4 The judges, staff, and volunteers that made the drive-thru possible: Judge Thomas Kane, Judge Michael McHenry, Magistrate William Moller, Judge Laura Findorff, Judge Timothy Schutz, Craig Caremean, Deborah Hamilton, Britt Kwan, Monica Crandall, Jessie Berger, and Sarah Lipka.

Professor Anna Carpenter Receives IAALS Legal Visionary Award

IAALS, the Institute for the Advancement of the American Legal System, has named Anna E. Carpenter recipient of the inaugural Alli Gerkman Legal Visionary Award. The award showcases innovators, risk-takers, visionaries, and emerging leaders who bring a different perspective and a reform-minded approach to the improvement of our legal system, and who are early in their legal careers. Carpenter is a law professor and the director of clinical programs at the University of Utah S.J. Quinney College of Law.
Virtual Ball for All Celebrates EDI Initiatives

The Center for Legal Inclusiveness hosted its annual Ball for All Gala on Saturday, May 1. Hundreds of people joined online for the “Mardi Gras in May”-themed event to help support equity, diversity, and inclusion (EDI) initiatives and successes within the legal profession. The event featured “pre-party Zoom rooms” and the annual Inclusiveness@Work awards honoring individuals who advance EDI in their workplaces and community. This year’s award recipients were Wilmer Hale (law firm/legal department), Law Bank (corporation/businesses), Maritza Dominguez Braswell (individual), Youth Celebrate Diversity (nonprofit/government/community organization), and Johnny Nguyen (young professional). Congratulations to these individuals and organizations for their outstanding work!

Clinic Helps Seniors Plan for the Future

It’s been a challenging year for seniors, but through the efforts of the Sam Cary Bar Association and Metro Volunteer Lawyers, many seniors now have one less thing on their to-do lists. On April 20, the organizations held a clinic for seniors who needed assistance filling out advanced planning documents. Thanks to volunteers Anne Zogg, Anthony Pereira, and Liz Jones for masking up to provide this much-needed pro bono service for our seniors!

1 Clinic volunteers Anne Zogg, Anthony Pereira, and Liz Jones.
2 Anthony Pereira assists a client.

Elisa Overall Joins Access to Justice Commission

The Colorado Access to Justice Commission welcomes Elisa Marie Overall as its first-ever executive director. Overall attended the DU Sturm College of Law as a Chancellor Scholar, a distinction awarded for her years working in Southwest Colorado to support immigrant communities and advocate for justice among marginalized communities across the Western Slope. With Overall’s support, the Commission will continue to build on the progress it made in 2020, as detailed in its Annual Report, https://www.coloradoaccesstojustice.org/atjc-reports.

Associates Campaign Has Record-Setting Year

The Legal Aid Foundation’s 2021 Associates Campaign raised a record $302,550.52 for legal aid, breaking the previous record set in 2019 by $71,000. All seven Colorado Supreme Court justices participated in a Zoom awards celebration to honor the winners of the friendly intra-firm competition. Awards were given to the top firm in each division (large firm, medium firm, small firm). Winners were: Highest Grand Total—Sherman & Howard, Ballard Spahr, and Kaplan Kirsch & Rockwell; Highest Associate Per Capita Gift—WilmerHale, Arnold & Porter, and Keating Wagner Polidori Free; and Highest Non-Associate Total—Sherman & Howard, Ballard Spahr, and Kaplan Kirsch & Rockwell.

CONTRIBUTE

Bar News is always looking for pictures and descriptions of legal events happening throughout Colorado. Snapshots taken with a phone camera work great! To contribute pictures, simply email them to Jessica Espinoza-Murillo at jespinova@cobar.org, and be sure to select the largest file size when prompted.
Ben Aisenberg’s remarkable life and career are pretty well known to those of us in the Colorado legal community who have been around a while. This profile highlights the salient waypoints along Ben’s journey, followed by some well-earned words of tribute from Ben’s friends and colleagues.

**The Highlight Reel**

Ben grew up in Worcester, Massachusetts, where he excelled in academics and sports. He similarly made his mark at Brown University and then Harvard Law School. Upon graduation, he had an opportunity to join what was then Harvard Law School. Upon graduation, he excelled in academics and sports. He similarly made his mark at Brown University and then Harvard Law School. Upon graduation, he chose Denver, having become acquainted with this area while serving in the Air Force in those days, with his area while serving in the Air Force. In those days, Ben became an accomplished commercial litigator known for his diligence, intellect, and preparation. He later opened his own small firm, where he excelled in representing plaintiffs in personal injury cases.

Ben became involved with the Colorado Trial Lawyers Association when it first formed in the late 1960s. Around that same time, he also became involved with the Denver and Colorado Bar Associations and began a decades-long stint on the CBA Ethics Committee. His dedication to the CTLA, DBA, and CBA resulted in his selection as president of each association—an unmatched “Triple Crown” achievement—and earned him Awards of Merit from the DBA, the CBA, and the CBA Ethics Committee. Over the years, Ben also received special recognition from the Colorado Asian Pacific American Bar Association (APABA) and the Sam Cary Bar Association for his generous support of those organizations and his passion for helping others, especially those underrepresented in the legal profession.

When not advocating for his clients or giving back to the legal community, Ben pursued another passion, bridge, which he once said helped finance his law school tuition. He became a Life Master at age 32, an unusual feat for someone so young. But Ben wasn’t all law and bridge. A lifelong bachelor, Ben was always up for a good time—whether in Las Vegas, where he frequented the craps tables, or in Denver and Aspen. The Blair Caldwell Denver Public Library, a library rich in Black history, will proudly display Ben’s Warrior for Justice Award, which has been donated to the library by his estate.

Ben regularly attended the gala events of Sam Cary, since Ben had leadership roles in the same time, in approximately 1976, Ben and Hojo Denson, was one of the co-founders of APABA and became its first president in 1990. Ben became involved with the Colorado Bar Association. Around that time, Regina and my family were welcomed into his homes in Colorado Springs and Denver. In those days, Denver’s big firms were not inclined to hire Jewish lawyers, even those with a double Ivy pedigree. The firm of Gorsuch, Kirgis, Campbell, Walker and Grover was an exception. There, Ben became an accomplished commercial litigator known for his diligence, intellect, and preparation. He later opened his own small firm, where he excelled in representing plaintiffs in personal injury cases. Ben became involved with the Colorado Trial Lawyers Association when it first formed in the late 1960s. Around that same time, he also became involved with the Denver and Colorado Bar Associations and began a decades-long stint on the CBA Ethics Committee. His dedication to the CTLA, DBA, and CBA resulted in his selection as president of each association—an unmatched “Triple Crown” achievement—and earned him Awards of Merit from the DBA, the CBA, and the CBA Ethics Committee. Over the years, Ben also received special recognition from the Colorado Asian Pacific American Bar Association (APABA) and the Sam Cary Bar Association for his generous support of those organizations and his passion for helping others, especially those underrepresented in the legal profession.

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**Remembering Ben Aisenberg**

1931–2021

**BY CHUCK TURNER**

“Think where man’s glory most begins and ends, and say my glory was I had such friends.”

—William Butler Yeats
Denver and the mountains, where he enjoyed a robust social life. Ben was also a political, history, and sports junkie; he was a voracious reader and always game for conversation and debate. His memory for details, whatever the subject—the law, the facts of cases, Jeopardy trivia—was elephantine.

**Tributes**

Ben Aisenberg was a brilliant, benevolent lawyer who was ethical to the core. But as Yeats understood, the true measure of a man’s life is not his professional successes; it’s what his friends say of him. And Ben’s friends and colleagues have a lot to say.

It is with great admiration that I write this tribute to my friend Ben Aisenberg. Given recent events, equity, diversity, and inclusion (EDI) have become common buzzwords in the legal world. However, Ben had been doing EDI work for his whole career. He was the first Jewish partner on 17th Street and knew firsthand the feeling of isolation in the legal profession. At his law firm, he welcomed their first Black associate lawyer, Trudi Morrison, and aided in her adjustment to 17th Street, when there were very few Black attorneys in the downtown law firms. He mentored Trudi in the firm, supported her with meaningful legal assignments, and encouraged her to join the Sam Cary Bar Association. Around that same time, in approximately 1976, Ben and I met at a CTLA meeting, and he welcomed me into the association.

Ben and I had discussions about the value of affinity bar associations, such as APABA and Sam Cary, since Ben had leadership roles in the DBA, CBA, and CTLA. My associate, Lucy Hojo Denson, was one of the co-founders of APABA and became its first president in 1990. Ben regularly attended the gala events of Sam Cary and APABA and made substantial financial contributions to their scholarship funds for Black and Asian American law students. In 2014 Ben received the Warrior for Justice Award, one of the most meritorious awards given by the Sam Cary Bar membership. The award recognized Ben’s career advocacy for diversity, equity, and inclusion in the legal profession. But Ben was more than an EDI advocate; he was an anti-racist in all aspects of his life. Multiple times, Regina and my family were welcomed into his homes in Denver and Aspen. The Blair Caldwell Denver Public Library, a library rich in Black history, will proudly display Ben’s Warrior for Justice Award, which has been donated to the library by his estate.

—Hon. Gary Jackson
I loved Ben’s sardonic/sarcastic sense of humor: “Do you really need that plate of breakfast today?” Or when we were on opposite sides of testifying as experts he would ask, “Would it help you if I sent the controlling Colorado case law” (before you embarrass yourself on the stand)? I loved sharing his shopping list at the beginning of the pandemic: 3 bags of Doritos, 2 containers of Dreyers French vanilla, 2 onions, 4 boxes of Good and Plenty candy, and 2 Hershey bars. A health nut he was not!

—Gary Blum

Ben generously supported the Colorado APABA Foundation for many years. To honor him, the Foundation board created the Eisenberg Award, to be given to a University of Colorado or University of Denver law student who wanted to participate in NAPALSA (National Asian Pacific American Law Students Association) leadership but who needed financial resources to travel to various meetings and conferences. Ben encouraged younger attorneys to take on leadership roles. We thought this was an appropriate way to honor him.

I will miss Ben. He always came to our APABA banquet. Since I oversaw the banquet seating arrangements, I would make sure he sat at my table whenever I could. My husband loved his company—he said visiting with Ben during the evening made the banquet bearable. It was never about him; it was about celebrating the accomplishments of others, being there to support them, and enjoying seeing friends and colleagues.

—Fay Matsukage

I once tried a case involving a lawyer who had stolen funds from a client. There were many mitigating circumstances, but the lawyer was eventually disbarred after the Supreme Court reviewed the case. Ben had been on the hearing board, and he knew in detail the facts of the case. I know this because for at least 10 years after it was over, he kept telling me how sad it was that the lawyer got disbarred and pointing to facts about the matter that I had forgotten.

Another thing that stood out is that during the hearing, which was in about 1995—before cell phones were in everyone’s pocket—Ben kept looking at something in his hands. After the case concluded, he showed me his small electronic device on which he could continually see baseball scores. I had never seen such a device. As everyone knows, he was a sports fanatic.

I miss him deeply and always will.

—Jamie Sudler

Ben was one of the best humans I’ve ever known. Growing up, I thought it was so cool there was someone else with Bennett as his first name. I was proud to work with such a legend on the Ethics Committee. There are many things I’ll miss about Ben—sitting next to him at events so we could talk before watching baseball on his phone is one of them. He inspired young lawyers to strive to be great lawyers, but he also inspired us to enjoy ourselves while doing it.

—Ben Lebsack

Shortly after I joined the Ethics Committee, I applied for a judgeship on the Court of Appeals. Although Ben and I didn’t know each other very well, Ben wrote a letter of recommendation on my behalf. I appreciated that very much, since at the time I was a legal services lawyer and those who knew me best were not well-known members of the Colorado bar. I’m sure Ben’s letter significantly assisted in my being appointed to the court in November 1992.

—Hon. Daniel Taubman

I met Ben during my first Ethics Committee meeting. We were in a breakout session for new members, and Ben told us that we were not allowed to speak at the meetings for the first year. I thought he was serious at first, but I realized that he was joking. This was my introduction to his wonderfully dry sense of humor.

I will miss him. No one can fill his shoes.

—Heather Whitman

Ben’s kindness was unparalleled. He was both curious and kind in his dealings with those of us who were outside his normal circle of colleagues. He invited me and several of his close friends to stay at his condo in Aspen for one of our ethics meetings, and it is a memory I will always cherish. When Ben visited our home in Cuchara and met our cats and dog, he asked how each was doing by name for years afterward. His memory for details of cases, people, cats, you name it, was legendary, and he seemingly never forgot anything that meant something to him.
Lastly, Ben was a champion of the bar who was always willing to fight the good fight, and he contributed his time, money, and knowledge to the judicial branch’s many battles with those who wanted (and still do) to put judges back into electoral politics.

Ben was a mighty intellect and a true gentle giant of the profession.

—**Hon. Claude Appel**

The word “unique” is used often without a lot of care and even in violation of the word’s dictionary definition. But Ben was unique. His voice, his mannerisms, his intellect, his intellectual curiosity, and his concern for the law and for others were unique. For the rest of my life, I will cherish my monthly dinners with Ben. This is a huge loss for all of us. I will miss him dearly.

—**Hon. Michael H. Berger**

Ben was a great lawyer, a true champion of the bar, and a real mensch. He will be missed. 

—**Al Wolf**

I met Ben in the early ’80s when we were both CTLA officers. I quickly learned that Ben knew everything about almost every legislator. On several occasions, I called Ben from the legislature (from a pay phone) for assistance. Because he was unavailable when I called, and rather than calling me back at night, Ben just walked over to the legislature and pulled me out of the hearing. Invariably, he had the exact information that I needed. Ben, you were quite a guy!

