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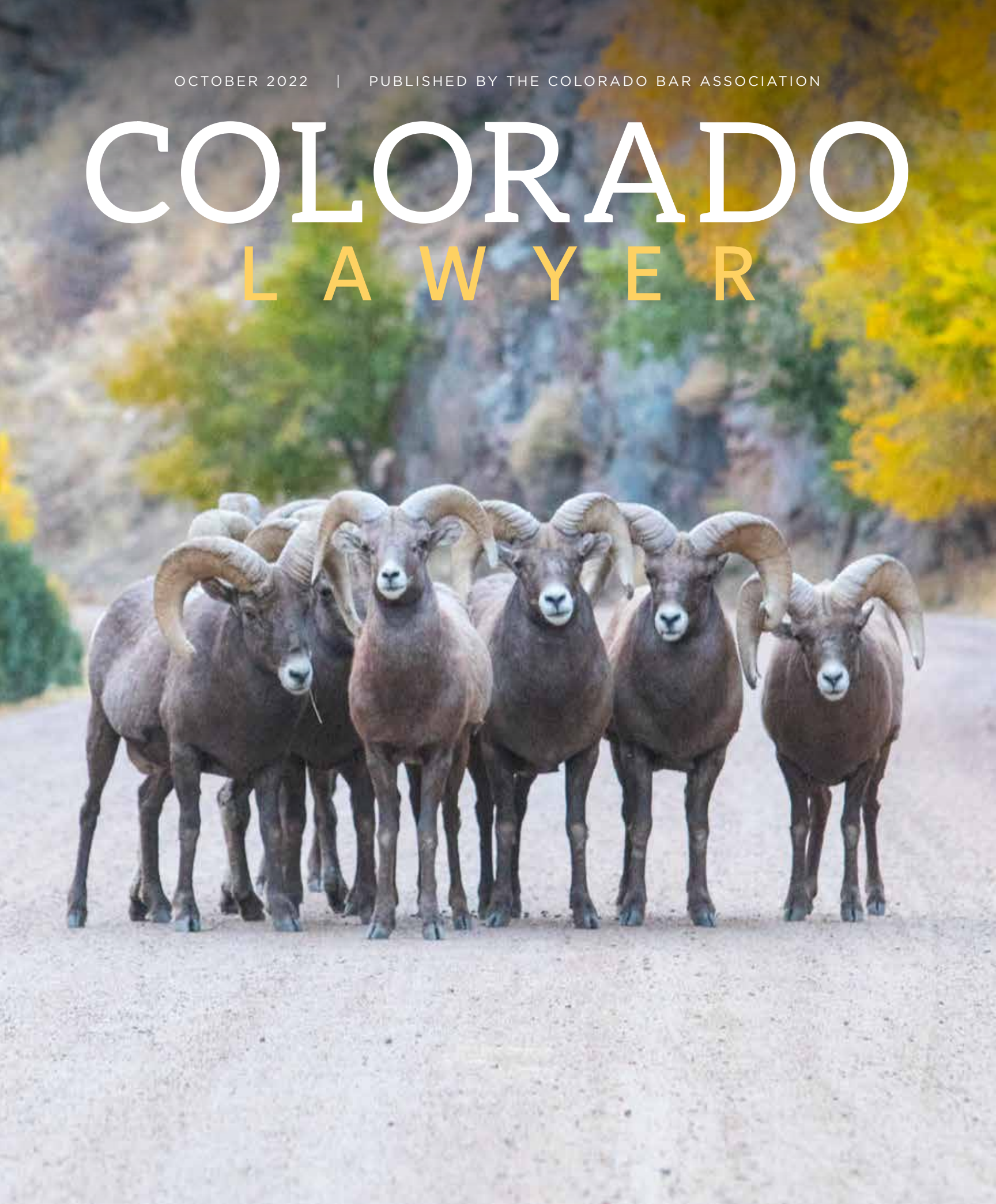

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COLORADO LAWYER, THE OFFICIAL PUBLICATION OF THE COLORADO BAR ASSOCIATION, SERVES AS AN INFORMATIONAL AND EDUCATIONAL RESOURCE TO IMPROVE THE PRACTICE OF LAW.

FEATURES

ON THE COVER: N. Reid Neureiter took this photo of a group of bighorn sheep rams in October 2021 in Douglas County's Waterton Canyon. Waterton Canyon has a six-mile gravel road that goes up the length of the canyon and is perfect for hikers and cyclists. Because no dogs are allowed in the canyon, the bighorn sheep that populate the surrounding cliffs have become accustomed to humans and tolerate their presence, allowing a photographer to get some special images. This photo was taken in the late afternoon with a Canon EOS 7D Mark II body, equipped with a EF70-200mm f/2.8L IS lens. Neureiter has served as a US magistrate judge for the District of Colorado since 2018.

COLORADO LAWYER

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WELCOME

DEPARTMENTS

AROUND THE BAR

FROM THE COURTS

UNDER OATH

Reimagine

Strategic Planning for a Collective "Why?"

BY J. RYANN PEYTON

The success of our bar association depends on a collective vision that serves and inspires our members to engage with our programs, build relationships with one another, and be motivated to lead.

Every CBA president must get used to answering the question "why?"—*Why do you want this job? Why now? Why this initiative? Why did you make that decision?*

Depending on who's asking the question and their motivations for asking it, *why* can be vague or specific, introspective or peripheral, or sincere or sardonic. Ultimately, *why* is a question every CBA president has to answer for themselves.

It is the burden of the president to identify, create, and champion alignment in the collective *why* of our community. To generate this alignment, my *why* must be nimble in some ways yet durable in others. The success of our bar association depends on a collective vision that serves and inspires our members to engage with our programs, build relationships with one another, and be motivated to lead.

This bar year is a strategic planning year for the CBA. The current CBA strategic plan, REFOCUS 2020, was formulated in 2016 to guide the CBA through 2020. When it was drafted, no one could have imagined how the year 2020 would evolve. A global pandemic, unprecedented political divisiveness, and a racial justice reckoning 200 years in the making reshaped our country, our communities, and our profession. In light of the extraordinary circumstances, the CBA's strategic plan was renewed for another three years.

Now, six years later, the CBA is poised to embark on its strategic work again and collectively envision the next iteration of its *why* for Colorado's legal community.

Embrace Your Inner Architect

One of my *whys* for serving as CBA president this year is the opportunity to engage in the strategic planning process. I happily geek-out on strategic initiative development, research and assessment, and building blueprints for organizations. I've had the opportunity to lead several organizations through the strategic planning process, and each time I've learned more about how to enjoy the process.

Unfortunately, there's a common assumption among professionals that strategic planning needs to be challenging, exhausting, insufferable, or a necessary evil to obtain funding and credibility. But it doesn't have to be this way. The strategic planning process can be the catalyst that brings a fractured community together. Strategic planning can be an opportunity for bridge building.

While the crisis levels of 2020 have subsided and we've become adept at navigating the "new normal" of our polarized pandemic world, lawyers will still have an important role to play in 2023 and beyond. In our roles as problem solvers, conflict resolution-ists, and social visionaries, lawyers can be enormously helpful in reconnecting a fractured world. We are, after all, in the dispute resolution business, and resolving conflict is central to what we do.

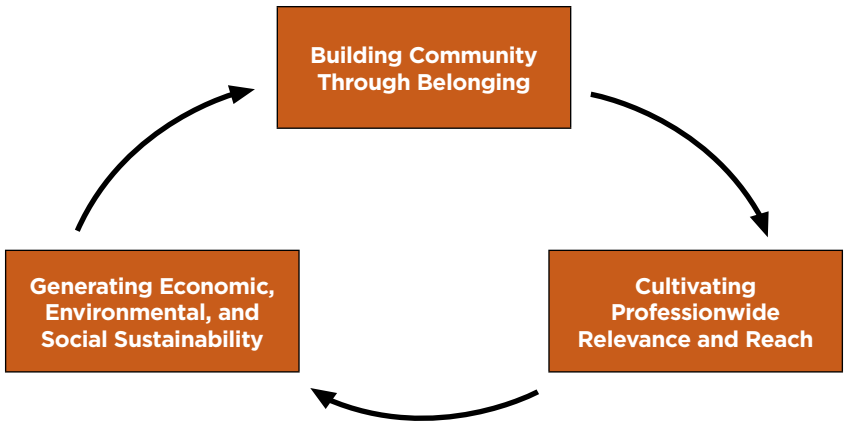
To do this well, we begin in our own house, by reconnecting our own profession and legal community. As architects, we can be bridge builders for and amongst one another.

Disrupting the Process

Another opportunity that comes with the strategic planning process is the ability to change or disrupt old patterns in thinking, planning, and doing within an organization. It is within this disruption that real progress and change can be made. Six years into a strategic plan that was only supposed to last three years, the CBA is well-positioned to disrupt its own processes and design an innovative plan for success. To cultivate this innovation, we will reimagine our process in a number of ways. Most important, we will strive to do the following:

- Ask the tough questions. We will not shy away from the variety of elephants in the

THE CBA'S THREE VISIONARY THEMES



room that the CBA needs to address to serve its members with integrity.
- Empower our members to see themselves as leaders and owners of this process. Our goal is to generate ownership in the process from the start so that our members and our member-leaders have an attachment to the strategic vision.
- Go beyond solving organizational problems. We will approach this process from a place of success and abundance to answer the question, "What does the CBA do better than anyone else?" Our vision will center on what we can do from this place of prosperity, rather than how we are limited by our challenges.

We will use this process to take risks and to ask questions like *What if?* with a new sense of joy and excitement. Every organization can stand a little bit of disruption from time to time. This is our opportunity to disrupt forward.

Every organization can stand a little bit of disruption from time to time. This is our opportunity to disrupt forward.

Let's Get to Work

The CBA's 2023 strategic plan will focus on three long-term visionary themes:
- building community through belonging
- generating economic, environmental, and social sustainability
- cultivating professionwide relevance and reach.

Although the CBA will generate and implement a long-term (three-year) strategic plan, the structure of the CBA's strategic plan will consist of short-term initiatives to be completed in the first 6 to 12 months of the plan. Ideally, the CBA will generate new short-term initiatives annually to allow experimentation across different initiatives and prevent stagnation or lack of nimbleness as industry and member needs change.

The process will be led by a Strategic Planning Committee comprised of CBA members, leaders, and staff. The committee's work will be divided into three phases.

Phase 1: Research and Assessment, September 2022–November 2022

The goal of phase 1, currently underway, is to collect information on best practices and bar association movement trends across the United States (and the world) in the following areas:

1. bar programs
2. communication delivery and technology infrastructure
3. member demographics and climate
4. sustainability and partnerships.

A working group will be assigned to each area to identify best practices and growth trends in that area and compare them with what the CBA is currently doing. The four working groups will comprise CBA members who will work under the leadership of a CBA executive council at-large member.

Phase 2: Community Input, December 2022–January 2023

Phase 2 will be devoted to learning about the needs, wants, desires, characteristics, and demographics of our membership. Individual preferences regarding each of the four areas above will be sought through online surveys, focus groups, and town hall meetings engaging local bars, sections, diversity bars, and staff members.

Phase 3: Building the Blueprint, February 2023–June 2023

This phase will be divided into three components:

1. Information sharing—The information gathered in phases 1 and 2 will be shared with the Strategic Planning Committee, Executive Council, general membership, and other stakeholders.
2. Priority statement—The committee and other stakeholders will use the information collected to identify short-term priority areas within the three visionary themes for the CBA in the coming years.
3. Developing the blueprint—The committee and other stakeholders will use the priorities identified to create goals and approaches that will then form the 2023 CBA strategic plan.

We Need Your Voice

The voice and expertise of every CBA member is imperative to this process. Our goal is for you to see yourself reflected in the CBA through its strategic vision. As such, your representation matters and is requested. Bring your *why* and your big questions. Join us in building bridges to the future of our bar association. CL

How Successful is Your Mentoring Program?

Measuring a Program's True Impact

BY J. RYANN PEYTON

The success of a formal mentoring program can be difficult to measure. It largely depends on the users' experience, and user experience varies from person to person and program to program. But indicators of success are almost always required for a mentoring program's growth and sustainability. Stakeholders want to be able to point to tangible impacts to justify the allocation of time and financial resources needed to keep the program operational. After all, "What gets measured gets managed."[1]

Unfortunately, law firms, government law offices, law schools, bar associations, and other legal organizations tend to measure their mentoring program's success incorrectly or not at all. Most legal organizations focus on the program's metrics, but the best indicators of a program's success are actually the learning outcomes. Additionally, when programs establish and build on a theory of change in their program development, that theory can lead to improved evaluation and reporting processes as the program matures. This article discusses some practical ways for legal organizations to measure their mentoring program's true impact.

Establishing a Theory of Change

A theory of change is an organization's set of beliefs and hypotheses about how its activities lead to outcomes that contribute to a program's overall mission and vision.[2] Often developed during the planning stage of a mentoring program, a theory of change is useful for monitoring and evaluating a mentoring program as it grows and sustains over time. It can help organizations devise better evaluation tools, identify key indicators of success, prioritize areas of data collection, and provide a structure for data analysis and reporting.[3]

Developing a theory of change is a lot like designing a mentoring program. You'll need to:

1. identify the people you're working with (your audience);
2. determine the needs and characteristics of your audience; and
3. establish the program's final goals (what the program aims to achieve for your audience).

A program's final goals should be realistic and succinct, forward looking and relatively long-term, and engaging for stakeholders. You should set no more than a few final goals, and it is often best to set just one.

Many legal organizations struggle to articulate appropriate and actionable final goals for their mentoring program, and so the goals wind up being too broad or impracticable. For instance, a law firm might focus on "improving outcomes" for program participants in areas such as employment prospects, practice competencies, and leadership potential. While noble in spirit, these final goals are overly broad, and the correlation of the mentoring program to the outcomes is nearly impossible to measure. Presumably after some time in the legal profession, every lawyer will have improved employment prospects, practice competencies, and leadership potential. The mentoring program's impact on these outcomes may be tangential at best.

Or a bar association might focus on "elevating opportunity" for lawyers from communities that have been historically excluded within the profession. Again, while an important and admirable goal, it's impracticable because it's too dependent on external factors such as systemic and structural racism and other barriers in the legal profession. Organizations should consider what their mentoring program is accountable for and what's beyond its sphere of influence.

A good way to better articulate a final goal that's too broad or overarching is to draw accountability lines between the outcomes the program achieves and the longer-term goals to which these outcomes contribute.[4] Developing accountability pathways allows the organization to work backward from the final goals to identify the intermediate outcomes needed to achieve the final goals. These intermediate outcomes are the changes the users or beneficiaries experience by engaging with the program activities. Figure 1

FIG. 1. DEVELOPING ACCOUNTABILITY PATHWAYS

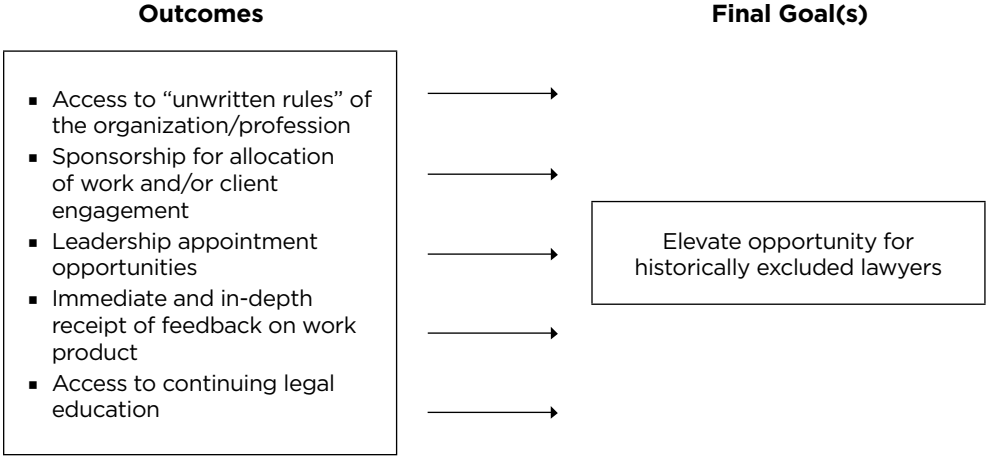
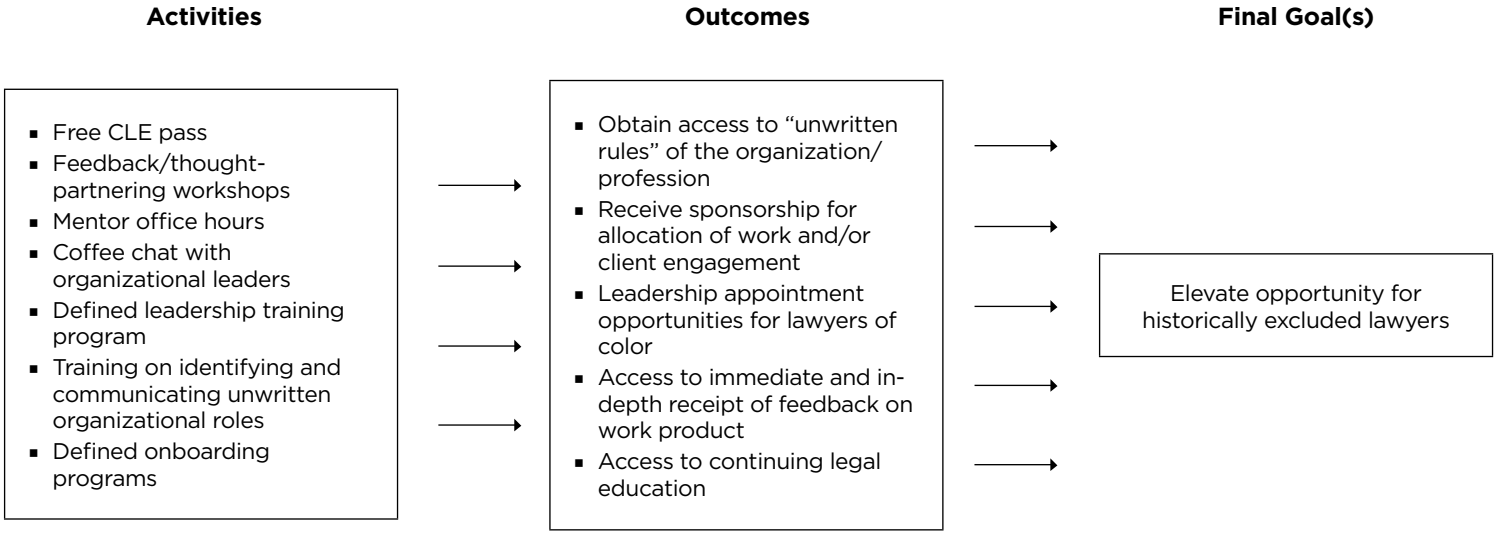


FIG. 2. ADDING PROGRAM ACTIVITIES



shows possible accountability pathways for a mentoring program whose final goal is "elevate opportunity for historically excluded lawyers."

Establishing intermediate outcomes is perhaps the most important part of measuring program impact. Many organizations jump from their program activities to their final goals without thinking through the changes that need to happen for program participants in between engaging in program activities and reaching the final goals. Intermediate outcomes, when clearly articulated, are things your program can directly influence through its activities. Outcomes should be feasible given the scale of the activities. They should be short-term but should link logically to your final goals. And ideally, they should be supported by evidence that such outcomes help achieve your program's final goals.

Once you've established your final goals and intermediate outcomes, consider how the program activities will make this change happen. Take each intermediate outcome in turn and think about how it links to your activities. Consider the features that make the activities successful and whether you've overlooked any intermediate outcomes. Figure 2 shows what adding program activities to the earlier accountability chart might look like.

At this stage, it's important not to focus too heavily on how your theory of change will be measured. Ultimately, a program should not be designed around what can be measured. The mechanics of measurement can be addressed later. However, throughout the accountability process, consider what evidence already exists that's relevant to your theory of change. Ideally, this will be in the form of references to published research, but you could also include your own organization's experience and data. You may find some evidence that contradicts your theory. Think this through, and if necessary, modify your activities to reflect what the evidence tells you. If you don't have evidence, then identify your assumptions about why a specific activity will lead to a specific outcome or why an intermediate outcome will lead to a final goal.

Your theory of change will depend on your program's "enablers"—conditions or factors that need to be in place for the program to work.[5] Enablers can be internal or external. Internal enablers are those mostly within your control, such as your staff, administrators, and mentors. External enablers are often beyond your immediate control. They can include social, cultural, economic, and political factors; external rules, regulations, and policies; and outside organizations and stakeholders. The program enablers can substantially help or hinder your program's activities. Within your program accountability chart, you can create an additional layer showing the relationship between your program enablers and the program activities.

Once you're satisfied with your theory of change, you can start thinking about how to measure and evaluate it.

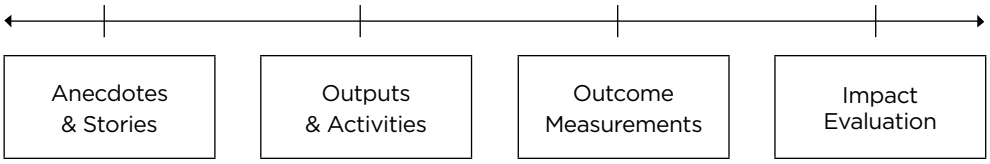
Outcomes versus Metrics

A metric is essentially a standard of measurement. To apply metrics to a mentoring program, where learning is the most substantive outcome, you have to come up with something to measure. You might measure the number of participants who complete the mentoring, or the quality of the program by its cost, return on investment, or efficiency. Ultimately, however, learning outcomes are the most important indicators of a program's overall success. If you aren't measuring your learning outcomes, you have to wonder why you are providing a mentoring program at all.

Figure 3 shows outcome-based learning when measured on a spectrum. At the low end of the spectrum are anecdotes and stories from program participants. While these can be useful, they may not indicate true outcome achievement or trends. Despite the lack of connection between anecdotes/stories and outcomes, they're often used to engage internal stakeholders in the mission and vision of the program.

The next level on the spectrum is program output and engagement in activities. Most organizations focus their effort here, because they're familiar with measuring and reporting

FIG. 3. OUTCOME-BASED LEARNING SPECTRUM



the quantitative aspects of a program, such as number of participants, program cost, participant demographics, activity engagement, and program completion.

The higher levels of the spectrum are outcome measurements and impact evaluation. This is where organizations struggle, because they don't know how to qualitatively measure outcomes and impact. Outcome-based learning looks different than traditional metric collection, so it needs to be measured differently.

The good news is that once you've developed a theory of change and created an accountability chart that accurately describes the connection between your program activities, program outcomes, and final goals, you are well positioned to measure your program outcomes. The methodology discussed here involves both outcomes and metrics to convey program impact. The "impact" will be your final goal, the "outcome" will use adjectives or verbs to describe the desired change, and the "metric" will use numbers and percentages to approximate progress in reaching an outcome. Figure 4 shows what this might look like for our example organization.

You can use this model to begin developing the quantitative metrics that will provide data to support your mentoring program outcomes and ultimately support the program's input. The key is to know what you're measuring and directly connect the metric to the program outcome. Don't just connect general program metrics to outcomes and hope for the best. Once you've determined these metrics, you can then incorporate the participants' stories and anecdotes to elaborate on these metrics and further engage stakeholders.

The Kirkpatrick Model

So, how do you quantitatively measure a qualitative user experience in an outcome-based learning program? The Kirkpatrick Model provides a simple and effective means to evaluate user experience through quantitative methodology.[6] It has four levels: reaction, learning, behavior, and results.

Level 1: Reaction

This first level measures whether learners find the training engaging, favorable, and relevant to their position or reason for program engagement. A crucial component of the Level 1 analysis is a focus on the learner versus the trainer. Thus, in mentoring programs, the focus here is on the mentee's takeaways rather than the skill or ability of the mentor.

This level is most commonly assessed by a program closure survey that asks participants to rate their experience in the program. Assessments can also be done at various intervals throughout the program. The main objective is to ascertain whether the program met the participant's needs. Organizations should encourage written comments and honest feedback.

Level 2: Learning

Level 2 assesses whether the learner acquired the intended knowledge, skills, attitude, and confidence from the program. Learning can be evaluated through both formal and informal methods and should be evaluated through pre-learning and post-learning assessments to identify accuracy and comprehension.

Methods of assessment include comparison surveys or interview-style evaluations. In mentoring programs, this might look like a pre-program assessment of the participant's knowledge, relationships, and professional goals as compared to a post-program assessment of

FIG. 4. MEASURING PROGRAM OUTCOMES

What is the ultimate impact or goal that you are trying to achieve in your work?	**Impact** Elevate opportunity for historically excluded lawyers		
Outcomes: What outcomes (or changes) are needed in order to put you on the path toward your ultimate impact or goal?	**Outcome** ▪ Participants have access to and engage in leadership appointment opportunities for lawyers of color	**Outcome** ▪ Participants receive immediate and substantive feedback on work product	**Outcome** ▪ Participants receive sponsorship for allocation of work and/or client engagement
Metrics: What evidence (data, information, other) would tell you if you are making progress toward each of your outcomes? **(1–3 metrics per outcome)**	**Metric** ▪ # of new leadership opportunities created for lawyers of color ▪ # of lawyers of color appointed to those leadership roles ▪ % of program participants who go on to serve in professional leadership positions within 3 years	**Metric** ▪ # of feedback workshops offered throughout the year ▪ # of workshop participants ▪ % of program participants who feel they have received meaningful feedback	**Metric** ▪ # of participants who believe their sponsor has met or exceeded expectations ▪ Billable-hour expectations met ▪ % of program participants who go on to make partner in their organization within 7 years

the same items. Here, it's important to use a clear scoring process to reduce the possibility of inconsistent evaluation reports. A control group may be used for comparison.

Level 3: Behavior

Level 3 measures whether participants were truly impacted by the learning and if they're applying what they learn. Assessing behavioral changes makes it possible to know not only whether the skills were understood, but also if it's logistically possible to use the skills in the legal organization or the profession overall.

The Level 3 assessments can be carried out through observations and interviews. Assessments can be developed around applicable scenarios and distinct key efficiency indicators or requirements relevant to the participant's role or professional goals. Self-assessment may be used here, but only with a precisely designed set of guidelines.

Level 4: Results

The final level measures the learning against the program's articulated outcomes. Analyzing data at each level allows mentoring programs to evaluate the relationship between each level to better understand the training results—and, as an added benefit, allows organizations to readjust plans and correct course throughout the learning process.

Conclusion

Quantitative metrics play an important role in measuring the impact of a mentoring program, but it's the ability to make those metrics accountable to program outcomes that conveys true program impact. To make measurements matter, organizations should focus on building a theory of change that incorporates meaningful program outcomes and measurements of those outcomes. After all, if you can't measure it, you can't improve it. To do right by your mentoring program participants and to effect the change you wish to see in the profession, you must do what it takes to correctly and substantively measure the learning that occurs within mentoring relationships. CL

J. Ryann Peyton is the CAMP director and a seasoned consultant and advocate on diversity and inclusivity in the legal field. Before joining CAMP, Peyton focused her law practice on civil litigation with an emphasis on LGBT civil rights.

Coordinating Editor: J. Ryann Peyton, r.peyton@csc.state.co.us

NOTES

1. This popular quote is often attributed to management theorist Peter F. Drucker, but the origin of this expression is unclear.
2. Center for the Theory of Change, What is Theory of Change?, https://www.theoryofchange.org/what-is-theory-of-change.
3. GrantCraft, "Mapping Change Using a Theory of Change to Guide Planning and Evaluation" (2006), https://learningforfunders.candid.org/wp-content/uploads/sites/2/2018/12/theory_change.pdf.
4. *Id.*
5. Wilkinson et al., "Building a System-Based Theory of Change using Participatory Systems Mapping," 27(1) *J. of Evaluation* 80 (2021), https://journals.sagepub.com/doi/10.1177/1356389020980493.
6. More information about the Kirkpatrick Model can be found at https://www.kirkpatrickpartners.com/the-kirkpatrick-model.

Litigation in the Living Room

BY KERRY MCCARTHY

Any good relationship book, podcast, or newsletter will tell you that communication is key to a successful relationship. But healthy communication doesn't come as easily when our emotions are driving the conversation.[1] For those who have been trained to argue for a living and who spend their careers preparing for litigation, it may be much more difficult to use healthy communication with a partner or loved one during conflict.

Lawyers are known for effective communication, and their focus and drive when pursuing an outcome that's best for their client is unwavering. In litigation, for example, there's a spirit of "win or lose" that often entails high stakes, fast-paced and intense depositions, and time-consuming trial prep. At trial, from opening to closing statements, litigators present their arguments with confidence and strength while undermining those of the opposition. These adversarial skills are practiced and perfected in court, until they become deeply ingrained and second nature. But they don't lend themselves well to conflict resolution or relationship repair with friends, family, and other loved ones.

This article offers some techniques that lawyers can use to better communicate during conflicts with loved ones at home. Fortunately, the conflict resolution skills we use in our living room can also improve our litigation skills.

The Gottman Method

While conflict is a part of any relationship, many struggle to communicate effectively about their feelings and needs with their partners. Couples often fight about the same things over and over again.[2] The arguments may look similar—fighting over the budget or chores around the house—but a deeper issue lingers below the surface, unresolved. For instance, one spouse might tend to nitpick the other's purchases, causing the couple to argue about who buys what and when. But the underlying issue might be that the spouse views their partner's spending as a lack of commitment to the couple's shared goals.

Drs. John and Julie Gottman created the Gottman Method to help couples like this improve their conflict resolution skills and address the heart of their issues without creating gridlock. The method draws on their 40 years of research and clinical experience with more than 3,000 couples.[3] Research suggests the Gottman Method is an effective way to improve marital relationships, adjustment, and intimacy.[4]

The Four Horsemen of Relationships

Through his research, John Gottman has identified criticism, defensiveness, contempt, and stonewalling as the "four horsemen" of relationships.[5] These communication styles can chip away at relationships and create impassable blocks to conflict resolution. But if we can learn to spot these negative behaviors in our communication, we can replace them with healthier ones and improve our relationships. Below is a description of each problematic behavior, followed by its antidote.[6]

Criticism

The first horseman is criticism—verbally attacking a person's character or personality. This can present itself when we use statements such as "you always" and "you never." We're making judgments about the person rather than identifying the behavior we're not happy with.

Antidote: Use a gentle start-up: Beginning the conversation without accusations or name-calling can set the conversation up for success. When we start conversations with criticisms like "it's your fault that we're always late" or "you're so lazy," we put the other person on the defensive. Talk about your feelings and make requests using "I" statements such as "I don't feel like a respectful friend when we're

late. Can we leave at 12:30 today to be sure we arrive at the wedding on time?" or "I appreciate all the hard work you've done in the yard. We still have quite a bit to do in the house to prepare for the party. Can you help me finish cleaning up inside?"

Defensiveness

Perceived attacks tend to put us on the defensive. One way we shift blame is by playing the victim and justifying our behaviors while condemning our partner's. For example, during an argument about the budget, one partner might say, "well at least I didn't spend half my paycheck on a mountain bike."

Antidote: Adopt the perspective that the conflict is "our" problem, not just the other person's. When your partner is talking, listen with the intent of understanding rather than responding. Take responsibility and offer an apology for any transgression. For example, you might say, "I'm sorry for not being more mindful of my spending. Let's take a look at the budget together to see where we can cut back."

Contempt

Contemptuous behavior insults the other person's sense of self. This may take the form of name-calling or acting with an air of superiority. An example is: "I learned how to clean up after myself in kindergarten—when are you ever going to learn?" John Gottman identifies contempt as the most toxic of the four horsemen, because it can destroy psychological and emotional health and result in very real physical health concerns.[7]

Antidote: During conflict, it can be difficult to recognize the positive attributes of your relationship and partner. Intentionally remind yourself of your partner's positive characteristics and attributes, and express gratitude for positive actions. Fondness and admiration pave the way for conflict resolution from a "we" perspective. This can look like: "We've been really busy with work and the kids the past few days. We both seem to be struggling to put our limited energy after work into household chores. What do you think about us dedicating an hour on Thursday to cleaning up together? I think it will make it easier on both of us."

Stonewalling

Stonewalling is avoiding conflict by withdrawing or conveying—through words or actions—disapproval, dismissal, or separation. This can take a variety of forms, such as walking away without communicating the need for space, responding with unhelpful comments like "whatever" or "yeah right," or not responding at all.

Antidote: When you're stressed and emotionally overwhelmed, it's easy to overlook or even reject your partner's attempts to repair conflict. When you find yourself no longer engaging in a helpful way, give yourself some time for healthy coping skills. Tell your partner that you need a break before coming back to the problem at hand.

Engaging in a soothing or distracting activity, such as going for a walk or speaking with a friend or therapist, can reduce the intensity of your emotions and allow you to think more clearly. When you lower your stress levels, you give your brain the time and space to engage your executive functioning skills—decision-making, judgment, moderation of social behavior, social control, and so on. Engaging this part of your brain allows you to incorporate logical thoughts, integrate emotional information appropriately, and engage more effectively during conflict.[8]

Key Takeaways

Conflict is a normal and healthy part of relationships, and how we approach a disagreement can support or compromise the outcome. The four horsemen enable us to reflect on how our communication style and behaviors may be impacting our relationships. Ask yourself in what ways might you be able to soften your verbal and nonverbal communication using Gottman's antidotes. Who in your life may benefit from you taking steps to adjust how you manage conflict in personal relationships? Why is it important to you to invest in your personal relationships? What kind of support do they offer you? What are you grateful for in your relationships? Just remember to consider these questions when you're calm; asking them when you're upset can jeopardize a positive conclusion.

Conclusion

The skills that make you an effective attorney are valuable, but as with any strength, there can be drawbacks. If you notice increased or unwanted conflict with loved ones at home, try taking a step back to consider your communication style—both what you're saying and how you're saying it. Maintaining a constructive, supportive mindset that's suitable for conflict resolution is not always easy, but it's the key to healthy dialogue and relationship repair. CL

For more well-being strategies, visit the Colorado Lawyer Assistance Program (COLAP) website at www.coloradolap.org, or contact COLAP at info@coloradolap.org or (303) 986-3345 to request a confidential, free well-being consultation.

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NOTES

1. "Tools for Managing Stress and Anxiety," *Huberman Lab Podcast* (2021), https://www.youtube.com/watch?v=ntfcfJ28eiU.

2. Lund, "The Gottman Conflict Blueprint" (Oct. 22, 2015), https://www.youtube.com/watch?v=o1v6j_4_NtQ.

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5. Lisitsa, "The Four Horsemen: The Antidotes," The Gottman Institute blog, https://www.gottman.com/blog/the-four-horsemen-the-antidotes.

6. *Id.*

7. *Id.*

8. Lerner et al., "Emotion and Decision Making," 66(1) *Annual Rev. of Psychol.* 799 (Jan. 2015), https://doi.org/10.1146/annurev-psych-010213-115043.

The Benefits of Promoting Party Self-Determination in Mediation

BY TESSA R. DEVAULT, WESLEY PARKS, AND MARA ARUGUETE

The rise of court-mandated mediation changes the perception of mediation as voluntary, which may influence the permanence of settlements reached in mediation. This article describes a study that investigated the causal role of party self-determination on settlement satisfaction by collecting data from litigators, mediators, and nonlegal professionals. It also explores ways to reduce post-mediation litigation by promoting party self-determination.

Post-mediation litigation is on the rise. Mandated court mediation is also on the rise. Professionals agree that parties must have self-determination regarding mediation outcomes.[1] This article, and the research supporting it, explores the question: Is there a relationship between party self-determination during the mediation process and post-mediation litigation? Research for this article included a review and analysis of surveys completed by professionals participating in alternative dispute resolution processes, including judges, attorneys, and mediators. The findings suggest that participants with higher levels of self-determination in both the process and outcome of mediation are more satisfied with the mediation professionals involved in the process and the overall process itself. The results also suggest that higher satisfaction with the mediation process could result in a decrease in post-mediation disputes.

Self-Determination and Mediation

Self-determination is a fundamental tenet of mediation practice and is defined in Standard I of Model Standards of Conduct for Mediators:

> Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.[2]

The purpose of the research conducted for this article was to determine whether litigation arising from mediation increases when participants exercise less self-determination during mediation (and vice versa).

Empirical Studies Illustrating the Benefits of Party Self-Determination

Empirical studies that observe the mediation process are rare, partly due to the confidentiality of the process. More studies on what happens during mediation are needed so that the legal field can better develop best practices based on observable, empirical data. The two studies discussed below provide a sample of what has been learned from direct observations of the mediation process. Together, the studies suggest that increasing party self-determination during mediation results in settlements that are more acceptable to the parties, and therefore, longer lasting.

The Maryland Study

A recent empirical study observing interactions between mediators and participants in child custody mediation supports our findings that increased perceived self-determination correlates with longer-lasting settlements. In 2018, Lorig Charkoudian, Jamie L. Walter, and Deborah Thompson Eisenber found that the amount of time spent in caucus was correlated with decreased long-term faith in parents' ability to work together toward resolution of future custody disputes. This research study was conducted on 130 court-ordered child custody mediation cases involving 270 participants in Maryland (the Maryland Study). The researchers performed a follow-up survey approximately six months after each mediation session and found:

> [T]he greater use of caucus was associated with an increase in participants' sense of hopelessness about the situation from before to after the mediation and a decrease in their belief that they could work together with the other parent to resolve their conflict or

that there was a range of options that could resolve their conflict.[3]

The Maryland Study found that caucus-style mediation decreased party interaction and diminished party perception of self-determination. In cases where the caucus was used more, parties were less likely to resolve custody disputes on their own six months after the mediation. Conversely, the Maryland Study found that a mediator's use of joint brainstorming techniques increased parents' belief that they could work together to resolve their conflicts with a range of options after the mediation. Brainstorming techniques included "asking participants what solutions they would suggest, summarizing those solutions, and asking participants how they think those ideas might work for them."[4]

Although the Maryland Study did not include attorneys representing clients in mediation, it measured the effect of mediator evaluation, finding that mediator evaluation increased post-mediation litigation. When lawyers act as mediators, evaluation of the case becomes almost inevitable.[5] Evaluative techniques, also known generally as "directive techniques," include "explaining one party's position to the other, and providing their own opinion and advocating for one participant or the other."[6] Mediator evaluation includes case analysis, assessment of strengths and weaknesses, predictions about likely court outcomes, and recommendations of specific settlement proposals.[7] The Maryland Study found that when mediator evaluation is used, "the more likely the participants are to file an adversarial motion" after the mediation.[8]

The Maryland Study supports the concern that mediator evaluation lessens participants' ability to exercise self-determination, resulting in perceptions of unfair mediation outcomes and increasing the likelihood of mediation litigation.[9] Fairness of process and self-determination are interrelated. Individuals tend to perceive a process as fair when they participate in decision-making, are not coerced into making a decision, and have knowledge of the relevant information necessary to make a decision.[10] Self-determination allows parties to problem-solve and resolve disputes on their own terms and based on their own values and interests. The joint session can be used to increase perceptions of fairness in the process, thus promoting longer-lasting settlements.

The New York Study

In the early 1990s, Dean G. Pruitt, Robert S. Peirce, Neil B. McGillicuddy, Gary L. Welton, and Lynn M. Castrianno gathered data through direct observation of 72 community mediations and found a direct correlation between party self-determination and long-term settlement satisfaction (the New York Study).[11] The New York Study is another rare study where mediations were directly observed by the researchers, who also had mediation participants complete a follow-up survey. In this case, researchers contacted the disputants four to eight months after the mediation by telephone to discuss the status of the mediated agreements with each party separately. The researchers found that party participation in joint problem-solving behaviors and their perceptions of feeling heard directly impacted the long-term success of, and continued compliance with, mediated agreements.[12] Interestingly, the New York Study found no relationship between short-term success and long-term success of mediated outcomes, noting that "long-term success is not a simple function of reaching an agreement or the quality of the agreement [in the short term]."[13] Self-determination was a key distinguishing indicator of long-term compliance with mediated agreements. The researchers found that "joint problem solving contribute[d] to improved relations" between the disputants in the long term.[14]

Relevant Colorado Law

The Colorado Dispute Resolution Act[15] authorizes courts to order mediation.[16] Of Colorado's 22

judicial districts, only three do not have a policy of issuing mediation orders.[17] Seven judicial districts require parties to attend mediation.[18] The remaining 12 judicial districts require mediation for certain cases (like eviction actions or small claims) or grant discretion to each judge to order mediation on a case-by-case basis. Most Colorado judicial districts use their right to order mediation, so many cases are subject to the mediation process. Therefore, there are substantial public policy reasons to ensure that parties are engaged in self-determination when mediating their disputes.

As courts order more cases to mediation, disputes arising from those mediations exemplify the importance of encouraging party self-determination in the mediation process. The Colorado Court of Appeals recently reaffirmed that mediation communications are confidential in *Tuscany Custom Homes, LLC v. Westover.*[19] At issue in *Tuscany* was a decision by the trial court to declare a settlement was reached between three parties. The trial court relied on an unsigned, post-mediation writing as evidence of the existence and terms of an alleged oral agreement reached during mediation.

In *Tuscany*, the parties mediated their dispute and the mediation concluded without a signed document memorializing a settlement. Instead, the mediator sent an email listing the terms of settlement purportedly reached during the mediation and requested all counsel respond in agreement. Counsel for two of the three parties responded with their assent to the terms. One of those attorneys then drafted a settlement agreement based on the terms contained in the mediator's email. The third party's attorney responded that their client had no changes to the draft settlement agreement and indicated they would work with their client for a signature.

Two of the three parties signed the draft settlement agreement, but the third party refused because the agreement was missing a term material to the third party regarding a right to assert future claims. The two parties who signed the draft settlement agreement then moved the trial court to enforce its terms. The draft settlement agreement and the mediator's email were offered as evidence that an enforceable contract between the parties existed. The Court of Appeals held that the mediator's email and the draft settlement agreement were confidential mediation communications prohibited from being introduced as evidence of an enforceable settlement.

The *Tuscany* decision is important for two reasons. First, it upholds and expands the confidentiality of mediation communications under the Dispute Resolution Act as held in *Yaekle v. Andrews.*[20] Second, it exemplifies how additional litigation may result when party self-determination is undermined during the mediation process.

> "Party self-determination as to the mediation process and outcome is undermined when an attorney speaks on behalf of a party without full authority."

This case presents a cautionary tale for attorneys who make representations about their client's position without authorization. The third party's attorney in *Tuscany* represented to the other two parties that the attorney's client agreed with the terms of the draft settlement agreement when, in fact, the draft settlement agreement lacked a material term. The miscommunication between attorney and client resulted in an unsigned draft settlement agreement, additional litigation, a hearing and testimony in front of the trial court, an appeal, remand to the trial court, and further proceedings.

Tuscany exemplifies the importance and relevance of a client's self-determination in settlement. Party self-determination as to the mediation process and outcome is undermined when an attorney speaks on behalf of a party without full authority. Post-mediation litigation follows, and settlement efforts are stymied. When clients are empowered to be part of the process and feel heard, settlement fortitude is more readily achieved.

The Colorado Survey

The authors developed a survey to isolate and study party self-determination in mediation. The following outlines the participants, procedure, results, and preliminary conclusions of the research.

Participants

Participants[21] were recruited through various lawyer and mediator listservs and electronic communications. Most participants were attorneys (71.4%), and the rest were various other law professionals. About half of the participants (47.40%) reported having mediation training, though fewer (23.7%) reported practicing as mediators. On average, participants had 19.14 years of professional experience. Participants completed the survey online via Qualtrics.

Procedure

In this one-way experimental design,[22] participants were each randomly assigned to a high or low self-determination group. Each group read a hypothetical scenario (involving a client named Saul, an attorney, and a mediator) describing a breach of contract complaint over a home remodeling job. The surveys were controlled to isolate and study the variable of party self-determination. The differences between the groups were examined using independent samples *t*-tests.

In both scenarios, the parties brought claims against each other, the subject client was represented by counsel who participated

in the mediation, and the mediator used an evaluative mediation style. In both scenarios, the attorney advised the client that the case was not worth litigating. Although the client believed he was right, he agreed to pay a small sum to the opposing party in settlement. Both scenarios resulted in a signed settlement agreement.

In the high self-determination scenario, the parties voluntarily agreed to attend mediation and agreed on the mediator. The client met with his attorney to prepare for the mediation. The client heard the mediator evaluate both the strengths and weaknesses of his case and was encouraged by his attorney to share his story. The client felt heard and unpressured at mediation and had the choice to settle or not. The attorney and client reviewed the settlement agreement together before the client signed.

In the low self-determination scenario, the court ordered the parties to mediate and appointed the mediator. The client did not meet with his attorney to prepare for mediation, nor did he review the terms of the settlement agreement with his attorney before signing. The client heard the mediator only discuss the weaknesses of his case, and the attorney did all the talking at mediation. The client felt ignored during mediation and pressured to settle with little to no choice.

After reading the assigned scenario, each participant completed a survey consisting of four scales measuring their evaluation of the individuals featured in the scenario in addition to the probable outcome of the scenario. Each 4-point evaluation scale featured response options of *Strongly Agree* (scored as 4), *Agree* (scored as 3), *Disagree* (scored as 2), and *Strongly Disagree* (scored as 1). In each scale, higher scores indicated more positive evaluations. As a manipulation check, participants were also asked to assess the client's exercise of self-determination on a scale of 1 (*highest degree of self-determination*) to 10 (*lowest degree of self-determination*).

- **Evaluation of Client.** Participants evaluated the client on the basis of how easy it might be to work with the client (e.g., "Saul [the client] is probably reasonable."). Two items were reverse-scored.[23] Cronbach's alpha showed good scale reliability (.90).[24]
- **Evaluation of Mediator.** Participants assessed the mediator based on professional qualities (e.g., "The mediator is effective."). One item was reverse-scored. Cronbach's alpha showed good scale reliability (.90).
- **Evaluation of Attorney.** Participants assessed the attorney based on professional qualities (e.g., "Saul's attorney appears trustworthy."). Two items were reverse-scored. Cronbach's alpha showed adequate scale reliability (.77).
- **Evaluation of Probable Outcome.** Participants assessed the probable outcome of the case by evaluating the client's predicted response (e.g., "Saul [the client] will probably dispute the terms of settlement in the future."). Three items on this scale were reverse-scored. Cronbach's alpha showed good scale reliability (.83).

INDEPENDENT SAMPLES T-TESTS

	HIGH SELF-DETERMINATION		LOW SELF-DETERMINATION		
Evaluation	*M*	*SD*	*M*	*SD*	*t*-test
Client	3.19	.41	2.79	.56	2.39*
Mediator	2.99	.39	2.29	.58	3.90**
Attorney	2.89	.28	2.21	.47	5.03***
Outcome	2.93	.31	2.11	.43	6.33***

*p<.05, **p<.01, ***p<.001

Results

Prior to hypothesis testing, we examined the degree to which participants in each self-determination group correctly perceived the client as having high or low self-determination. As expected, participants in the high self-determination group[25] perceived the client as having significantly higher self-determination than those in the low self-determination group.[26] This indicates that participants read the scenarios carefully enough to notice the intended experimental manipulation.[27]

Next, we examined whether self-determination affected participants' evaluation of the individuals in the scenario and the probable outcome of the scenario. As hypothesized, the client, the mediator, and the attorney were rated more favorably by the high self-determination group than by the low self-determination group. Additionally, participants in the high self-determination group predicted a more favorable outcome of the case. The table summarizes the results.

Preliminary Research Conclusion

The survey results show that party self-determination is a causal factor in evaluating clients, mediators, and mediation outcomes. All variables in the test scenarios were nearly identical except for the party's degree of self-determination—the surveys were designed to isolate and study that element. There is a statistically significant difference in the self-determination rates between the scenarios, suggesting that the scenarios accurately communicated the intended level of party self-determination. The results confirm that a party's self-determination increases faith in the client, attorney, mediator, and mediation outcome. Therefore, promoting party self-determination yields positive reactions to the mediation participants and process.

The research supports the hypothesis that increasing self-determination in mediation will increase satisfaction with mediation outcomes and lead to less post-mediation litigation. The authors are conducting further research by studying post-mediation surveys of court-ordered participants to determine whether party self-determination correlates with attorney presence during mediation. This new study

tests theories that court-mandated mediation without promotion of self-determination may increase the occurrence of post-mediation litigation. If this is true, does party self-determination in the process and outcome help reduce post-mediation disputes? Is the legal profession doing enough to educate legal professionals (attorneys, advocates, mediators, arbitrators, judges), clients, and members of the public about mediation so they may participate meaningfully in the process?

The answers to these questions may suggest that more should be done to educate legal professionals and members of the public about mediation. When courts require parties to attempt one form of alternative dispute resolution, success of the process depends on the parties' satisfaction with the process. People engaged in dispute resolution processes who feel more in control of the process and outcome are more satisfied with the legal system and its participants. Such satisfaction may help parties resolve disputes early or possibly avoid the legal system altogether, which can reduce court docket size.

Conclusion

A growing body of research suggests that promoting party self-determination can strengthen settlements and reduce post-mediation litigation. If used properly, court-ordered mediation can support overarching policy goals of lessening the strain on the court system and encouraging parties to resolve their own disputes when possible. But how mediation best practices should be changed to encourage party self-determination is an open question. More research on the benefits of joint sessions as compared to shuttle mediation may provide opportunities to integrate self-determination into the mediation process and help parties avoid settlement remorse. The empirical research seems to support increased party involvement in decision-making if parties are to resolve (for the long-term), rather than merely settle (for the short-term), their disputes. CL



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NOTES

1. *See e.g.*, Model Rule of Prof'l Conduct (MRPC) 1.2, cmt. 2 (Am. Bar Ass'n 1983) (decision to settle a civil matter must be made by client, not counsel); MRPC 1.0(e) (defining "informed consent"); MRPC 1.4 (lawyers have a duty to keep clients informed); Model Standards of Conduct for Mediators, Standard I. Self-Determination (Am. Bar Ass'n, Ass'n for Conflict Resol., and Am. Arb. Ass'n 2005).

2. Model Standards of Conduct for Mediators, Standard I. Self-Determination, *supra* note 1.

3. Charkoudian et al., "What Works in Custody Mediation Effectiveness of Various Mediator Behaviors," 56 *Fam. Ct. Rev.* 544, 560 (2018). Maryland prohibits attorneys from attending child custody mediations in a representative capacity. *Id.* at 546. Studies have not addressed the effect of attorney presence in mediation.

4. *Id.* at 560.

5. Nolan-Haley, "Mediation: The New Arbitration," 17 *Harv. Negot. L. Rev.* 61, 84 (2012). (arguing mediator evaluation has become a substitute for arbitration).

6. *Id.*at 84. Mediators with subject matter expertise often employ evaluative techniques based on their individual experience and knowledge. Mediators who are also attorneys or retired judges, for instance, are often asked by parties to evaluate a case because of their expertise. Attorneys representing clients in mediation give legal advice to their clients involving the same or similar subject matter; however, mediators do not advise participants on how to proceed or what course of action to take. Mediator evaluation is not considered legal advice.

7. *Id.*

8. *Id.*

9. *See* Coben and Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation," 11 *Harv. Negot. L. Rev.* 43 (2006).

10. *See* Shapira, "A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform," 100 *Marquette L. Rev.* 81 (2016).

11. Pruitt et al., "Long-Term Success in Mediation," 17(3) *L. and Hum. Behav.* 313 (1993).

12. *Id.* at 328.

13. *Id.* at 325.

14. *Id.* at 327.

15. CRS §§ 13-22-301 to -313.

16. CRS § 13-22-311.

17. 2nd, 13th, and 14th.

18. 4th, 5th, 9th, 10th, 11th, 17th, and 18th.

19. *Tuscany Custom Homes, LLC v. Westover*, 490 P.3d 1039 (Colo.App. 2020).

20. *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008).

21. There were 38 participants—17 women and 18 men. The median age was 47.51.

22. Self-determination was the only factor being studied.

23. Reverse-scoring alternates the answer scale throughout a survey, which encourages participants to pay closer attention to questions.

24. Cronbach's alpha measures the internal consistency reliability of a scale by comparing survey items to one another. The minimum acceptable alpha value is .70.

25. (M = 6.27, SD = 1.62).

26. (M = 2.94, SD = 2.22), t(32) = 4.78, p = .00.

27. External manipulation included reverse-scoring and other survey features intended to ensure survey participants would carefully read and understand the self-determination factors and questions.

Receiverships and Arbitrations

BY JACK TANNER

This article discusses how and why receiverships and arbitrations are used in litigation and considers the potential benefits and obstacles to merging the two proceedings.

An old brainteaser from childhood asks: "What happens when an unstoppable force meets an immovable object?" The playground response was "an explosion," but the correct answer was that the question is flawed. If an unstoppable force exists, then by definition an object it meets cannot be immovable (and vice versa).

In the law, arbitration tends to be an unstoppable force. Courts are supposed to affirm arbitration awards, even if known to be contrary to law, absent a scant handful of statutory exceptions. Receiverships appear to be the immovable objects—only the court that appointed a receiver can instruct it what to do; other courts must not interfere. So, the new question is: Can receiverships and arbitrations effectively meet and coexist in the same matter?

Receiverships and arbitrations are fundamentally different proceedings, each having good reasons for its respective attributes. Trying to merge the two would be difficult (and perhaps impossible). If it can be done successfully, the combined result could provide a powerful and useful remedy. However, if and how it can be done remain open questions under Colorado law.

This article considers several issues that might arise when a situation calls for a receivership or an arbitration, or perhaps both. It is primarily intended for creative litigators who seek elegant and unusual solutions to problems that may not fit in the usual "round hole" of plaintiff versus defendant litigation.

A Brief History of Receiverships

First, a note on terminology: The term "receiver" is used in many ways. Numerous statutes create and give various powers and duties to quasi-judicial officers called "receivers." This article is not about them. Rather, it is about true equity receiverships—where a court of equity takes certain assets under its supervision and appoints a receiver to preserve the assets on behalf of the court, generally until the assets can be sold or the underlying litigation is resolved. "Preservation" can include not only operation, but also expansion. Appointing a receiver is inherently within the powers of a court that sits in equity.[1]

In essence, when a court appoints a receiver, it creates an estate (which can be specific assets, an entire company, or almost anything else). Those assets become a *res* that is *in custodia legis* ("in the custody of the law"). The *res* is under the exclusive control of the receiver, as supervised by the appointing court. As part of the appointment, the entire world is effectively enjoined from interfering with the receiver or the *res* except via proper motions filed in the appointing court.

Receiverships are court-created remedies. The first receiverships began in England in the late 1600s.[2] At that time, creditors' rights law allowed creditors to hold a ship in port if a debt was attached to the ship or its owner. But a ship in port did nobody any good, so the English Chancery created a "receiver." A receiver was a court officer who would board the ship as it left port, "receive" (and thus control) the money the ship earned in commerce, pay the receiver and the ship's crew, and then turn the excess funds back to the court to pay down the debt. That way, the creditor was protected, the debt could be repaid, and commerce could continue (which was good for both the economy and the Crown, since it taxed the commerce).

Over time, receivers began to be appointed over other *res* beyond ships—notably entire companies or certain assets that had been pledged as collateral.

Modern Receivership Practice

Today, receiverships are not limited to ships, and the *res* can be a company, pledged assets, a trust, a marital estate, or many other things. Most commercial deeds of trust provide for appointment of a receiver (often *ex parte*) in the event of default. The flexibility of the provisional remedy of a receivership is limited only by the creativity of the counsel and judge involved. Almost any asset can be put into a receivership, allowing the court to supervise the *res* while it sorts out the underlying dispute.

Receivership courts routinely resolve disputes affecting the *res* on summary procedures that would otherwise require plenary attention of a court.[3] In a receivership, a claimant with a claim against the *res* has a right to notice and an opportunity to be heard, but not a right to all the procedures set out in the Federal Judicial Center's 800-page *Manual for Complex Litigation*.[4] A large receivership may resolve thousands of disputed claims in summary fashion. This greatly reduces the burden on the court system as a whole, but likely increases it for the specific receivership court. One responsibility that comes from all this power is that receiverships must have substantial transparency to satisfy the constitutional requirement of due process.

An equity receivership is necessarily an interim remedy.[5] Because a receiver is a neutral officer of its appointing court, there must be an ongoing court proceeding for a receiver to exist. Once the case is over, a receiver is necessarily discharged.[6]

A Brief History of Arbitrations

In complete contrast to the judicially created remedy of receiverships, arbitrations were not created by courts and indeed cannot be created by courts. An arbitration's sole purpose is to resolve a dispute outside the court system.

Originally, arbitrations were used by nations to negotiate disputes where neither nation had complete jurisdiction.

In the last century, arbitrations began to be used in commercial disputes. In 1921, the Colorado legislature passed an act recognizing the validity of arbitrations. This law has been amended several times and is now codified as the Colorado Uniform Arbitration Act (the Act).[7] Generally, arbitration is a contractually created process, and only parties to the arbitration contract can be compelled to arbitrate.[8]

Modern Arbitration Practice

Currently under the Act, parties can agree to any form of arbitration rules. The largest arbitration organization in the United States is the American Arbitration Association (AAA), and its Commercial Rules provide that an agreement to arbitrate is "not incompatible" with a court entering interim remedies.[9] While this certainly invites injunctions to preserve the status quo pending arbitration, it could also be interpreted to allow receiverships.

Significantly, many parties seek arbitration because they desire confidentiality. Arbitrations are generally conducted completely confidentially, and only the final award is presented to a court for affirmance (if even that is necessary). In most cases, the court must affirm an arbitration award even if it is contrary to law.[10] The handful of exceptions to this rule generally turn on arbitrator bias.[11]

There is, however, a lesser-used aspect of the Act—under Section 208 of the Act,[12] courts have the authority to enforce an arbitrator's provisional order. In theory, this could include the provisional remedy of appointment of receiver.

The Interaction of Arbitration and Receivership Law

Not much law exists on the interaction of receiverships and arbitrations (perhaps because they are so fundamentally different). One of the few Colorado cases that appears to have at least tangentially involved the relationship between a receiver and an arbitrator is *Oberto v. Moore*.[13] In *Oberto*, the partnership agreement at issue contained an agreement to arbitrate. One party had a receiver appointed essentially *ex parte* (the parties were given less than one day's notice for a hearing in Telluride, when defense counsel was in Grand Junction). Equally disturbing was that the plaintiff was appointed receiver (contrary to the well-established requirement that a receiver be neutral). The Colorado Supreme Court reversed the appointment as an abuse of discretion:

> The appointment of the plaintiff copartner as temporary receiver was improvident. As a general rule, a receivership should not be created unless upon notice that gives ample time for all interested parties to attend and be heard. If there be exceptional cases that require *ex parte* action, they are limited to momentous emergencies which manifestly threaten dire destruction of health, safety, or irretrievable estate. There was no such exigency here . . . . The evidence at the *ex parte* hearing was plainly insufficient. . . .[14]

The Court was careful not to go beyond the quoted holding:

> In view of the conclusions we have above expressed, it is unnecessary at this time to decide whether Oberto is right in claiming that he can demand arbitration under the contract, or whether Moore is right in contending the contrary on the ground that the partnership agreement failed to name specifically the arbitrators who would represent the respective partners. What we might say on that subject would be mere dictum. That issue may be litigated in the main case if the parties so desire.[15]

No significant Colorado cases have been decided on this issue since *Oberto*, though courts in other jurisdictions have been addressing questions regarding the interaction of receiverships and arbitrations more frequently in recent years, as discussed below.

Can a Court Appoint a Receiver Where There Is a Binding Arbitration Clause?

Given *Oberto* is essentially the only Colorado appellate jurisprudence on the interaction of receivership and arbitration law, the question of whether and how a receiver can be appointed when there is an arbitration clause is unanswered under Colorado law. Some jurisdictions outside Colorado have expressly approved a court's appointment of a receiver pending an arbitration.[16] Other courts, however, have held that where there is a controlling arbitration clause, the court lacks jurisdiction to appoint a receiver.[17]

Can a Court-Appointed Receiver Be Forced to Arbitrate?