We will all miss you terribly.

—**Lance Sears**

Many years ago, when I was a young lawyer, Ben and I were on opposite sides of a fairly complex case. He was courteous in explaining to me the strengths and weaknesses of my case. He participated in reaching a settlement that was fair and reasonable. When I saw him regularly in the following years at various Ethics Committee functions, he was always friendly and approachable. What a kind and gentle, yet stalwart person he was. I will miss him.

—**David Littman**

My small firm shared office space with Ben’s firm for many years. I was fortunate to see him almost every day, even on weekends, if I happened to go into the office. (Ben always came in to pick up the mail on Saturdays.) I will miss this good friend, wise colleague, and mentor. Ben encouraged younger lawyers, and in particular women and attorneys of color, to dream big and to be active participants in the legal community, to serve on committees, as judges, and as activists for the rule of law. I will always treasure his friendship and mentorship, as well as his collegiality, his fine legal mind, his sense of humor, and his wide-ranging interests.

—**Cynthia F. Covell**

Yes, Ben wore colorful sweaters, as does Al Wolf. They heckled me for my bike spandex. I’ll miss his yelling at me at the bridge table. A true genius, a wonderful friend.

—**Hon. Ray Satter**

During the ’80s, the Ethics Committee held its monthly meetings at the DU Law School in one of the big auditorium classrooms, where each row of seats was higher than the row of seats in front of it. The meeting was about to start, and we were all taking our seats. The man behind me bumped his coffee cup, knocking it over and forward, thus spilling coffee onto me and the seats and floor around me. And that is how I met Ben Aisenberg.

We became close friends and remained close friends ever since. Ben shared with me not only his coffee but also his intellect, wisdom, and sense of humor. I looked forward to seeing him at Ethics Committee meetings, having lunch with him periodically (but in hindsight not often enough), and talking with him about politics, current events, recent cases, and whatever else either one of us wanted to talk about. Ben taught me so much, but never didactically, rather by accepting me, welcoming me, agreeing and disagreeing with me, and just talking with me.

Having Ben Aisenberg spill coffee on me is one of the best things that ever happened to me.

—**Jerry Pratt**

I didn’t spend enough time when Ben was alive reflecting on why I felt such affection for him. Now, since his death, I’ve spent a lot of time thinking about that. For me it comes down to this: Ben was sweet. Not in a Pollyannish or saccharine way. He was a great tease. He could be ironic and sarcastic. And as some of us recall from our Ethics Committee meetings and from
tangling with Ben outside of the committee, he wasn’t afraid to fight for what he believed and for his clients.

But he was eternally kind. He wanted to see people succeed. He wanted this world to be a better place. And I always—always—felt better after sharing a meal with Ben, exchanging emails with him, or chatting with him at our meetings. He was just so smart and funny and easy-going, even when he was crammed in the backseat of our car, stuck in traffic on the way to a committee meeting in Pueblo or in a snowstorm on the way home from Aspen. He never complained. He cracked me up. He asked questions and listened to the answers. He brought out the best in me.

He also inspired me. He was the youngest almost-90-year-old I’ve ever known. He was not jaded. He was independent, disciplined, and curious. He was utterly true to himself and loyal to his friends. He loved laughing and he loved life.

Reading this back, it sounds like a bunch of platitudes. But man, I miss him.

—Marcy Glenn

Ben and my firm office[d] together for over 20 years. Every morning as I entered the suite, my first stop was Ben’s office. We would discuss legal issues, current events, books and—of course—sports (usually about Ben’s pending bets). He was a man of special intelligence, congeniality, and many other notable attributes. But night owl was not among them. Some years ago, we had Ben and others over for a “Mystery Dinner.” These were then fashionable games where guests were given clues that allowed them to identify and name the culprit in a fictional murder. After we ate, and during the throes of forensic analysis, Ben fell fast asleep on my couch. He never did find out “whodunit.”

—Donald Alperstein

Ben was an original who exemplified Hunter Thompson’s definition of a life fully led: “Life should not be a journey to the grave with the intention of arriving safely in a pretty and well-preserved body, but rather to skid in broadside in a cloud of smoke, thoroughly used up, totally worn out, and loudly proclaiming.

“Wow! What a ride!”

Thanks for letting me be part of your ride, Ben.

—Charles Luce

Probably like most people who knew Ben, I always felt he cared for my opinion more than his own. In every conversation I had with him, it was clear that he cared much more about getting what we were discussing right and making sure I knew that he respected my opinion (which often differed with his but also often changed as I discussed things with him). Ben’s generosity of spirit and wisdom raised the intellectual quality and gratification of practicing law in Colorado.

—Bob Keatinge

Brilliant. Charming. Eccentric. This is how people often referred to Ben Aisenberg. They were right, yet they had no idea.

Ben was my mentor and my law partner. We began practicing law in 1984. I had heard that Ben was very smart and knew the law inside and out. That turned out to be an understatement. I was counseled that I should join Ben and we would make a complete person in that he knew the law and I knew people. That was the best advice I ever got. Thank you, Steve Rench.

Most lawyers knew Ben as a lawyer’s lawyer. Mr. Bar Association. Ethical. Compassionate. Generous with his money and his advice. Ben was all that. But for him it was never about padding his résumé. He cherished his professional relationships, and he truly loved the law. He loved the Colorado and Denver Bar Associations. And he loved CTLA.

Ben was tough, and often adamant in his opinions. We shared a legal secretary for years, and she would type a brief I dictated and then Ben would snatch it out of the typewriter or printer and promptly mark it up with red pen. She would give it to me, and I would cross out all his changes and put my words back in. Ben and I went back and forth for days like that until I had no choice but to capitulate just to get the damn thing filed. Years later, Ben remarked that he was proud of the lawyer I had become. He followed that up with that I finally did things his way.

Ben was a character. He had many quirks that ultimately become endearing. He would be the first to tell you that he didn’t have bad taste; he had no taste. Yet Ben had class. In his own, strange way. And he was vain, though you wouldn’t know it from looking at him. He wore socks with holes in them, clothes that didn’t match, and never saw style if it hit him in the
face. For example, one day I saw Ben spraying something on his head. He saw an infomercial for Hair in a Can, bought it, and started spray painting over his bald spots. I couldn’t get him to see the error in this, until I slapped our lease on his desk with a big red circle around the anti-asbestos clause to get him to stop. When I ran for CTLA treasurer I remarked that I could say I had been groomed by Ben for that position, but then again I wasn’t comfortable being associated with Ben’s grooming.

Ben was like another father to me. But as Ben got older our roles switched. Like John Sadwith, Chuck Turner, and several others, my importance to Ben increased as technology became central to Ben’s life. Invitations to dinner usually meant his Betamax needed adjustments, or a light bulb was out. John, Chuck, and I would chuckle over who had been called because he couldn’t get the movie or game he wanted to watch, or to fix whatever he did to mess up his cell phone. Of course, we all lived for those calls. For Ben brought so much intellect, humor, and life into our lives.

I can write volumes about Ben Aisenberg. He was a giant of a lawyer. A giant of a man. We are who we are, in large or small ways, because of Ben.

—Marc Kaplan

I met Ben in the fall of 1985 when I was being interviewed by CTLA officers for the job as CTLA’s first executive director. At the end of the meeting, Ben said, “He reminds me of a young Dan Hoffman.” That was certainly an undeserved comment but an honor. Obviously, he had yet to get to know me.

The next year, my first year at CTLA, Karen and I were driving home from the CTLA Convention in Vail when we stopped for gas in Silverthorne. There was Ben and his friend Sandy stranded, as his jaguar had broken down. I had a VW Rabbit stuffed to the gills, but we gave them a ride back to Denver with Ben sitting on a suitcase.

Thereafter it seemed that I became one of Ben’s “fix it” men and all-around helper, along with Chuck Turner. Ben would call us to help him make purchases such as appliances and TVs and to fix them when they needed repair. He was too impatient to wait for Comcast to arrive on a service call. There are so many Ben stories to tell.

One day, Ben called to ask for help fixing his TV. Chuck looked on the web for possible fixes and discovered that the TV would go out when it over-heated and a certain filter needed cleaning. I took a can of air, the kind used to clean computer keyboards, and I wedged myself behind the TV. We had taken off the back and made sure to turn off the TV. When I blew the air on the filter there was an explosion, and I was thrown against the back wall. My forearm hair a bit singed, we replaced the back and Ben yelled, “It works!” His hearing was so bad I don’t think he heard the explosion. I had destroyed the TV, but he was forever grateful until he called that night to tell me that his phone didn’t work.

Ben had a Sony Betamax and all his old movies were in that format, but the Betamax would break and he would call begging me to find someone who would repair it. We kept explaining about Tivo and On Demand, but he had to have his Betamax. Eventually there were no parts to be had for the Betamax.

Several years ago, Ben wasn’t feeling well. It appears he was experiencing side effects from his new medications. One day he was driving down 6th Avenue when he blacked out and sideswiped several cars. He was cited for careless driving, and I told him I would represent him in court. While we were waiting for our court date, one of his best friends, Gary Jackson, was appointed to the Denver County Bench. After a bit of sleuthing, I realized that Ben’s case was assigned to Gary’s courtroom. I knew if Ben discovered this, he would want to move the case, so I kept quiet about it, but Ben found out anyway. We argued about it, but I was able to convince him that we would tell the City Attorney about the relationship and state it on the record. We were the first case to be called on Judge Jackson’s first day on the bench. A plea bargain was reached, and the relationship was placed on the record and it was noted that the City Attorney had no objection. Judge Jackson also made a record, and we proceeded to sentencing. I started to make a mitigation statement when Ben interrupted me and said, “Judge, I want the maximum, give me the maximum” while I stood there aghast. Judge Jackson fined him $100, and on the way to the Clerk’s office to pay the fine, Ben kept telling me what a fabulous job I had done. So much for a cooperative client.

Though Ben was approaching 89, he didn’t forget a thing. He could tell you an Al Zinn story from 50 years ago (they were roommates). He was the first to know, or want to know, any judicial appointment and any important case decision that was coming down from the Colorado Supreme Court. He rarely missed an Ethics Committee meeting, even having me drive him down to the CBA office for a meeting while still in a neck brace.

Ben passed away before the NFL Championship games and the Super Bowl, where he most certainly would have placed bets, and you know what, I guarantee he would have won those bets. Being quarantined in his basement Man Cave since March, he was itching to start online betting when it became legal. The problem was that he was a bit tech-challenged and couldn’t figure out how to set up an account. He called our 28-year-old son, and though few, if any, had been in his home during COVID, Michael was permitted to enter to help Ben set up his account. Ben was forever grateful. You see he had his priorities.

Ben, we will miss you, your talent, your friendship and your “one of a kind-ness”.

—John Sadwith

Rest easy, Ben. We were all so fortunate to have known you.

Chuck Turner served as the executive director of the Colorado and Denver Bar Associations for over 30 years and survived two Aisenberg administrations, becoming a lifelong admirer and friend.

CONTRIBUTE

The CBA would like to highlight the achievements of members residing in Greater Colorado. If you or someone you know would like to be profiled, or you would like to volunteer to write for the Profiles in Success column, please email Kathleen Hearn Croshal at kcroshal@msn.com.
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As much as we will miss her, we know that with her brilliant legal mind and commitment to public service, Judge Moses will be an invaluable addition to the bench.

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We will miss Keith’s good humor, calm demeanor and thoughtful advice.

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We are pleased to announce that Erin M. Leach has joined the firm. Ms. Leach’s practice will focus on Commercial Litigation, Construction Litigation and Employment Litigation.

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Lyons Gaddis is pleased to announce that Erin C. Pierce is joining the Litigation Practice Group as an Associate Attorney.

Erin comes to the firm following her clerkship with the Hon. Thomas F. Mulvihill in the Boulder County District Court.

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White Bear Ankele Tanaka & Waldron is pleased to announce that Trisha K. Harris has become Of Counsel at the Firm effective as of May 1, 2021.

Ms. Harris’s practice focuses on the representation of special districts, homeowner associations, and developer clients with a specific emphasis on the formation and development of covenants and/or associations for developing communities.

tharris@wbanpc.com
T 303.858.1800 F 303.858.1801

JAMS is pleased to announce
Ann Gushurst
has joined our panel

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In Memoriam

Thomas J. DeMarino
November 24, 1937–April 6, 2021

Thomas “Tom” DeMarino passed away on April 6, 2021. He was born in Greensburg, Pennsylvania, on November 24, 1937, to Sue (Nicholson) and Thomas DeMarino. Tom graduated from Pennsylvania’s Greensburg High School, where he played football, threw the discus on the track team, and was a member of the Greensburg High School Chapter of the National Forensic League (NFL). NFL was the nationwide high school competition of debating, oratory, and student congress. Tom won the Pennsylvania state oratory championship in 1954 and went to the NFL championship in 1955, where he won an award for superior speaker.

Tom attended Dickinson College in Pennsylvania. He was a four-year starter on the football team at guard, offense, and defense; was a member of Skull and Key Men’s Junior Honor Society; served as president and vice president of the Dickinson Student Senate; and was president of Phi Kappa PSI. Tom also attended Dickinson Law School, winning the Inaugural Abel Law Advocacy Prize. He was admitted to the Pennsylvania Bar in 1963.

From 1963 to 1965, Tom served as 1st Lieutenant in the US Army. He graduated from Ranger and Airborne schools and served as a Rifle Company Commander with the 7th Infantry Division in Korea.

Tom and prior wife Betsy moved to Denver in 1965. He was admitted to the Colorado Bar in 1965 and practiced for 33 years in Denver as insurance defense counsel. From 1999 to 2019, he was an administrative law judge with the Colorado Department of Labor and Employment, Division of Workers’ Compensation, where he served as chief judge from 1999 until 2012.

Tom was very active in state and local bar associations. He served as president of both the Colorado (Insurance) Defense Lawyers Association and the Denver Bar Association. In 1995, he received the DBA Award of Merit for co-founding the Barristers Benefit Ball, which has since raised millions for Metro Volunteer Lawyers. He also served on the CBA Executive Council and was the founder and first chair of the CBA Workers’ Compensation Section, receiving its Lansford F. Butler Award in 1997. He was a Fellow of both the Colorado Bar Foundation and the American Bar Foundation.

Tom was also a frequent speaker at workshops and seminars across the state. He presented on trial advocacy skills for the National Institute for Trial Advocacy and on tort and workers’ compensation law at annual CLE seminars. He also authored numerous CBA-CLE publications and was an enthusiastic member of the Denver Law Club, a group that presented ethics issues in musical format at the CLE’s annual “Ethics Revue.” In 2016, CBA-CLE recognized Tom as a “Living Legend” for his many contributions.

Among other pursuits, Tom was an avid black diamond skier and mountain climber. He loved climbs on 13,000- and 14,000-foot peaks, day or night, summer or winter. He climbed the Teton and several high peaks in Peru. He was a longtime member of Colorado Mountain Club and served on its Board of Governors. He also served as treasurer of the Colorado Mountain Club Foundation.

In addition, Tom helped found the Denver Barbarians Rugby Football Club and was a longtime rugby and lacrosse player. He enjoyed opera and was president of Denver Lyric Opera. In 2019, he became a weekly tutor with Whiz Kids of the Denver Leadership Foundation. He was also a member of the Eagle Bend Community Church.

At the time he passed, Tom’s greatest love was his wife Marge and all his children and grandchildren in their collective families. He is survived by his wife Marge; brother Don; son Jeffrey and daughter Lynn Kitt (Lance); stepchildren Ken Swank (Tina), David Swank (Sarah), John Connell, Kathy Hintlian (Matt), Carol Gutowski, Patrick Connell, Jeffrey Luedtke (Hawley), and Monica Hirsch; grandchildren Peter and Ella; and 19 step-grandchildren. Predeceased wives were Wendy Glenn, Joyce Swank, and Betsy Luce.
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Colorado Supreme Court Rules Committees

Announcement
On April 14, 2021, Chief Justice Boatright signed an Order mandating electronic filing using the Colorado Courts E-Filing Service for attorneys filing documents in the Supreme Court. This order is effective July 1, 2021.

The following are not subject to the order: 1) documents filed by parties not represented by counsel, and 2) motions to appoint a retired or resigned justice or judge pursuant to C.R.S. 13-3-11 and C.R.C.P. 122.

The Order is available on the supreme court's website: www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/SC20_Landing%20Page/Mandating%20E-Filing.pdf.

Rule Change 2021(04) Rules Governing Admission to the Practice of Law in Colorado Rules 203.2, 203.3, 205.3, 205.4, 205.6, 208.2, and 209.5

Rule 203.2. Applications for Admission on Motion by Qualified Out-of-State Attorneys

(1) An applicant who meets the following requirements may, upon motion, be admitted by the Supreme Court to the practice of law in Colorado. An applicant under this rule shall:
   (a) Have been admitted to practice law in another jurisdiction of the United States through examination;
   (b)–(g) [NO CHANGE]
   (2)–(4) [NO CHANGE]
   (5) For purposes of this rule, all applicants must pass the Multi-State Professional Responsibility Examination (MPRE) prior to admission. For applicants licensed in another jurisdiction of the United States and engaged in the active practice of law for 15 or more years at the time of application without any public discipline, a passing score previously accepted by another jurisdiction of the United States will be accepted for admission in Colorado without regard to when that passing score was achieved. For other applicants who are licensed in another jurisdiction of the United States, a passing score will be valid if it was achieved at an examination taken not more than five years before acceptance of the application for admission in Colorado. For applicants who are not licensed in another jurisdiction of the United States, a passing score will be valid if it was achieved at an examination taken not more than two years before acceptance of the application for admission in Colorado. The Supreme Court shall review and determine the passing score for the MPRE for admission in Colorado.
   (6) [NO CHANGE]

Rule 203.3. Applications for Admission on Motion based upon UBE Score Transfer

(1) Score Transfer, Generally. An applicant who has taken the Uniform Bar Examination (UBE) in a jurisdiction other than Colorado, and who meets the following requirements may, upon motion, be admitted to the practice of law in Colorado based upon UBE score transfer. The applicant under this rule shall:
   (a) [NO CHANGE]
   (b) Be otherwise eligible to sit for the UBE in Colorado under C.R.C.P. 203.4;
   (c)–(f) [NO CHANGE]
   (2) [NO CHANGE]
   (3) All Colorado UBE score transfer applicants must pass the Multi-State Professional Responsibility Examination (MPRE). For applicants licensed in another jurisdiction of the United States and engaged in the active practice of law for 15 or more years at the time of application without any public discipline, a passing score previously accepted by another jurisdiction of the United States will be accepted for admission in Colorado without regard to when that passing score was achieved. For other applicants who are licensed in another jurisdiction of the United States, a passing score will be valid if it was achieved at an examination taken not more than five years before acceptance of the application for admission in Colorado. For applicants who are not licensed in another jurisdiction of the United States, a passing score will be valid if it was achieved at an examination taken not more than two years before acceptance of the application for admission in Colorado. The Supreme Court shall review and determine the passing score for the MPRE for admission in Colorado.
   (4) [NO CHANGE]

Rule 205.3. Pro Hac Vice Authority before State Courts—Out-of-State Attorney

(1) General Statement and Applicability.
   (a) An out-of-state attorney (as defined in Rule 205.1) may be permitted to appear in a particular matter in any state court of record under the conditions listed in this rule.
   (b) An out-of-state attorney who is domiciled in Colorado and has been authorized for practice pending admission under Rule 205.6 may be permitted to appear in a particular matter in any state court of record under the conditions listed in this rule.
   (c) This rule does not apply to an attorney who has been authorized for practice pending admission under Rule 205.6 and is employed by one of the entities identified by Rule 205.6(3) as qualifying for court appearances.
   (2)–(5) [NO CHANGE]
   (6) Appellate Matters and Other Forms of Review.
   (a) If an attorney wants to appear in a proceeding before a Colorado appellate court, and the attorney obtained permission to appear in a proceeding involving the same action in a Colorado state trial court, the attorney only needs to file an updated affidavit with the Clerk of the Office of Attorney Registration and a copy filed into the Appellate Court proceeding. No additional filing fee is required.
   (b) If an attorney wants to appear in a proceeding before a Colorado appellate court and the
attorney did not obtain permission to appear in a proceeding involving the same action in a Colorado state trial court, another Colorado appellate court or administrative agency, the attorney shall file a motion and affidavit with the clerk of the Colorado appellate court, with a copy sent to the Clerk of the Office of Attorney Registration, requesting permission to appear. The motion, affidavit, and filing fee must be submitted as otherwise provided in section (2) of this rule.
(7) [NO CHANGE]

Rule 205.4. Pro Hac Vice Authority before State Agencies—Out-of-State Attorney

(1) An out-of-state attorney (as defined in Rule 205.1) may, in the discretion of an administrative hearing officer in Colorado, be permitted to appear on a particular matter before any state agency in the hearings or arguments of any particular cause in which, for the time being, he or she is employed, under the same filing requirements as set forth in C.R.C.P. 205.3.
(2) An out-of-state attorney who is domiciled in Colorado and has been authorized for practice pending admission under Rule 205.6 may be permitted to appear in a particular matter in any state agency under the conditions listed in this rule.
(3) This rule does not apply to an attorney who has been authorized for practice pending admission under Rule 205.6 and is employed by one of the entities identified by Rule 205.6(3) as qualifying for court appearances.

Rule 205.6. Practice Pending Admission

(1) General Statement and Eligibility. An attorney who currently holds an active license to practice law in another jurisdiction in the United States, and who has been engaged in the active practice of law for three of the last five years, may provide legal services in Colorado through an office or other place for the regular practice of law in Colorado for no more than 365 days, provided that the attorney:
(a)–(d) [NO CHANGE]
(e) Based on a conferral with the Office of Attorney Admissions regarding the application for admission, reasonably expects to fulfill all of Colorado’s requirements for that form of admission;
(f)–(i) [NO CHANGE]
(2) Foreign Legal Consultants. An attorney currently authorized as a foreign legal consultant in another jurisdiction in the United States may provide legal services in Colorado through an office or other place for the regular practice of law in Colorado for no more than 365 days, provided that the attorney:
(a)–(d) [NO CHANGE]
(e) Based on a conferral with the Office of Attorney Admissions regarding the application for admission, reasonably expects to fulfill all of Colorado’s requirements for admission as a foreign legal consultant; and
(f) [NO CHANGE]
(3) Appearances. Prior to admission on motion as a qualified out-of-state attorney (C.R.C.P. 203.2), on motion based upon UBE transfer score (C.R.C.P. 203.3), by examination (C.R.C.P. 203.4), or as a foreign legal consultant (C.R.C.P. 204.2), the attorney may not appear before a court of record or tribunal or state agency in Colorado that requires pro hac vice admission unless the attorney either is granted such admission pursuant to C.R.C.P. 205.3, 205.4, or 205.5, or the attorney is employed by the office of the state public defender, the state or any of its departments, agencies, or institutions, a county, a city, or a municipality, or a nonprofit legal services organization where poor or legally underserved persons receive legal advice.
(4)–(8) [NO CHANGE]

Rule 208.2. Character and Fitness General Requirements

(1) [NO CHANGE]
(2) [NO CHANGE]
(2.5) Subpoenas. The Regulation Counsel or Chair of the Character and Fitness Committee may issue subpoenas to parties other than the applicant to compel the production of relevant documents and other evidence. Subpoenas issued under this section and challenges thereto are subject to C.R.C.P. 45. Challenges to subpoenas must be directed to the Presiding Disciplinary Judge.
(3) [NO CHANGE]
Rule 209.5. Post-Hearing Procedures

(1)–(3) [NO CHANGE]
(4) Proceedings Before the Supreme Court.
(a) Docketing. The matter shall be docketed by the Clerk of the Supreme Court as:

SUPREME COURT, STATE OF COLORADO

Case No.

ORIGINAL PROCEEDING IN ATTORNEY ADMISSIONS

IN THE MATTER OF (the name of the Applicant),

APPLICANT

Once docketed, the matter will remain confidential unless written exceptions are filed, in which case the matter no longer remains confidential and instead becomes a public proceeding.

(b)–(d) [NO CHANGE]

Amended and Adopted by the Court, En Banc, April 15, 2021, effective July 1, 2021.

By the Court:
Monica M. Márquez
Justice, Colorado Supreme Court

Rule Change 2021(05)
Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings, Colorado Attorneys’ Fund for Client Protection, and Mandatory Continuing Legal Education and Judicial Education

Rules 250.1, 250.2, 250.6, 250.9 and 250.10

Rule 250.1.
 Definitions (1)–(13) [NO CHANGE]
 (14) “CLJE Regulations” refer to the Continuing Legal and Judicial Education Committee’s Regulations Governing Mandatory Continuing Legal and Judicial Education.

Rule 250.2. CLE Requirements

(1) CLE Credit Requirement. Every registered lawyer and every judge must complete 45 credit hours of continuing legal education during each applicable CLE compliance period as provided in these rules. The 45 credit hours must include at least seven credit hours devoted to professional responsibility.
(a) Beginning January 1, 2023, the seven credit hours devoted to professional responsibility must include the following:
 i. At least two credit hours in the area of equity, diversity, and inclusivity, and
 ii. At least five credit hours in the areas of legal ethics and legal professionalism.
(b) Failure to comply with these requirements in a timely manner as set forth in these rules may subject the registered lawyer or judge to a fee, a penalty, and/or administrative suspension.

(2)–(5) [NO CHANGE]

Rule 250.6. Accreditation

(1) [NO CHANGE]
(2) Criteria. For an activity to be accredited, the following criteria must be met: (1) the subject matter must directly relate to legal subjects and the performance of judicial duties or the practice of law, including professionalism, leadership, equity, diversity, inclusivity, wellness, ethics, and law practice management, and (2) the activity must be directed to lawyers and judges. The CLJE Office will consider, in accrediting educational activities, the contribution the activity will make to the competent and professional practice of law or administration of justice.
(3) Professional Responsibility. For an activity or portion of an activity to be accredited as professional responsibility it must address legal ethics, legal professionalism, or equity, diversity, and inclusivity as these terms are defined in CLJE Regulation 103.1.
(4)–(7) [NO CHANGE]

Rule 250.9. Representation in Pro Bono Legal Matters

(1) Maximum Credits. A registered lawyer may earn a maximum of nine CLE credit hours during each three-year compliance period for providing uncompensated pro bono legal representation to indigent or near-indigent persons, or supervising a law student providing such representation. Professional responsibility credit may not be earned under this rule.