If a Colorado court appoints a receiver over a company, can the receiver be required to arbitrate pursuant to preexisting company contracts? Again, there is no controlling law in Colorado on this point, and out-of-state authorities are split. The court in *Greenblatt v. Ottley*[18] held that a receiver appointed over a health-care facility in New York was not bound by an arbitration agreement contained in the collective bargaining agreement, stating:

> It is utterly incompatible with the jurisdiction of the court over a receivership of a health care facility pursuant to the Public Health Law and with the duties of the Commissioner of Health as a receiver to require the Commissioner to be bound, without his consent, to a pre-receivership arbitration agreement.

While *Greenblatt*'s language is stronger than most taking this position (perhaps because it is based on a state statute), other cases reach similar conclusions.[19] But there are several other authorities to the contrary.[20]

Can an Arbitrator Appoint a Receiver?

Numerous out-of-state courts have held that an arbitrator can appoint a receiver.[21] In *Stone v. Theatrical Investment Corp.*, the district court affirmed an arbitrator's appointment of an officer denominated "a receiver."[22] However, the court noted that the receiver's "limited duties . . . are functionally more akin to those of a collection agent."[23] The court further held that because no New York or federal law prohibits an arbitrator from appointing a receiver, an arbitrator acting under either of those laws could do so.

At the other end of the spectrum is *Marsch v. Williams*,[24] where the California Court of Appeals held that an arbitrator cannot appoint a receiver even if the arbitration agreement expressly says the arbitrator has that power. Part of *Marsch*'s analysis was that although a California statute allows courts to enter interim relief pending

an arbitration, that statute does not appear to permit the appointment of a receiver as a remedy.

Somewhere in between *Stone* and *Marsch* are authorities such as *Ravin & Rosen, P.C. v. Lowenstein Sandler, P.C.*,[25] which held that an arbitrator could not appoint a receiver because neither the arbitration agreement nor the AAA Rules (which were incorporated by reference) could be read to fairly provide that authority.

What Value Would an Arbitrator-Appointed Receiver Provide?

In addition to the challenge of maintaining transparency and confidentiality, appointment of a receiver by an arbitrator could also create practical problems. Receivers routinely deal with entities that are not parties to the litigation in which the receivers were appointed. For example, when a receiver is appointed over a company, one of the first things the receiver usually does is go to the company's bank and get the bank accounts turned over to the receiver. If the bank refuses, the receiver can and will obtain contempt orders (another inherent power of a court in equity) from the appointing court against the uncooperative third party. This can coerce the bank to cooperate with the receiver.

No such power is directly available to an arbitrator-appointed receiver. If a bank refuses to cooperate with an arbitrator-appointed receiver, neither the receiver nor the arbitrator has any apparent remedy because the bank never contractually agreed to let the arbitrator resolve disputes.[26]

Another limitation on arbitrator-appointed receivers involves the claims process. As noted above, a court-appointed receiver can resolve claims against the *res*, often on summary procedures. But unless the claimants also agreed to have their disputes resolved via arbitration, an appointee of an arbitrator would not likely have authority over those claimants or their claims. So, one of the most powerful aspects of receiverships (the ability to resolve claims on a summary basis) would not be available to an arbitrator-appointed receiver.

Even where the third party is cooperative and not adverse to the receiver, an arbitrator-appointed receiver may run into problems. When a receiver sells property, it typically cannot and does not give the usual warranties and representations of a seller. Rather, the receiver obtains a court order stating that the receiver has authority to sell and that the buyer is obtaining good title.[27] This court order "runs with" the property sold, and thus is good against the whole world. The buyer can therefore be confident it is receiving good title, even without the usual seller's warranties and representations. An arbitrator, however, has no ability to provide

such an order. It would not "run with" the property and be good against the whole world. In a better-case scenario, this would result in a lower sale price because the buyer would take the uncertainty into account. In a worst-case scenario, it might scare off all buyers entirely.

Although a receiver may be the most powerful remedy known at civil law, an arbitrator-appointed receiver would not be nearly as powerful nor as useful. The limited powers that an arbitrator alone could provide would greatly reduce the value of such a receiver.

Are Joint Appointments Possible?

One possible solution to the "either/or" situation described above is found in CRS § 13-22-208, which provides that a court can confirm certain "provisional" relief of arbitrators as follows:

> (2) After an arbitrator is appointed and is authorized and able to act:
>
> (a) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and
>
> (b) A party to an arbitration proceeding may request the court to issue an order for a provisional remedy *only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy*. (Emphasis added).

So perhaps an arbitrator could appoint a receiver, and the order of appointment could be confirmed by a trial court while the arbitration is ongoing. This would likely give the receiver the option of court action if, for example, a recalcitrant third party refuses to cooperate or if a sales order that runs with the *res* (and is good against the whole world) is needed.

The issue of a summary claims process operated by the arbitrator-appointed receiver is somewhat more complicated. Though the threat of contempt against uncooperative banks might happen only once or twice, a full-blown claims resolution process would take up a good amount of time. If the claimants do not consent to the arbitrator's jurisdiction, the court would have to do this process itself.

The court conducting the claims process while the arbitrator supervises all other aspects of the receivership raises another issue: the familiar notion that no one can serve two leaders. A receiver, being supervised both by an arbitrator and a judge, could face a terrible dilemma if given conflicting instructions. Hopefully, the arbitrator and the trial court would find common ground and not put the receiver in such a conflict.[28]

Not all states have this option. In *Reserve Recycling v. East Hoogewerff*, the arbitrator's order appointing an "overseer" (who had the powers of a receiver) pending resolution of separate litigation over appointment of a receiver was not a "final order," and the court therefore lacked jurisdiction to review it under Ohio's version of the Uniform Arbitration Act.[29] Therefore, this type of "overseer" could not, for example, resolve a claim by a third party against the *res* without that claimant consenting to the jurisdiction of the arbitrator.

Another solution might be to have a court appoint a receiver either prior to or during the arbitration. Colorado law already recognizes that even in the face of an arbitration clause, a court can enter interim equitable relief (such as injunctions) without disturbing the arbitrator's jurisdiction.[30] Because arbitrations are not instantaneous, without injunctive relief there could be nothing left to arbitrate by the time the arbitration process is finished.

Perhaps a court could appoint a receiver and direct the receiver to follow the direction of the arbitrator, only coming back to the court if some power beyond that of the arbitrator (such as orders involving third parties) were needed. As noted above, however, this approach would be clumsy and awkward (and hence expensive)

and could be perilous if the receiver received conflicting instructions from its two supervising bodies.

Conclusion

The procedures of receivership and arbitration are fundamentally different. Trying to combine them is like pointing a truly unstoppable force at a truly immovable object: fraught with peril. The conflicting goals of transparency in a receivership and confidentiality in an arbitration alone may prevent any simultaneous process. Further, the contractually given powers of an arbitrator would have no effect on a third party absent that party's consent. But if some form of joint appointment could be accomplished and the appointing court and arbitrator can work cooperatively, the resulting remedy could be powerful and useful to the parties and the courts. CL

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NOTES

1. *E.g., Johnson v. El Paso Cattle Co.*, 725 P.2d 1180 (Colo.App. 1986) (appointing a receiver in equity inherent power of district court). That is, if a legislature gives a court equity powers, then that court has the authority to appoint a receiver even if the legislature has not expressly granted the court that authority. *E.g.*, *Grayson v. Grayson*, 352 P.2d 738, 743 (Or. 1960) (when Oregon legislature gave divorce courts equity powers, it necessarily gave them the power to appoint receivers).

2. For a fuller discussion of the history of receiverships, *see generally* 1 Clark, *Clark on Receivers*, §§ 4 to 7 (3d ed. 1959).

3. A fuller discussion of modern receivership practice can be found in Tanner, "The ABCDs of Equity Receiverships," 48 *Colo. Law.* 24 (June 2019).

4. *Manual for Complex Litigation, Fourth* (2004).

5. In federal courts and most state courts, a receivership must be sought as a remedy ancillary to another claim for relief. That is, appointment of a receiver cannot be the sole claim for relief in a complaint. Colorado law differs, however, because of Colorado's rare-if-not-unique non-judicial foreclosure process. *See* CRCP 120. Rule 66, CRCP, expressly allows appointment of a receiver as the sole claim for relief. If Colorado instead followed the majority rule, then the non-judicial foreclosure process would rarely be used because a receiver could not be appointed to protect the property during the pendency of the foreclosure process. As it is, however, such "foreclosure receivers" are the most common type of receivers in Colorado.

6. One exception to this rule is that a receiver can be appointed post-judgment to help the judgment creditor satisfy the judgment if the more common methods of judgment collection have not worked. CRCP 66(a)(2). But even with a post-judgment appointment, there must be some court supervision; once the judgment is fully satisfied, the receiver would be discharged.

7. CRS §§ 13-22-201 et seq.

8. *E.g.*, *Santich v. VCG Holding Corp.*, 443 P.3d 62 (Colo. 2019).

9. American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, Rule R-37(c), https://adr.org/sites/default/files/CommercialRules_Web-Final.pdf.

10. *E.g.*, *Coors Brewing Co. v. Cabo*, 114 P.3d 60 (Colo.App. 2004) (arbitrator's "manifest disregard" of the law is not grounds to vacate an award).

11. The grounds to vacate an arbitration award include corruption, partiality, refusing to take evidence, refusing reasonable requests for postponement, an arbitrator exceeded its authority, no agreement to arbitrate, or the arbitration was conducted without notice. CRS § 13-22-223. Generally, an arbitrator is not bound to follow the law. *See id.*

12. CRS § 13-22-208.

13. *Oberto v. Moore*, 23 P.2d 578 (Colo. 1933).

14. *Id.* at 580.

15. *Id.*

16. *E.g.*, *Syphers v. Scardino*, No. 85-3696, 1985 U.S. Dist. LEXIS 13161 at 17–18 (E.D.Pa. Dec. 5, 1985) (appointing a receiver over partnership pending arbitration of the partners' disputes); *Shribman v. Miller* 158 A.3d 432 (N.J.Super. Ct.App.Div. 1960) (unless arbitration clause is worded so that arbitration is a condition precedent to any relief from court, a party may seek a receiver from a court without violating the arbitration clause); *Mitchell v. Murphy*, 43 P.2d 424 (Okla. 1935) (arbitration clause in partnership agreement did not preclude equity court from appointing receiver pending arbitration); 3 Clark, *Clark on Receivers*, § 916 (3d ed. 1959) ("If the arbitration is along legal lines, the court has ample power to say that the matters in question ought to go to arbitration as the parties have agreed, but that pending the arbitration a receiver should be appointed or an injunction granted for the purpose of protecting the property."). Ironically, *Ellington & Guy, Inc. v. Currie*, 137 S.E. 869 (N.C. 1927), held that a refusal to arbitrate constituted grounds for a court to appoint a receiver.

17. *E.g.*, *Sun Valley Ranch 308 Ltd. P'ship v. Robson*, 294 P.3d 125 (Ariz.Ct.App. 2012) (demand for a receiver had to be arbitrated, and the arbitrator had authority to appoint a receiver pursuant to the arbitrator's authority to order "interim measures").

18. *Greenblatt v. Ottley*, 430 N.Y.S.2d 958 (1980).

19. *See also Riker v. Browne*, 204 N.Y.S.2d 60 (1960) (receiver's authority to reject a contract is well-established receivership law, and it stood to reason a receiver could reject the requirement of arbitration); *S.E.C. v. Stanford Int. Bank Ltd.*, No. 10-10335, 424 F.App'x. 338 (5th Cir. 2011) (a federal court supervising receiver had authority to stay all actions that concerned the *res*, including the demand for arbitration).

20. *E.g.*, *Thiesing v. ISP.com, LLC*, 805 N.E.2d 778 (Ind. 2004) (receiver bound by arbitration clause in promissory note the receiver was trying to enforce); *Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755 (Tex.App. 2016) (receiver bound by arbitration clause in contract binding on company over which receiver was appointed); *Wiand v. Schneiderman*, 778 F.3d 917 (11th Cir. 2015) (no inherent conflict between Federal Arbitration Act and receiver; receiver could be compelled to arbitrate its "clawback" claims in Ponzi scheme case).

21. *E.g.*, *Sun Valley Ranch 308 Ltd. P'ship*, 294 P.3d at 132; *Stone v. Theatrical Inv. Corp*, 64 F.Supp.3d 527 (S.D.N.Y. 2014).

22. *Stone*, 64 F.Supp.3d at 539.

23. *Id.*

24. *Marsch v. Williams*, 23 Cal.App.4th 238, 245–47 (Cal.Ct.App. 1994).

25. *Ravin & Rosen, P.C. v. Lowenstein Sandler P.C.*, 839 A.2d 52, 54 (N.J.Super.Ct.App.Div. 2003).

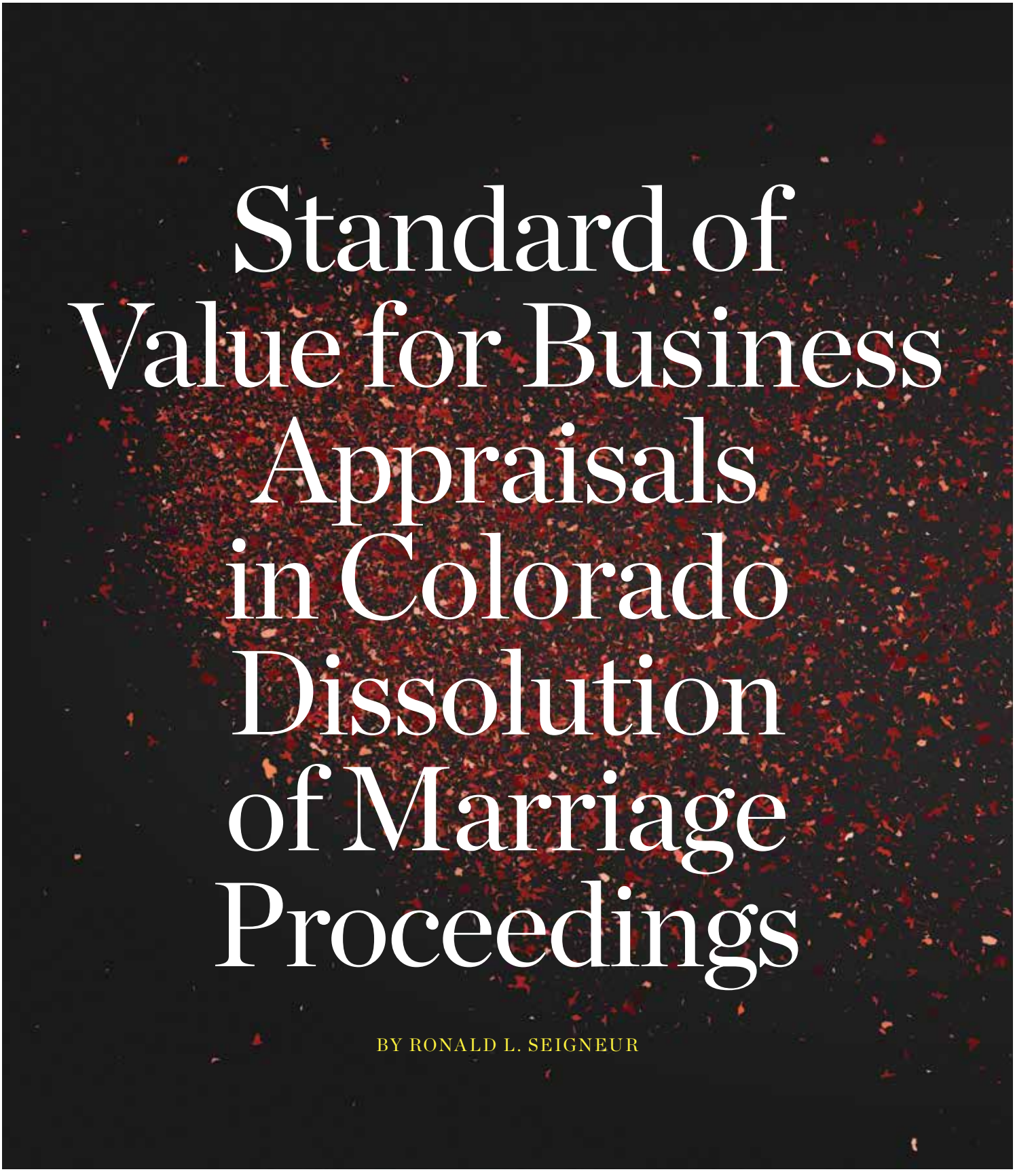
26. *See Santich*, 443 P.3d at 65.

27. For a fuller description of why a receiver does not give warranties and representations but instead delivers a court order, *see* Tanner, "The ABCDs of Equity Receiverships," 48 *Colo. Law.* 24 (June 2019), at n. 32 and accompanying text.

28. There is at least some precedent for such cooperation between two courts when a state court-appointed receiver locates property in another state. An original state appointing court's jurisdiction over property stops at the state line, so a receiver finding out-of-state property will seek to have itself appointed in ancillary fashion in the state where the property is located. *See generally*, 1 Clark, *Clark on Receivers*, at §§ 318 and 320.1; *Farm & Home Sav. & Loan Ass'n of Mo. v. Breeding*, 115 S.W.2d 615, 616–17 (Tex. 1938) (affirming authority of Texas ancillary receiver over property of Missouri defendant found in Texas). Such ancillary appointments have not created notable jurisdictional conflicts because the two judges tend to be cooperative and respectful of one another.

29. *Reserve Recycling v. East Hoogewerff*, No. 84673, 2005 WL 315376 (Ohio Ct. App., Cuyahoga County Feb. 10, 2005).

30. *See Merrill Lynch v. District Court*, 672 P.2d 1015, 1018 (Colo. 1983) (court had authority to enter a preliminary injunction to preserve status quo pending the outcome of arbitration).



Standard of Value for Business Appraisals in Colorado Dissolution of Marriage Proceedings

BY RONALD L. SEIGNEUR

This article addresses the application of different standards of value for business appraisals in Colorado dissolution of marriage proceedings and discusses how the standards affect the concluded value of a closely held business or professional practice ownership interest.

There is relative consensus in the legal and financial expert communities that the selection of the applicable standard of value in a business or professional practice appraisal in a Colorado dissolution of marriage proceeding is a legal issue to be determined by the trial court. Unfortunately, there is also a relative consensus in the Colorado family law community that there is not a clear, established standard of value that applies to a Colorado dissolution of marriage case. The burden this uncertainty levies on the trier of fact to weigh conflicting legal precedents creates inefficiencies and extra costs in many dissolution proceedings involving formal business appraisals. This article explores the issue of selecting a standard of value in dissolution of marriage proceedings and provides insight into how the different standards affect valuations in business and intellectual property appraisal matters.

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Overview of the Standard of Value

Before a business appraisal can be completed, a standard of value must be established. The business community has several well-established definitions of various standards of value to fit different circumstances. Various credentialing organizations recently compiled an update to the *International Glossary of Business Valuation Terms* (*Glossary*),[1] a resource widely accepted among financial experts. The updated *Glossary* includes the following definitions:[2]

- *Fair market value* represents the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, each acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of relevant facts.
- *Fair value*[3] consists of different definitions, depending on the context and purpose. Fair value is typically defined or imposed by a third party (e.g., by law, regulation, or contract, or for financial reporting/attestation standard-setting bodies).[4]
- *Investment value* represents the value of an asset or business to a particular owner or prospective owner for individual investment or operational objectives. This is also known as *value to the owner*.

Notably, at least among the business appraisal community, value to the owner is referenced as a subset to the more universally accepted investment value standard and is not otherwise defined as a separate identifiable standard of value. Investment value considers the value to an identified owner and/or buyer of a business interest, while fair market value assumes an unidentified hypothetical willing buyer and/or seller with no relationship to the subject business or professional practice. Each standard can produce vastly different results.

When a propertied spouse in a dissolution proceeding[5] is an identified seller, the standard immediately shifts from a fair market value to an investment value, and it becomes critical to consider the motivations and circumstances of that identified individual, no different than when there is an identified buyer of the interest that has unique motivations and economic attributes.

The *Glossary*'s definition of fair market value is like that set forth in IRS Revenue Ruling 59-60,[6] which defines fair market value as

> the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.

Issued in 1959, Revenue Ruling 59-60 has become a guideline for other valuation purposes and has been accepted by the valuation community as a key analytical framework for valuing closely held businesses.

Additionally, court decisions frequently state that the hypothetical willing buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and the market for such property.[7]

Seller and Buyer Characteristics

The definitions of fair market value from the *Glossary* and Revenue Ruling 59-60 assume the following:

- The buyer and seller are hypothetical parties and not specific buyers or sellers.
- The hypothetical buyer and seller are prudent and act in their own best interests.
- The hypothetical buyer is without the synergistic benefits that may be available to the identified owner of the subject interest.
- The business will be exposed for sale on the open market for a reasonable period of time.
- The consideration paid for the property is in cash or its equivalent.
- The business will continue as a going concern and not be liquidated unless evidence to the contrary suggests that the highest and best use of the property is liquidation.

The hypothetical buyer under the fair market value standard is a financially motivated buyer, not a strategic buyer. That is, the hypothetical buyer contributes only capital and management experience equivalent to that of current management. This excludes the hypothetical buyer who, because of other business activities, brings some value-added benefits to the business that will enhance the business being valued and/or the buyer's other business activities (e.g., being acquired by other businesses in the same or a similar industry). This also excludes a buyer like a stockholder, creditor, or related or controlled entity who might be motivated to acquire the interest at an artificially high or low price due to considerations not typical of the arm's length financial buyer. It also excludes a synergistically motivated buyer, such as a competitor looking to expand market share or someone looking to vertically integrate an existing business.

The definitions of fair market value also assume the following attributes of the hypothetical willing buyer:

- The buyer will analyze feasibility of the purchase, perform due diligence, and analyze valuation scenarios in determining the price they are willing to pay for the ownership interest and will negotiate that price with the seller.
- The buyer may seek assurances from the seller regarding certain aspects of the business and will seek assistance from the seller in transitioning the business, including post-transaction employment and possible seller financing, although contracts for such post-transaction services will typically be at current market compensation rates.
- The buyer will not breach confidentiality or make threats.

The seller, under the preceding definitions of fair market value, is also hypothetical and has knowledge of all relevant facts (i.e., the influences on value exerted by the market, the investment characteristics specific to the business's risk drivers, degree of control, lack of marketability, and other relevant considerations). The preceding definitions of fair market value also assume the concept of a hypothetical willing seller—one who may assist the buyer in transitioning the business by providing post-transaction employment and training, assistance with employee retention, and other necessary support in return for market-based compensation.

> "It is not unusual for legal counsel in Colorado dissolution proceedings to request that business appraisers prepare analyses and expert reports applying both a value to the owner and a fair market value standard."

Two Methods for Determining Legal Standard of Value

Beyond the definitions generally accepted in the business community, legal practitioners must understand how Colorado courts use standards of value in dissolution proceedings.

The applicable Colorado statute on disposition of property in a dissolution proceeding[8] does not define a legal standard of value to be used in valuing a closely held business or professional practice. Colorado case law has established two fundamental choices for the legal standard of value in Colorado dissolution proceedings: (1) fair market value; and (2) value to the owner, although the latter is not a clearly defined standard in the business valuation community.

It is not unusual for legal counsel in Colorado dissolution proceedings to request that business appraisers prepare analyses and expert reports applying both a value to the owner and a fair market value standard. The appropriate standard of value that will apply in any given proceeding is for the trier of fact to determine, and typically this is not adjudicated until permanent orders unless agreed to in advance by the parties and their respective legal counsel. The added time and cost to the appraiser always depends on the facts and circumstances of the particular matter, but costs for preparing valuations using multiple standards of value can be 20% to 50% more due to the differences in underlying assumptions.

The following landmark Colorado appellate court cases give guidance in valuing goodwill in a closely held business and, in turn, guidance on the appropriate standard of value for the trial court to apply in dissolution proceedings:

- *In re Marriage of Martin,* later reaffirmed by *In re Marriage of Graff*, established that goodwill "is not necessarily dependent upon what a willing buyer would pay

for such goodwill . . . [but] whether the business has a value to the spouse over and above the tangible assets."[9]

- The Court in *In re Marriage of Huff* stated that "the excess earnings valuation method is an appropriate valuation in a dissolution proceeding because it provides the present value of the partnership interest to the participating spouse . . . ."[10]
- *In re Marriage of Thornhill* addressed whether marketability discounts could be applied in dissolution cases.[11]

In *Thornhill*, the trial court allowed for a 33% discount for lack of marketability, using a fair market value standard, on a 70.5% controlling interest in an oil and gas service business. On appeal, the non-propertied spouse argued that application of a marketability discount was prohibited under *Pueblo Bancorporation v. Lindoe, Inc.*, a case that dealt with discounts in dissenting shareholder valuations.[12] The Colorado appeals court rejected appellant's challenge to the use of a discount, finding *Pueblo Bancorporation* inapplicable in a dissolution proceeding for several reasons.[13]

Instead, the court noted it was "persuaded by the decisions of numerous other jurisdictions that have concluded marketability discounts may be applied in valuing shares in closely held corporations in dissolution proceedings."[14]

Therefore, *Thornhill* expanded Colorado trial courts' discretion. In dissolution cases in Colorado, courts may now apply either investment value/value to the owner (pursuant to *Martin*, *Graff*, and *Huff*); or fair market value, with discounts for lack of marketability and, when less than a controlling interest is at issue, lack of control/minority interest (pursuant to *Thornhill*). The resulting difference in the concluded estimate of value of the subject interest to the marital estate can be extreme.[15] The essence of value to the owner is captured in the question: What is the propertied spouse—the owner of the business or professional practice—willing to pay into the marital estate to retain the rights and benefits of the business or professional practice?

A Practical Example

To help put this issue into context, consider a recent dissolution proceeding in which both spouses retained experienced financial experts. The propertied spouse owned roughly an 80% controlling interest in a family business with operating revenues exceeding $60 million annually as of the date of appraisal, up from about $2 million at the date of marriage. The key challenge in valuing the propertied spouse's ownership interest as a martial asset was determining its increase in value during the tenure of the marriage.

Both experts valued the business using both a value to the owner standard of value and a fair market value standard of value at both the date of marriage and the current appraisal date. The difference in the results from each method was significant. The expert for the propertied spouse estimated the value of the subject controlling interest as of the appraisal date to be roughly $8 million under a fair market value standard and roughly $6.5 million under a value to the owner standard—$1.5 million less in value as compared to what the controlling interest would be worth to a non-synergistic hypothetical buyer. Uniquely in this instance, the expert for the propertied spouse essentially argued that the control owner did not have the ability to operate the business as efficiently as a market buyer could and would therefore have higher operating risk and have less access to lower rate debt, and concluded the subject interest had less value to the owner as compared to the value of the interest on the open market.

> "A sound valuation will be based on all the relevant facts, but the appraiser must apply the elements of common sense, informed judgment, and reasonableness when weighing those facts and determining their significance."

Valuing Closely Held and Controlling Interests

A sound valuation will be based on all the relevant facts, but the appraiser must apply the elements of common sense, informed judgment, and reasonableness when weighing those facts and determining their significance.[16] A critical factor in valuing a business interest is whether the subject ownership interest is controlling. Regardless of whether evidence exists of an impending exchange of the ownership interest as is assumed under the fair market value standard, the value that a controlling owner of the interest could achieve in an open exchange is highly relevant because it sets the floor value of the interest.

The owner of a controlling interest has the right to make key management and operational decisions, including generally having the unilateral right to determine when and if to liquidate their ownership and realize the market value of their interest. Under a fair market value standard, a non-controlling interest in a closely held business or professional practice may also be subject to significant discounts for lack of marketability and for lack of control, which is also referred to as a minority interest discount.[17]

Whether the ownership is controlling is key, because the value to a controlling owner in a business or professional practice will rarely, if ever, be lower than the enterprise market value of the controlling ownership interest in an arm's length exchange under a fair market value standard. The value of a controlling interest to a specific owner is often significantly higher than

fair market value, though this is contrary to the position taken by the business appraiser in the example outlined above. This is because the controlling owner typically has the advantage of significant synergistic benefits and privileges—unavailable to an uninvolved, unidentified hypothetical fair market value buyer—that may produce a greater economic return. The controlling owner likely has well-established relationships with key employees, customers, and vendors, and often has knowledge about operational issues that may not be apparent or accessible to the average fair market value buyer. Therefore, investment value/value to the owner may be the best standard to use when assessing the value of a controlling owner's interest.

Some valuation analysts may refer to value to the owner as a subset of the fair value standard of value, particularly when evaluating non-controlling ownership interests, which is inaccurate. This confusion may stem from the lack of consideration of discounts when the subject ownership interest is not a controlling interest and a sale of the overall enterprise is not imminent. Under the usual application of value to the owner in Colorado family law courts, minority interest discounts and a discounts for lack of marketability are typically not considered, contrary to the application of these discounts for a non-controlling interest under a fair market value. But the lack of application of discounts does not change a value to the owner standard to a fair value standard.

Like an owner of a controlling interest, an owner of a closely held interest will often enjoy unique economic benefits due to a combination of relationships with clients or customers, loyalty and recurring patronage from those clients or customers, strategic relationships with vendors and suppliers, and relationships with key employees that cannot be replicated by a hypothetical willing buyer. These benefits can be significant and evident regardless of whether the owner of the interest is a controlling owner or a minority owner and often result in a calculated value of the subject ownership interest that far exceeds what a fair market value buyer would be willing to pay without the benefit of these relationships. Therefore, an investment value/value to the owner standard may also be proper here.

Management decisions such as how the business is capitalized, whom to do business with, how much to pay employees, and how to handle billing and collections can affect business profits. If a controlling owner of a closely held business or professional practice chooses to retain his or her interest, their decisions may also result in lower profits for the business compared to what a market buyer could achieve. But if the proper standard of value is applied, these decisions should not diminish the market value of the subject interest to the marital estate for purposes of a dissolution proceeding.