(2)–(5) [NO CHANGE]

Rule 250.10. Participation in the Colorado Attorney Mentoring Program (CAMP)

(1) One-Year CAMP Program. A registered lawyer or judge may earn a maximum of nine CLE credit hours, two hours of which will count toward the legal ethics portion of the professional responsibility requirement of C.R.C.P. 250.2 (1), for successful completion of the one-year CAMP program curriculum (pursuant to C.R.C.P. 255) as either a mentor or as a mentee.
(2) Six-Month CAMP Program. A registered lawyer or judge may earn a maximum of four CLE credit hours, one hour of which will count toward the legal ethics portion of the professional responsibility requirement of C.R.C.P. 250.2 (1), for successful completion of the six-month CAMP program curriculum (pursuant to C.R.C.P. 255) as either a mentor or a mentee.
(3) CLE Credit Participation Criteria. To receive CLE credit hours as a mentor or mentee:
(a)–(b) [NO CHANGE]
(c) Mentors may participate in a CAMP program, one mentor relationship at a time, as often as they wish, but may receive a maximum of nine total CLE credit hours, including a maximum of two legal ethics credit hours of the professional responsibility requirement of C.R.C.P. 250.2 (1), per compliance period.
(d)–(g) [NO CHANGE]
(4) [NO CHANGE]

Amended and Adopted by the Court, En Banc, April 15, 2021, effective July 1, 2021.

By the Court:
Monica M. Márquez
Justice, Colorado Supreme Court

Visit the Supreme Court’s website for complete text of rule changes, including corresponding forms and versions with highlights of revisions (deletions and additions), which are not printed in Court Business. Material printed in Court Business appears as submitted by the Court and has not been edited by Colorado Lawyer staff.
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Disciplinary Case Summaries


The Presiding Disciplinary Judge approved the parties’ conditional admission of misconduct and suspended Angela Delorme-Gaines (New Mexico attorney number 24883) for 90 days with payment of $4,000 in restitution, with conditions. The suspension took effect on March 26, 2021.

Delorme-Gaines is not licensed to practice law in Colorado. Though she is licensed to practice law in New Mexico, she was suspended in 2019 for noncompliance with continuing legal education requirements. In 2019, Delorme-Gaines agreed to help a client whose former employer refused to release his security clearance. The client also understood that she would represent him in a tort action against his former employer. She had not previously represented the client, but she did not provide him with a written fee agreement or a written scope of representation. The client paid her $4,000.

Delorme-Gaines discussed with her client the benefits and costs of filing the tort suit in Colorado and in Florida. She conducted legal research about her client’s matter and raised the issue of his security clearance with the office of Congressman Doug Lamborn, telling the congressman’s staff that her client’s security clearance was being illegally held by his former employer. When the congressman’s office intervened, the former employer agreed to release the security clearance. The relationship between Delorme-Gaines and her client later broke down, and she notified her client that she would not represent him in litigation.

Through this conduct, Delorme-Gaines violated Colo. RPC 1.5(b) (a lawyer shall inform a client in writing about the lawyer’s fees and expenses within a reasonable time after being retained if the lawyer has not regularly represented the client) and Colo. RPC 5.5(a) (1) (a lawyer shall not practice law without a law license or other specific authorization).

The case file is public per CRCP 251.31.

No. 21PDJ021. People v. Finn. 4/19/2021. Conditional Admission of Misconduct—Attorney Suspended.

The Presiding Disciplinary Judge approved the parties’ conditional admission of misconduct and suspended William Ryan Finn (attorney registration number 51171) for six months, with three months to be served and three months to be stayed upon the successful completion of a 22-month period of probation, with conditions, to run concurrent to Finn’s discipline in case number 20PDJ052. The suspension took effect on April 19, 2021.

In 2019, Finn’s previous employer filed a disciplinary complaint against him for dishonest conduct, which was ultimately sanctioned in case number 20PDJ052. The employer terminated Finn’s position with the firm. During an interview with another firm in December 2019, a senior partner asked Finn why he left his previous position. Finn did not disclose that he had been fired. In January 2020, Finn received from disciplinary authorities the request for investigation submitted by his former employer. When Finn began working with the new firm later that month, he completed and signed an application form for the firm’s professional liability insurance policy. The form directed Finn to state whether a disciplinary investigation or complaint was pending against him. Finn
and disbarred Michael J. Tauger (attorney registration number 01902). The disbarment took effect on April 5, 2021.

Tauger has thrice been suspended from the practice of law. Twice he was suspended for conduct that included practicing law while he was suspended. He was most recently disciplined in April 2020, when he was suspended for three years.

In July 2020, Tauger provided a form asset purchase agreement to parties who were negotiating for the purchase of assets of a marijuana-related business in Colorado Springs. Tauger made modifications to that agreement, and to a noncompete agreement and a related consulting agreement. He emailed these documents to the parties in July and August 2020. One of the emails used the domain name “taugerlaw.com” and included a disclaimer indicating that the message was confidential and potentially privileged.

Through this conduct, Tauger violated Colo. RPC 3.4(c) (a lawyer shall not knowingly disobey an obligation under the tribunal’s rules) and Colo. RPC 5.5(a)(2) (a lawyer shall not practice law where doing so violates the legal profession’s regulations).

The case file is public per CRCP 251.31.


The Presiding Disciplinary Judge approved the parties’ conditional admission of misconduct involving dishonesty, fraud, deceit, or misrepresentation.

The case file is public per CRCP 251.31.

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After the suspect was handcuffed, plaintiff returned to his parked vehicle. Officer Evans followed plaintiff to his vehicle and asked him to bring identification and the video of the arrest to the officer’s patrol car. Plaintiff brought his license, but not his tablet containing the video, to the patrol car.

Officer Evans then told plaintiff he needed a witness statement from him and handed him a form. When asked whether he had a video of the arrest, plaintiff claimed he did not. On the witness statement, plaintiff wrote that he did not see any inappropriate police conduct, that the officers stopped using force as soon as they had the suspect in custody, and that he only took a snapshot photo of the arrest, which he no longer had. Plaintiff later stated that his answers were lies made because he was afraid if he told the truth, he would have been incarcerated and the video would have been taken away. After he was encircled by several officers, plaintiff retrieved the tablet and showed it to Officer Evans, who grabbed the tablet and searched for the video. Plaintiff objected to the search. Officer Evans was unable to find the video and returned the tablet. Plaintiff left about 23 minutes after the officer first approached him.

Plaintiff filed a civil action against several officers and the City and County of Denver (Denver). As relevant here, he claimed the individual defendants retaliated against him for filming the suspect’s arrest in violation of the First Amendment, that they detained him and searched the tablet in violation of the Fourth Amendment, that they conspired to commit the constitutional violations, and that Denver was liable for the First Amendment violations due to its failure to train.

The officers successfully moved to dismiss the First Amendment claim on the basis of qualified immunity, because plaintiff’s right to record them in the performance of their official duties in public spaces was not clearly established at the time of their alleged conduct. The district court later granted summary judgment to Denver on the failure to train claim, based on the officers’ testimony that they understood that plaintiff had a right to record them. Based on this ruling, the court reinstated the First Amendment claim against the officers because the record supported a finding that at the time of the conduct the officers actually knew, based on their training, that plaintiff’s right existed. The court denied the officers’ motion for summary judgment based on qualified immunity on the reinstated claim. The court granted summary judgment to the officers on the Fourth Amendment claim, holding that Officer Evans had reasonable suspicion that plaintiff had violated Colorado law by making false statements to the police. The court also denied summary judgment on
the conspiracy claim pertaining to the Fourth Amendment claim.

The officers filed an interlocutory appeal from the orders partially denying their qualified immunity defenses. As to plaintiff’s First Amendment retaliation claim, the officers contended that the court should have granted them immunity once it held that judicial precedent did not clearly establish plaintiff’s First Amendment right to record them at the time of the conduct. Judicial decisions are the only valid interpretive source of the content of clearly established law, and a defendant’s eligibility for qualified immunity is judged by an objective standard, so what the officers subjectively understood the law to be was irrelevant to this test. Thus, the officers’ First Amendment training was not relevant to the clearly established law inquiry. Accordingly, the district court erred in denying the officers qualified immunity on the First Amendment retaliation claim.

Further, because the officers were entitled to qualified immunity on the First Amendment retaliation claim, it necessarily followed that they were also entitled to qualified immunity on the conspiracy claim as it related to the First Amendment right.

The officers also argued that the district court’s order denying them qualified immunity on plaintiff’s Fourth Amendment conspiracy claim was erroneous. Here, the court’s factual findings were not sufficient to support a legal conclusion that officers conspired to violate plaintiff’s Fourth Amendment rights by unlawfully searching plaintiff’s tablet. Further, any Fourth Amendment rights that plaintiff possessed were not clearly established under the particular facts of this case. Therefore, the district court erred in denying the officers qualified immunity with respect to plaintiff’s Fourth Amendment conspiracy claim.

The partial denial of the officers’ motions for summary judgment on the grounds of qualified immunity was reversed and the case was remanded for further proceedings.


In 2009 defendant entered the United States unlawfully. He married a US citizen in 2011 but did not take immediate steps to obtain lawful residency. After removal proceedings commenced in 2016, defendant began the process of adjusting his residency status to lawful based on his marriage, but he did not complete the process.

In 2017, the Drug Enforcement Agency determined that defendant was operating a drug-trafficking organization. When agents raided his house, they found 187 grams of heroin and 15 firearms. Defendant was initially charged with distribution of at least 100 grams of heroin and conspiracy to distribute. Each charge carried a five-year mandatory minimum sentence. Defendant then entered a plea agreement under which he pleaded guilty to distributing an unspecified quantity of heroin and being an alien in possession of a firearm in violation of 18 USC § 922(g)(5). Neither of these charges carried a mandatory minimum sentence. It was undisputed that the district court failed to advise defendant of two elements of the firearms offense: (1) that the alien is illegally or unlawfully present in the United States, and (2) that the alien knows he is illegally or unlawfully present. Defendant requested a downward variance from the sentencing guidelines, but the district court sentenced him, at the low end of the guidelines range, to 78 months on each count to run concurrently.

On appeal, defendant argued that the district court erred by failing to inform him of the two § 922(g)(5) elements before accepting his guilty plea and, accordingly, the plea must be vacated. Because defendant failed to raise the issue in district court, the Tenth Circuit reviewed for plain error.
The government conceded that defendant satisfied the first two plain error prongs. As to the third prong, defendant was required to show “a reasonable probability that, but for the error, he would not have entered the plea.” In the uninformed-guilty-plea context, a defendant may satisfy the third prong of plain error review by establishing a plausible defense based on an erroneously omitted element. Here, the district court plainly erred by accepting defendant’s guilty plea without advising him of two § 922(g)(5) elements. And defendant established a plausible defense to the § 922(g)(5) offense because his claim that at the time of the offense, he was not aware that he was unlawfully present in the United States is credible. However, defendant agreed to plead guilty in exchange for the dismissal of charges that carried five-year mandatory minimums in hopes that this would result in a sentence below the five-year threshold. While defendant’s strategic choice did not succeed, the error has no impact on the reason defendant took the plea deal, so he cannot show a reasonable probability that, but for the error, he would not have pleaded guilty. Therefore, defendant failed to satisfy plain error review.

The conviction was affirmed.


Defendant was convicted of charges related to his participation in a scheme to transport a large quantity of phencyclidine (PCP). Because he had two prior California felony drug convictions, defendant received a life sentence under 21 USC § 841(b)(1)(A) on count two, causing another person to possess with intent to distribute in excess of one kilogram of a mixture or substance containing a detectable amount of PCP.

In 2018, Congress passed the First Step Act (Act). Section 401 of the Act reduced the mandatory minimum sentence under § 841(b)(1)(A) from life to 25 years. The amendments effected by § 401 were not retroactive to sentences imposed before the enactment. However, the Act also amended 18 USC § 3582(c)(1)(A)(i) (the compassionate release statute). Following the Act’s enactment, defendant filed a motion to reduce his sentence under the compassionate release statute. The district court denied the motion, concluding that it lacked the authority to reduce the sentence.

Defendant appealed, arguing that the district court did have such authority. Under the Act, a district court may grant a motion for release if the court: (1) finds that extraordinary and compelling reasons warrant such a reduction; (2) finds that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and (3) considers the factors set forth in § 3553(a), to the extent applicable. The district court’s decision here indicates it concluded the Sentencing Commission possessed the exclusive authority to define the phrase “extraordinary and compelling reasons” through its general policy statements. However, Congress intended for the Sentencing Commission to generally describe such reasons as guideposts only; district courts have the authority to determine for themselves what constitutes extraordinary and compelling reasons.

Second, the district court also, as part of its analysis under the first step of the statutory test, concluded that it lacked the authority to treat the Act’s reduction of the mandatory minimum sentence under § 841(b)(1)(A) from life to 25 years as an “extraordinary and compelling reason” for purposes of § 3582(c)(1)(A)(i). However, a district court may find the existence of extraordinary and compelling circumstances based in part on a defendant’s pre-Act mandatory life sentence under § 841(b)(1)(A).

Third, the district court’s decision also indicates that the district court viewed its authority, at step two of the statutory test, as limited by the Sentencing Commission’s most recent policy statement. However, the Sentencing Commission’s existing policy statement is applicable only to motions for sentence reductions filed by the Director of the Bureau of Prisons, not to motions filed directly by defendants. Therefore, the district court misunderstood the extent of its authority at both steps one and two of § 3582(c)(1)(A)’s statutory test.

The judgment was reversed and the case was remanded for further proceedings.
identity of the government’s confidential source. Here, the district court admitted transcripts of all conversations between the source and defendant into evidence, so the source would have added nothing new, and her testimony would have been unnecessarily cumulative. Accordingly, defendant failed to show that the district court abused its discretion.