Conclusion

The legal standard of value used in a dissolution proceeding can significantly impact the underlying appraisal of assets of a marital estate. Practitioners should understand the various standards of value, strive to provide guidance on the appropriate standard(s) of value to apply to the valuation analyst early in a dissolution proceeding, and seek early guidance from the court if they have questions about which standard applies to the case. CL

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NOTES

1. Laro and Pratt, *Business Valuation and Federal Taxes: Procedure, Law, and Perspective*, App. A (2d ed. 2011).
2. These standards of value are the three choices credentialed business appraisers consider when undertaking an appraisal engagement of a closely held business or professional practice.
3. In Colorado, the landmark case of *Pueblo Bancorporation v. Lindoe, Inc.*, 37 P.3d 492 (Colo. 2003), establishes that statutory fair value in a dissenting shareholder action is essentially defined as fair market value without the application of discounts for lack of marketability and lack of control.
4. Fair value for financial reporting purposes is defined in the International Financial Reporting Standards (IFRS) and under Generally Accepted Accounting Principles (GAAP), which define fair value as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date.
5. "Propertied spouse" in this instance refers to the actual owner of the interest in the business or professional practice that is subject to the appraisal analysis, though both spouses have an economic interest in the business or professional practice as it pertains to the marital estate in the dissolution proceeding.
6. IRS Rev. Rul. 59-60, 1959-1 CB 237.
7. For examples of applicable case law, *see* Fishman et al., "Standards of Value in Divorce," ch. 5 in *Standards of Value: Theory and Applications* (2d ed. 2013).
8. CRS § 14-10-113.
9. *In re Marriage of Martin*, 707 P.2d 1035, 1037 (Colo.App. 1985); *In re Marriage of Graff*, 902 P.2d 402, 405 (Colo.App. 1994).
10. *In re Marriage of Huff*, 834 P.2d 244, 256 (Colo. 1992).
11. *In re Marriage of Thornhill*, 200 P.3d 1083 (Colo.App. 2008).
12. *Pueblo Bancorporation v. Lindoe*, 37 P.3d 492 (Colo.App. 2002).
13. *Thornhill*, 200 P.3d at 1087.
14. *Id.*
15. A 33% discount for lack of marketability is unusual on a 70.5% controlling interest, but the Colorado appellate courts did not consider or comment on the size of the discount. *See also* Clarke and Seigneur, "*In Re Marriage of Thornhill*: Emerging Issues in Standard of Value Determinations for Family Law Matters," AICPA *CPA Expert* newsletter (Spring 2009), https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=1359&context=aicpa_news.
16. *See* IRS Rev. Rul. 59-60, *supra* note 6.
17. While a controlling interest in a closely held business is also not as marketable as a publicly traded security, the controlling owner retains the economic benefits of the interest during a possible extended period to market the controlling interest at the election of the control owner. Therefore, a discount for lack of marketability is typically not taken on control positions, although a smaller discount for lack of liquidity, often calculated as the cost of brokering and selling the enterprise, is appropriate.

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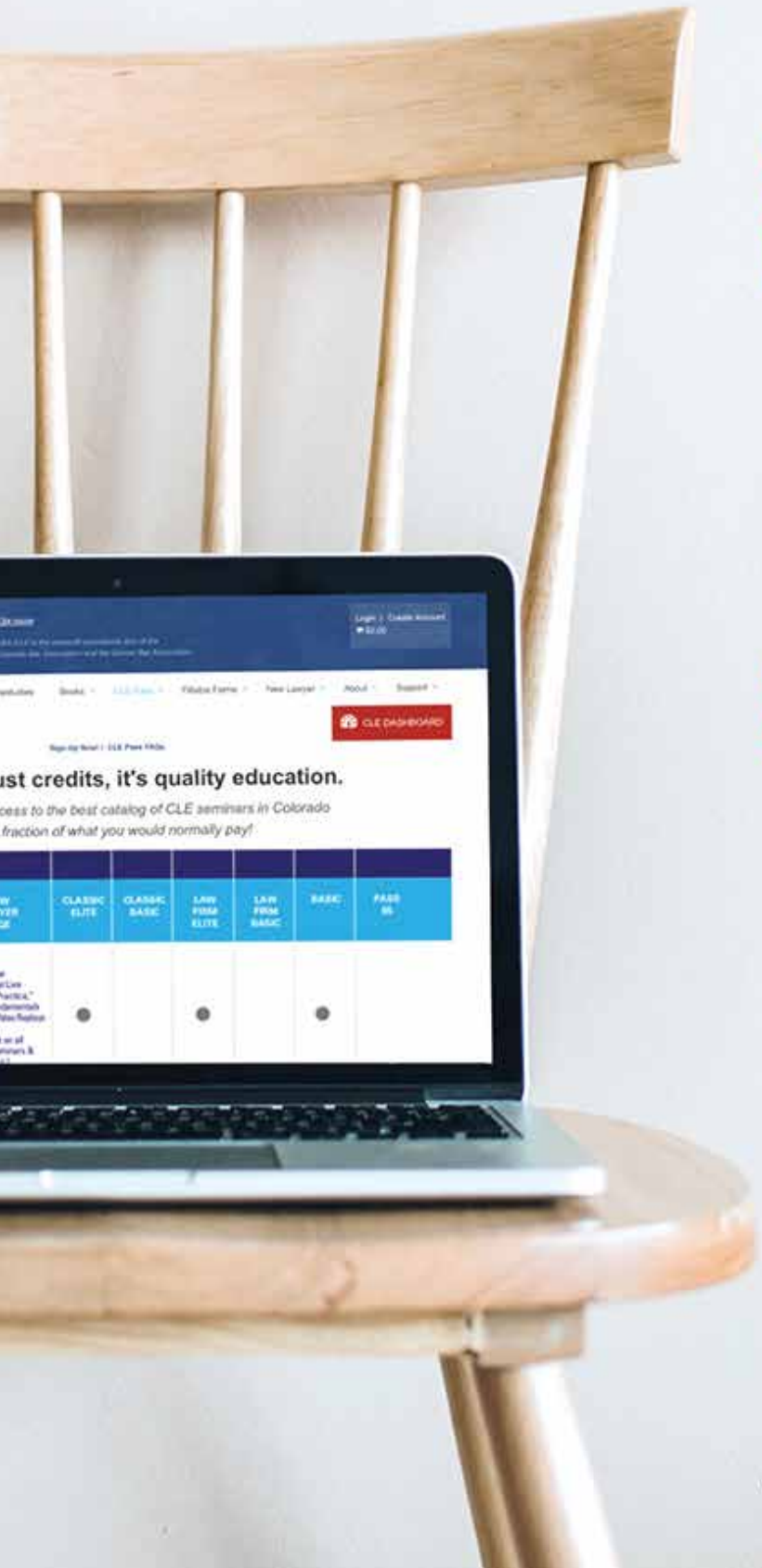

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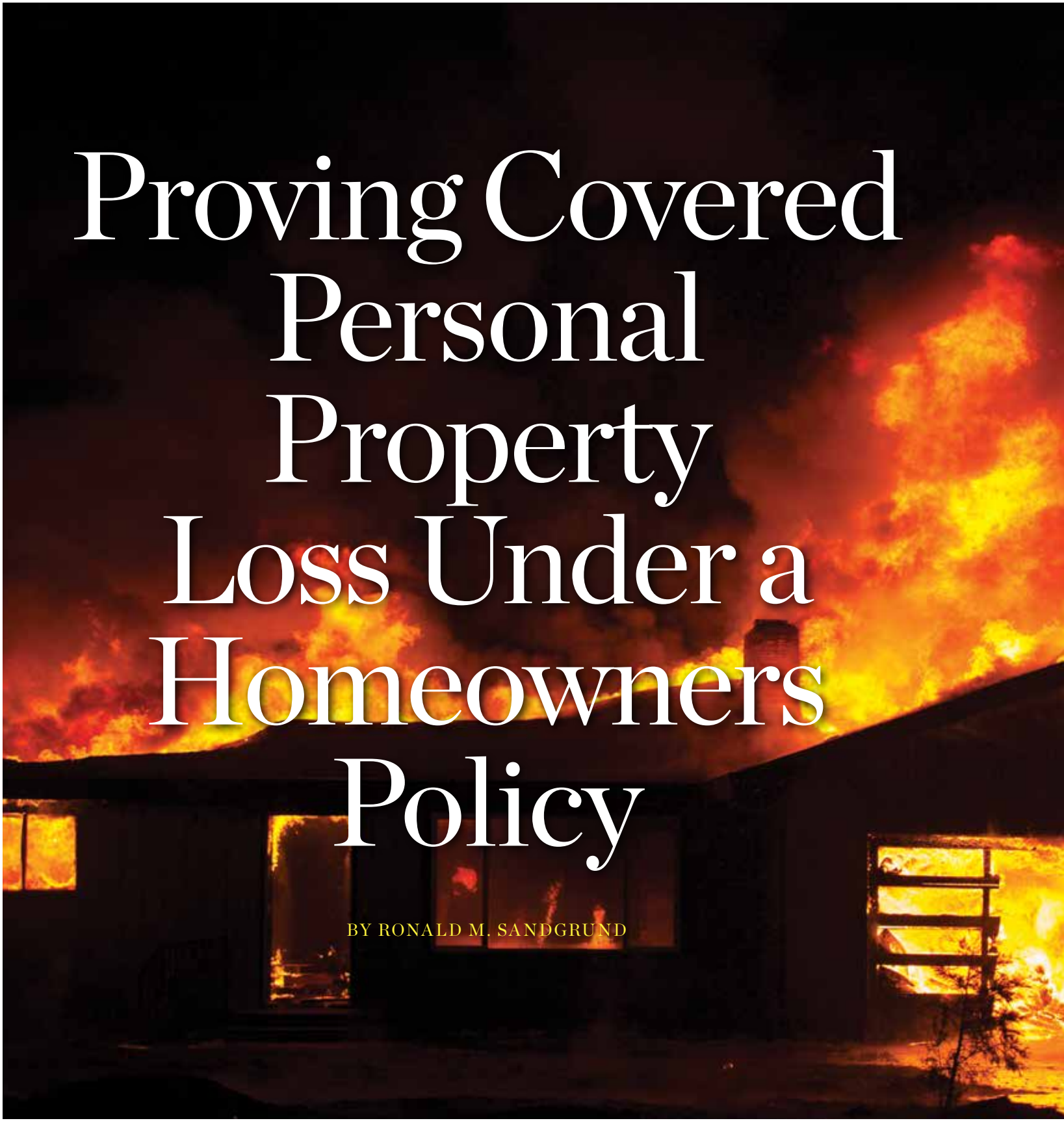

Proving Covered Personal Property Loss Under a Homeowners Policy

BY RONALD M. SANDGRUND

This article discusses common problems homeowners face when filing claims to access their insurance coverage for personal property loss following the catastrophic loss of a home by fire, flood, or otherwise.

On December 30, 2021, the Marshall Fire, fueled by steady 100 mile-per-hour straight-line winds, scorched Louisville, Superior, and unincorporated Boulder County, killed two people, and destroyed nearly 1,000 homes.[1] Among the many profoundly sad scenes following that conflagration was that of people picking through their homes' ash and rubble to create an inventory of their burned personal property. Capable of exceeding 5,000 degrees,[2] home fires often destroy personal property or render it unrecognizable. Most home insurance policies include automatic coverage for personal property (contents) loss with payment limits equal to some percentage of the overall dwelling limits.[3] In Colorado, when a home's contents are completely destroyed by fire, homeowner insurers are required to pay 30% of the personal property limits without any proof of the nature, condition, or value of the lost property.[4] With a little arm-twisting, the Colorado Division of Insurance persuaded many insurers to pay a much higher percentage to homeowners affected by the Marshall Fire.[5] But generally, to receive payment above that statutory minimum, homeowners must establish additional personal property loss per their policy's terms.

This article examines the typical insurance coverage applicable to the destruction of a homeowner's personal property due to fire, flood, or some other catastrophic event. It discusses problems inherent in establishing a covered personal property loss and provides practical tips for addressing them. It also suggests steps to take to maximize coverage when buying homeowners insurance, including establishing the pre-loss existence, condition, and value of the property, and securing more expansive insurance protection.

Common Coverage and Proof Problems

Establishing personal property loss following the loss of a home is no easy task. Homeowners generally must prove what personal property was present when the home was destroyed, the property's age and condition, the availability of "like kind and quality" replacement personal property, and the property's depreciated value and actual replacement cost. Moreover, most policies impose sub-limits that apply to particular kinds and classes of property, such as cash, silverware, valuable collections, and certain business property. Coverage limitations or exclusions also may apply to items with sentimental or unique value, such as wedding albums, family heirlooms, and antiques.

Creating a personal property inventory from memory, random family photos, electronically stored purchase records and credit card receipts, remnants found in the rubble, and so on can help complete a personal property inventory post-loss, but compiling such inventories is time-consuming and heart-rending, may be imprecise and incomplete, and could cause inadvertent duplications. These uncertainties can lead an insurer to contend that some of the claimed inventory is fraudulent and seek to void some or all of the policy's coverage.[6] Because such inventories may consist of thousands of line items, the risk of accidental duplication or error is almost unavoidable, so the risk of an insurer raising a fraud defense cannot be eliminated. Example 1 lists some common loss-adjustment strategies employed by insurers and "badges of fraud" they may flag.[7]

Policy Language

Several aspects of homeowners insurance policies are typically implicated in catastrophic personal property loss claims: (1) the policy

EXAMPLE 1. AN INSURER'S FRAUD-DETECTION CHECKLIST

- ✓ When appropriate, conduct a detailed recorded interview of the insured regarding the inventory, and compare the inventory with photos and descriptions of the debris field taken soon after the loss.
- ✓ Look for inconsistencies in the insured's explanation of who prepared the inventory, how it was prepared, and how supporting inventory documents were authenticated.
- ✓ Ensure that the inventory is complete, including the quantity, description, condition, age, actual cash value, and replacement cost of the destroyed property.
- ✓ Request documentation, such as tax, divorce, bankruptcy,* and other records, as well as digital photos and metadata, to rule out improper modifications, alterations, and valuations. Then, follow up with the claimed source of the documentation—such as retailers and online sellers—to verify items and identify any returns.
- ✓ Under suspicious circumstances, examine an insured's finances to find out if the insured had the means to buy the claimed items, especially when considering the items' age.

*Insureds sometimes undervalue assets on a bankruptcy petition while inflating the value during an insurance claim. In *Fidelity Nat. Ins. Co. v. Jamison-Means*, 2008 WL 687383, at *5 (M.D.Ala. 2008), the insured stated in her bankruptcy schedule that her household goods' value about 30 days before the loss was $2,300, but her insurance proof of loss claimed $41,818. The court held that the insured violated her policy's concealment/fraud exclusions.

declaration's monetary limits for the personal property (contents) coverage; (2) the policy's specified sub-limits and exclusions for certain kinds and classes of personal property; and (3) the policy's loss settlement and appraisal provisions. Example 2 contains some common provisions, but the exact policy language often varies considerably among policies. (Discussion of third-party appraisal provisions, typically triggered when the policyholder and insurer disagree on the amount of the loss, is beyond this article's scope.)

Key Policy Terms

"Replacement cost" generally means the cost to replace personal property with new property of like kind and quality materials, goods, or products. "Actual cash value" or "ACV" typically means the replacement cost less depreciation. "Depreciation" usually refers to a property's loss of value due to age, wear, deterioration, use, or obsolescence. Depreciation should not be taken on a partial loss where the property can be repaired or restored.[8]

Actual Purchase Requirement Before Full Replacement Cost Reimbursement

The use of the term "replacement cost coverage" in many policies may be misleading because most policies require the insured to *first replace the property* as a *condition precedent* before the full replacement cost becomes payable. This means the insured must secure the necessary funds to buy the item and then seek reimbursement of the difference between the item's ACV and its replacement cost.[9] Courts have held that an insurer is not obligated to pay for claimed personal property loss where the insured's demand is based solely on the property's replacement cost and the item's actual replacement has not occurred—unless the policy provides true *unconditional* replacement cost coverage.[10] Replacement cost coverage is sometimes referred to as "new for old," because it entitles the insured to replace old property with new property.[11]

Like Kind and Quality

Most policies require that an insured replace destroyed property with property of "like kind and quality." This does not equate to a precise duplicate of the destroyed property, just substantial similarity and use. Few cases have explained how to judge similarity of kind and quality when no comparable item can be found.[12] An insurer's insistence on an insured replacing destroyed property with identical property may be unreasonable if the policy only requires replacement with like kind and quality property. It is advisable to try to get an insurer to agree ahead of time how closely a new replacement item (such as a new Sony TV) must resemble the destroyed item (such as an older LG TV) both for ACV and replacement cost purposes. One frequently employed restriction—the "functional personal property valuation" limitation or endorsement—limits the insured's replacement cost recovery to the s*mallest* of (1) the limit of insurance; (2) the cost to replace, on the same site, the lost or damaged personal property with the closest equivalent property available; or (3) the amount the insured actually spends to repair or replace the lost or damaged personal property.[13]

Goods No Longer Available

If the destroyed personal property is no longer made or available after the loss occurs, most policies allow its ACV or replacement cost to be calculated using property of like kind and quality.

Obsolete and Sentimental Goods

Challenges may arise when valuing obsolete goods and sentimental items.[14] Old computers, typewriters, and other aged electronic equipment that have become obsolete may be unwittingly assigned an inflated value. An insured may also overvalue items that have a family history or sentimental importance, such as heirlooms and handmade items handed down from prior generations, family photographs

EXAMPLE 2. COMMON POLICY PROVISIONS

How Losses Will be Paid—Loss Settlement

- [*Example 1—conditional replacement cost coverage*] If you do not replace the destroyed property, payment will be on an actual cash value basis. This means there may be a deduction for depreciation. You may make a claim for additional payment if you replace the damaged covered property within 180 days* of the actual cash value payment. The personal property reimbursement payment will not exceed the amount actually and necessarily spent to replace the property with similar property of like kind and quality.

  "Actual cash value" means the amount it would cost to replace covered property with material of like kind and quality, less allowance for physical deterioration and depreciation, including obsolescence. For personal property we will pay the actual cash value at the time of the loss but not more than the amount required to replace it.

- [*Example 2—unconditional replacement cost coverage*]: We will pay replacement cost at the time of the loss, without deduction for depreciation. Replacement cost means the cost, at the time of loss, of a new article identical to the one destroyed. When a new article is no longer available, replacement cost shall mean the cost of a new article similar to that destroyed. It must be of comparable quality and usefulness.

Personal Property Excluded from Coverage

- animals, birds, or fish
- motorized land vehicles [this definition may include e-bikes]
- film, tape, disc, drum, cell, and other magnetic recording or storage media for electronic data processing other than the cost of such media in unexposed or blank form

Personal Property Subject to Sub-limits

- $5,000: property used or intended for use in a business, including property held as samples or for sale or delivery after sale, while the property is away from the residence premises
- $250: trading cards
- $10,000: watercraft
- $1,000: firearms
- $500: furs
- $1,500: goldware, silverware, pewterware, and platinumware
- $500: tools and their accessories
- $1,000: money, bank notes, bullion, coins and medals, and other numismatic property
- $2,500: manuscripts, securities, accounts, deeds, evidence of debt, letters of credit, passports, tickets, stamps, and other philatelic property

*HB 22-1111 mandates that policies provide, in the event of a declared wildfire disaster, an extended period to replace destroyed personal property and recover depreciation where the property is destroyed equal to 365 days after the expiration of the policy's alternate living expense period or 36 months after the insurer provides its first payment toward the property's ACV. CRS § 10-4-110.8(13)(d).

or picture albums, baby clothes, and wedding dresses. The insured may attach great emotional value to the item that does not match its actual value. Under a true unconditional replacement policy, however, the insurer may be obligated to pay what is necessary to replace the item with one of like kind and quality unless the policy provides otherwise, which some do for certain antiques and collectibles.

Electronic Data and Other Unique Personal Property

Electronic data may be difficult and expensive to duplicate. For example, recompiling financial records, digital photos, and the like may require exceptional efforts and may not even be possible. In many instances, no amount of effort or expense could recreate the lost data. Most policies exclude payment for recreating the data itself and limit recovery to the cost of the raw media storage product.

Soot, Ash, Smoke, and Char Damage

This article assumes a claim is being made for personal property destroyed by fire, but what about smoke-damaged property? Most policies cover "all risks of physical loss," which typically includes soot, ash, smoke, and char damage from fire.[15] And payment for smoke damage to household items such as area rugs, clothing, curtains, and furniture usually falls under one's personal property coverage.[16] Still, parties may dispute whether items are salvageable or have been so charred or saturated with soot, ash, or smoke that they are essentially destroyed (i.e., unsafe, unsanitary, or otherwise unusable or aesthetically spoiled) and not economically reparable.[17] Fire particulates, including some impregnated with unhealthy synthetic chemicals, can easily infiltrate and permeate a home and all its soft and hard goods and furnishings, often in ways not visible to the eye. Cleaning may not be cost-beneficial or even feasible. An experienced certified industrial hygienist or indoor air quality specialist may need to establish and quantify the extent and severity of, and health risks posed by, such damage. If cleaning is unsuccessful, recovery for both the cleaning expense and the replacement property could be available.

Typical Exclusions, Limitations, and Sub-Limits

Policies often exclude damage to or provide sub-limits of liability for personal property "primarily used for business purposes." But certain business property, like home computers, can become comingled with non-business property and may be multipurpose, especially as more people work from home. Some exclusions focus on the property's current use, while others encompass property "ever used" for business purposes.[18]

Most policies contain sub-limits for certain categories of personal property, such as collectibles, including baseball cards, stamps, and comic books. For these items, it may be necessary to obtain a separate personal articles or collections policy or rider to ensure adequate protection. Other items for which special sub-limits may apply include guns, furs, jewelry, watches, precious stones, stamps, coins, medals, fine china, and wine bottles. Nearly all policies contain sub-limits for cash.[19] Proving the presence and amount of burned up cash may be a challenge, although contemporaneous bank and ATM cash withdrawal records may help supply proof.

Compiling a Loss Inventory

Homeowners should carefully read their entire policy and all its riders and endorsements to ensure they are complying with its terms, are aware of all claim limitations and deadlines, and understand what is required of them when submitting and proving a personal property claim. Homeowners should not agree to a quick settlement simply to avoid the heartache and headache of compiling a lost property inventory. If the process seems too daunting, they should consider hiring a licensed, reputable, and competent public adjuster, usually on a negotiated "percentage of the paid claim" basis, perhaps with a monetary fee cap and/or excluding or limiting fee recovery for payments already or required to be made.[20] A good public adjuster can save insureds a lot of time and stress.

Critically, under no circumstance should insureds attempt to pad their claim by including items they did not own or claiming that the destroyed property was of higher quality or grade than what they actually owned. A single false statement of fact, knowingly made with the intent to mislead the insurer, can void some or all of a claim and even lead to criminal prosecution.[21] Conversely, an insurer must not mislead insureds or deprive them of their insurance benefits. Given the emotional toll of a disaster that destroys a home and its contents and the inherent difficulties of compiling and valuing/depreciating a houseful of personal property—including the inevitable errors and duplication that may find their way into a post-loss personal property inventory consisting of thousands of line items—mistakes should be expected during the inventory compilation process. However, such innocent errors should not supply grounds for voiding a claim or sustain allegations of fraud.[22] Moreover, homeowner opinions as to perceived value, general condition ("slightly worn," "like new"), and depreciation are not generally considered statements of fact sufficient to establish fraud.[23]

Various strategies can be used to create an inventory of destroyed personal property. Some insurers and public adjusters, as well as online resources, can supply blank form inventories grouping items by room (e.g., kitchen, dining room, primary bedroom, primary bathroom, etc.), or by grouping similar items (e.g., kitchen tools, pots and pans, kitchen appliances, sporting goods, men's clothing, etc.), or by the nature of the goods (e.g., cooking implements, camping equipment, etc.).[24] The more complete and accurate the inventory, the greater the chances of negotiating for and obtaining full compensation. Creating a spreadsheet can be useful,[25] and inserting hyperlinks to online cost information can both simplify and expedite the claims process. Depending on the circumstances, some insurers may waive inventory and/or proof of loss requirements following discussion and negotiation, even up to the policy's payment limits. Colorado's Division of Insurance persuaded several insurers to do this following the Marshall Fire.

One common starting point is to draw a floorplan and work room-by-room through the home, recollecting from memory what was present and/or imagining walking around each room, looking in all its storage spaces (closets, drawers, and cabinets), and recording the contents from every vantage point. Homeowners should take their time and take breaks to limit burnout—recreating a home inventory is a highly emotional, stressful, tedious, and draining experience. It can be helpful to start with the largest or highest value items in each room, because they're often the easiest to remember, and to group similar items together.

Home photos and videos, including those taken by relatives during holiday, birthday, or other celebrations, may capture scenes in a home that can be a great help. Although often traumatizing, sifting through the ashes or soaked remnants of a home after a fire or flood may reveal lost property fragments, and photos of these pieces may offer additional proof of loss. Also helpful are hard copies of receipts (if they survived), online and cloud-stored electronic copies of receipts, and electronic purchase record compilations. If the homeowner frequently shopped at the same store for specialty

items like clothing, or sports, ski, scuba, and camping equipment, the vendor may be able to retrieve purchase records by name or credit card number.[26] Simply walking through hardware, houseware, clothing, department, and sporting goods store aisles can help jog memories, and so may perusing Amazon, Best Buy, and Wal-Mart websites. A bridal registry scanner may help with compiling prices for destroyed property.

Establishing ACV and Replacement Costs

Homeowners should ask the insurer for a copy of its depreciation schedule, which it is statutorily required to produce.[27] There is no generally accepted or legally enforceable depreciation schedule.[28] After receipt of an ACV payment, the homeowner should then provide the insurer proof of the cost of fully replacing the item and seek reimbursement of the item's actual replacement cost, less any ACV previously paid. When establishing unconditional replacement cost values or ACV before an item is replaced, proof issues often emerge. Replacement cost is usually measured as of the date of the loss, but values pegged in rough proximity to that date will often suffice.[29] There is no one correct depreciation formula when calculating ACV because such measures are subject to debate and are dependent on the item's age, condition, and current availability (though many insurers rely on age alone). Depreciating fine arts and vintage and precious gems and metal jewelry may not be justified because their value often appreciates over time.[30] Critically, Colorado has long recognized that property owners may testify to the value of their own property, both real and personal, with few limitations.[31] Accordingly, courts have held that owners should be allowed to testify to their personal property's depreciated value.[32]

Colorado has allowed personal property owners to prepare a list of their lost property from memory (particularly if the property is completely destroyed), to use that list while testifying, and to provide details about the property's original cost, how long they used it, and its condition when destroyed.[33] Pricing should be based on identical property or similar items of like kind and quality. Where an item is no longer available, functionally and/or aesthetically similar items may offer a fair approximation. Example 3 shows the types of evidence that a homeowner might use to prove an item was present when the house was destroyed, as well as the item's replacement cost and/or depreciated value (ACV).

EXAMPLE 3. EVIDENCE SUPPORTING PERSONAL PROPERTY LOSS AND VALUATION

- owner's recollection and testimony
- third-party recollection and testimony from friends, family, and others who can attest to the item's presence in the home
- third-party expert witness valuation testimony
- original paper or electronic purchase and credit card receipts, including online compilations from vendors such as Amazon, Best Buy, Wal-Mart, and REI, and online statements from VISA, Mastercard, Venmo, etc. (all helpful, but typically not required expressly by a policy)
- online advertised sales offering prices from Amazon, Wal-Mart, Best Buy, eBay, Etsy, etc.
- online auction prices from eBay, Etsy, etc.
- appraisals for jewelry, fine art, coin, stamp, and other collections
- personal property inventories
- personal financial statements containing personal property purchase prices and/or valuations (such as jewelry and fine art)
- photographs and videos

An interesting question is whether homeowners can rely on offering prices rather than actual sales prices when valuing their property for unconditional replacement cost or ACV purposes.[34] In 1976, *People v. Codding* rejected as hearsay the admission of price tag evidence to establish merchandise's value in a criminal theft prosecution and also declined to apply the business record hearsay exception due to lack of foundation for the price tag preparation method.[35] *Codding*'s holding was later abrogated by a statute expressly declaring price tag evidence non-hearsay and admissible in theft cases.[36] More recently, in 1996, the Colorado Court of Appeals affirmed a trial court's exercise of discretion in admitting price quotations for various items contained in a letter and a second set of quotations transmitted by fax cover sheet under Colo.R.Evid. 803(6), the business records exception to the hearsay rule.[37] The court stated:

> [W]hen information is provided as a part of a business relationship between a business and outsiders, the records may be admissible. This is particularly so if the information was provided at the request of the business and the document was of a type typically relied upon by that business in making decisions.[38]

The court added that "the documents themselves reveal that such were prepared as part of a regularly conducted business activity . . . namely, the sale of service and products and relate to a business activity . . . the purchase of such items."[39]

Several courts outside Colorado allow price tags as evidence of value under the business records hearsay exception, reasoning that retail stores and consumers rely on price tags when buying and selling merchandise.[40] Given the broad latitude Colorado courts afford property owners to express opinions on their property's value, our courts may conclude that offering prices help support owners' valuation opinions. Although the offering price itself might be inadmissible hearsay, the author has found no Colorado case so holding in the context of

insurance claim personal property valuations. The use of and reliance on advertised personal property prices by Colorado insureds and their public adjusters—and insurers and their in-house adjusters—during the claims adjustment process is not uncommon.[41]

Colorado Insurance Regulations Concerning Personal Property Claim Payments

Colorado Code of Regulation 702-5:5-1-14 provides that a homeowner insurer

> shall make a decision on claims and/or pay benefits under the policy within sixty (60) days after receipt of a valid and complete claim unless there is a reasonable dispute between the parties concerning such claim, and provided the insured has complied with the terms and conditions of the policy of insurance.

An insurer faces monetary penalties for violations. The regulation defines the terms "valid and complete claim" and "reasonable dispute" rather broadly, which leaves much room for debate whether the insurer has met its obligations.

Steps to Take Before Loss

Creating a home inventory before a loss occurs is rarely done, but it can pay enormous dividends and save the homeowner much work and stress later. Videos of every piece of personal property accompanied by an audio narration of what is being shown, brand and model names, vendors or stores from which the items were purchased, and dates and estimated or actual dollar amounts of purchase are incredibly useful. Photographs of individual items can supply detail a video may miss. Pull things out of every drawer, closet, and cabinet and spread them out for more complete and accurate images. Store offsite or make electronic copies of valuable papers such as passports, car and home titles, diplomas and certificates, and vaccination and birth records.

It is important and efficient to maintain electronic copies of all inventories, receipts, photos, and videos in multiple places, such as in the cloud, in a safety deposit box, and in a fire-resistant safe or box.[42] The inventory itself should include an item's brand and model/style name, its age, its quantity, its purchase price (including whether purchased new or used), and its condition—be as detailed as possible. And update your inventory and supporting digital imagery at least every two or three years.

Conclusion

The trauma and tedium of completing a personal property inventory with valuations is often a necessary evil that follows the loss of a home in a natural disaster. These stresses can be mitigated by taking steps to create and update a detailed inventory *before* the loss occurs. Courts and many insurers tend to give the benefit of the doubt to homeowners in construing homeowner policies and evaluating personal property loss claims following such disasters. State statutes, insurance regulators' moral suasion, and the desire of insurers to maintain the goodwill of existing and future insureds can lead to personal property loss payouts without the necessity of formal proof of loss and property valuations. Whenever possible and if affordable, every insured should consider buying *unconditional* replacement cost insurance that will pay the cost of replacing destroyed property with the same or comparable new property without insureds first having to pay for such replacement out of their own pocket. CL

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NOTES

1. Colorado Division of Homeland Security and Emergency Management, "DR4634 Marshall Fire and Straight Line Winds," https://mars.colorado.gov/MarshallFire.

2. House fires and wildfires can range from 400 degrees to 9,000 degrees Fahrenheit depending on fuel source and oxygen content. *See* Firefighter Insider, "What Is the Temperature of Fire? How Hot Does It Get?," https://firefighterinsider.com/temperature-of-fire.

3. As a large Colorado homeowners insurer notes, "[R]enters, homeowners and condo insurance policies typically include coverage for the contents of your home. This coverage is sometimes known as 'contents insurance,' but is usually described in most insurance policies as personal property coverage." Allstate, "What Is Contents Insurance?," https://www.allstate.com/resources/what-is-contents-insurance.

4. CRS § 10-4-110.8(11)(a). On June 2, 2022, Governor Polis signed into law House Bill 22-1111, which raised the minimum percentage of personal property limits owed by insurers for total losses by a wildfire disaster at owner-occupied residences to 65%, without requiring a written contents inventory. CRS § 10-4-110.8(14).

5. *See Consumer Advisory: Boulder County Fires—Improving Policyholders' Experiences*, DORA: Division of Insurance (Mar. 14, 2022), https://doi.colorado.gov/news-releases-consumer-advisories/consumer-advisory-boulder-county-fires-improving-policyholders. Insurance Commissioner Mike Conway argued to insurers that they needed to "get out of their own way" because based on past claims experience, they were ultimately going to pay this higher percentage anyway; he said he would publish the names of insurers who refused to get on board. Other states may well follow this creative and groundbreaking approach.

6. *See United States v. Ostrom*, 80 F.Appx. 67, 71 (10th Cir. 2003) (pursuant to policy's fraud clause, a misrepresentation concerning part of claim relieves the insurer of its obligation to pay any portion of the claim, citing cases).

7. *See* Karabinos, "Detecting Contents Fraud: A Practical Approach to Examining an Insured's Loss Inventory List" (Apr. 30, 2018), https://www.mondaq.com/unitedstates/insurance-laws-and-products/696872/detecting-contents-fraud-a-practical-approach-to-examining-an-insured39s-loss-inventory-list (originally published in CLM Magazine).

8. *Cf. Gulf Ins. Co. v. Carroll*, 330 S.W.2d 227, 233 (Tex.App. 1959), followed in *Harper v. Penn Mut. Fire Ins. Co. of West Chester, Pa.*, 199 F.Supp. 663, 666 (D.C.Va. 1961) ("If depreciation is to be

deducted from the cost of new materials, it would frequently make the sum insufficient to complete the repairs, thereby resulting in the building being only partially completed.").

9. Financing options might include insureds tapping into their savings, borrowing money, or using payments under other policy coverages as essentially loans to themselves.

10. *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, 395 F.Appx. 659, 663 (11th Cir. 2010) (applying Florida law).

11. Schirle, "Measuring Damages in a Megaloss if 'Like Kind and Quality' Does Not Exist," 36 *The Brief* 31, 32 (Fall 2006) (ABA Tort Trial and Insurance Practice Section).

12. *Id.* at 33. *Cf. Dupre v. Allstate Ins. Co.*, 62 P.3d 1024 (Colo.App. 2002) (court rejected insurer's argument that "equivalent construction for similar use" limits dwelling replacement cost coverage to the "reproduction cost." Citing the plain meaning of the words, the court concluded that since the dictionary definitions of both "equivalent" and "use" contemplated "functionality," the phrase "equivalent construction for similar use" includes maintaining the property's function before loss.)

13. Schirle, *supra* note 11 at 33. The "functional loss restriction" is "designed to be used when replacement of the personal property in question with substantially identical property is either impossible or unnecessary, usually as a result of technological change." *Id.* (quoting 2 International Risk Management Institute, Commercial Property Insurance, ISO Forms and Endorsements, VI.F.48 (2003)).

14. *See* Epps, "Adjusting Residential House Fires," IRMI Expert Commentary (Oct. 2004), https://www.irmi.com/articles/expert-commentary/adjusting-residential-house-fires.

15. *See*, *e.g.*, *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (where gasoline vapors penetrated church foundation and accumulated, rendering building uninhabitable, the property suffered a "direct, physical loss"). *See also* Henderson et al., "Survey of COVID-19 Insurance—Part 1: Coverage for Business Income Interruptions," 49 *Colo. Law.* 58–60 (Aug./Sept. 2020), https://cl.cobar.org/features/survey-of-covid-19-insurance-issues-part-1 (discussing what constitutes "direct physical loss").

16. *See* United Policyholders, "Smoke and Ash Damage from a Wildfire," https://uphelp.org/claim-guidance-publications/smoke-and-ash-damage-from-a-wildfire.

17. *Haught v. State Farm General Ins. Co.*, 2009 WL 2235937, at *10 (E.D.Mo. 2009) (inventory created factual issue whether insured's personal property was either totally damaged or only partially damaged by fire).

18. *See Pepper v. Allstate Ins. Co.*, 799 N.Y.S.2d 292, 295 (N.Y.App.Div. 2005) (phrase "used or intended for use in a business" reasonably meant only property "currently being used for business purposes"). *Cf. Warren v. Farmers Alliance Mut. Ins. Co.*, 501 P.2d 135 (Colo.App. 1972) (insured's fiberglass mold's destruction while it was located on contractor's premises was not excluded as "business property while away from the described premises" because insured's main income was from the oil business, and he manufactured fiberglass sports car bodies only as a hobby).

19. *Cf. Cotlar v. Gulf Ins. Co.*, 318 So.2d 923, 926-27 (4th Ct.App.La. 1975) (policy limitation intended to exclude coverage of property consisting of money did not apply to the insured's collection of Mardis Gras souvenir doubloons).

20. *See* CRS § 10-2-417 (describing public adjuster licensing, financial responsibility, and standards of conduct); -417(6)(a) (public adjuster must serve the client with "objectivity and loyalty" in a manner that will "best serve the insured's insurance claim needs and interests").

21. *See*, *e.g.*, CRS §§ 10-1-128 (fraudulent insurance acts); 18-5-211 (criminal code definition of insurance fraud).

22. *Cf. Transp. Ins. Co. v. Hamilton*, 316 F.2d 294, 296–97 (10th Cir. 1963) (while knowing and willful over-estimated values made with the intent to deceive insurers may void coverage, insureds may present inaccurate proofs due to faulty memory, inadvertence, wildly divergent valuations views, and unavailability of evidence without acting with fraudulent intent).

23. Generally, opinions are not considered factual representations sufficient to support a fraud claim. *See, e.g.*, *Knight v. Cantrell*, 390 P.2d 948, 951 (Colo. 1964) (statement that dwelling was a "good house" was an opinion and could not support a misrepresentation claim).

24. *See*, *e.g.*, United Policyholders, "Household Inventory Sample Spreadsheet," https://uphelp.org/claim-guidance-publications/household-inventory-sample-spreadsheet.

25. Consider spreadsheet column headings for: Line Number, Room Location, Item Description, Vendor/Brand Name, Purchase Date, Purchased New or Used, Item's Age on Date of Loss, Quantity, Purchase Price, Depreciated Value/ACV (if required), Replacement Cost (with embedded hyperlink to site for same or similar item with pricing), Sales or Other Tax, Shipping/Installation/Other Acquisition Costs, Total (Extended) Replacement Cost [summing values], and Comments. Don't forget to include compensable cash and securities.

In some contexts, Colorado recognizes "acquisition costs" as a component of personal property valuation. *See*, *e.g.*, 5 Division of Property Taxation, Colorado Department of Local Affairs, *Assessor's Reference Library: Personal Property Valuation Manual* § 3.4 (1989, rev. vol. 2002) (original personal property installed means the cost as "the amount that was paid for the personal property when it was new," and includes "the purchase price of the item, *freight to the point of use, applicable sales/use tax and any installation charges necessary to ready the property for use* . . . ," as quoted in *Xerox Corp. v. Board of Cnty. Comm'rs, Arapahoe Cnty.*, 87 P.3d 189, 192 (Colo.App. 2003) (emphasis added). The purchase of some household items, including some computer, home alarm, and audio-visual systems and equipment, requires paying initial setup, calibration, and programming fees, all of which may qualify as acquisition costs.

26. Moreover, if the insured owned 20 shirts purchased at the same store, the average value of similar shirts sold at that store may supply a reasonable estimate of the shirts' aggregate replacement cost.

27. CRS § 10-4-110.8(11)(b) (insurer must make available its methodology for determining depreciation).

28. Depreciation guides are available. *See e.g.*, *The Claim Pages Depreciation Guide (Personal Property)*, https://www.claimspages.com/documents/docs/2001D.pdf and https://uphelp.org/wp-content/uploads/2020/09/Depreciation_CP-2.pdf. *See also* United Policyholders, Depreciation Basics, https://uphelp.org/claim-guidance-publications/depreciation-basics, and Personal Property Depreciation, https://uphelp.org/wp-content/uploads/2020/09/UP-Depreciation-Schedule-1.pdf. The author is not aware of any insurers who maintain internal depreciation guides that they expressly incorporate by reference into their policies with the aim of binding their insureds.

29. If one links an inventory item to an online sales price and that price is reduced over time, the original price may still be the more accurate price because it was set closer to the date of loss and because seasonal sale prices are typically transitory.

30. *People v. Ensley*, 477 N.E.2d 760, 761 (Ill.App.Ct. 1985) (in appeal challenging amount of restitution following theft conviction, court observed that various jewelry constituted property that would normally appreciate in value). Other kinds of property may not be subject to any depreciation. *See People v. Rednour*, 665 N.E.2d 888, 889 (Ill.App.Ct.Dist. 1996) (a safe "is not subject to substantial mechanical deterioration. Therefore, its life span is indefinite.").

31. *See generally*, Maguire, "An Owner's Right to Testify to Value," 25 *Colo. Law.* 77 (Nov. 1996) (property owner may testify to property's value if testimony is not based on "improper considerations"); *Annot.*, Dransfield, "Admissibility of Opinion of Nonexpert Owner as to Value of Chattel," 37 *A.L.R.2d* 967 (1954, 2022 Supp.). *See also Montgomery v. Tufford*, 437 P.2d 36, 40 (Colo. 1968) (where owner prepared a lost personal property list and estimate of values from memory before trial, owner was competent to testify as to values over objection that the valuation was speculation and conjecture). *See also Goetz v. Sec. Indus. Bank*, 508 P.2d 410, 412 (Colo. App. 1973) (where plaintiff had a "precise recollection of the number of items which were taken by the bank and stated the range, in his opinion, of their values," trial court properly used plaintiff's lower valuation for each tool and excluded any item the plaintiff wasn't certain was in the truck); *Keller-Loup Const. Co. v. Gerstner*, 476 P.2d 272, 274 (Colo.App. 1970) (tenant was competent to testify to itemization

of destroyed personal property, including value estimates so as to allow trial court to determine property's value at time of loss); *Grange Mut. Fire Ins. Co. v. Golden Gas Co.*, 298 P.2d 950, 955 (Colo. 1956) (allowing owner testimony as to value of personal property destroyed by fire; "The record is gorged like an overfed gourmet with evidence of plaintiffs' reconstructed, itemized personal property losses. These were proved over defendant's objection in a reasonable manner since the property in question was destroyed and was unavailable for valuation."); *Colo. Midland. Ry. Co. v. Snider*, 88 P. 453, 454–55 (Colo. 1906) (household goods' value may be shown in connection with other things to enable the jury to infer the goods' value when they were destroyed; court found that the destroyed articles' cost, how long they had been in use, and their condition when destroyed was competent evidence of their value). *Cf. In re Marriage of Plummer*, 709 P.2d 1388, 1389–90 (Colo.App. 1985) (owner must be shown to have "the means to form an intelligent opinion, derived from an adequate knowledge of the nature, kind and value of the property in controversy"; husband precluded from testifying to value of wife's *separate property*); however, the scope and validity of this *dicta* was questioned in *Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.*, 117 P.3d 60, 69 (Colo.App. 2004).

32. *See, e.g., Denver Urb. Renewal Auth. v. Berglund-Cherne Co.*, 568 P.2d 478, 483 (Colo. 1977) (owners may testify to property's depreciated value).

33. *See Colo. Midland Ry. Co. v. Snider*, 88 P. 453 (Colo. 1906); *Grange Mut. Fire Ins. Co. v. Golden Gas Co.*, 298 P.2d 950 (Colo. 1956).

34. Real estate—as opposed to personal property—valuation experts typically rely on actual comparable sales prices rather than offering/listing prices when determining real property fair market value. *Cf. Bennett v. Price*, 692 P.2d 1138, 1140 (Colo.App. 1984) (real estate listing prices may tend to be inflated and may overstate the property value; the better reasoned rule is that such evidence is speculative and unreliable).

35. *People v. Codding*, 551 P.2d 192, 193 (Colo. 1976).

36. CRS § 18-4-414(1)–(2) provides that "[e]vidence offered to prove retail value may include, but shall not be limited to, affixed labels and tags, signs, shelf tags, and notices," and "[h]earsay evidence shall not be excluded in determining the value of the thing involved." Thus, "[b]y enacting § 18-4-414, the General Assembly intended to reflect the fact that the price tag on an item presumptively is the means by which sellers designate an item's retail value. Ordinarily, customers do not bargain over the price of retail goods." *People v. Schmidt*, 928 P.2d 805, 807 (Colo.App. 1996). As *Schmidt* noted, "the price tags now speak for themselves." *Id.* at 808. Whether a Colorado court would find CRS § 8-4-414's legislative recognition of a "price tag" exception to the hearsay rule persuasive in recognizing a similar exception under CRE 803(6), the business records exception, in the context of an insurance personal property loss claim, is an open question. *Cf.* CRE 803(17) (market quote exception to hearsay rule); CRE 807 ("residual" exception to hearsay rule if "equivalent circumstantial guarantees of trustworthiness" are present). *Codding* was decided in 1976 and, therefore, the effect of Rule 807, adopted in 1999, was not considered.

37. *See Hauser v. Rose Health Care Sys.*, 857 P.2d 524, 530 (Colo.App. 1993).

38. *Id.*

39. *Id.* (citing with authority *United States v. Grossman*, 614 F.2d 295 (1st Cir. 1980) (approving admission of manufacturer's price catalogue to establish retail prices under business records exception)).

40. *State v. Odom*, 393 S.E.2d 146, 151 (N.C.App. 1990); *accord People v. Mikolajewski*, 649 N.E.2d 499, 504 (Ill.App. 1995) (holding that price tags are self-authenticating due, in part, to "the day-to-day reliance by members of the public on their correctness and the unlikelihood of fabrication"); *Robinson v. Commonwealth*, 516 S.E.2d 475, 478–79 (Va. 1999) (recognizing a judicial hearsay exception for price tags, stating that "the inherent unreliability of hearsay is not present" where a buyer understands that the tagged price is what must be paid in order to purchase an item, and that "it would be unreasonable and unnecessary to require that in each case a merchant must send . . . personnel to establish the reliability of the information shown on a price tag affixed to an item that has been stolen.").

41. Many insurers use the XactContents software program to compile and establish ACV and replacement cost values on homeowner inventory. This program's pricing is extracted from "major national retailers," https://www.verisk.com/insurance/products/xactcontents. Such software has been criticized because it may rely on outdated historical data and/or irrelevant pricing from distant geographies or dissimilar socio-economic regions.

42. Items stored on-premises in "fire-rated" safes may still be destroyed in a fire. Many times, the contents are not burned but rather become subject to such high temperatures transmitted through the safe's metal components that rare coins will melt and paper currency and valuable papers will turn brittle or be reduced to dust.

METRO VOLUNTEER LAWYERS MAKE A DIFFERENCE

Volunteer with MVL's

FAMILY LAW COURT PROGRAM

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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News from the CBA, Local Bars, and More

BY SHELBY KNAFEL

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.

COBALT Fundraiser Benefits Mujeres de Colores

COBALT's "Brews and Backpacks" fundraiser was a huge success, raising over $18,000 in cash plus myriad school supplies for children. All proceeds benefit Mujeres de Colores, a Fort Collins-based nonprofit that works to elevate the status of women and children through education and leadership.

The fundraiser was sponsored by the 2022 COBALT class.
Photo by La Kischa Cook.

Linda Phillips Receives Lifetime Achievement Award in Business Law

The CBA Business Law Section has named Linda Phillips recipient of its 2022 Cathy Stricklin Krendl Lifetime Achievement Award. The award recognizes intellectual and professional excellence in the practice of business law, efforts to advance business law practice in Colorado, and devotion to the principles of legal professionalism.

Phillips is a business and cooperative law attorney at Jason Wiener PC, where she specializes in business formations, contracts, employment law, and real estate. She helped form and was on the Board of Directors of the Rocky Mountain Employee Ownership Center, a nonprofit that promotes employee-owned business models.

MVL Holds Family Law Clinics

It was another busy month for Metro Volunteer Lawyers, which held family law clinics in Denver, Arapahoe, and Jefferson counties. MVL thanks all of the dedicated volunteers who provide support each month—these clinics wouldn't be possible without them!

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1 Drew Thomas, Sofia Faiella, and Matt Stewart assist a client at the Jefferson County clinic.
2 Karla Carrigan, Heather Landauer, Nicoal Sperrazza, and Megan Cronin at the Araphahoe County family law clinic.

Meet CTLA's Newly Elected Officers

The Colorado Trial Lawyers Association welcomes the following newly elected officers: Thomas Neville, a partner at Ogborn Mihm, LLP (president); Kari Jones Dulin of Dan Caplis Law (president-elect); Sam Cannon of Cannon Law (vice president); Jason Wesoky of Ogborn Mihm, LLP (secretary); and Megan Matthews of Denver Trial Lawyers (treasurer). Newly elected officers serve a one-year term.

CTLA Treasurer Megan Matthews, Secretary Jason Wesoky, President Thomas Neville, Vice President Sam Cannon, and President-elect Kari Jones Dulin.

YLD Leaders Get to Work

The CBA Young Lawyers Division convened in August to map out its programming for the upcoming year. Be sure to visit the CBA website periodically for upcoming YLD-sponsored CLEs, networking events, and volunteer opportunities.

YLD leaders meet at the CBA offices.

IAALS Announces New CEO

The Institute for the Advancement of the American Legal System has named Brittany Kauffman as its new CEO. Over the last decade, Kauffman has been involved in civil justice and judiciary reform, including working with the Conference of Chief Justice's Civil Justice Improvements Committee and the American College of Trial Lawyer's Task Force on Discovery and Civil Justice. She has been serving as interim CEO since May and previously served as a senior director.

CLI Hosts Annual Diversity Summit

The Center for Legal Inclusiveness hosted its annual Legal Inclusiveness and Diversity Summit in August. The summit's theme was "A Brave New (Hybrid) World: Navigating Inclusivity and Ensuring Equity." The event featured a breakout session on the importance of a diverse workplace experience.

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 Shelby Knafel at sknafel@cobar.org, and be sure to select the largest file size when prompted.

Congratulations to the 2022 Pro Bono Stars

Every October, in honor of pro bono month, the Denver Bar Association and the DBA Access to Justice Committee recognize a select few individuals for their outstanding pro bono contributions within the Denver legal community. This year's six honorees are Spencer Allen, Christopher Jackson, Leo Milan, Amelia Power, Nicoal Sperrazza, and Naomi Stokeld. Please join us in celebrating these amazing Pro Bono Stars!

Spencer Allen

Spencer practices environmental and natural resources litigation for a small Denver firm. Although the type of law Spencer practices does not present many opportunities for direct pro bono work, Spencer has always been driven to help bridge the legal need gap. He volunteers with the Federal Pro Se Clinic, where he assists litigants in a diverse range of cases, from Title VII employment discrimination to Fair Housing Act violations. He also represents clients in federal court through the Federal Limited Appearance Program. Spencer's early introduction to pro bono work started in the University of Denver Civil Litigation Clinic, where he was inspired on a daily basis by 2021 Pro Bono Star Professor Tammy Kuennen on how to be a dedicated advocate to those in need.

Christopher Jackson

Chris is a partner at Holland & Hart LLP. His practice focuses primarily on civil appeals in both state and federal court. Chris has handled appellate pro bono matters for over a decade

on a wide range of topics, from landlord-tenant disputes to divorce proceedings to foreclosure matters. Most recently, he's been an active volunteer at the CBA's civil appeals clinic, which provides free, limited-scope legal consultations to pro se litigants. Chris also spends a substantial amount of time on election-related pro bono work, helping nonprofits, candidates, and others navigate the often-complex rules surrounding political activity. In addition, he serves on the

CBA Board of Governors and the DBA Board of Trustees, and he is an active member of the ABA's and CBA's appellate practice committees.

Leo Milan

Leo is a retired senior assistant attorney general and former pro bono coordinator with the Colorado Department of Law. During his tenure at the AG's Office, and in conjunction with Metro Volunteer Lawyers, the pro bono program grew to over 40 volunteers and over 200 clients per year, serving both Adams and Arapahoe counties. Leo currently volunteers for MVL's Pro Bono Post-Decree Clinics and serves on MVL's Board of Directors. Before his appointment to the AG's Office, Leo was actively involved in Missions for Ministries, building houses in Juarez, Mexico. More recently, he has participated in local builds with Habitat for Humanity. He also offers his time to serve as a judge and mentor for high school students in a variety of civic and legal capacities.

Amelia Power

Amelia is a partner at Power Law, a boutique law firm dedicated to the ideal that every person accused of a crime should receive excellent legal representation regardless of ability to pay. She began Power Law with a discount rate program for those who make too much to qualify for state-paid representation, and she continues to represent indigent clients as a contractor with the Office of Alternate Defense Counsel. Since entering private practice, Amelia has largely focused her pro bono representation on clients charged for exercising their First Amendment rights to protest local and societal injustice. She spent hundreds of pro bono hours representing Lillian House, a protest leader and community activist who faced serious felony charges arising from the 2020 Elijah McClain protests in Aurora. She continues to represent other protestors pro bono, both at the trial and appeal stages.

Nicoal Sperrazza

Nicoal owns her own practice focused on family law and civil litigation matters. As a first-generation Korean American and coming from an immigrant family, pro bono work is especially important to Nicoal, and she is committed to help bridge the access to justice gap. Nicoal primarily volunteers through MVL's Family Law Unbundled program, which enables her to customize her volunteer hours based on her personal and professional schedule. She is also grateful to have expertise in a practice area that is vastly underserved and where she can make a significant difference in the lives of others and their children regardless of their current financial situation.

Naomi Stokeld

Naomi focuses her practice on business law and estate planning, working with multiple clients from entrepreneurs to medium-sized businesses. Naomi is licensed in Colorado, California, and Chile. She believes lawyers have a fundamental duty to use law to build a more equitable and humane society by providing access to justice to those who society has neglected. She enjoys working with nonprofit organizations to help people navigate business, elder, and family law issues. CL

The Colorado Supreme Court Would Like to Recognize Your Commitment to Pro Bono Service

The Colorado Supreme Court takes great pride in recognizing those firms, government, and in-house counsel groups that have committed to the Colorado Rule of Professional Conduct 6.1(a) goal of annually performing 50 hours of pro bono legal services per Colorado licensed attorney, primarily for people of limited means and/or organizations that serve people of limited means. In addition to listing their names here and on the Court's website, all firms and groups on the Colorado Supreme Court's pro bono commitment list are recognized during a special ceremony.

If your firm or group has not already joined the Colorado Supreme Court's pro bono commitment list, please consider joining today. Simply email Jackie Marro, access to justice coordinator for the State Court Administrator's Office, at jacqueline.marro@judicial.state.co.us.

List of Organizations Committed to the Annual Goal of 50 Pro Bono Hours

(*) indicate the organizations that achieved their goal for the 2021 calendar year

Access Immigration LLC
Law Office of Michelle Adams, LLC
Albuja Law LLC*
Spencer R. Allen, Esq.*
Altman Keilbach Lytle Parlapiano & Ware, P.C.*
Andersen Law PC*
Anderson & Hughes, P.C.
Appeal to Justice LLC*
Aretz & Co. Immigration, LLC*
Arnold & Arnold, LLP*
Arnold & Porter LLP*
Azizpour Donnelly LLC*
Ballard Spahr LLP*
Devon Barclay, PC*
Steven J Barr*
Becker Law Group
Bell & Pollock, P.C.*
Block45 Legal
Bruce C. Bernstein
Blain Myhre LLC*
Ilene Lin Bloom, P.C.
Mark S. Bove, P.C.
Bowman Law LLC*
Bridge to Justice*
The Law Office of Becky Briggs, LLC
Brownstein Hyatt Farber Schreck LLP
Bryan, Cave, Leighton, Paisner LLP
Buchanan & Stouffer, P.C.
John C. Buckley III, Esq.
Buell & Ezell, LLP
Burg Simpson Eldredge Hersh & Jardine, P.C.*
Law Offices of Martha Buyer, PLLC*
Bruce C. Carey
Chan Law Firm*
Clawson & Clawson, LLP*
Coleman Law
Colorado Family Law Project*
Colorado Office of the Attorney General Pro Bono Volunteers
Tracy Cross, Attorney at Law
Law Office of Dailey & Pratt, LLC*
Kenneth Davidson, Attorney at Law
Davis Graham & Stubbs LLP*
Deemer Law Group, PLLC
Dentons US LLP
James B. Devaney*
Shelly Dill, Uhuru Law, Mediation & Consulting*
Dodson and Associates, P.C.
Donley Law, P.C.
Law Office of Jeanne C. Doremus
Dufford Waldeck
M.L. Edwards, Attorney at Law*
Ellmann & Ellmann, P.C.*
Martha H. Eskesen, P.C.*
Ewing Law, PC
Eytan Nielsen LLC
Faegre Drinker Biddle & Reath LLP*
Catherine Flanders, Esq.*
Susan Fort, Attorney at Law*
Jennifer S. Fox, Esq.*
Casey Frank, Attorney & Counselor*
Franks Law, PC*
Laurinda Frederick*
The Fry Law Firm, LLC*
Charles F. Garcia, Attorney at Law
Gaddis, Herd, Craw & Adams, P.C.*
Alex Gano, Esq.*
The Law Office of Matthew Gardner, LLC*
Gast Johnson & Muffly, PC
Gebhardt Emerson Moodie Bonanno, LLC*
Gibson, Dunn & Crutcher LLP
Gendelman Klimas Ltd.
James W. Giese, P.C.*
Tamir Goldstein*
Gradisar, Trechter, Ripperger & Roth
Susan Grauer, Esq.*
Griffiths Law PC
Guzman Immigration
Hackstaff & Snow, LLC
Haddon, Morgan and Foreman, P.C.*
Hanes & Bartels LLC
Catherine Hansen-Stamp, Esq.*
The Harris Law Firm, PLLP*
Hassler Law Firm, LLC*
The Law Offices of David A. Helmer, LLC
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Jon Hertzog, Esq.
The Hinton Law Office, LLC
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Joseph G. Hodges, Jr., Attorney at Law*
Hoffman Nies Dave & Meyer LLP
Hogan Lovells US LLP*
Holland & Hart LLP
Courtney Holm & Associates, P.C.*
HopkinsWay PLLC
The Law Offices of Melissa D. Hubbard*
John C. Hugger, Attorney & Counselor at Law
Lori C. Hulbert, J.D., LL.M.
Fairfield and Woods, P.C.
Husch Blackwell LLP

Ireland Stapleton Pryor & Pascoe, PC
Jackson Kelly PLLC
M. Tracy James, Esq., Mediator
Johnson & Klein, PLLC*
Johnson Knudson LLC
Johnson Kush P.C.*
Katrina S. Jones, Esq., P.C.*
Joseph & Hall P.C.
Kane Law Firm, P.C.*
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Littman Family Law and Mediation Services*
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COLTAF LEADERSHIP BANKS

COLTAF's Leadership Banks are those financial institutions that go above and beyond the eligibility requirements of Rule 1.15E to actively support COLTAF in its mission to ensure that low-income Coloradans have access to critically needed civil legal aid. They pay premium rates on all COLTAF deposits and waive all regular service charges on COLTAF accounts. Prime Partners pay on all their COLTAF deposits a net yield of at least 75% of the Federal Funds Target Rate, or a minimum of 0.50%, whichever is greater. The following organizations were prime partners as of February 2022.