Defendant also argued that the district court erred in admitting an agent’s expert testimony. The agent’s testimony provided a basis on which the jury could infer that defendant recruited a vulnerable girl seeking structure and stability in her life, so it related to an element of the crime. Accordingly, the district court did not abuse its discretion by allowing the agent’s expert testimony on pimping and prostitution culture. Further, defendant agreed to the jury instruction about the agent’s testimony and therefore invited any error caused by the lack of instructions and waived his right to challenge them.

Defendant further argued that the district court erred by failing to admit a government trial exhibit in its entirety. Here, the government’s proposed exhibit contained exclamatory statements that defendant claimed on appeal the district court should have admitted. But defendant caused their exclusion through his own relevance objection to the district court. As a result, if the district court erred by not admitting evidence it did not know defendant believed was exculpatory, the error was invited.

Defendant also argued that the aggregation of the district court’s errors leads to cumulative error. However, defendant identified at most invited error, so the Tenth Circuit rejected this argument.

Lastly, defendant argued that his sentence was substantively unreasonable. However, the district court did not abuse its discretion. The conviction was affirmed.


Plaintiff is a physician practice that owns and operates the New Mexico Cancer Center (NMCC). Defendant Presbyterian Healthcare Services (PHS) is a nonprofit integrated healthcare system that participates in multiple markets and employs many physicians. PHS controlled defendant Presbyterian Health Plans, Inc. (PHP), which operates on a for-profit basis and sells health insurance products. Plaintiff is an in-network provider for PHP.

The NMCC opened in 2002, and plaintiff and PHP entered into a five-year provider agreement. The agreement was extended on annual intervals after its expiration. In 2007, PHS opened its own oncology program and began to compete with plaintiff.

Plaintiff filed suit against defendants alleging, as relevant here, claims under Section 2 of the Sherman Act for monopolization and attempted monopolization and various state law claims. Plaintiff’s claims centered on three alleged anticompetitive practices that PHS implemented: (1) the “mandate,” under which PHP would cover certain drugs only if they were purchased from a specified pharmacy; (2) an alleged joint venture between PHP and Radiology Associates of Albuquerque (RAA) in which PHP enrollees needing breast imaging services were forced to use RAA under their PHP plan; and (3) PHS’s policies concerning internal physician referrals. The district court granted summary judgment to defendants on the Sherman Act claims and declined to exercise jurisdiction over the remaining state law claims.

Plaintiff appealed the district court’s grant of summary judgment. First, as to the mandate, none of the conduct that plaintiff asserted was anticompetitive constituted a refusal to deal because none of the conduct demonstrated a willingness to forsake short-term profits to achieve an anti-competitive end, and none of the conduct showed that defendants ended a preexisting course of dealing with plaintiff. Second, plaintiff’s allegation of a joint venture between RAA and PHS lacked merit. Third, regarding the claims concerning internal referrals, PHS was under no obligation to refer its patients to another practice or hospital. Accordingly, the district court did not err in holding that plaintiff had failed to establish a Sherman Act claim. Further, the district court did not abuse its discretion in declining to exercise jurisdiction over the remaining state law claims after it dismissed the Sherman Act claims.

The summary judgment was affirmed.


Plaintiff is a Muslim man of Pakistani descent who served as an executive with defendant. While working for defendant, plaintiff offered to pay for an administrative assistant’s rental car and a few weeks later invited her to see a movie, stating that he didn’t have a significant other. The employee expressed concerns to her supervisor about plaintiff’s conduct, and plaintiff’s supervisor discussed the incident with him. Several weeks later at a reception, plaintiff told a female delegate from the United Kingdom that he got a positive vibe from her and that she was an attractive young female. A United Kingdom consulate official expressed concern to plaintiff’s supervisor about the comments. When plaintiff’s supervisor brought these comments to his attention, plaintiff confirmed that he made the comments and said there was nothing wrong with them. Defendant then terminated plaintiff’s employment.

Plaintiff sued defendant under Title VII of the Civil Rights Act contending that his firing resulted from discrimination based on race, religion, and gender. Defendant prevailed on summary judgment on all of the claims.

On appeal, plaintiff challenged the entry of summary judgment. Because plaintiff relied on circumstantial evidence for his claims, the Tenth Circuit applied the burden-shifting framework under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to determine if a factual dispute exists on whether defendant discriminated against plaintiff. To prevail under this inquiry, (1) plaintiff must present a prima facie case of discrimination; (2) if plaintiff makes this showing, the burden shifts to defendant to provide a legitimate, nondiscriminatory reason for the firing; and (3) if defendant provides a legitimate, nondiscriminatory reason, the burden reverts to plaintiff to show pretext.
As evidence for his claims, plaintiff cited defendant’s decision to not fire C.B., another male executive accused of sexual harassment. Plaintiff presented evidence that C.B., a white male manager, had yelled at a female subordinate, exchanged sexual text messages with subordinates, and asked a subordinate to run a personal errand during work hours; that C.B. was placed on administrative leave and required to take classes and was not terminated; and that the three individuals who fired plaintiff were involved in the decision to issue only a warning to the white male employee. This is evidence from which a factfinder could reasonably infer race discrimination based on defendant’s treatment of plaintiff.

Further, while defendant fired plaintiff for a legitimate, nondiscriminatory reason—inappropriate comments to two women—plaintiff rebutted the explanation with evidence of defendant’s greater leniency toward C.B. and inadequacy in defendant’s investigation based on its failure to ask plaintiff why he made the statements or investigate beyond confirming that the statements were made. A factfinder could reasonably regard plaintiff and C.B. as similarly situated, and defendant’s limited investigation suggests pretext. Therefore, plaintiff satisfied his burden to show a prima facie case of race discrimination and pretext.

As to the discrimination claim based on religion, plaintiff did not identify the religion of any comparators or show past complaints of religious discrimination, and he presented no evidence of statements or actions suggesting a negative perception of Muslim employees. As to the gender discrimination claim, plaintiff did not identify a female employee who engaged in similar conduct and obtained better treatment, and he did not present evidence to meet the heightened requirements for discrimination against males. Therefore, plaintiff failed to present a prima facie case for discrimination based on religion or sex.

The award of summary judgment on the race discrimination claim was reversed and the summary judgment award on the religion and gender discrimination claims was affirmed.  

These summaries of selected Tenth Circuit opinions are written by licensed attorney Robert Gunning (Boulder). They are provided as a service by the CBA and are not the official language of the court. The CBA cannot guarantee the accuracy or completeness of the summaries. The full opinions are available on the CBA website and on the Tenth Circuit Court of Appeals website.

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Summaries of Published Opinions

April 1, 2021
Discovery—Mandatory Competency Evaluation—Preliminary Competency Finding.

Defendant tried to initiate a romantic relationship with the victim. After the victim rebuffed his advances, defendant sent her dozens of text messages over the course of two days, some of which threatened that he would rape and kill her. Defendant also went to the victim's home and left a bag hanging on the door containing a knife and a threatening message. A jury found defendant guilty of stalking. Between trial and sentencing, defense counsel filed a formal competency motion. The trial court denied the motion and sentenced defendant.

On appeal, defendant contended that the prosecution failed to disclose an exhibit to the defense before introducing it at trial, which constituted a discovery violation and violated his right to due process. It is unclear from the record whether the prosecution failed to disclose the exhibit. However, assuming the allegation is true, any error was harmless beyond a reasonable doubt because the properly admitted evidence of defendant’s guilt was overwhelming.

Defendant also argued that the trial court erred by failing to order a competency evaluation before trial or, alternatively, between trial and sentencing. The court, defense counsel, or the prosecution may raise the issue of competency. Once the defendant’s competency is properly raised with supported facts, the court may make a preliminary finding of competency or incompetency. If the court determines that it has insufficient information to make a preliminary finding, it must order a competency evaluation. The court must also order a competency evaluation if the court makes a preliminary finding and either party objects to it within seven days. In evaluating whether a written competency motion triggers the statutory procedure, the court’s task is limited to evaluating whether the proffered facts support counsel’s good faith doubt about the defendant’s competency.

As to the pretrial competency evaluation request, defense counsel stated that he had concerns about defendant's competency but did not explain what those concerns were or file a motion. Therefore, his statement gave the trial court no reason to believe that defendant was incompetent before trial, and the court did not err by failing to order a competency evaluation at that time. However, the post-trial competency motion set forth facts that included defendant’s belief that the witness who testified as the victim was an imposter and thus supported defense counsel’s good faith doubt about defendant’s competency. Accordingly, the trial court erred in not making a preliminary competency finding, and this error was not harmless.

The judgment of conviction was affirmed, the sentence was vacated, and the case was remanded with directions for further proceedings.

First Degree Assault—Strangulation—Extreme Indifference—Serious Bodily Injury—Expert Testimony—Prosecutorial Misconduct.

Defendant had an altercation with his girlfriend K.B. during which he strangled her; grabbed her arms, causing significant bruising; and headbutted her, causing a laceration above her eye. A jury found defendant guilty of first degree assault with extreme indifference.

On appeal, defendant contended that there was insufficient evidence of first degree assault because his conduct did not meet the definition of serious bodily injury under the relevant statutes. Here, defendant’s “conduct” was strangulation, and there was expert testimony that the strangulation and resulting constriction of K.B.’s carotid artery had placed her at a substantial risk of death. There was also photographic evidence of K.B.’s injuries. Moreover, the jury could reasonably infer from K.B.’s altered state and memory loss that her brain had been deprived of oxygen for a time. Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence to support a jury finding that K.B. suffered serious bodily injury.

Defendant also argued that reversal is required due to statements made by law enforcement witnesses at trial. Defendant did not object to the statements at trial. Defendant contended that two officers improperly offered expert testimony that K.B. was disoriented because she had been strangled. This testimony about their observations of the victim’s mental and physical condition at the hospital was not improper, but in any event, any error was harmless because it was cumulative of the physician’s testimony. And the testimony about the types of strangulations cases one officer observed was elicited by the defense and defense counsel did not object to the statement’s admission. Further, the investigator’s testimony about strangulation injuries and doctors’ frequency in signing serious bodily injury forms was also cumulative of other evidence. Accordingly, the district court did not abuse its discretion.

Defendant further contended that the prosecution engaged in misconduct throughout the trial. As to only the investigator, the prosecution’s examination was improper but does not warrant reversal. And as to the closing statement, the prosecution did not misstate the definition of reasonable doubt or the law on serious bodily injury, did not improperly refer to testimony, and did not improperly argue a cycle of violence theory because it was supported by the evidence.

Defendant also requested correction of the mittimus, which reflects that he pleaded guilty to first degree assault with extreme indifference.

The judgment was affirmed and the case was remanded for correction of the mittimus.

2021 COA 42. No. 19CA1117. People v. Argott.
Sentencing—Probation—“Wobbler” Statute—Converting Felony to Misdemeanor.

Defendant pleaded guilty to a drug felony. The plea agreement included a stipulation that at the sentencing hearing the court would place defendant on probation without imposing a jail sentence. At the sentencing hearing, the court put defendant on supervised probation for one year; ordered him to complete a substance abuse
evaluation and comply with its recommendations; and informed him that under CRS § 18-1.3-103.5(2)(a), a “wobbler” statute, the court would reduce his felony conviction to a misdemeanor if he successfully completed his probation.

Defendant’s probation was later revoked, and the court resentenced him to probation with 90 days in jail with work release. Defendant’s probation was revoked a second time, and the court resentenced him to unsupervised probation on the condition that he serve 130 days in a community treatment center with work release. After defendant successfully completed the days in a community treatment center, he asked the court to reduce his sentence to a misdemeanor, which the court denied.

On appeal, defendant contended that the court erred when it decided that he was not eligible for relief under CRS § 18-1.3-103.5(2)(a) because it had previously revoked his probation. Subsection 103.5(2)(a) requires a court to reduce a felony drug conviction to a class 1 misdemeanor drug conviction if it finds that the defendant has successfully completed any community-based probation sentence. The statute does not exclude defendants who have had courts revoke their probation and whom courts have then resentenced to probation. Accordingly, the court erred. However, defendant is not automatically entitled to an order reducing his felony conviction to a class 1 misdemeanor; the court must decide whether he has “successfully completed” his probation.

The order was reversed and the case was remanded for further proceedings.


Johnson is an inmate in the Colorado Department of Corrections. He filed 10 separate packets with the trial court, each of which consisted of two documents. One document was titled “NOTICE OF CLAIM” and in all but one of the documents, Johnson wrote that he would provide additional information once he filed his “actual complaint” and stated that he had mailed copies of the documents to the Attorney General’s office. The second document in each packet was labeled “Motion for the Court to Grant the Following.” It asked the court to make the “notice of claim” a part of the court record and to send him filing forms for state-level lawsuits, forms for pro se litigants with no legal training, and an in forma pauperis application.

Johnson made 10 different allegations against various parties in the 10 packets. The trial court treated the documents as complaints and decided they were substantially frivolous, groundless, and malicious, and it struck them all. It also assessed filing fees and ordered that the fees be taken from Johnson’s inmate account.
On appeal, Johnson argued that the court acted prematurely when it struck the documents because they were notices of claim under the Colorado Governmental Immunity Act (CGIA). The documents here were notices of claim because they were labeled as such, indicated that Johnson intended to file an actual complaint later, and generally followed the requirements of CRS § 24-10-109(1) to (3) by setting forth specific allegations and naming various prison employees. However, the trial court did not err in striking them because under the CGIA, Johnson was required to complete the notice of claim process before filing an action with the court. Therefore, he should have waited until the Attorney General had denied his claims with the court. Therefore, he should have waited the notice of claim process before filing an action and naming various prison employees. However, the orders were affirmed in part and reversed in part, and the case was remanded for the court to refund the assessed fees.