5Star Bank
Air Academy Federal Credit Union
Bank of Estes Park
Berkley Bank
Cache Bank & Trust
Ent Credit Union
First National Bank of Colorado
First Southwest Bank
Flatirons Bank
InBank
Integrity Bank & Trust
Mountain Valley Bank
Pikes Peak National Bank
RG Bank
UMB Bank
United Fidelity Bank
Vectra Bank
Wells Fargo
Western States Bank

Proclamation

Brian D. Boatright
Chief Justice
Colorado Supreme Court

Lolita Buckner Inniss
Dean
University of Colorado
Law School

Bruce P. Smith
Dean
University of Denver
Sturm College of Law

J. Ryann Peyton
President
Colorado Bar Association

Declaring October 2022 Legal Professionalism Month in the State of Colorado

WHEREAS, the Supreme Court of Colorado is vested with the authority and responsibility to determine who is possessed of the moral and ethical character, knowledge, and skill to represent clients and serve as an officer of the court; and

WHEREAS, law schools teach such knowledge and skill and foster the formation of professional identity; and

WHEREAS, members of the legal profession are public citizens having special responsibility for the quality of justice, the improvement of the law, the access to the legal system, the administration of justice, and the quality of service rendered by the legal profession; and

WHEREAS, members of the legal profession in Colorado have established the Colorado Bar Association; and

WHEREAS, the objectives of the Colorado Bar Association include advancing the science of jurisprudence, securing more efficient administration of justice, advocating thorough and continuing legal education, upholding the honor and integrity of the bar, cultivating cordial relations among the lawyers of Colorado, and perpetuating the history of the profession and the memory of its members,

NOW THEREFORE, the Chief Justice of the Supreme Court of Colorado, the President of the Colorado Bar Association, and the Deans of the University of Colorado School of Law and the University of Denver Sturm College of Law do hereby declare and proclaim October 2022 to be Legal Professionalism Month in the State of Colorado;

AND IN FURTHERANCE THEREOF, encourage

- *Members of the Legal Profession to rededicate themselves to demonstrating the highest standards of professionalism and integrity, and promoting public trust in the rule of law;*
- *Professional Entities, including law firms, corporate and public law offices, bar organizations, and Inns of Court, to promote legal professionalism and public confidence in the profession;*
- *Judicial Officers and Court Staff to promote public confidence in the courts, our system of justice, and the professionalism of the bench and bar; and*
- *All Members of the Legal Profession to foster diversity, equity, and inclusion within the profession.*

Declared and Proclaimed this 23rd day of August 2022.

Brian D. Boatright
Chief Justice
Colorado Supreme Court

Lolita Buckner Inniss
Dean
University of Colorado
Law School

Bruce P. Smith
Dean
University of Denver
Sturm College of Law

J. Ryann Peyton
President
Colorado Bar Association

Submission Guidelines for Lawyers' Announcements in *Colorado Lawyer*

The content of Lawyers' Announcements is subject to approval and must meet criteria for this type of advertising. Lawyers' Announcements are distinguishable from "display advertising." Email mhigham@cobar.org for information about display advertising in *Colorado Lawyer*.

General

The Lawyers' Announcements section is reserved to announce the following:

- New members to a law firm or legal department
- Name change of a law firm
- Formation, merger, or new affiliation of law practice(s) and law-related associations
- Relocation of a law practice
- Change in job status
- Retirement of attorneys
- Notices of professional appointment, honors, or awards

Sizes and Cost

Quarter page vertical

- 3.75″ wide x 4.25″ tall
- $250 CBA members; $350 nonmembers

Half page horizontal

- 7.75″ wide x 4.25″ tall
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Full page

- 7.75″ wide x 8.875″ tall
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Submission of Content

- Advertisers are responsible for the editorial and graphic content of their announcements.
- Digital files are preferred.
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- Submit files as press-quality PDFs saved at 300 dpi resolution.
- Ads must be designed to the correct ad size. Ads sent in an incorrect size are subject to refusal or misprinting.
- Design services are available for an additional fee.

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- By check: payable to Colorado Bar Association, mailed to Colorado Lawyer, Attn: CBA Accounting Dept., 1290 Broadway, Ste. 1700, Denver, CO 80203.
- By credit card: contact Melissa Higham at mhigham@cobar.org.

Questions?

Contact Melissa Higham at mhigham@cobar.org.

LAWYERS' ANNOUNCEMENTS **DEADLINES**

ISSUE	DEADLINE
January	December 1
February	January 3
March	February 1
April	March 1
May	April 1
June	May 2
July	June 1
August/ September	July 1
October	September 1
November	October 3
December	November 1

Announcements received past deadline will be accommodated as space permits. Payment must be received by deadline to secure placement.

Johnson Law Group


O'KEEFE


GARCIA


HINDS


LASKY


BECOAT

We are excited to announce that **SHANNON M. O'KEEFE** has become an Equity Partner at Johnson Law Group. Shannon joined the firm in September 2019 and has excelled in her roles as both an Attorney and Managing Partner.

We also wish to congratulate **PAOLA GARCIA** on her promotion to Senior Paralegal. Paola has been a dedicated member of the firm since July 2019 and has consistently demonstrated her commitment to Johnson Law Group's core values, to her clients, and to her teammates. We look forward to seeing all she will accomplish in this new role.

Finally, we welcome to the team our three newest Attorneys:

- **ANNE HINDS** joined the firm on May 16, 2022. Anne currently resides in Florida but will be joining us soon in the south Denver area. Her experience working with large firms, running her own business, practice of law for over 20 years, and bright personality make her a wonderful asset and fantastic colleague.
- **JESSICA LASKY** joined the firm on June 13, 2022. Jessica lives in the Colorado Springs area and has been practicing a mix of family and criminal law for nearly 20 years. Her breadth and depth of experience in these areas and dedication to excellence make her a great fit for complex matters and mentorship opportunities.
- **EDWARD BECOAT** joined the firm on June 20, 2022. Edward lives in the Grand Junction area and has been practicing law for two years with a mix of civil, business, and family law practice. His energy and passion for the law make him stand out as a dedicated advocate for his clients.

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Meet

JEFF JOSEPH *Partner, BAL Denver*

A Q&A on the firm, his background in immigration law, and the challenges faced by companies' global workforces today.

What does BAL offer to businesses in the Rocky Mountain area?

BAL Denver provides on-the-ground support to businesses in the Rocky Mountain region, delivering top-notch immigration expertise, a people-centered approach and award-winning technology to help companies gain a strategic advantage in attracting and retaining global talent.

Tell us about your background.

I'm a Denver native, and I've practiced immigration law for 25 years. I practiced for over two decades at a full-service law firm that I founded. In October 2022, I joined BAL to launch its Denver office to offer companies in the region all the resources and brain trust of BAL's 12 offices nationwide. I am Second Vice President of the Executive Committee of the American Immigration Lawyers Association (AILA) and have held numerous positions with AILA, including past Chair of the Colorado Chapter and Director on the National Board of Governors. I also served as Vice Chair of the Immigration Law Section of the Federal Bar Association and President of the Colorado Chapter of the FBA. I speak Spanish and love sharing my passion for immigration law by speaking at conferences. I also have taught as an adjunct professor at my alma mater, the University of Denver College of Law.

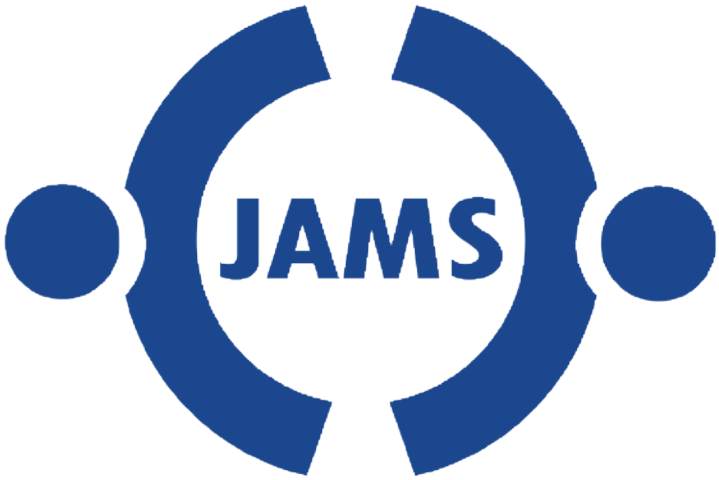
What are the biggest challenges for companies in terms of their global workforce and how is BAL able to help them meet these challenges?

Companies and their employees are facing significant government processing delays and backlogs both at the USCIS service centers and abroad at U.S consulates. BAL has a talented Government Strategies Team made up of former senior-level leaders from USCIS, Homeland Security and Department of State. Their extensive government connections and deep knowledge and experience in government set BAL apart. Our award-winning technology and "oneBAL" culture of teamwork and collaboration enable us to shift resources and scale to any company's needs when addressing work surges or fluctuations, so we can provide clients with a seamless and consistent experience.

Berry Appleman & Leiden LLP | 1900 Wazee Street, Suite 300, Denver, Colorado | Visit us at BAL.com

Four more professionals are joining JAMS

We are happy to welcome **David Stevens**, **Anne Ollada**, **Hon. Michael A. Martinez** and **Kris A. Zumalt** to our panel.



BHGR

BERG HILL
GREENLEAF RUSCITTI LLP

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After nearly two decades of serving her clients at S.D. Merritt & Associates, P.C., Shelly Merritt has moved her legal practice to Berg, Hill, Greenleaf, and Ruscitti, LLP.

"I am very excited about this move as it will allow me to continue to serve my clients with the support and resources of an exceptional law firm. My practice will continue as my clients have experienced at S.D. Merritt & Associates, P.C., but with a very qualified team to support me."

Berg Hill Greenleaf Ruscitti is a full-service commercial law firm, we offer a wide range of legal services to businesses and individuals throughout the state, nation, and world. From our offices in San Diego and Irvine, California, Boulder and Denver, Colorado, and Cheyenne, Wyoming, we strive to provide high-quality legal work efficiently and cost-effectively. Our team works hard to understand each client's unique needs to provide the tailored legal advice they deserve.

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We are pleased to announce that Howard J. Pollack has joined the firm as a shareholder and director. Howard is part of our Real Estate and Real Estate finance practice areas, and is a member of our Hospitality & Resorts group. His focus will be on the acquisition, development and finance of new and existing hotels.

Howard J. Pollack
hpollack@ottenjohnson.com
303.575.7515 (direct)

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50 YEARS

DIETZE AND DAVIS, P.C.
ATTORNEYS AT LAW

The attorneys and staff of
Dietze and Davis, P.C. congratulate

NATHAN A. KLOTZ

For his selection as a *2022 Colorado Rising Star* by Super Lawyers!

Mr. Klotz's practice includes civil litigation.

His colleagues are proud of his hard work and accomplishments!

dietzedavis.com

HBMS
HARRINGTON BREWSTER MAHONEY SMITS

Harrington Brewster Mahoney Smits is thrilled to welcome Meghan Johnson as an associate attorney with the firm!

Meghan obtained her law degree from the University of Denver Sturm College of Law and her bachelor's degree from St. Cloud State University in Minnesota. She has firsthand experience to most family law issues and understands the importance of remaining child focused and settling outside of court when possible

Welcome, Meghan

Lawyer of the Year

The Judicial Arbiter Group, Inc., congratulates **Judge Steve C. Briggs (Ret.)** on his selections as *The Best Lawyers in America*'s 2023 "Lawyer of the Year" in Arbitration, as well as on his many years of *Best Lawyers'* selection in Arbitration, Mediation, Appellate Practice, Commercial Litigation, and Insurance Law.

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Case Summaries and Captions from the Colorado Supreme Court and Court of Appeals

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EVANSCASE.com 303.757.8300

Evans Case LLP is pleased to welcome

Susan G. Pray

as Of Counsel to the Firm.

Susan Pray received a B.S degree in Civil Engineering from Gonzaga University, and earned her Juris Doctor degree from Harvard University. Evans Case is proud to work alongside her. Ms. Pray is active in the Bar and in the community as a fellow emeritus of the Colorado Bar Foundation and the Arapahoe County Bar Foundations, a member of the American Bar Association, the Colorado Bar Association, the Arapahoe County Bar Association, and the Denver Bar Association.

Having over 40 years of litigation experience, Ms. Pray will now focus her practice in the areas of probate litigation, complex commercial litigation, and personal injury and insurance coverage.

Evans Case focuses on family law, civil litigation, probate litigation, contested guardianship and conservatorship and real estate.

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www.evanscase.com

Attorneys at Law
EVANS CASE LLP
EVANSCASE.com 303.757.8300

Evans Case LLP is pleased to welcome

David R. Struthers

as Of Counsel to the Firm.

David Struthers received his B.A. from Colorado College in Political Science and his Juris Doctor from University of Denver, College of Law. His vast knowledge in probate litigation matters including fiduciary accountability and advice, will and trust disputes, issues of capacity and other manifestations of the human condition surrounding estates, aging and injury makes his arrival to Evans Case unique and exciting. His appellate experience includes writing for and arguing before the Colorado Supreme Court, the Colorado Court of Appeals and the Tenth Circuit Court of Appeals.

Having over 34 years of litigation experience, Mr. Struthers will continue to focus his practice in the areas of probate litigation, complex commercial litigation, and personal injury and insurance coverage.

Evans Case focuses on family law, civil litigation, probate litigation, contested guardianship and conservatorship and real estate.

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CBA ETHICS HOTLINE

A Service for Attorneys

The CBA Ethics Hotline is a free resource for attorneys who need immediate assistance with an ethical dilemma or question. Inquiries are handled by individual members of the CBA Ethics Committee. Attorneys can expect to briefly discuss an ethical issue with a hotline volunteer and are asked to do their own research before calling the hotline.

To contact a hotline volunteer, please call the CBA offices at 303-860-1115.

CBA
Est. in 1897
Colorado Bar Association

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Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)

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Colorado Lawyer, 1290 Broadway, Ste. 1700, Denver, CO 80203

Contact Person: Susie Klein

Telephone *(Include area code)*: 303-860-1115

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Colorado Bar Association, 1290 Broadway, Ste. 1700, Denver, CO 80203

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Editor (Name and complete mailing address)

Susie Klein, 1290 Broadway, Ste. 1700, Denver, CO 80203

Managing Editor *(Name and complete mailing address)*

Susie Klein, 1290 Broadway, Ste. 1700, Denver, CO 80203

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

Full Name	Complete Mailing Address
Colorado Bar Association, *Colorado Lawyer*	1290 Broadway, Ste. 1700, Denver, CO 80203

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☒ None

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The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:

☒ Has Not Changed During Preceding 12 Months

☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

13. Publication Title	14. Issue Date for Circulation Data Below
Colorado Lawyer	August/September 2022

15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*			14,448	14,894
b. Paid Circulation (By Mail and Outside the Mail)	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	14,408	14,854
	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	0	0
	(3)	Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	0	0
	(4)	Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	0	0
c. Total Paid Distribution *[Sum of 15b (1), (2), (3), and (4)]* ▶			14,408	14,854
d. Free or Nominal Rate Distribution (By Mail and Outside the Mail)	(1)	Free or Nominal Rate Outside-County Copies included on PS Form 3541	0	0
	(2)	Free or Nominal Rate In-County Copies included on PS Form 3541	0	0
	(3)	Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)	0	0
	(4)	Free or Nominal Rate Distribution Outside the Mail *(Carriers or other means)*	20	20
e. Total Free or Nominal Rate Distribution *(Sum of 15d (1), (2), (3) and (4))*			20	20
f. Total Distribution *(Sum of 15c and 15e)*			14,428	14,874
g. Copies not Distributed *(See Instructions to Publishers #4 (page #3))*			20	20
h. Total *(Sum of 15f and g)*			14,448	14,894
i. Percent Paid *(15c divided by 15f times 100)*			99%	99%

16. Electronic Copy Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Paid Electronic Copies	0	0
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a)	14,408	14,854
c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a)	14,428	14,874
d. Percent Paid (Both Print & Electronic Copies) (16b divided by 16c × 100)	99%	99%

☒ **I certify that 50% of all my distributed copies (electronic and print) are paid above a nominal price.**

17. Publication of Statement of Ownership

☒ If the publication is a general publication, publication of this statement is required. Will be printed in the October 2022 issue of this publication.

☐ Publication not required.

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Susie Klein, Managing Editor, Colorado Bar Association, 1290 Broadway, Ste. 1700, Denver, CO 80203	

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

In Memoriam

Matthew James Costinett

May 25, 1971–July 21, 2022

Matthew James Costinett, beloved son, brother, dear friend to many, and a shrewd and meticulous jurist, passed away suddenly on July 21, 2022, far too young. Matt was born in Maryland on May 25, 1971, to Paul Robin Costinett and Jan Rey Granados Costinett. He is survived by his mother Jan and brothers Paul and Chris.

Matt grew up exploring the great outdoors of Southern Maryland, where his love of rocks, minerals, and the natural sciences was born. He went on to earn a bachelor of science in geology from the University of Maryland, College Park. After college, he worked as an environmental and energy consultant in Arlington, Virginia. In his spare time, he enjoyed hiking and going for long bike rides and runs, and even ran (and finished) the Marine Corps Marathon. A voracious learner always yearning for more, he decided to pursue a career in environmental law and moved to Denver, earning his law degree at the University of Denver Sturm College of Law in 2003.

As a practicing attorney, Matt developed a diverse legal practice, but he became heralded within Denver legal circles for his unparalleled knowledge of oil and gas law, his fastidiously drafted title opinions, and his strong client advocacy skills. Matt was always generous about sharing his time and knowledge with others, and he trained and mentored a fair number of younger attorneys. Matt ultimately transitioned his practice to renewable energies, working at the Polsinelli law firm.

Matt was kind, fiercely loyal to those he loved, always dependable, and selflessly thoughtful of others. He had a clever and witty sense of humor, he loved animals (particularly cats), and his kindness, generosity, and intellectual curiosity will be missed terribly, as will his home-grown pumpkins and annual Christmas cards. Most of all, Matt will be missed by those who loved him dearly and who will always cherish his memory as a blessing.

Donations in Matt's memory may be made to the American Foundation for Suicide Prevention. A memorial fund has been established in his name at www.afsp.org.

—Submitted by Paul Costinett

Anton V. Dworak

August 14, 1967—August 3, 2022

Anton V. Dworak, a shareholder at Lyons Gaddis, passed away suddenly at the young age of 54 from Creutzfeldt-Jakob disease. Anton will be remembered for his quick wit, sharp intellect, and affinity for others.

As a past vice president of the Colorado Bar Association and a past president of the Boulder County Bar Association, Anton spread his unique perspective of the world, whether by providing solid legal advice or by quoting a unique line from one of his favorite movies, perhaps in a passable yet fake British accent.

Anton has been described by many as a true gentleman, a man perhaps from a past generation when his signature sweater vests and bowties were more in vogue. Perhaps it was the influence of his time in the Deep South, where he obtained a bachelor's degree in economics from Emory University in Atlanta in 1990.

That true gentleman spent nearly his entire career at Lyons Gaddis. After graduating from the University of Denver Sturm College of Law in 1993 and earning an LLM in Taxation, Anton joined Lyons Gaddis in 1999 and became a shareholder in 2004.

While much of his life was devoted to the law, his pride and joy was his family, both human and canine. Many remember how often he noted how lucky he was to have his wife Jeanne and his children. When asked about his "blended family," he would cringe. He said it sounded like a cooking show.

Spending time with his clan was his priority, and he immersed himself in their interests and activities. He even experienced the life of a roadie going from gig to gig with his musician son Alfred, also known as Alphonso. Alphonso's shows took him around Colorado but also to blues and jazz meccas like New Orleans and Memphis.

Anton's definition of family wasn't limited. He and his family, through Rotary's Rocky Mountain Youth Exchange, hosted more than a dozen exchange students from all over the world. He said it was to share the many remarkable places and activities that exist in Colorado. Many suspected it was an excuse to have fun and to stay young by osmosis.

His view of life was embodied in Rotary International's Four-Way Test: Is it the truth? Is it fair? Does it build good will and better friendship? Will it benefit all concerned? *But*, Anton would add, *is it fun?*

Family for Anton included the entire community. He truly never met a stranger. Many people note that, while he seemed somewhat quiet and reserved, his dry sense of humor and his mastery of sarcasm quickly dispelled that notion. With a certain panache, he was able to handle very serious and difficult matters due to his connection with others. He was proud to be a lifetime member of the Longmont Cemetery Board, and he was known to discuss the subtleties associated with cemetery care and its eternal residents at length.

As a fourth-generation Longmont resident, he was committed to the community. Anton's current membership on the Longmont United Hospital Board of Directors meant a great deal to him, as did his membership on the Board of Directors of the Longmont Area Chamber of Commerce, Twin Peaks, and numerous other community organizations. He was proud to share his knowledge and expertise, thanks to his strong sense of responsibility to care for others and the community that he loved.

He once said that he would have loved to have been on the panel of *Match Game*

during the seventies. He thought it looked like fun—sipping cocktails and making jokes with Richard Dawson, Brett Sommers, Fanny Flagg, and Charles Nelson Reilly. Perhaps he's playing with them now, sipping his signature Tanqueray and tonic, waiting for his family and friends to join him.

Anton is survived by his wife Jeanne; children Naomi Cross, Alfred Dworak, and Lela Dworak; and brother Karl Dworak.

—Submitted by Lyons Gaddis, P.C.

Gordon E. Schieman

August 13, 1931–November 21, 2021

Beloved husband, father, grandfather, lawyer, and best friend to many, Gordon Schieman passed away of natural causes in November 2021 while vacationing in Mexico with his wife Corinne and dear friends. He was 90.

Born in the South Side of Chicago to Emil and Linda Schieman, Gordon graduated with a degree in business from the University of Illinois, followed by a law degree and LLM, both from the University of Denver Sturm College of Law. He was a member of the Alaska, Colorado, and Nevada Bars.

In 1957 Gordon married Corinne Decker in Tokyo, and the newlyweds climbed Mt. Fuji on their honeymoon. During their 64-year marriage, the couple traveled, bicycled, skied, and hosted friends from all over the world.

Gordon loved education and teaching. During his military career, he was a professor at the US Air Force Academy and later was a member of the JAG Corps, serving in Turkey and at Lowry Air Force Base in Aurora, Colorado. While teaching at the Air Force Academy, he brought Ved Nanda, newly appointed DU law professor, to the academy as a guest teacher. Ved then had Gordon guest teach at DU law school. The two of them began a long-term close friendship that had Gordon and Corrine taking many overseas trips to wherever Ved was teaching. Upon retiring from the military, Gordon entered into law practice, specializing in trusts and estates, and also served as an adjunct professor of law at DU. Over the years, Gordon shared offices with Bruce Schilken, John Phillips, and Keith Davis.

Gordon was a man of many passions. He excelled at skiing, horseback riding, mountain climbing, and travel. He volunteered for 28 years with the National Ski Patrol Association, serving at Alyeska Resort in Alaska and Monarch Ski Resort in Salida, Colorado. He climbed every fourteener in Colorado and enjoyed them so much that he climbed many of them again.

More than almost anything, Gordon loved horses and being a cowboy. He rode his entire life and had many adventures, including multiple riding trips in Canyon de Chelly (one of his favorites). When he was 75, he completed the ride of a lifetime, the 170-mile Billy the Kid Ride, an adventure he would recall with great fondness. He last rode the "triple by-pass" bicycle ride (120 miles and 11,000 ft. elevation gain from Evergreen to Avon over Juniper Pass, Loveland Pass, and Vail Pass)—when he was 80!

Gordon was an exceedingly warm and generous person who wanted to help make the world a better place. He actively supported numerous causes, volunteered his time, and served on many boards. He loved a spirited discussion of current topics, especially when accompanied with multiple glasses of wine and copious amounts of popcorn.

Gordon is remembered for his exceptionally big heart, robust love of life, penchant for spontaneously breaking into song, dance moves, sourdough pancakes, and love of books and history—and for a life extraordinarily well lived. Many, many people rightly consider Gordon to be their best friend, and all of them would be right.

All of us whose lives were greatly enriched by having known, worked, and played with Gordon will fondly miss him.

—Submitted by John R. Phillips and Ved Nanda CL

In Memoriam is a complimentary service of the CBA honoring the lives and work of recently deceased members. Please email submissions to Susie Klein at sklein@cobar.org. High-resolution photos are appreciated.

WRITE FOR US

Want to raise your profile in the Colorado legal community and earn CLE credit in the process? Consider writing for *Colorado Lawyer*, the CBA's official publication.

All article submissions are peer-reviewed by coordinating editors before being scheduled for publication. To get started, please review our writing guidelines and contact the appropriate coordinating editor to discuss your topic. **For more information, visit cl.cobar.org/write-for-us.**

If you don't see a coordinating editor listed for your area of interest, contact Liz Daniels at ldaniels@cobar.org (substantive law articles) or Susie Klein at sklein@cobar.org (all other articles).

Disciplinary Case Summaries for Matters Resulting in Diversion and Private Admonition

Diversion is an alternative to discipline. Pursuant to CRCP 251.13 and depending on the stage of the proceeding, Attorney Regulation Counsel (Regulation Counsel), the Legal Regulation Committee (LRC), the Presiding Disciplinary Judge (PDJ), the hearing board, or the Supreme Court may offer diversion as an alternative to discipline. For example, Regulation Counsel can offer a diversion agreement when the complaint is at the central intake level in the Office of Attorney Regulation Counsel (OARC). Thereafter, LRC or the PDJ must approve the agreement.

Determining if Diversion is Appropriate

Diversion is appropriate where (1) there is little likelihood that the attorney will harm the public during the period of participation; (2) Regulation Counsel can adequately supervise the conditions of diversion; and (3) the attorney is likely to benefit by participation in the program. Regulation Counsel will consider diversion only if the presumptive range of discipline in the particular matter is likely to result in a public censure or less. However, if the attorney has been publicly disciplined in the last three years, the matter generally will not be diverted under the rule. Other factors Regulation Counsel considers may preclude Regulation Counsel from agreeing to diversion.

Diversion agreements strive to educate and rehabilitate attorneys so that they don't engage in such misconduct in the future. They may also address some of the systemic problems an attorney may be having. For example, if an attorney engaged in minor misconduct (neglect), and the reason for such conduct was poor office management, then one of the conditions of diversion may be a law office management audit and/or practice monitor.

Diversion Agreement Conditions

The type of misconduct dictates the conditions of the diversion agreement. Although each diversion agreement is factually unique and different from other agreements, many times the requirements are similar. Generally, the attorney is required to attend ethics school and/or trust account school conducted by OARC attorneys. An attorney may also be required to fulfill any of the following conditions:

- law office audit
- practice monitor
- practice mentor
- financial audit
- Colorado Lawyer Self-Assessment Program (online self-assessment)
- restitution
- payment of costs
- mental health evaluation and treatment
- continuing legal education (CLE) courses
- any other conditions that would be determined appropriate for the type of misconduct.

Diversion agreements generally span from one to three years. After the attorney successfully completes the requirements of the diversion agreement, Regulation Counsel will close its file and the matter will be expunged pursuant to CRCP 251.33(d). If Regulation Counsel has reason to believe the attorney has breached the diversion agreement, Regulation Counsel must follow the steps provided in CRCP 251.13 before an agreement can be revoked.

Diversion Summaries

From May 1, 2022, through July 31, 2022, at the intake stage, Regulation Counsel entered into 15 diversion agreements involving 15 separate requests for investigation. LRC approved 8 diversion agreements involving 10 separate requests for investigation during this time frame. One diversion agreement was submitted to the PDJ for approval. Below are summaries of some of these diversion agreements.

Lack of Competence

▸ Respondent was retained to represent the client in an immigration matter. Respondent charged the client $5,495 (a $3,500 flat fee plus $1,995 for filing fees and costs). Respondent filed the petition on behalf of the client, but it was rejected because respondent used an incorrect form. The client promptly provided the updated form, but respondent did not file the updated form until the client reached out to respondent a month later. Respondent again filed the incorrect form, which was rejected. Respondent offered a partial refund to include filing fees and a portion of the legal fees. Respondent indicated that respondent earned the remainder of the fees, which the client disputed.

Rules Implicated: Colo. RPC 1.1, 1.3, and 1.5(a), (f), and (h).

Diversion Agreement: One-year diversion agreement with conditions, including ethics school, fee arbitration, certified completion of the online self-assessment program, and payment of costs.

▸ A client hired a law firm to represent him in a civil claim against his daughter and her husband for various instances of financial exploitation. Respondent was assigned to the case and filed a complaint raising numerous specific claims for relief. Before trial, the defendants in the civil case filed a motion for summary judgment on all issues. Respondent filed a responsive brief objecting to the relief requested and asserting that respondent's client disputed certain facts upon which the motion relied. However, no supporting affidavit of the plaintiff was submitted by respondent, and no extension of time to make such a submission

was requested. The defendants then filed a reply pointing out the lack of supporting sworn testimony from the plaintiff. After receiving this pleading, respondent filed a delinquent affidavit of the plaintiff disputing certain facts alleged by the defendants in their original motion for summary judgment, but did not seek leave of the court to file this affidavit out of time. The defendants motioned to strike the plaintiff's affidavit. In response, respondent filed a brief explaining why the affidavit was being delinquently filed. The court granted the motion to strike and then granted the defendant's motion for summary judgment on all claims.

Rules Implicated: Colo. RPC 1.1, 1.3, and 1.4.

Diversion Agreement: One-year diversion agreement with conditions, including ethics school, certified completion of the online self-assessment program, and payment of costs.

Neglect of a Legal Matter

A client hired respondent to assist with the probate of her family member's will. The client signed an hourly fee agreement containing a provision for the submission of fee disputes to arbitration conducted by the CBA Fee Arbitration Committee. The client paid an initial retainer of $3,000, which respondent deposited directly into respondent's operating account. Respondent filed a petition for formal probate in May 2021. In July 2021, respondent met with the client and was advised that the sale of the family member's house was imminent. In late July 2021, the broker handling the sale reached out to respondent via email indicating that they needed various documents submitted no later than mid-August to close the sale. The client, her realtor, and the closing agent reached out to respondent numerous times during the first 10 days in August to secure documents necessary to complete the sale. Respondent did not respond to these communications or provide the necessary documents. The next month, the client wrote to respondent requesting an accounting and a refund of unearned fees. Respondent did not respond to that letter, provide the client with any invoice or bill, or take steps to withdraw as counsel in the probate matter. Respondent has since withdrawn from this matter and is set to engage in fee arbitration with the client regarding the client's assertion that respondent did not earn all of the fees claimed by respondent.

Rules Implicated: Colo. RPC 1.3, 1.4, 1.15A(a) and (b), and 1.16(d)

Diversion Agreement: One-year diversion agreement with conditions, including ethics school and payment of costs.

▸ Respondent represented a father in child support modification proceedings. The mother in those proceedings was unrepresented for the majority of the case. In connection with those proceedings, respondent's client was sanctioned by the court and adjudicated to have been "stonewalling" by failing to timely provide required financial disclosures. While the proceedings were ongoing, respondent served mother with a copy of a pleading that differed materially from the pleading respondent had filed with the court. Although mother had provided her mailing address to the court and to respondent on repeated occasions requesting that this address be used for service of process, respondent continued to serve her at an erroneous mailing address and ignored her repeated requests for email service. As a result, she was not timely provided with filings in the case.

The court issued an order requiring in advance of court-ordered mediation the exchange of financial information and the filing of a related certificate of compliance. Respondent failed to file the required certificate, and the court adjudicated that mother had not received the financial information from respondent's client that the court had ordered be provided. The court sanctioned respondent's client financially and required the parties to re-attend mediation after father provided the required financial information. Respondent did not provide mother proof of respondent's client's current income before or during the rescheduled mediation. Father's current earnings information was not provided to mother until after regular business hours the day before the scheduled child support modification hearing. Following a hearing on child support modification, respondent submitted a form of order to the court containing certain provisions the court had not ordered and that favored respondent's client. On March 9, 2022, the court entered an order requiring respondent to file a proposed written child support order. Respondent did not file the order until the court issued two additional orders directing respondent to make this submission.

Rules Implicated: Colo. RPC 1.3, 3.1, 3.2, 3.4(c), and 8.4(c) and (d).

Diversion Agreement: One-year diversion agreement with conditions, including ethics school, a practice audit and monitoring, three hours of CLE credit, and payment of costs.

▸ A client hired respondent in November 2019 to assist him in connection with two court cases involving the allocation of parental responsibilities with respect to his minor daughter. In November 2020, the parties reached an agreement to resolve both cases, and their agreement was placed orally on the record. The judge directed counsel to file a proposed form of written order with the court. Respondent believed that opposing counsel had filed a proposed form of written order in November of 2020. But he had not done so. The client followed up with respondent numerous times in 2021 about his need for a written court order. Respondent did not ensure that a proposed form of order was submitted to the court until May 2022, after an investigation into respondent's conduct had been commenced by OARC.

Rules Implicated: Colo. RPC 1.3 and 1.4(a).

Diversion Agreement: One-year diversion agreement with conditions, including certified completion of the online self-assessment program and payment of costs.

▸ Respondent failed to act with reasonable diligence in pursuing a change in the designation regarding military retirement survivor benefits for a client consistent with the decree of dissolution entered in the client's dissolution of marriage action. Respondent did not represent the client in the dissolution action itself and was retained only for this limited purpose. Additionally, respondent failed to keep the client apprised of the status of respondent's efforts for several years.

Rules Implicated: Colo. RPC 1.3 and 1.4.

Diversion Agreement: One-year diversion agreement with conditions, including certified completion of the online self-assessment program and payment of costs.

▸ Respondent negligently disbursed settlement proceeds to a client in a personal injury matter at a time when a third party claimed an interest in those funds. The client was receiving medical treatment on a lien basis, and there were two lienholders. Respondent did not have actual knowledge of the second lien (which was based on an agreement signed by the client with a treatment provider) but should have been more diligent in verifying that all claims and liens against settlement proceeds were accounted for when making disbursements from those proceeds. Respondent also failed to reconcile respondent's trust account at least quarterly, resulting in a failure to timely note or prevent an overdraft in the account. Ultimately, the shortfall did not result in a bounced check. Respondent also did not maintain all required ledgers for each individual for whom respondent held funds in trust.

Rules Implicated: Colo. RPC 1.3,1.15C(c), and 1.15D.

Diversion Agreement: One-year diversion agreement with conditions, including trust account school, ethics school, and payment of costs.

Failure to Communicate

▸ A client hired respondent regarding injuries suffered in a rear-end collision. Respondent and the client had a telephone conversation regarding a proposed settlement offer. The client was reluctant to accept the settlement offer. During the conversation, which lasted approximately 40 minutes, respondent attempted to intimidate the client through name-calling, called the client "a baby," and brought up the client's problems in personal relationships.

Rules Implicated: Colo. RPC 1.4, 1.7, and 8.4(g).

Diversion Agreement: One-year diversion agreement with conditions, including ethics school and payment of costs.

Fees Issues

▸ A client learned that Colorado was declining to renew his driver's license because of a license revocation proceeding in Arizona that had occurred 13 years prior. The client hired the law firm to help him secure an immediate temporary Colorado driver's license while the client took the steps necessary to clear up the Arizona licensing issue. The client signed a flat fee agreement requiring payment of $1,200 for

"Colorado license application and/or hearing." There were no benchmarks in the parties' fee agreement. The client paid two payments of $600 each in September 2021. Respondent deposited the client's funds into the operating account upon receipt.

In response to a disciplinary inquiry from the complainant, in January of 2022 respondent placed $1,200 from the firm's operating account into the firm's trust account. Contemporaneous to the client's two payments, respondent's associate sent an email to the help desk at the Colorado Department of Revenue Division of Motor Vehicles asking it to "evaluate [the client's] record and determine if he can get a driver's license in light of Colorado law." The department reviewed the client's file and wrote to the client denying his eligibility.

At the client's request, respondent's associate then requested a hearing on the client's behalf. Respondent's associate participated in a telephone call with the client and with a representative of the Arizona Department of Motor Vehicles, but the law firm did not otherwise interact with the Arizona licensing authorities on behalf of the client. Nor did respondent submit a license application to Colorado on the client's behalf. After resolving the situation in Arizona on his own, the client was himself able to renew his Colorado driver's license. No administrative hearing took place. The client requested an accounting and a partial refund from respondent. Respondent did not provide the requested accounting and refused to issue the client any refund.

Rules Implicated: Colo. RPC 1.5(a), 1.5(h), 1.15A(a) and (b), and 1.16(d).

Diversion Agreement: One-year diversion agreement with conditions, including fee arbitration, ethics school, and payment of costs.

▸ Respondent represented a client in an employment law matter. During the representation, respondent increased respondent's hourly rate for attorney fees and billed the client at the increased rate without notifying the client. Later, respondent mistakenly removed money belonging to the client from respondent's trust account without an invoice or demonstration that the amount was earned, and without crediting the client for the payment. The error was discovered when brought to respondent's attention by the client and confirmed through a subsequent reconciliation of respondent's trust account.

Rules Implicated: Colo. RPC 1.5(b), 1.5(f), and 1.15(A)(a).

Diversion Agreement: One-year diversion agreement with conditions, including fee arbitration, a financial audit, and payment of costs.

▸ Respondent failed to supervise a non-attorney assistant who independently collected legal fees from the client without respondent's knowledge.

Rules Implicated: Colo. RPC 1.5(h) and 5.3.

Diversion Agreement: Two-year diversion agreement with conditions, including ethics school, a practice audit and monitoring, and payment of costs.

Trust Account Issues

▸ In March 2020, a client contacted respondent seeking representation concerning the estates of the client's father and the father's wife, both of whom had passed away. The client paid a total of $2,000 for retainers in both matters by credit card, and a fee agreement was sent in May 2020. Respondent erroneously entered only $1,000 as the amount of the retainer in the firm's Clio system. The credit card payment was deposited into respondent's operating account. Respondent failed to transfer the funds to the firm's COLTAF account. Respondent performed work for the client in an invoiced amount of more than $1,000 as of June 1, 2020. Because of the error in the Clio system, respondent incorrectly concluded that all of the retainer had been earned. Upon inquiry by OARC, respondent discovered the erroneous accounting entry and refunded the unearned portion in April 2022. Respondent also had facts in mitigation, including the death of a close family member, contracting COVID-19, and losing office staff during the relevant time period.

Rules Implicated: Colo. RPC 1.15A.

Diversion Agreement: One-year diversion agreement with conditions, including trust account school and payment of costs.

▸ In March 2021, respondent began representing the client, a Texas resident, regarding a criminal case pending in Colorado. The fee agreement contemplated a flat fee, although it also referred to that fee as a "retainer." The agreement also indicated that if the client terminated the representation before the matter was completed, respondent would charge a $325 hourly rate for legal services. The client terminated respondent's representation in July 2021. According to respondent's records, at the hourly rate, respondent earned $5,100.20 of the $6,667.00 the client paid, leaving a balance due to the client of $1,566.80. The client made four separate requests to respondent for an accounting and refund of the retainer balance via text in July, September, and October 2021. Respondent acknowledges receiving these requests and admits the error in failing to provide the client with an accounting and refund until notified of the request for investigation. According to respondent, the client's file was closed after respondent withdrew, and a family member's medical issue in October 2021 necessitated that respondent travel multiple times to Texas, causing the lack of a timely response. Respondent did not transfer $100.20 of the client's funds that he claims to have earned out of respondent's COLTAF account until April 2022. After receiving a copy of the client's request for investigation, respondent mailed an accounting and a check for $1,566.80 to the client.

Rules Implicated: Colo. RPC 1.15A(a), 1.15C(c), 1.15D, and 1.16(d).

Diversion Agreement: One-year diversion agreement with conditions, including trust account school, fee arbitration, and payment of costs.

Bringing a Meritorious Claim and Contention

▸ Respondent filed a motion to modify parenting time in a domestic relations case. Respondent represented grandparent intervenors. The motion to modify parenting time sought allocation of full parental responsibilities to the intervenors. The intervenors had not previously been awarded parenting time but had court-authorized grandparent visitation. Before this filing, the court had denied a motion concerning parenting time disputes that respondent filed on behalf of the same intervenors because the intervenors lacked standing to enforce parenting time disputes. The motion to modify parenting time did not allege facts or cite authority under which the intervenors might have standing to be awarded parental responsibilities. The court denied the motion. The court found the motion presented no facts establishing intervenors might be entitled to the relief sought under the relevant statute. The court noted its previous finding concerning standing. The court found the motion was not well-grounded in fact or warranted by existing law and violated CRCP 11.

Rules Implicated: Colo. RPC 3.1.

Diversion Agreement: One-year diversion agreement, including ethics school, CLE courses related to domestic relations matters, and payment of costs.

Failure to Comply with a Court Order or the Rules of a Tribunal

▸ The court issued a conferral and civility order in a contentious domestic relations case. The order imposed more detailed conferral requirements than those imposed by CRCP 121 § 1-15(8) and prohibited the parties from including unprofessional language (such as reference to wife's "baby daddy") in pleadings. Respondent filed a motion for post-trial relief in the case, alleging that wife's and her counsel's unprofessional behavior leading up to the permanent orders hearing deprived husband of a fair trial. The court found respondent's arguments to be baseless and unsupported by the evidence. Respondent failed to include a supporting affidavit to the motion for post-trial relief, as required by CRCP 59(d). Furthermore, respondent renewed use of the term "baby daddy" in the motion, and the court found the allegations to be vitriolic attacks on wife and her counsel. The court sanctioned respondent and the client, jointly and severally, for violating the conferral and civility order and filing a meritless motion for post-trial relief.

Rules Implicated: Colo. RPC 3.4(c).

Diversion Agreement: Three-year diversion agreement with conditions, including three hours of OARC-approved CLE courses on professionalism, practice monitoring, and payment of costs.

▸ Respondent self-reported a criminal conviction after respondent entered a guilty plea to disorderly conduct—offensive gesture (class 1 petty offense) as part of a deferred judgment and sentence. Other charges, including those related to violating court orders or conditions, were dismissed as part of the plea agreement.

Rules Implicated: Colo. RPC 3.4(c) and 8.4(d).

Diversion Agreement: One-year diversion agreement, including ethics school, certified completion of the online self-assessment program, and payment of costs.

Criminal Act

▸ Respondent pleaded guilty to one count of harassment—strike/shove/kick, CRS § 18-9-111(1)(a), a class 3 misdemeanor. The sentence was deferred for six months. Respondent was assessed fines and costs. In 2022, the court found that respondent had complied with all court-ordered requirements pursuant to the deferred plea agreement and probation period, and it ordered the deferred plea agreement dismissed with prejudice.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: One-year diversion agreement with conditions, including required contact with the Colorado Lawyer Assistance Program and payment of costs.

▸ Respondent was arrested on suspicion of driving under the influence of alcohol following a traffic stop for expired license plates. Respondent refused blood or breath testing for alcohol but later tested at 0.105 BAC at the jail.

Respondent was charged with driving under the influence and later pleaded guilty to a deferred judgment and sentence for driving while ability impaired. This was respondent's first alcohol-related driving offense. Respondent timely reported the conviction.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: One-year diversion agreement with conditions, including compliance with the terms of the criminal sentence, ethics school, and payment of costs.

▸ In 2021, respondent was stopped in another state for swerving while driving. Respondent failed to adequately perform roadside maneuvers and refused chemical testing. Respondent was charged with, and pleaded no contest to, driving under the influence of alcohol in September 2021. This was respondent's first alcohol-related conviction. Respondent voluntarily completed an independent medical evaluation (IME). The IME provider did not diagnose respondent with a substance abuse or other disorder and did not recommend testing or monitoring beyond that required by the terms of the criminal probation.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: One-year diversion agreement with conditions, including compliance with the terms of the criminal sentence, ethics school, and payment of costs.

▸ Respondent was pulled over while driving in Denver for failing to stop at a red light. Respondent failed to adequately perform roadside maneuvers, and chemical testing subsequently revealed that respondent had a BAC of 0.132. Respondent pleaded guilty to driving while ability impaired by alcohol. This was respondent's second alcohol-related conviction; he had pleaded guilty to driving while under the influence of alcohol in 2016. Respondent voluntarily completed an independent medical evaluation and was not diagnosed with any substance abuse or other disorder. The evaluator did not recommend monitoring beyond that being done in connection with respondent's criminal probation.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: One-year diversion agreement with conditions, including compliance with the terms of the criminal sentence, ethics school, and payment of costs.

▸ Respondent was convicted by a jury of harassment and sentenced to 18 months of supervised probation, 36 hours of community service, 10 hours of anger management or domestic violence classes, and fines and costs.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: One-year diversion agreement with conditions, including compliance with the terms of the criminal sentence, ethics school, and payment of costs.

▸ Oklahoma police responded to a call from a motorist who observed respondent swerving while driving on the interstate. The responding state trooper observed several open travel-sized containers of vodka in the vehicle's passenger seat, center console, cup holder, and passenger-side floorboard. Another officer later found more empty travel-sized bottles in respondent's bag, as well as two unopened ones. According to the trooper, respondent could not form complete sentences; had red, bloodshot, watery eyes; exhibited extremely slow and delayed body movements; and smelled of alcohol. Respondent declined to submit to a breath alcohol test. Respondent pleaded guilty to driving under the influence and transporting an open container of alcohol in a vehicle. Respondent was sentenced to one year in jail, all but four days of which was suspended; one year of district attorney supervision; continued counseling and active participation in a recovery program; an alcohol assessment and compliance with ensuing recommendations; attendance at a victim impact panel; random urinalysis screening; 40 hours of community service; and payment of fines and costs. Respondent acknowledges that respondent is an alcoholic and suffered a relapse that resulted in the conduct at issue here. Since respondent's arrest, respondent has completed a 16-day in-patient residential treatment program for alcoholism, as well as a 10-day aftercare retreat offered by the same program. Respondent continues to see a licensed therapist on a weekly basis and to attend and participate in support meetings. Respondent timely self-reported this conviction to OARC. This was respondent's fifth alcohol-related conviction but the first since respondent became licensed to practice law.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Three-year diversion agreement with conditions, including compliance with the terms of the criminal sentence, two-and-a-half years of alcohol monitoring, continued therapy and attendance at peer support group meetings, ethics school, and payment of costs.

▸ Respondent pleaded guilty to driving while impaired by alcohol after being stopped for speeding in 2021. A chemical blood test administered shortly after the traffic stop revealed respondent had a blood alcohol level of 0.129 g/210L. This was respondent's first alcohol-related conviction. Respondent timely reported the conviction to OARC and has completed the terms of the criminal probation. Respondent voluntarily completed an independent medical examination with a duly licensed practitioner who did not diagnose respondent with an alcohol or other substance use disorder.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: One-year diversion agreement with conditions, including ethics school and payment of costs.

Private Admonition Summaries

Private admonition is the least serious of the formal disciplinary sanctions and is only appropriate for cases of minor misconduct where there was little or no injury to a client, the public, the legal system, or the profession, and where there is little to no likelihood of repetition. From May 1, 2022, through July 31, 2022, at the intake stage, LRC issued one private admonition involving one matter. Below is a summary of that admonition. The PDJ did not approve any private admonitions during this time frame.

▸ Respondent pleaded guilty to driving while ability impaired as a second offense. Respondent then failed to abide by the terms of his OARC diversion agreement, which required monitored sobriety.

Rules Implicated: Colo. RPC 8.4(b). CL

Summaries of diversion agreements and private admonitions are published on a quarterly basis. They are supplied by the Colorado Supreme Court Office of Attorney Regulation Counsel.

Disciplinary Case Summaries

No. 22PDJ020. People v. Delanghe. 4/25/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Benjamin J.H. Delanghe (attorney registration number 43563) for three years. The suspension, which takes into account significant mitigating factors, took effect on July 25, 2022. To be reinstated to the practice of law in Colorado, Delanghe must prove by clear and convincing evidence that he has been rehabilitated, has complied with all disciplinary orders and rules, and is fit to practice law.

On January 21, 2022, Delanghe pleaded guilty in federal court to two counts of possession with the intent to distribute a controlled substance. The factual predicate involved two incidents in 2019 when a confidential source working with the Drug Enforcement Administration (DEA) arranged to purchase cocaine from Delanghe.

In March 2019, DEA agents provided the confidential source $3,000 and drove the confidential source to a location near Delanghe's home. The agents watched the confidential source enter Delanghe's home during surveillance. The confidential source used the funds to purchase from Delanghe two ounces of cocaine. DEA agents verified through laboratory testing and analysis that the net weight of the purchased cocaine was 55.4 grams.

The next month, the confidential source purchased two ounces of cocaine from Delanghe with $2,700 provided by DEA agents while DEA agents conducted surveillance. Laboratory analysis confirmed that the confidential source had purchased cocaine, with a net weight of 55.5 grams.

In Colorado, distribution or possession with intent to distribute 55.4 grams of cocaine is a level 2 drug felony.

Through this conduct, Delanghe violated Colo. RPC 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects).

No. 22PDJ035. People v. Kennedy. 6/22/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Nathan Bret Kennedy (attorney registration number 45061) for five months. The suspension took effect on June 22, 2022. As a condition of reinstatement to the practice of law in Colorado, Kennedy must pass ethics school and complete a self-assessment program during his period of suspension.

Beginning in 2017, Kennedy litigated for two clients a case for unpaid wages against the clients' former employer. The court closed the case in November 2018 after Kennedy failed to follow the court's case management and delay reduction orders directing the parties to set a pretrial conference and jury trial. In February 2019, Kennedy moved to reopen the case. But Kennedy's motion did not explain why he failed to comply with the two orders, and he never replied to the response opposing his motion. The court denied Kennedy's motion the next month. In May 2019, one of Kennedy's clients asked him for an update on the case, and

Kennedy suggested that they schedule a phone call. According to the client, it was Kennedy's first communication with him since November 2018, before the case had been dismissed.

In another case, Kennedy represented a client at a criminal trial in May 2021. On the first day of the trial, Kennedy requested a mistrial, telling the judge that he could not effectively represent his client because he had not seen the prosecution's exhibits before trial. But the prosecution had sent Kennedy its discovery via compressed file in October 2020, and Kennedy had downloaded the file at least three times. The court declared a mistrial based on Kennedy's ineffective assistance and reset the matter for a later date, stating in its minute order that the mistrial was not the prosecution's fault.

In a third matter, Kennedy agreed to represent two parents in a dependency and neglect case. Kennedy obtained informed, written consent from each parent, who waived the potential conflicts arising from the dual representation. Kennedy appeared on behalf of the parents at a temporary custody hearing; the presiding magistrate ordered, however, that Kennedy could not represent both parents, because representing both parents in a dependency and neglect case is prohibited dual representation.

Through this conduct, Kennedy violated Colo. RPC 1.3 (a lawyer must act with reasonable diligence and promptness when representing a client); Colo. RPC 1.4(a)(3) (a lawyer must keep a client reasonably informed about the status of the matter); Colo. RPC 1.7(a)(2) (a lawyer must not represent a client if the representation involves a concurrent conflict of interest); and Colo. RPC 8.4(d) (a lawyer must not engage in conduct prejudicial to the administration of justice).

No. 21PDJ089. People v. Kim. 7/21/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Thai Soo Kim (attorney registration number 36086) for one year and one day, subject to the possibility of early reinstatement. The suspension took effect on July 21, 2022.

Following dissolution of Kim's marriage, the domestic relations court entered final support orders requiring Kim to pay $1,086 per month in child support to his former spouse, beginning on February 1, 2020. On May 7, 2020, Kim's former spouse moved to hold him in contempt, alleging that at the time of filing he had made only one $500 payment toward child support and that he was $3,844 in arrears. At the contempt hearing in October 2020, the district court found that Kim willfully failed to comply with the support order. The court ordered Kim to continue to pay monthly child support as well as $892 per month for a period of 12 months and another $5,000 in attorney fees and costs. But between February 1, 2020, and November 12, 2021, respondent did not make any full payments toward child support and made only partial payments for nine months.

Through this conduct, Kim violated Colo. RPC 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal).

No. 22PDJ047. People v. Marker. 8/2/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and publicly censured Michelle Ann Marker (attorney registration number 32120). The public censure took effect on August 2, 2022, and carries conditions.

Marker agreed to represent an incarcerated client in defending against a motion to modify child support filed by the client's former spouse. Marker says she spoke with the client about a $2,000 retainer, earned on an hourly basis, but the client believed that Marker would charge her a $2,000 flat fee. Marker did not provide the client a fee agreement until six months later. The delay was due in part to the client's concerns about receiving mail while incarcerated. In the fee agreement, Marker reserved the right to change her hourly rate without notice.

The client's parents mailed Marker a check. Marker negligently deposited the check in her operating account, which was overdrawn. By the time she deposited the check, she had earned only about a quarter of those funds. The following day, Marker deposited additional funds into her operating account; in a month's time, however, her operating account was overdrawn once again. Marker earned the full retainer several months later.

The client later asked Marker for an accounting and invoices, which Marker had neglected to send monthly. Marker eventually sent the client an invoice with some charges that the client disputed. Marker clarified with the client that she did not intend to collect on all the charges listed.

Through this negligent conduct, Marker violated Colo. RPC 1.4(a)(3) (a lawyer must keep a client reasonably informed about the status of the matter); Colo. RPC 1.5(b) (a lawyer must 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); Colo. RPC 1.5(f) (a lawyer does not earn fees until a benefit is conferred on the client or the lawyer performs a legal service); and Colo. RPC 1.15A(a) (a lawyer must hold client property separate from the lawyer's own property).

No. 22PDJ042.People v. Martin. 8/9/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Michael Andrew Martin (attorney registration number 51991) for 30 days, all to be stayed on Martin's successful completion of a one-year period of probation with conditions. The probation took effect on September 13, 2022.

Martin is the managing lawyer in the Denver office of a Utah-based law firm. A client who was charged with driving under the influence in Mesa County, Colorado, hired Martin for representation during only the pretrial phase of the client's criminal case. On May 28, 2021, Martin and his client appeared remotely before the trial court, setting the matter for a pretrial conference on September 10, 2021, and for trial on September 14, 2021.

In early August 2021, Martin booked a seven-day Caribbean cruise to begin on September 5, 2021. Soon thereafter, Martin booked a second seven-day cruise to begin immediately after the first cruise on the same ship. His vacation was set to occur during the client's trial.

Twice in August 2021, the court issued separate orders indicating that it was prepared to go forward with the trial. On August 30, 2021,

Martin moved to withdraw from the client's matter, citing the client's failure to meet his financial obligations. The court reserved ruling on Martin's withdrawal motion, which was filed 15 days before trial. The court advised the parties that it would address the withdrawal motion at the pretrial conference, granting the parties leave to appear virtually. On September 2, 2021, the court again granted Martin leave to appear virtually.

Neither Martin nor his client appeared at the pretrial conference on September 10, 2021. The court denied Martin's motion to withdraw and maintained the scheduled trial date of September 14, 2021. On September 12, 2021, Martin's second cruise departed from Miami. On September 14, 2021, the court called the client's matter for trial. Martin's ship was docked in Honduras on that date. Neither Martin nor his client appeared. The court issued a bench warrant for the client's arrest due to his failure to appear. The court also issued an order directing Martin to show cause at an in-person hearing why he should not be held in contempt of court for failing to appear at the prehearing conference and at trial.

Even though the court ordered Martin to appear at the show cause hearing in person, he appeared remotely. At the hearing, Martin apologized to the court and explained that he expected the motion to withdraw to be granted and the trial date to be vacated when his client did not appear at the pretrial conference.

Through this misconduct, Martin violated Colo. RPC 1.3 (a lawyer must act with reasonable diligence in representing a client) and Colo. RPC 8.4(d) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

No. 21PDJ054. People v. Newcomb. 7/18/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Andrew Murphree Newcomb (attorney registration number 37032) for two years. The suspension, which took effect on August 22, 2022, takes into account significant mitigating factors. To be reinstated to the practice of law in Colorado, Newcomb must prove by clear and convincing evidence that he has been rehabilitated, has complied with all disciplinary orders and rules, and is fit to practice law.

In 2019, Newcomb joined a law firm and agreed to bring his clients from his solo practice to the law firm. Under Newcomb's negotiated compensation plan, the law firm was to help manage all of Newcomb's clients' cases and receive a percentage of the net fees earned in the cases. In July 2019, Newcomb represented to the law firm's malpractice insurance carrier that he was not providing professional services other than through the law firm. But until January 2020, Newcomb continued to represent clients through his solo practice, collecting fees that he did not split with the law firm as he was required to do under the compensation plan. During this time, Newcomb misrepresented to the law firm the status of the clients' cases; for instance, he stated that he had fired clients whom he in fact continued to represent. A file audit revealed that Newcomb had systematically deleted client files from the law firm's file share service. The law firm restored the deleted files and learned that Newcomb had settled two cases for clients whom Newcomb claimed he had fired and one case that Newcomb had falsely stated he had settled in 2019. All of the settlement checks had gone to Newcomb's solo practice and were processed outside of the law firm's trust accounts.

In January 2021, the law firm fired Newcomb in a recorded videoconference call. During the call, Newcomb falsely claimed that the law firm had all of his active cases from his solo practice and that there were no funds in his solo practice's trust account. In fact, records from the trust account show that the account cleared thousands of dollars on a monthly basis, including over $80,000 that cleared in the month after the law firm fired Newcomb.

Through this conduct, Newcomb violated Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

No. 22PDJ044. People v. Percy. 7/29/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Jerry Gene Percy (attorney registration number 05875) for three years. The suspension took effect on July 29, 2022. To be reinstated to the practice of law in Colorado following his suspension period, Percy must petition the Presiding Disciplinary Judge and establish by clear and convincing evidence that he has been rehabilitated, has complied with all disciplinary orders and rules, and is fit to practice law.

In April 2002, Percy was suspended in case number 02PDJ018 for advising clients while he was administratively suspended. Percy never sought reinstatement from his disciplinary suspension and has remained suspended since 2002.

Even so, in 2014, two clients retained Percy to file a trademark application for the clients' business. Percy never filed the trademark application, though he billed the clients and the clients paid him for that work. The clients also enlisted Percy to help them sell the business. In 2016, Percy negotiated a sale agreement between the clients and a buyer, the clients' son. Percy encouraged the parties to the transaction to contact him separately if they had concerns about the transaction or his joint representation. The agreement was to go into effect in October 2016, and at that time, the parties to the transaction began to operate substantially in line with the agreement's terms. But Percy did not finalize the sale documents, and he continued to discuss the transaction with the parties together and individually. Eventually, the parties' relationships deteriorated, delaying the sale's completion until March 2021.

In 2020, a lawyer advised Percy that the lawyer represented the buyer in the transaction. The lawyer learned that Percy was suspended. In December 2020, one of Percy's clients confronted Percy about his disciplinary suspension. Percy told the client that he would investigate the matter and let the client know. But Percy never informed the client that he had been suspended throughout the representation or reported back to the client after having been confronted. Percy continued to represent the clients and the business in connection with the transaction into 2021.

Through this conduct, Percy violated Colo. RPC 1.3 (a lawyer must act with reasonable

diligence and promptness when representing a client); Colo. RPC 1.7(a)(1) (a lawyer must not represent a client if the representation is directly adverse to another client); Colo. RPC 1.7(a)(2) (a lawyer must not represent a client if the representation involves a concurrent conflict of interest); Colo. RPC 1.9(a) (a lawyer who has formerly represented a client in a matter must not later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to those of the former client unless the former client gives written informed consent); Colo. RPC 3.4(c) (a lawyer must not knowingly disobey an obligation under the rules of a tribunal); and Colo. RPC 5.5(a)(1) (a lawyer must not practice law without a law license or other specific authorization).

No. 22PDJ043. People v. Peters. 7/20/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended William Ellery Peters (attorney registration number 11325) for one year, with 60 days to be served and the remainder to be stayed pending Peters's successful completion of an 18-month period of probation, with conditions. The suspension took effect on August 24, 2022.

Peters was retained by a client to litigate a business matter. In November 2020, Peters and the client entered into a contingency fee agreement providing that Peters's fee would be the greater of his hourly fee or 30% of the gross amount collected. The fee agreement did not include a disclosure of the nature of other types of fee agreements, the nature of specially awarded fees, or the potential for an award of costs and attorney fees to the opposing party, as then required under the rules of professional conduct.

Peters filed a complaint on the client's behalf in February 2021 and served disclosures under CRCP 26(a) in May 2021. Opposing counsel notified Peters of certain deficiencies in the disclosures and asked him to produce documents. When Peters did not, opposing counsel moved to compel mandatory disclosures and for sanctions. Peters did not timely file a response.

In early June 2021, the court entered a delay prevention order referencing its pretrial order, which gave Peters 42 days to set the matter for trial. Because Peters had not yet set the case for trial, the court warned Peters that it would dismiss the case without prejudice unless Peters set the case. But Peters again failed to set the case for trial by the court's deadline. In mid-June 2021, opposing counsel moved to dismiss the complaint for failure to prosecute.

On June 30, 2021, the court granted opposing counsel's motions to compel and for sanctions, directing Peters to correct deficiencies in the mandatory disclosures. Peters did not notify his client of that order. The client later emailed Peters and asked him to withdraw from the case. In response, Peters emailed the client a letter attaching a notification certificate advising the court of Peters's withdrawal from the case. Peters claims he did not move to withdraw because he was unfamiliar with the local civil rules and did not know he needed leave of court to withdraw.