Western Mobile Boulder, Inc. (Western Mobile) obtained approval from Boulder County (County) through an approval resolution to engage in open pit gravel mining as a special use. The mining was to commence on January 1, 2003, and take place in several phases over 30 years, plus an additional three years to complete all post-mining reclamation work. From 1998 to 2006, Western Mobile worked with its successor in interest Lafarge West, Inc. (Lafarge) to operate under the approval resolution at the mining site, and Lafarge eventually took over the site. Lafarge later requested and was granted a temporary cessation for the site. Its request stated that active mining had not occurred at the site since 2006. Lafarge then sold its interests in the site in 2010 to Martin Marietta Materials, Inc. (Marietta). After the purchase, Marietta maintained and paid for permits and annual reports; inspections and maintenance for air, water, and weeds; construction of buildings that would be needed for mining; and reclamation work. But it never performed any gravel mining.

In 2017 plaintiffs asked the County to determine whether the approved special use had lapsed due to inactivity for longer than five years pursuant to Boulder County Land Use Code article 4-604(C). The County’s land use director determined that the approved special use had not lapsed, and the Boulder County Board of Adjustment (BOA) affirmed the decision. Plaintiffs appealed to the district court, which affirmed the BOA’s decision.

On appeal, plaintiffs argued that the district court erred because any activity other than actual open pit gravel mining is unambiguously beyond the scope of what was contemplated by the Code. Article 4-604(C) of the Code provides that a special use permit lapses if it is inactive for five years. Here, even though accessory uses are allowed, the permitted special use was to mine gravel, and any permitted accessory use must comply with the same conditions for approval as the main use, which is open pit gravel mining. Because the County director did not form his determination under the correct definition of “special use permit,” his decision was an abuse of discretion. However, the Court of Appeals could not discern whether the County director would have reached a different conclusion under the correct construction of the law.

The judgment was reversed and the case was remanded for further proceedings.

April 8, 2021


Defendant was charged with human trafficking for sexual servitude, pimping, and pandering. He
pleaded not guilty, and a month later he filed a request for disposition of his case under the Uniform Mandatory Disposition of Detainers Act (UMDDA). The trial court later granted two continuances, and defendant’s counsel filed a motion to dismiss for violation of the UMDDA. The court denied the motion. Defendant was found guilty as charged.

On appeal, defendant contended that the district court erred by finding good cause for the prosecution’s continuance request and denying his motion to dismiss. The UMDDA requires that an incarcerated defendant be brought to trial within 182 days after the court and the prosecuting official receive his or her request for final disposition of charges, unless, as relevant here, that period is extended for good cause. Here, the UMDDA deadline was exceeded, but the court properly found good cause to extend the deadline based on the prosecution’s request for a continuance due to the victim’s unavailability. Accordingly, the court did not err by denying defendant’s motion to dismiss.

Defendant also argued that the evidence was insufficient to support his conviction for human trafficking. However, the evidence sufficiently supported a finding that defendant enticed, recruited, or transferred the victim with the intent to induce her (by using or threatening to use force or by controlling her access to drugs) to engage in prostitution.

Defendant further argued that the court erred by admitting (1) a photograph of him holding a gun, (2) a detective’s testimony that he found a music video link titled “ImaPimp” on defendant’s Facebook page, and (3) the victim’s testimony that a photo showed another girl who worked for defendant. The photograph of defendant holding a gun and the Facebook post were relevant and not unfairly prejudicial. Although the photograph of the other girl was not relevant, any error was harmless in light of other evidence. Accordingly, the court did not err.

Defendant also contended that the court erred by failing to give a modified unanimity instruction on the human trafficking charge because the prosecution presented evidence of two discrete acts, either one of which could have constituted the offense of trafficking. However, the human trafficking offense was charged and tried as a continuing course of conduct constituting a single transaction, so a modified unanimity instruction was not required, and the district court did not err.

Defendant further contended that the district court erred by imposing an aggravated sentence based on its own factual finding, rather than a jury finding, that he was under confinement when he committed the charged offenses. A defendant’s status as “under confinement” in a halfway house is a fact that falls under the prior conviction exception and is exempt from the jury trial requirement. Therefore, the court did not err. The judgment and sentence were affirmed.


AA Wholesale Storage, LLC (AA) obtained a default judgment against Swinyard for nonpayment of a debt on a commercial lease. AA was unsuccessful in collecting the judgment and learned that Swinyard was prosecuting a civil action against unrelated third parties. AA moved under CRCP 69(g) for a turnover of Swinyard’s claims in the hope of applying the proceeds of that litigation to satisfy its judgment. The district court denied the motion.

On appeal, Swinyard argued that the Court of Appeals lacked jurisdiction because the district court’s order was not a final judgment. Here, AA requested the turnover of Swinyard’s choses in action and the court definitively denied that request. The district court’s order ended the particular part of the action in which it was entered leaving nothing further for the district court to do as to this particular collection tool. Therefore, the order was final and appealable.

On the merits, AA argued that the court abused its discretion in denying its CRCP 69(g) motion. The court recognized a number of practical problems associated with the turnover of Swinyard’s claims to AA, which included Swinyard’s required participation in the case to prove the value of services.
rendered, Swinyard’s lack of motivation to pursue the case if the funds were going directly to AA, and consideration of pending counterclaims against Swinyard. The court also invited AA to consider alternative relief in the form of a lien on the proceeds of Swinyard’s litigation. These considerations were proper exercises of the court’s discretion.

The order was affirmed.

2021 COA 47. No. 20CA0800. People in the Interest of J.G. Juvenile Court—Dependency and Neglect—Troxel Presumption.

The juvenile court adjudicated the children dependent and neglected and transferred their custody to the paternal grandmother, M.B. Mother later moved to have the children returned to her care. After a six-day hearing, the court denied the motion. M.B. moved for an allocation of parental responsibilities (APR) for the children. After a hearing, the juvenile court allocated sole decision-making authority and primary parenting time to M.B. and allowed mother weekly parenting time.

Mother argued on appeal that the juvenile court erred in concluding that M.B. had standing to request an APR when the children had been temporarily placed in her care over mother’s objection. Mother’s argument was based solely on the Uniform Dissolution of Marriage Act, which does not govern APRs in dependency and neglect cases. But the Children’s Code, which does apply, expressly authorizes a grandparent to intervene as a matter of right following a child’s adjudication as dependent and neglected. Further, M.B.’s motion was duplicative of the guardian ad litem’s (GAL) motion for an APR to M.B., and mother did not contend that the GAL lacked standing to seek an APR to the paternal grandmother. Accordingly, the juvenile court did not err.

Mother also argued that the juvenile court erred by failing to apply the presumption under Troxel v. Granville, 530 U.S. 57, 68 (2000), that parents may regain the presumption that they will act in the child’s best interests following a child’s adjudication as dependent and neglected before allocating parenting time to the paternal grandmother. Here, in ruling on the APR request, the juvenile court reviewed and adopted an earlier order that expressly determined that mother had complied with her treatment plan and was a fit parent. Therefore, mother was entitled to the Troxel presumption, but the record does not show that the court applied Troxel’s protections to her.

Mother also contended that granting sole parenting time and decision-making authority to a nonparent over a fit parent’s objection infringes on the parent’s constitutional rights. Mother did not raise this argument in juvenile court, but the Court of Appeals addressed it for remand purposes. When the Troxel safeguards are applied, the Children’s Code authorizes an APR to a nonparent in accordance with the child’s best interests, even over the objection of a parent, without requiring a demonstration of parental unfitness or significant harm to the child.

The judgment was reversed and the case was remanded for further proceedings.


Muhs worked as a registered nurse for Catholic Health Initiatives Colorado (Catholic Health). She stole and self-injected fentanyl while working there, and Catholic Health terminated her employment. Muhs was awarded unemployment compensation benefits based on a finding that she was not at fault for her unemployment because her fentanyl addiction rendered her fentanyl theft and use nonvolitional. A panel of the Industrial Claim Appeals Office affirmed the award.

On appeal, Catholic Health argued that Muhs was not entitled to benefits because she did not comply with CRS § 8-73-108(4)(b)(IV) of the Colorado Employment Security Act (Act). The Act provides that a worker who loses employment because of a "no-fault" addiction may qualify for unemployment benefits only if the worker asserts an alcohol or substance abuse disorder and within four weeks of that admission takes enumerated steps to qualify for benefits. Here, it was undisputed that
Muhs did not comply with the statute. Therefore, the Panel erred.

The order was set aside and the matter was remanded to the Panel with directions to return the case to the hearing officer for entry of an order disqualifying Muhs from unemployment compensation benefits.

April 15, 2021

Defendant was tried on charges of child abuse resulting in the death of her 4-month-old grandson. The court empaneled a 12-person jury with one alternate. At the end of the evidence, the court identified Juror 11 as the alternate and excused him from deliberations. The jury found defendant guilty of child abuse resulting in death. Juror 11 then testified at defendant’s sentencing hearing that he thought there was reasonable doubt in defendant’s case, and he stated that other jurors had expressed doubts about defendant’s credibility during the trial. Defendant filed a Crim. P. 33 motion for a new trial alleging juror misconduct based on the jurors engaging in premature deliberations and attached an affidavit from Juror 11 to support her motion. The court denied the motion without a hearing.

On appeal, defendant contended that the trial court erred by denying her motion for a new trial because it erroneously found Juror 11’s affidavit inadmissible under CRE 606(b). CRE 606(b) recognizes three narrow exceptions to the ban on post-verdict juror testimony, and the US Supreme Court recognizes a constitutional exception when a juror makes a statement indicating reliance on racial stereotypes or animus to convict a defendant. Whether CRE 606(b) applies depends on the type of juror misconduct alleged rather than when it occurred. Juror 11’s affidavit did not allege misconduct that falls within a recognized exception. Accordingly, CRE 606(b) barred receipt of the affidavit, and the trial court did not err.

The judgment was affirmed.

April 22, 2021

The probate court appointed a conservator for Meggitt. It later found that the special conservator’s fees and costs were reasonable and entered an order for their payment.

On appeal, Meggitt argued that the probate court lacked jurisdiction to enter an order for payment of those fees and costs because her attorney did not serve her with notice of the original petition to appoint a conservator or notify her of the hearing on the petition. However, the probate court had subject matter jurisdiction under CRS § 15-14-402(1), which was not divested by the subsequent failure to follow statutory requirements. Further, Meggitt did not challenge the service and notice of the appointment proceedings for over a year and thus waived any objection to the court having personal jurisdiction over her affairs. Therefore, this portion of her appeal was dismissed.

Meggitt also contended that the lack of notice of the fee rate and costs incurred by the special conservator precludes compensation. The special conservator is entitled to compensation because she provided services as a fiduciary on behalf of Meggitt’s estate under court order. Here, the petition complied with the statute by stating that the basis of compensation had not yet been determined, and Meggitt conceded that she was not seeking review of the court’s determination that the fees were reasonable. Therefore, any error in not disclosing the special conservator’s fee rate was harmless.

The order was affirmed.

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then undergo a court-ordered sanity evaluation. The court denied the motion and ordered a sanity evaluation. The evaluator concluded, relying on defendant’s suppressed but voluntary statements to law enforcement, that defendant was legally sane at the time of the killing. Before trial, the prosecution served subpoenas duces tecum on several agencies, requesting records of defendant’s psychiatric or psychological treatment or evaluations. Defendant moved to quash the subpoenas. The trial court denied the motion and permitted disclosure of defendant’s statements to medical professionals. A jury convicted defendant as charged.

On appeal, defendant contended that the trial court erred by denying his motion to quash the prosecution’s subpoenas duces tecum because the court’s ruling unlawfully expanded the waiver of the physician-patient/psychologist-patient privilege under CRS § 16-8-103.6(2)(a). A defendant who places his mental condition at issue by pleading NGRI waives confidentiality as to his communications to a physician or psychologist during an examination or treatment for the mental condition for purposes of a trial or hearing on the issue of the mental condition. Here, the psychiatric nurse’s and licensed professional counselor’s testimony were encompassed by the statutory waiver of confidentiality for a physician or psychologist. Accordingly, the trial court correctly applied the broad waiver of privilege and did not abuse its discretion in denying defendant’s motion to quash.

Defendant also contended that the trial court erred by ruling that the prosecution could use his voluntary but unwarned statements against him at trial. When a defendant pleads NGRI and undergoes a court-ordered mental health evaluation, a failure to adequately advise the defendant under Miranda regarding his statements to the evaluator generally precludes the prosecution from using the statements as substantive evidence in its case-in-chief. But if the defendant subsequently presents evidence of his mental condition, the prosecution may rebut this presentation with evidence from the court-ordered evaluation, including defendant’s unwarned statements, so long as they were voluntary. Here, the trial court did not abuse its discretion by ruling that the prosecution could use the sanity evaluator’s testimony and opinion to rebut any psychiatric evidence defendant might present to demonstrate his insanity at the time of the killing.

Defendant further argued that the trial court erred by denying his motion challenging the constitutionality of CRS § 16-8-107(3)(b). He argued that the statute is facially unconstitutional because the required court-ordered sanity examination forces a defendant to choose between his Fifth Amendment privilege against self-incrimination and concomitant right to remain silent, and his right to present a defense. Defendant also maintained that the statute was unconstitutional as applied to him because he was compelled through the court-ordered evaluation to provide otherwise unavailable evidence to the prosecution that was then used against him. However, other Court of Appeals divisions have addressed and rejected these arguments, and defendant failed to show that these holdings were inapplicable to his case.

The judgment of conviction was affirmed.

Defendant also contended that the trial court violated his right to due process by quashing his subpoena duces tecum for and refusing to conduct an in camera review of the personnel file of the investigator who posed as the alleged victim. The trial court did not abuse its discretion by quashing the subpoena because defendant was using the subpoena to improperly conduct discovery. Further, defendant failed to make an initial showing that the subpoenaed materials were relevant. Accordingly, the trial court did not abuse its discretion by declining to conduct an in camera review before ruling on defendant’s right to see the materials.

The judgment of conviction was affirmed.


Omegle is a social media site that allows people to communicate anonymously with random strangers through videos and instant messages. Defendant was on the site when he sent sexually tinged messages and images to a user claiming to be 14-year-old girl (but who was actually law enforcement personnel). He was charged with internet luring of a child and Internet sexual exploitation of a child. Defendant endorsed a therapist as an expert witness, but after several motions and hearings, the trial court issued an order significantly limiting the opinions that the expert could provide to the jury. The jury convicted defendant of internet sexual exploitation of a child.

On appeal, defendant argued that by limiting the expert witness’s testimony, the trial court violated his constitutional right to present a defense. Defendant waived his argument regarding certain opinions because defense counsel agreed at the final hearing to narrow the scope of the expert’s proposed testimony. While defendant preserved his arguments as to opinions B through F, opinions B, C, E, and F were irrelevant. Although opinion D was relevant to role play in chat rooms, the testimony would have improperly bolstered defendant’s argument that he believed he was communicating with an adult playing the role of a 14-year-old girl. Therefore, the court did not abuse its discretion by excluding opinions B through F.

Defendant also contended that the trial court violated his right to due process by quashing his subpoena duces tecum for and refusing to conduct an in camera review of the personnel file of the investigator who posed as the alleged victim. The trial court did not abuse its discretion by quashing the subpoena because defendant was using the subpoena to improperly conduct discovery. Further, defendant failed to make an initial showing that the subpoenaed materials were relevant. Accordingly, the trial court did not abuse its discretion by declining to conduct an in camera review before ruling on defendant’s right to see the materials.

The judgment of conviction was affirmed.


Two men robbed the owner of an automobile repair shop and a customer. One of the robbers was wearing an orange construction vest; the other was wearing a yellow vest. During the robbery, the man in the yellow vest struck the owner in the head with a pistol, kicked the owner repeatedly, and kicked and pistol-whipped the customer. The customer sustained serious injuries, and the owner died at the scene. After a portion of surveillance video recorded during the incident was released to the public, a person came forward and identified defendant as the robber wearing the yellow vest.

Defendant was eventually tracked down in Philadelphia, and he was arrested there. While being booked, defendant made a statement that was potentially inculpatory (the statement), but the prosecution and Colorado police did not learn about this statement until the seventh day of defendant’s trial. At that point, the prosecutor told the trial court and defense counsel that the prosecution had just learned of the statement. Defense counsel asked the court to prevent the prosecution from introducing the statement into evidence as a sanction for not giving it to the defense before trial within the Crim. P. 16 time parameters. The court agreed that the mid-trial disclosure of the statement violated the rule, but it found that the prosecution had not intentionally
kept the statement from the defense. Therefore, the court decided that it would hold a hearing outside the jury’s presence to decide whether to suppress the statement on Fifth Amendment grounds, as a sanction to remedy the rule violation. At the end of the hearing, the court denied the motion to suppress. The Philadelphia detective then testified before the jury about defendant’s statement. A jury convicted defendant of first degree murder, first degree assault, aggravated robbery, and conspiracy to commit aggravated robbery.

On appeal, defendant argued that the court erred by permitting the prosecution to introduce the statement into evidence because it was disclosed too late. Here, the record shows that Philadelphia police both participated in the investigation of this case and reported to the prosecution about it, thereby satisfying both requirements of Crim. P. 16(I)(a)(3). Crim. P. 16(I)(b)(1) required the prosecution to provide the defense with defendant’s statement “as soon as practicable but not later than 21 days after the defendant’s first appearance at the time of or following the filing of charges.” Therefore, the prosecution violated Crim. P. 16 by not disclosing the statement until the seventh day of defendant’s trial. However, the court did not abuse its discretion under Crim. P. 16(III)(g) when it chose the sanction of holding a suppression hearing, which was a sanction defendant requested, instead of barring the prosecution from introducing the statement.

Defendant also contended that the court erred by allowing a detective to testify that, in his opinion, defendant was the robber in the yellow vest. Because ordinary people routinely recognize people in videos and photographs without having specialized knowledge, experience, or training, the detective’s testimony was lay testimony, not expert testimony. Further, the testimony was relevant and did not invade the jury’s province. Therefore, the trial court did not err in allowing the detective’s testimony.

Defendant further argued that the court erred by allowing testimony from a homeowner stating that defendant had committed a similar crime against him several months before the repair shop robbery. The homeowner had recognized defendant as his attacker when he saw the surveillance video on the news. Evidence of other crimes is admissible under CRE 404(b) if the court is satisfied, by a preponderance of the evidence before it, that the other crime occurred and that defendant committed the crime. Here, while the court’s written order did not specifically address whether there was proof by a preponderance of the evidence that defendant was the attacker, it is clear from the court’s order that it implicitly found that defendant attacked the homeowner. Therefore, the court’s decision was not manifestly arbitrary, unreasonable, or unfair, and it did not abuse its discretion in admitting the testimony.

The judgment of conviction was affirmed.


Coyle was charged with sexual assault on a child by one in a position of trust and attempted sexual assault on a child. The alleged victim testified that Coyle touched her inappropriately on two occasions. The jury acquitted Coyle of the completed sexual assault charge but convicted him of the attempted sexual assault charge. Coyle’s conviction was reversed on appeal due to the trial court’s failure to either require the prosecution to elect which incident supported the charge of attempted sexual assault on a child or to give the jury a modified unanimity instruction. On remand, the parties agreed that another trial would violate Coyle’s double jeopardy rights. The trial court thus granted Coyle’s motion to dismiss the attempt charge. Coyle then filed a petition for compensation under Colorado’s Exoneration Act (Act). The State moved to dismiss the petition for failure to state a claim because the conviction was reversed for reasons unrelated to Coyle’s actual innocence, and the district court granted the motion. Coyle moved for reconsideration, which was denied.

On appeal, Coyle argued that the court erred in denying his petition for compensation under the Act because (1) the Act precludes motions to dismiss petitions, and (2) his conviction reversal was based on the information that he was not the attacker.

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on his actual innocence. The Act permits certain people wrongfully convicted of or incarcerated for felonies to seek compensation from the State. As relevant here, the Act does not permit a person to file a petition for compensation if the person’s conviction was reversed based on a legal error unrelated to the person’s actual innocence. An error involving the failure to ensure juror unanimity is a legal error unrelated to the person’s actual innocence. By the Act’s terms, Colorado’s Rules of Civil Procedure apply to petitions under the Act.

As to defendant’s procedural challenge, a district court may resolve a person’s eligibility to file a petition via a motion to dismiss, so there was no procedural error in the district court granting the State’s motion to dismiss under CRCP 12(b)(5). On the merits, Coyle did not meet the threshold eligibility requirements for filing a petition because his conviction was reversed due to legal error unrelated to his actual innocence. Therefore, the court properly dismissed the petition.

The judgment was affirmed.


Plaintiff filed a complaint on July 15, 2019, against ISS Facility Services, Inc. (ISS) and the City and County of Denver (Denver) alleging that she injured herself on an unmarked water hazard at Denver International Airport (DIA) on July 13, 2017. Denver owns DIA and contracts with ISS for janitorial services. Denver and ISS moved to dismiss the complaint because it was filed outside the applicable two-year statute of limitations in CRS § 13-80-102(1)(a) and sought attorney fees and costs. The district court dismissed the complaint and entered an award for attorney fees and costs.

On appeal, plaintiff argued that her complaint was timely filed under CRCP 6(a), which extended the limitations period. Negligence claims in Colorado are subject to the two-year statute of limitations in CRS § 13-80-102(1)(a). The parties agreed that the limitations period started on July 13, 2017. July 13, 2019 was a Saturday, so plaintiff filed her complaint on the next non-weekend day that the court was open. Rule 6(a) only applies to a time period under the rules, not a statutorily prescribed time period. Further, CRS § 24-11-110 does not control over the more specific provisions in CRS § 13-80-102(1)(a) and does not expand the limitations period. Finally, electronic filing has been allowed for years and has been required since 2010 in the Second Judicial District where this case was filed, so there was no obstacle to plaintiff timely filing on a Saturday. Therefore, plaintiff failed to timely file her complaint and her claims are barred.

Plaintiff also challenged the fees award, but her reply brief argument was too late and underdeveloped, so the Court of Appeals did not consider this argument.

The judgment was affirmed.


The juvenile court adjudicated the children dependent and neglected in relation to mother. It also entered a default adjudicatory and treatment plan order for the biological father. C.L.F., who helped care for the children, filed a motion to declare herself the children’s legal parent. The court determined that C.L.F. was a presumptive parent because she had held the children out as her own and father was a presumptive parent because genetic tests established that he was the children’s biological parent. However, the court concluded that it was unable to recognize more than two legal parents for the children, and after making further findings, it ultimately declared father the children’s legal parent.

C.L.F. appealed the parentage determination, arguing that the juvenile court erred by holding that children could not have more than two legal parents. Colorado’s Uniform Parentage Act does not allow a court to recognize more than two legal parents for a child. Therefore, the juvenile court properly determined that it was unable to name both C.L.F. and father as the children’s legal parents in addition to mother.

C.L.F. also argued that the juvenile court erred by declaring father as the legal parent because the court failed to consider the children’s best interests. Here, the juvenile court considered the children’s relationships and attachment to each of the presumptive parents, so it properly considered the child’s best interests.

C.L.F. also argued that the juvenile court erred by concluding that policy and logic did not support declaring her the legal parent. However, the court properly considered the appropriate factors under CRS § 19-4-105(2)(a) in weighing the conflicting parentage presumptions.

C.L.F. further argued that the juvenile court erred by failing to apply the preponderance of evidence standard when weighing the competing parentage presumptions. Here, the court applied the clear and convincing standard of proof. While this was the wrong standard, given that father prevailed under the higher standard of proof, he would also have prevailed under the lower applicable preponderance of the evidence standard. Accordingly, reversal of the parentage judgment is not required.

The judgment was affirmed.

April 29, 2021

Defendant attacked his ex-wife, B.D., fracturing her cervical spine and skull in a way that left skull fragments lodged in her brain. As B.D. was being admitted to the hospital, she suffered a stroke. B.D. spent a month on a respirator in an induced coma, underwent seven surgeries, and spent months at a rehabilitation facility. Following her release from the facility, B.D. received three procedures from an aesthetics spa related to her face and neck. Medicaid, B.D.’s insurer, declined to pay for these procedures because they were deemed to be cosmetic in nature.

Defendant pleaded guilty to attempted first degree (after deliberation) murder and was sentenced. Thereafter, B.D. sought restitution for the cost of the aesthetics procedures. Over defendant’s objection, the district court awarded B.D. $8,999 in restitution.

On appeal, defendant argued that the evidence was insufficient to show his conduct was the proximate cause of B.D.’s need for the aesthetics procedures. Here, B.D.’s testimony was sufficient to sustain the district court’s finding. The fact that B.D.’s medical records may not have given certain details, or that an expert did not testify, affected the weight, not the sufficiency, of her testimony.

Defendant also contended, the People conceded, and the court agreed that the amount of restitution awarded to B.D. was erroneously inclusive or duplicative of various expenses.
The order was affirmed in part and vacated in part, and the case was remanded to correct the restitution amount.


Mother was designated the primary residential parent for the parties’ minor child but alternated parenting time with father on a weekly basis. Thereafter, both parties moved to relocate with the child, and the district court granted mother’s request to relocate with the child to Florida. Six months later, father moved to enforce parenting time under CRS § 14-10-129.5, contending that mother was refusing to communicate with him and denying him parenting time, and the child was endangered in her care. Father requested that he be designated the child’s primary parent. The court granted father’s request after a hearing.

On appeal, mother argued that the district court failed to properly apply the endangerment standard to father’s motion to enforce parenting time. If a parenting time modification substantially changes parenting time and changes the parent with whom the child resides a majority of the time, the court must apply CRS § 14-10-129(2). Here, the existing parenting time order did not specify that the child’s primary residence would be changed based on mother’s behavior, so there was no such provision to enforce. Thus, although father ostensibly brought an enforcement motion, he did not seek to enforce a provision of the existing order allowing for a change in the child’s primary residence. Rather, he asked to modify the existing order to that effect pursuant to § 14-10-129.5(2)(b). Therefore, § 14-10-129(2) applies to his request, including the endangerment standard under § 14-10-129(2)(d), because it involves a change in the child’s primary residence. Though the district court purportedly used the endangerment standard, it erred in applying that standard, and its findings under the statute were insufficient to support the order changing the child’s primary residence.

The order was reversed and the case was remanded with instructions for reconsideration of father’s request to modify parenting time and the child’s primary residence.


Devereux Cleo Wallace (Devereux) provides residential and outpatient mental health services to children and adolescents with psychiatric disorders. Pilmenstein worked for Devereux as one of its direct care providers (DCPs). Pilmenstein worked shifts as long as 12 consecutive hours, but Devereux did not provide her or other DCPs with compensated duty-free rest periods. Pilmenstein filed a class action lawsuit against Devereux to recover compensation for the rest periods she asserted she was entitled to under Colorado law.

Pilmenstein and Devereux each filed summary judgment motions, which the district court denied. But the court granted Pilmenstein’s motion for class action certification, which effectively applied a three-year statute of limitations to the action. After these rulings, the parties jointly asked the court to decide several disputed legal questions under CRCP 56(h). In its ruling on the motion, the court concluded that employees have a private right of action to recover monetary damages if their employer fails to provide them with rest periods in violation of Colorado Minimum Wage Orders (MWOs). The court noted, however, that it could not determine as a matter of law whether Devereux acted willfully by failing to provide rest periods and left that issue for the finder of fact. To expedite an appeal, the parties jointly moved for entry of a stipulated final judgment to include an award of damages to Pilmenstein and the class members, subject to Devereux’s right to appeal. The court entered a final judgment as requested.

On appeal, Devereux argued that the district court erred by ruling that it was required to comply with the rest period requirements in the applicable MWOs because MWOs, which are administrative
regulations, and the opinion letters, which are the agency’s interpretations of those regulations, stated that companies such as Devereux were exempt from the MWOs. Devereux did not dispute that the MWOs unambiguously required employers in the health and medical industry to provide their employees with 10-minute compensated and duty-free rest periods for every four-hour period the employee worked. Because the MWOs were unambiguous, the Court of Appeals rejected language in the opinion letters to the contrary. Accordingly, the district court did not err.

Devereux also argued that the district court erred by ruling that an employer’s failure to provide the required rest periods can give rise to a private action for monetary damages. The MWOs are regulations that implement several statutes, including the Colorado Wage Claim Act and the Colorado Minimum Wage Act, both of which authorize private rights of action to recover monetary damages. The Minimum Wage Act and the MWOs authorize a private right of action for rest period violations where the employee seeks to recover the minimum wage for required rest periods that were not provided, and this matter is a minimum wage case. Therefore, the district court did not err.

Devereux further argued that the district court erred by declining to determine that Devereux did not act willfully as a matter of law, which would have shortened the statute of limitations. Whether an employer acted willfully by failing to pay wages is a mixed question of fact and law. Here, there are disputed issues of material fact as to whether Devereux acted willfully in not providing its DCPs with rest periods. Therefore, the district court properly declined to decide the willfulness issue on summary judgment.

Devereux also contended that the district court applied an incorrect accrual date in certifying the class. However, the facts relevant to the accrual date are undisputed, and the court did not err.

The judgment was affirmed and the case was remanded, with instructions, for further proceedings.


Plaintiff filed a complaint for review of a fee imposed by the City of Aurora. The district court dismissed the complaint for lack of subject matter jurisdiction because the complaint was filed two days after the jurisdictional deadline in CRCP 106(b). Plaintiff asked the district court to accept the untimely complaint under CRCP 6(b)(2), but its request was denied.

On appeal, plaintiff argued that its Rule 106(a)(4) action was timely filed because the Rule 106(b) 28-day deadline applies only where a statute authorizes judicial review of agency action, not where, as here, a municipal code provision provides another deadline. And if Rule 106(b) applies, it violates plaintiff’s due process rights. However, Rule 106(b) is clear that, unless a statute provides a different deadline for seeking review of a final agency decision, a Rule 106(a)(4) complaint must be filed within 28 days. Further, an ordinance is not a statute and cannot provide an alternative deadline to commence a Rule 106(a)(4) action. Therefore, the Rule 106(b) deadline applies to plaintiff’s Rule 106(a)(4) complaint. Moreover, holding plaintiff to that deadline under the circumstances of this case does not violate its right to due process.

Plaintiff also argued that the district court erred by concluding that Rule 6(b)(2) does not allow it to accept a Rule 106(a)(4) complaint beyond the deadline. The Court of Appeals decided, as an issue of first impression, that Rule 6(b)(2) authorizes a court to accept a Rule 106(a)(4) complaint filed past the Rule 106(b) deadline upon a showing of excusable neglect. Further, the standard for evaluating excusable neglect under Rule 6(b)(2) parallels the standard under Rule 60(b) and requires a balancing of the equities. Here, the district court did not consider all pertinent factors when evaluating plaintiff’s Rule 6(b)(2) motion.

The orders dismissing the amended complaint and denying the Rule 6(b)(2) motion were reversed and the case was remanded for reconsideration of the Rule 6(b)(2) motion and further proceedings as necessary.


Defendant filed a pro se petition for postconviction relief under Crim. P. 35(c) challenging the proportionality of his sentence. In August 2020, the district court denied the petition without a hearing and sent the order to two attorneys still listed in the district court file as counsel of record. Defendant was not served a copy of the order. In February 2021, the district court received a letter from defendant inquiring as to the status of the petition. The court entered an order explaining it had denied the petition several months earlier. Again, this order was sent to the listed counsel of record and not defendant. One of the attorneys of record filed a motion requesting to be removed as counsel of record and forwarded a copy of the orders to defendant. Five weeks later, defendant filed his notice of appeal.

The deadline to appeal a final judgment in a criminal case is 49 days after the entry of the judgment or order. The time may be extended by up to 35 days upon a finding of excusable neglect. The time may also be expanded upon a finding of good cause shown. Here, the trial court sent its orders to two attorneys who had ceased to represent defendant as a matter of law. The trial court failed to remove defendant’s former attorneys as counsel of record and to discharge its obligation to serve defendant with the orders. Thus, defendant could not have known that the time to file an appeal had commenced. Once he was served, he filed an appeal within a reasonable time. Accordingly, there was ample good cause to accept the late filing.

The motion for extension of time was granted and the notice of appeal was accepted as timely filed.
Summaries of Published Opinions

April 12, 2021

In this case, the Supreme Court was asked to decide whether defendant’s *Miranda* rights were violated when, while in police custody, he was asked his name before receiving *Miranda* warnings. The Court was also asked to decide whether the division below erred in establishing a “new crime exception” to *Miranda v. Arizona*, 384 U.S. 436, 444, 478–79 (1966), and applying it here.

The Court held that the question about defendant’s name constituted a custodial interrogation, but, on the facts presented here, defendant’s response was admissible at trial because the question was akin to the type of routine booking question that has been deemed to be excepted from *Miranda’s* reach. The Court thus affirmed the judgment of the division below, albeit on other grounds. In light of this decision, the Court did not consider, and therefore vacated, the portion of the division’s judgment establishing, sua sponte, a new crime exception to *Miranda*.


The Supreme Court held that a settlement between a workers’ compensation insurer and a third-party tortfeasor for all past medical expenses paid as a result of an on-the-job injury extinguishes the plaintiff-employee’s claim to recover damages for those past medical expenses from the third-party tortfeasor. Because the injured employee need not present evidence of either billed or paid medical expenses in the absence of a viable claim for such expenses, the collateral source rule is not implicated.

The Court returned the case to the US District Court for the District of Colorado for further proceedings.


In this case, the Supreme Court reviewed a Court of Appeals’ decision holding that the trial court improperly admitted certain testimony from a police officer as lay opinion.

The Court held that the trial court did not abuse its discretion by admitting the officer’s testimony as lay opinion because the testimony rested on rationally drawn conclusions that the officer derived from his observations and

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perception of the witness’s body language. The Court further held that the officer’s passing reference to his training and experience did not render the testimony expert opinion under CRE 702, nor did the officers testimony improperly comment on the credibility of another witness.

The Court of Appeals’ judgment was reversed.

April 16, 2021


The Colorado Commission on Judicial Discipline recommended approval of the Stipulation for Public Censure executed pursuant to Colorado Rules of Judicial Discipline 36(e) and 37(e) (RJD). In the Stipulation, Judge Natalie T. Chase, who is white, admitted to the following: using a racial slur several times during a conversation with a Black family court facilitator; stating, while on a break during court business in a manner that was not dignified or courteous; and using derogatory language about a fellow judge in front of her law clerk.

The Supreme Court concluded that the terms of the Stipulation comply with RJD 37(e) and are supported by the record. The Court therefore ordered the Stipulation to become effective and publicly censured Judge Chase for failing to maintain the high standards of judicial conduct required of a judge; for violating Canon Rule 1.2, which requires that a judge at all times shall act in a manner that promotes public confidence in the judiciary; for violating Canon Rule 2.3, which prohibits a judge from manifesting bias or prejudice based on race or ethnicity by her words or actions; for violating Canon Rule 1.3, which prohibits a judge from abusing the prestige of the judicial office; and for violating Canon Rule 2.8, which requires a judge to be patient, dignified, and courteous. Further, the Court accepted Chase’s resignation as a judge in the Arapahoe County District Court.

April 19, 2021


In this direct appeal, appellant sought review of the dismissal of his habeas corpus petition by a district court magistrate. Because a district court magistrate is authorized to rule on a habeas corpus petition only when the parties consent to proceeding before the magistrate and appellant did not so consent here, the Supreme Court concluded that the dismissal order was entered without authority. Accordingly, the Court reversed that order and remanded the case to for further proceedings before a district court judge.


In this theft case, the Court of Appeals reviewed whether the evidence was sufficient to prove that defendant committed a class 4 felony theft. A division of the Court concluded that the evidence was insufficient because the prosecution had not shown the difference in value between the total amount of certain public benefits defendant received and the amount for which she might have been eligible had she accurately reported her household income. Therefore, the division reversed the trial court and entered judgment for the lowest level of theft, a class 1 petty offense.

Rejecting the overpayment approach in favor of a total amount approach, the Supreme Court concluded that because an applicant is not entitled to, and so has no legally cognizable interest in, any benefits until she has submitted accurate information demonstrating as much, all the benefits defendant received by submitting false information were obtained by deception. Accordingly, the evidence was sufficient to sustain defendant’s conviction for a class 4 felony theft.

The Court of Appeals’ judgment was reversed.
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If you’re interested in writing an article for Colorado Lawyer or would like to submit a manuscript, please contact the appropriate coordinating editor to discuss your topic. If you’d like to write an article in an area not listed on these pages, please contact Jodi Jennings at jjennings@cobar.org (substantive law articles) or Susie Klein at sklein@cobar.org (all other areas). Writing guidelines are available at cl.cobar.org.

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**“As I See It” Opinion Articles**

*Colorado Lawyer* accepts opinion articles whereby members can express their ideas on the law, the legal profession, and the administration of justice. Please note that the publication is mindful of its role in promoting civility and professionalism and reserves the right to reject any article: submissions that include personal attacks, contain language that may be deemed defamatory, or are inconsistent with the objectives of the CBA will not be considered.

Contact John Hiski Ridge, john ridge@outlook.com or (206) 919-6708, to submit an opinion article or discuss your topic.

Full guidelines are available at cl.cobar.org.

**General Interest Articles**

*Colorado Lawyer* publishes general interest articles in the “SideBar” column. This is a place to:
- share your unique experiences as a lawyer
- discuss a helpful skill
- talk about a law-related topic that is important to you
- offer practical advice to fellow attorneys
- share your law-related “war stories.”

SideBar articles should take a lighter look at the law or talk about your perspective; articles on particularly divisive topics will not be considered.

Send SideBar articles or topics to Susie Klein at sklein@cobar.org for consideration.
Kyle S. Aber
Kyle Aber is Colorado born and bred. He grew up in Arvada, went to CU for undergrad (Go Buffs!), and graduated from DU law school (Go Pios!). He worked as a prosecutor in Pueblo County before moving to the Pueblo City Attorney’s Office (Go Student Loan Forgiveness!). He is a proud Puebloan and a proud CBA member.

**PROFILE**

**Hometown:**
Arvada

**Law School:**
University of Denver Sturm College of Law

**Lives in:**
Pueblo

**Works at:**
City of Pueblo

**Practice Area(s):**
Administrative Law, Municipal Law, Prosecution

**CBA Member Since:**
2014

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**What do you like most about your practice area?**
I never believed my admin law professors, but it really is true: administrative law encompasses the practice of every other kind of law. On any given day, I could be working on constitutional law, criminal law, contract law, and any other area of law that may come up. Sometimes it’s frustrating when I have several projects from across the legal practice spectrum come in at all once, but I love learning about areas I have not worked in a lot. Working for the City of Pueblo constantly affords me the opportunity to learn, grow, and tackle new challenges.

**What’s your favorite place you've traveled to?**
My wife and I went to Italy shortly after we got married. We traveled to Rome, Florence, and Venice. I loved soaking in the culture, the history, the art, and of course the food!

**What’s the most random job you’ve ever had?**
In college I worked for a company that installed data networks in Denver Public Schools. My job was mostly crawling through attics, ceilings, and walls pulling a bundle of wires behind me. It was interesting, especially in the older schools that weren’t built with data networks in mind. I have probably seen parts of those schools that no one else has seen for a very long time.

**What’s your favorite place to escape to in Colorado?**
One of the best things about living outside the Denver Metro area is how easy it is to get to the mountains (no traffic, yay). My favorite place to escape to is San Isabel National Forest. You will find me there most summer weekends soaking up all that the Rocky Mountains have to offer.

**What do you consider your greatest achievement?**
My wife and I just had our first child at the end of 2020. I would love to point to any number of things I’ve accomplished in my life, but when I look at my son it’s impossible to say I’ve ever done anything more important.

**If you weren’t a lawyer, you’d be?**
A chef! 😋

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Would you like to be featured in Under Oath?
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Kyle S. Aber

A chef!

If you weren’t a lawyer, you’d be?

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