In early July 2021, the court denied Peters's notice of withdrawal. Peters then filed an untimely response to the motion to dismiss and an untimely certificate of compliance with mandatory disclosures. The same day, opposing counsel filed an attorney fees affidavit. Peters did not respond. Instead, he moved to withdraw. The court later awarded attorney fees against Peters's client, dismissed the case without prejudice, and denied the motion to withdraw as moot.

Through this conduct, Peters violated Colo. RPC 1.3 (a lawyer must act with reasonable diligence and promptness when representing a client); Colo. RPC 1.4(b) (a lawyer must explain a matter so as to permit the client to make informed decisions regarding the representation); and Colo. RPC 1.5(c) (2020) (a lawyer's contingent fee agreement must conform to the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure).

No. 22PDJ001. People v. Schwartz. 7/15/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Gabriel Nathan Schwartz (attorney registration number 35915) for six months. The suspension took effect on September 13, 2022. To be reinstated to the practice of law in Colorado, Schwartz must prove by clear and convincing evidence that he has been rehabilitated, has complied with all disciplinary orders and rules, and is fit to practice law.

In August 2017, Schwartz was assigned as a mentor to a law student. During lunch with a member of his law firm and the student, Schwartz made inappropriate statements of a sexual nature that upset the law student, who reported that Schwartz commented on the physical attractiveness of his opposing counsel and joked about sex, rape, and child pornography. Schwartz maintains that he was attempting to explain to the law student the type of clients she would represent as a criminal defense lawyer.

In 2017 and 2018, Schwartz supervised another law student through a law school mentorship program. During that time, Schwartz employed two paralegals with whom he engaged in ongoing sexual banter. The law student was uncomfortable with the banter and gave the paralegals copies of the rules of professional conduct discussing sexual harassment.

One of the paralegals worked for Schwartz from 2016 to 2020. On one occasion during that time, Schwartz slapped the paralegal's buttocks with his open hand; Schwartz did so after the paralegal had told him not to. The paralegal and another lawyer who had witnessed the conduct confronted Schwartz about the matter. Later, in another incident, Schwartz put his arm around the paralegal's teenage child and told the child to come see him when she turned 18. The paralegal, extremely upset, sent an email to Schwartz telling him to stop sexually harassing her. She also contacted the lawyer who had witnessed the earlier matter. The lawyer emailed Schwartz, describing Schwartz's conduct during the previous six months that caused the lawyer concern, including unwanted physical contact.

Through this conduct, Schwartz violated Colo. RPC 8.4(h) (it is professional misconduct for a lawyer to engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on the lawyer's fitness to practice law) and Colo. RPC 8.4(i) (a lawyer must not engage in conduct, in connection with the lawyer's professional activities, that the lawyer knows or reasonably should know constitutes sexual harassment).

No. 22PDJ015. People v. Smith. 7/28/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Mitchell Dean Smith (attorney registration number 36030) for one year and one day. The suspension took effect on July 28, 2022. To be reinstated to the practice of law in Colorado, Smith must prove by clear and convincing evidence that he has been rehabilitated, has complied with all disciplinary orders and rules, and is fit to practice law.

In May 2020, a client hired Smith to represent her in a domestic relations matter. The client paid Smith a retainer, but Smith did not endorse the check until November 2020. The check cleared into Smith's operating account; he never put the retainer into his trust account. Per Smith's billing statement, he failed to safeguard in his trust account some portion of the client's funds.

Throughout the representation, Smith had very little communication with the client. He regularly failed to respond to her requests for updates and for information about upcoming events, and his infrequent replies were largely unresponsive. Smith failed to inform the client about major developments in her case.

Smith also failed to diligently work on his client's matter. He failed to prepare for or participate in mediation. He never prepared, filed, or provided opposing counsel with his client's sworn financial statement. Nor did Smith provide his client with the opposing party's mandatory financial disclosures. He failed to prepare for his client's permanent orders hearing and never gave his client the final orders, though she asked for them on at least two occasions.

In early 2021, a dispute about dependency tax exemptions arose. Smith failed to communicate with opposing counsel about the dispute, and opposing counsel filed an emergency motion to enforce the permanent orders. Smith never read the motion or sent his client the motion. The client later filed an amended tax return, but Smith failed to provide a copy to opposing counsel. Smith did not appear for the hearing on the motion and never read the order issued after the hearing, which directed the client to respond to opposing counsel's request for sanctions. When the client failed to submit a response, the court entered a sanction of more than $2,000 against her. The client confronted Smith about the sanction, and Smith promised to investigate, but he never responded again. Smith later refused to participate in the disciplinary process.

Through this conduct, Smith violated Colo. RPC 1.3 (a lawyer must act with reasonable diligence and promptness when representing a client); Colo. RPC 1.4(a)(3) (a lawyer shall keep a client reasonably informed about the status of the matter); Colo. RPC 1.4(a)(4) (a lawyer shall promptly comply with reasonable requests for information); Colo. RPC 1.15A(a) (a lawyer shall hold client property separate from the lawyer's own property); Colo. RPC 1.16(d) (a lawyer shall protect a client's interests upon termination of the representation); Colo. RPC 8.1(b) (a lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); and Colo. RPC 8.4(d) (it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice).

No. 22PDJ045. People v. Thompson. 7/26/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Mark Duncan Thompson (attorney registration number 22091) for six months, all stayed pending Thompson's successful completion of a one-year period of probation. Thompson's sanction, which takes into account significant mitigating factors, took effect on July 26, 2022. The order approving the stipulation sanctions Thompson in his capacity as a Colorado-licensed lawyer; the Colorado Commission on Judicial Discipline, which maintains concurrent jurisdiction, is charged with disciplining Thompson in his capacity as a judicial officer.

Thompson's discipline arises from his guilty plea to an amended count of disorderly conduct. The plea was based on a heated verbal confrontation with his 22-year-old stepson in front of and inside Thompson's home. At one point during the confrontation, Thompson recklessly displayed a firearm, alarming his stepson. His stepson left the house and called 911. At the time of the offense, Thompson was the sitting chief judge for Colorado's Fifth Judicial District. The district attorney's office and the judges for the district recused themselves and arranged for the appointment of a special prosecutor and judge.

Following his guilty plea, Thompson was sentenced to one year of unsupervised probation with standard probationary terms as well as the following special terms and conditions: he was required to remain in the anger management treatment he had been undergoing since the incident and provide a release to his current therapist and any successor or other treatment provider authorizing full disclosure of information to the special prosecutor and the court; he was required to satisfactorily complete requirements of disciplinary authorities resulting from his conviction; and he was required to timely provide to the special prosecutor and the judge proof that he had completed the probationary terms and conditions.

Through this conduct, Thompson violated Colo. RPC 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's fitness).

No. 22PDJ030. People v. Vahsholtz. 6/22/2022. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended George Robert Vahsholtz (attorney registration number 07179) for three years. The suspension took effect on June 22, 2022. To be reinstated to the practice of law in Colorado, Vahsholtz must prove by clear and convincing evidence that he has been rehabilitated, has complied with all disciplinary orders and rules, and is fit to practice law.

In July 2019, Vahsholtz was suspended in case number 19PDJ033 for one year and one day. Then, in April 2020, he was suspended for one year in case number 20PDJ017, to run concurrent with the suspension in case number 19PDJ033. Vahsholtz remains suspended and has yet to petition for reinstatement.

In July 2020, a former client of Vahsholtz contacted him about sealing a record in a criminal matter. Vahsholtz told the former client that he was suspended from the practice of law, and the former client retained another lawyer. Nevertheless, Vahsholtz collected $3,000 from the former client and applied that money toward the fees of the former client's new lawyer as the new lawyer billed them. Vahsholtz did not hold the former client's money in trust. The former client's new lawyer ultimately concluded there was no pathway forward, and Vahsholtz agreed. Vahsholtz eventually refunded to the former client $2,000 that had not been billed for work by lawyers on the former client's case.

Later, Vahsholtz asked a prosecutor to look into his former client's case. In September 2021, Vahsholtz left the former client a voicemail promising to contact a judge in the near future. A few weeks later, Vahsholtz left the former client another voicemail describing a conversation he had with a new district attorney and vowing to set the matter for a hearing if he did not get a satisfactory answer about the former client's case from the new prosecutor. When the former client later asked for an update in setting a hearing, Vahsholtz responded, "October 29, get decision." Vahsholtz admits he acted in a representative capacity when communicating with the district attorney and as reflected in Vahsholtz's correspondence with his former client.

Through this conduct, Vahsholtz violated Colo. RPC 1.15A(a) (a lawyer must hold client property separate from the lawyer's own property); Colo. RPC 3.4(c) (a lawyer must not knowingly disobey an obligation under the rules of a tribunal); and Colo. RPC 5.5(a)(2) (a lawyer must not practice law when doing so violates regulations of the legal profession). CL

These summaries of disciplinary case opinions and conditional admissions of misconduct are prepared by the Office of the Presiding Disciplinary Judge; the CBA cannot guarantee their accuracy or completeness. Full opinions are available at https://coloradosupremecourt.com/PDJ/PDJ_Decisions.asp. The case files are public per CRCP 251.31.

Summaries of Selected Opinions

No. 21-8021. United States v. Armajo. 6/23/2022. D.Wyo. Judge Seymour. *FRE 404(b)—FRE 403—Assault Resulting in Serious Bodily Injury—Self-Defense Claim.*

Following a day spent drinking, smoking marijuana, and arguing, defendant's uncle Eli declared that he had "had enough" of defendant. Eli then pulled the truck they were riding in over so they could "duke it out." At trial, Eli testified that he struck defendant several times, bloodying defendant's face and breaking his glasses. According to Eli's testimony, defendant then pulled out a knife and slashed Eli, stabbing him twice in the leg. Eli further testified he was left bleeding by the side of the road when defendant drove away in the truck. A passerby noticed him, and Eli was treated at the hospital and released the next day.

Defendant was charged with two assault charges. Although defendant did not testify at trial, his counsel cast the stabbing as self-defense. At trial, a Bureau of Indian Affairs officer testified that in 2018, he arrived at the scene of a fight to find defendant covered in blood after being beaten by Eli. The defense also argued that the evidence showed it was Eli who escalated the fight by drawing a knife, and defendant stabbed Eli only because he reasonably believed his life was in danger. The jury ultimately found defendant guilty of assault resulting in serious bodily injury, but not guilty on the charge of assault with a dangerous weapon with intent to do bodily harm.

Before trial, defendant filed a FRE 404(b) notice that he intended to present evidence not only of the 2018 beating but also of an alleged assault by Eli on his disabled brother in 2014 and several alleged assaults on a girlfriend in 2015 and 2017. Following a hearing, the district court ruled that defendant would be allowed to present evidence of Eli's 2018 assault, but not evidence relating to the alleged assaults against others. While the evidence served a valid purpose under Rule 404(b) because defendant's state of mind was pivotal, the district court determined that the other assault evidence was barred under Rule 403 because its probative value was substantially outweighed by the risk of unfair prejudice. Defendant appealed this ruling.

The Tenth Circuit concluded that defendant met his burden to show self-defense, in that he reasonably believed he was in imminent danger of death or great bodily harm, necessitating an in-kind response. The appeal therefore centered on the evidence the jury never heard. As an initial matter, the Tenth Circuit held that the district court was correct in holding that under FRE 404(b), specific instances of a victim's violent conduct, when known by a defendant, may be admissible in a self-defense case to prove the defendant's state of mind.

Next, the Tenth Circuit determined that the district court did not abuse its discretion in applying the FRE 403 balancing test. The court did not err when it considered the lack of similarity of the other alleged assaults as a factor relevant to the probative value analysis. Further, the court's primary concern about unfair prejudice was valid. Presentation of evidence that Eli had abused a disabled person and a woman would very likely have stirred a strong emotional response from jurors, and the jurors also may have used the evidence to infer that Eli was a violent person and likely to have been the aggressor in this instance, which is precisely the sort of propensity inference that Rule 404(b) forbids. Therefore, because the evidence was likely to be highly prejudicial and of only marginally probative value, the Tenth Circuit held that the district court was justified in excluding the evidence under Rule 403.

The district court's ruling was affirmed.

No. 20-3132. Finch v. Rapp. 7/5/2022. D.Kan. Judge Tymkovich. *42 USC § 1983—Excessive Force Claim—Summary Judgment—Qualified Immunity*—Monell *Claim.*

A 911 dispatcher alerted Wichita law enforcement officers that a caller had shot his father and was holding his mother and brother at gunpoint. The dispatcher also reported that the caller threatened to light the house on fire and commit suicide. Officers responded and surrounded the residence.

Unbeknownst to the officers and dispatchers, this was a case of "swatting." The caller was a Los Angeles resident, with no connection to the Wichita address or its residents. This serial "swatter" made the call on behalf of a Call of Duty player who wanted to retaliate against another player after a virtual altercation in the videogame. However, none of the players actually lived in Wichita, and the caller was given a false address. Andrew Finch, one of the residents, had no connection to the caller or online altercation. He was at home with a few family members and friends.

It was dark outside when officers arrived. Officer Rapp was told to be "long cover" because he had a rifle. When Finch pushed the front door open and stepped onto the porch, an officer on the east side of the residence instructed him to put his hands up and step off the porch. Officer Rapp's supervisor, on the north side of the residence, shouted commands that were not heard by other officers. None of the officers identified themselves as police. Although Finch initially appeared to comply with commands to put his arms up, he then began to lower his hands. There was conflicting evidence as to what occurred next, with some officers believing that Finch was reaching for a weapon and others perceiving no threat. Officer Rapp believed Finch was drawing a firearm, and fired a single shot, hitting Finch in the chest. Finch died within minutes. Afterward, officers confirmed that Finch was unarmed and realized there had been no hostage situation or murder.

Through his next of kin, Finch filed a 42 USC § 1983 suit against Officer Rapp, his supervisor, and the City of Wichita. Defendants moved for summary judgment. The district court granted summary judgment on the claims against the supervisor and the City, but denied summary judgment and the qualified immunity defense as to Officer Rapp. Officer Rapp filed an interlocutory appeal of the denial of qualified immunity, and plaintiff appealed the final summary judgment entered in favor of the City.

The Tenth Circuit first evaluated the denial of summary judgment as to Officer Rapp. Excessive force claims are analyzed under the Fourth Amendment and its reasonableness standard. That standard asks whether police employed objectively reasonable force given the totality of the circumstances. The district court concluded that a reasonable jury could find that (1) Officer Rapp fired a shot when he could see Finch's hands were empty, (2) Officer Rapp's assertion that Finch made a threatening motion was false, and (3) Officer Rapp could not see Finch's movements clearly due to darkness and distance.

These findings were binding on the Tenth Circuit in its review of the qualified immunity denial. The Tenth Circuit rejected Officer Rapp's contention that the video evidence contradicted the district court's findings. Whether Officer Rapp reasonably believed Finch presented a threat is ultimately a genuine issue of fact for the jury to determine.

The Tenth Circuit next concluded that having found a constitutional violation, the district court correctly denied qualified immunity because Officer Rapp's actions violated clearly established law. In particular, the district court correctly relied on four Tenth Circuit opinions to determine that the right not to be subjected to deadly force was clearly established. While there was no case with identical facts, taken together, the cases established that an officer, even when responding to a dangerous reported situation, may not shoot an unarmed and unthreatening suspect.

Last, the Tenth Circuit determined that the district court properly granted summary judgment on plaintiff's municipal liability claims against the City. Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a city may be liable if it executes an unconstitutional policy or custom, or a facially constitutional policy that causes a constitutional violation. The Tenth Circuit concluded that plaintiff failed to show genuine issues of material fact regarding a city policy or custom of inadequate investigation and discipline, as alleged. Further, even if he could have, he was unable to prove causation. Plaintiff's arguments therefore did not meet the demanding standard of causation required in *Monell* cases, namely, a "direct causal link between the municipal action and the deprivation of federal rights."

The Tenth Circuit therefore affirmed the district court's denial of summary judgment as to the claims against Officer Rapp and affirmed the grant of summary judgment as to the claims against the City.

No. 21-1320. C1.G v. Siegfried. 7/6/2022. D.Colo. Judge Kelly. *High School Suspension and Expulsion—42 USC § 1983—First Amendment—Fourteenth Amendment Procedural Due Process—Motion to Dismiss.*

C.G., a student at Cherry Creek High School (CCHS), was off campus at a thrift store with three friends on a Friday evening when he took a picture of his friends wearing wigs and hats, including one hat that resembled a foreign military hat from the World War II period. C.G. posted the picture on Snapchat and captioned it, "Me and the boys bout to exterminate the

Jews." He removed the post after several hours and posted that he was sorry for the picture. One of C.G.'s Snapchat "friends" took a photo of the post before it was deleted. She showed it to her father, who called the police. The police went to C.G.'s house and determined there was no threat. A CCHS parent emailed the school and community leaders about the post.

The following Monday, the CCHS dean of students told C.G. that he was suspended for 5 days while the school investigated. The suspension was then extended another 5 days to facilitate an expulsion review, and then another 11 days to allow for its completion. Following an expulsion hearing, the superintendent informed C.G. that he was expelled for one year for violating several Cherry Creek School District (District) policies.

Plaintiff, on behalf of his minor son C.G., filed suit against the District and various employees under 42 USC § 1983, claiming violations of the First and Fourteenth Amendments. Defendants moved to dismiss under FRCP 12(b)(6) for failure to state a claim and on the basis of qualified immunity. The district court granted the Rule 12(b)(6) motion and dismissed plaintiff's claims.

On appeal, plaintiff argued that the First Amendment limits school authority to regulate off-campus student speech, particularly speech unconnected with a school activity and not directed at the school or its specific members. The appeal relied heavily on *Mahanoy Area School District v. B.L.*, 141 S.Ct. 2038 (2021), a US Supreme Court decision decided after the district court's decision.

Under the seminal decision, *Tinker v. Des Moines Independent Community School*, 393 U.S. 503 (1969), schools may restrict student speech only if it would substantially interfere with the work of the school or impinge upon the rights of other students. Based on *Mahanoy*, in considering student speech that occurs off campus and unconnected to any school activity, a school (1) can rarely stand *in loco parentis*, (2) will have a heavy burden to justify intervention when political or religious speech is involved, and (3) must especially respect an interest in protecting a student's unpopular expression.

The Tenth Circuit noted that the speech in this case is materially similar to the offensive, controversial speech at issue in *Mahanoy*. C.G. spoke outside of school hours from a location outside the school, did not identify the school in the post or target any member of the school community in particular, and transmitted the speech through his personal cellphone to an audience consisting of Snapchat friends. Schools may not invoke the doctrine of *in loco parentis* to justify regulating off-campus speech in normal circumstances. The Tenth Circuit also concluded that the facts did not support a reasonable forecast of substantial disruption that would warrant dismissal of the complaint. While offensive, the Tenth Circuit noted the post did not include weapons, specific threats, or speech directed toward the school or its students. Plaintiff thus properly alleged that the discipline for off-campus speech was a First Amendment violation that was not properly dismissed.

Next, because the district court did not address the question of qualified immunity, the Tenth Circuit remanded that issue for consideration.

Third, the Tenth Circuit's determination that C.G. properly pleaded a First Amendment violation meant that his as-applied challenge successfully withstood dismissal.

Fourth, the Tenth Circuit reversed the dismissal of plaintiff's due process claim because plaintiff pleaded that C.G. was not given a meaningful opportunity to explain his side of the story before officials made the disciplinary suspension decision. For suspensions of 1 to 10 days, a student must be given oral or written notice of the charges, and if the student denies them, an explanation of the evidence the authorities have and an opportunity to present the student's side of the story. Additionally, despite the fact that C.G. was given notice and opportunity to be heard before the expulsion, the Tenth Circuit determined that defendants' possible misconceptions of their ability to regulate student speech under the First Amendment may affect that analysis. The district court's dismissal of this further procedural due process claim was also vacated for reconsideration.

Fifth, the Tenth Circuit noted that the district court correctly dismissed plaintiff's facial challenge to the District's policies for Fourteenth Amendment violations because plaintiff abandoned it by not addressing it in his response to the motion to dismiss.

Last, because plaintiff properly pled a constitutional violation, his conspiracy claim was remanded for the district court to evaluate it in the first instance.

The Tenth Circuit therefore reversed the district court's dismissal of plaintiff's First Amendment claim and did not reach the related facial challenge. The Tenth Circuit also reversed the district court's dismissal of plaintiff's Fourteenth Amendment procedural due process claim for the initial suspension, and the claims relating to the other disciplinary actions were vacated for reconsideration. The dismissal of further facial challenges to the District's policies was affirmed. The questions of qualified and absolute immunity and the conspiracy claim were remanded for consideration.

No. 21-2073. United States v. Reed. 7/7/2022. D.N.M. Judge Baldock. *Felon in Possession of a Firearm—Armed Career Criminal Act—Voluntariness of Plea—Alleged Ineffective Assistance of Counsel—District Court Jurisdiction of Predicate Felonies Determination—Procedural Due Process.*

Defendant knowingly brought a handgun and several rounds of ammunition to an apartment in 2017. He was previously convicted in federal court of four felonies in 2004, all four of which were contained in a single judgment. In 2005, defendant was also convicted of a felony in state court. A grand jury indicted defendant for being a felon in possession of a firearm. A laboratory then found defendant's DNA on the handgun, and defendant's trial counsel was unable to locate any witness to support defendant's version of events.

The government offered defendant a plea agreement, which stated that the maximum prison sentence he could receive was 10 years, unless the district court determined that he was an armed career criminal under the Armed Career Criminal Act (ACCA), in which case the minimum prison sentence would be 15 years and the maximum sentence would be life. Trial counsel discussed the potential sentencing enhancement under the ACCA, but mistakenly believed that defendant did not have

the requisite number of felonies for an ACCA enhancement (three), and advised defendant based on this belief. Trial counsel did not promise defendant that the ACCA would not apply, however. Defendant entered the plea agreement at a change of plea hearing.

The Probation Office's Presentence Investigation Report (PSR) concluded that defendant was subject to an enhanced sentence due to his three federal drug-trafficking convictions. Defendant then obtained new counsel and moved to withdraw his guilty plea. Following an evidentiary hearing at which former trial counsel and defendant testified, the district court denied defendant's motion to withdraw his guilty plea. The court held that trial counsel's performance was not constitutionally ineffective and defendant failed to demonstrate prejudice. Defendant's objections to the PSR were overruled, and the court imposed the ACCA's mandatory minimum sentence of 15 years. Defendant appealed.

The first claim on appeal was whether the district court committed reversible error by concluding defendant's guilty plea was knowing and voluntary despite trial counsel's erroneous advice. As a threshold matter, the Tenth Circuit first concluded that because the district court held an evidentiary hearing on the motion to withdraw guilty plea, the factual record was sufficiently developed to review the ineffective assistance claim on direct appeal.

The Tenth Circuit then applied the two-part ineffective assistance of counsel test from *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, defendant was required to show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance resulted in prejudice. The Tenth Circuit concluded that defendant did not establish prejudice, so it did not consider the first prong. To show prejudice in the guilty plea context, a defendant must establish that there is a reasonable probability that, but for counsel's errors, defendant would not have pleaded guilty and insisted on going to trial. Here, the Tenth Circuit held that defendant did not establish prejudice because (1) he pleaded guilty after being informed repeatedly that he could receive an ACCA enhancement, and (2) the circumstances did not suggest he would have gone to trial absent counsel's erroneous advice. In particular, the prosecution's case was strong, and even under the ACCA standard, the plea lowered the guideline sentence.

Defendant next argued that the district court lacked the power to decide whether the prior convictions were committed on different occasions because a jury must find facts which increase a defendant's mandatory minimum sentence. The Tenth Circuit rejected this claim based on prior Tenth Circuit precedent, which provides that whether prior convictions happened on different occasions is not a fact required to be determined by a jury.

Third, defendant maintained that he had insufficient notice that the ACCA might apply before he pleaded guilty. The Tenth Circuit determined that defendant received due process because he had actual notice of the possibility of an ACCA enhancement in a reasonable time along with an opportunity to be heard concerning that status.

The district court's judgment and sentence were affirmed.

No. 21-1247. Irizarry v. Yehia. 7/11/2022. D.Colo. Judge Matheson. *42 USC § 1983—First Amendment Retaliation Claim—Motion to Dismiss—Qualified Immunity.*

Plaintiff, a YouTube journalist and blogger, filmed a DUI traffic stop in Lakewood, Colorado. Defendant, an officer with the Lakewood Police Department, was called to the scene by the other officers. According to the complaint, when he arrived, defendant stood in front of plaintiff, obstructing his filming of the DUI roadside sobriety test. When plaintiff and a fellow journalist objected, defendant shined a flashlight into plaintiff's camera. A fellow officer

told defendant to stop. The complaint alleges that defendant then got back into his police cruiser and drove the vehicle in the direction of the two journalists. He then blasted his air horn repeatedly.

Plaintiff sued under 42 USC § 1983, alleging that defendant violated his First Amendment rights. The district court determined that plaintiff alleged a constitutional violation but held that defendant was entitled to qualified immunity because the violation was not one of clearly established law. The court therefore dismissed the complaint for failure to state a claim under FRCP 12(b)(6). Plaintiff appealed.

To state a First Amendment retaliation claim, a plaintiff must allege facts showing that (1) the plaintiff was engaged in constitutionally protected activity; (2) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in the activity; and (3) the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct.

The Tenth Circuit first concluded that plaintiff alleged facts showing he was exercising his First Amendment right to film the police. Several First Amendment principles show that filming the police performing their duties in public is protected activity. Additionally, a Tenth Circuit decision provides that the First Amendment protects the filming of a police encounter, and precedent from every circuit also supports such a right.

Second, the Tenth Circuit held that plaintiff also showed that defendant's actions against him would chill a person of ordinary firmness from continuing to engage in protected filming activity. Defendant's actions made it difficult if not impossible for plaintiff to continue recording a potentially critical moment of the police activity. Further, defendant directed violence toward plaintiff by driving his police cruiser at him and his nearby colleague.

Third, the Tenth Circuit determined that the complaint alleged that plaintiff's protected filming activity motivated defendant's adverse actions, meeting the third element of the retaliation claim. The complaint alleged that defendant arrived on scene at the behest of his colleagues, and it was reasonable to infer his arrival was due to plaintiff recording the encounter. Moreover, because the physical interference with filming and driving the police vehicle at plaintiff served no legitimate law enforcement purpose, it was reasonable to infer that the filming substantially motivated defendant's actions.

Finally, the Tenth Circuit held that plaintiff also demonstrated that defendant violated his clearly established right to be free from retaliation for filming police performing their public duties. General statements of law can clearly establish a right for qualified immunity purposes if they apply with obvious clarity to the specific conduct in question. In May 2019, when the incident occurred, plaintiff had a clearly established right to film the traffic stop based on the persuasive weight of authority from six other circuits and a Tenth Circuit decision arising from another context. The Tenth Circuit therefore concluded that as to all three elements of First Amendment retaliation, plaintiff demonstrated a violation of clearly established law, and defendant was not entitled to qualified immunity.

The district court's decision was reversed and remanded for further proceedings.

No. 19-3210. United States v. Hernandez-Calvillo. 7/13/2022. D.Kan. Judge Moritz. *Constitutionality of Federal Immigration Statute—Encouraging or Inducing a Noncitizen to Reside in the United States—First Amendment Overbreadth.*

A grand jury indicted appellees based on their role in an alleged scheme to employ noncitizens in the drywall installation business. They were charged with several federal immigration crimes, the first of which alleged that they conspired to encourage or induce noncitizens to reside in the United States in violation of 8 USC § 1324(a)(1)(A)(iv). The remaining counts alleged specific instances of encouraging or inducing particular noncitizens to reside in the United States. At trial, the jury found appellees guilty of conspiring to encourage or induce but not guilty of the three individual counts of encouraging or inducing.

Before sentencing, appellees moved to dismiss the conspiracy count on First Amendment overbreadth grounds. The district court granted the motion, concluding that the statute is facially unconstitutional because it proscribes a substantial amount of protected speech. The government appealed.

The sole issue before the Tenth Circuit was the facial constitutional challenge to subsection (A)(iv). The Tenth Circuit stated that when a litigant contends that a statute is overbroad under the First Amendment, the litigant must show that a substantial number of the statute's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.

Subsection (A)(iv) makes it a crime to "encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of the law." The Tenth Circuit gave the terms "encourage" and "induce" their ordinary meaning and rejected the government's assertion that the terms may sometimes refer to criminal facilitation or solicitation. The ordinary meanings of the terms encompass both conduct and speech. The substantive scope of subsection (A)(iv) exceeds what one would find in a statute proscribing facilitation or solicitation. In particular, some of the activity that the statute prohibits a person from encouraging or inducing, namely residing in the United States, is not a crime.

Second, the government argued that any speech covered by subsection (A)(iv) was unprotected because it was integral to criminal conduct. The Tenth Circuit concluded, however, that this narrow category does not cover all of the speech the statute could reach. It is thus possible under subsection (A)(iv) to punish speech encouraging an act that is only civilly unlawful, along with protected "abstract advocacy of illegality." A statement to a noncitizen, "I encourage you to [reside in the United States]" would support a conviction under subsection (A)(iv), even if the noncitizen took no action in response.

Third, although the statute criminalizes some protected speech, the provision is facially overbroad only if it criminalizes a substantial amount of protected speech. The Tenth Circuit agreed with appellees that other statutes

independently, and more narrowly, proscribe the criminal activities. On the other side of the ledger, the Tenth Circuit concluded that many of subsection (A)(iv)'s potential applications involve protected speech. Actual prosecutions are not required to show a statute's overbreadth. On balance, a comparison of constitutional and unconstitutional applications is one-sided, and the statute's plain language is susceptible of regular application to protected expression, reaching vast amounts of protected speech uttered daily.

The Tenth Circuit therefore affirmed the dismissal of the indictment.

No. 21-6047. United States v. McCrary. 7/26/2022. W.D.Okla. Judge Ebel. *Fentanyl Possession and Distribution—Sentencing Factors—Procedural and Substantive Unreasonableness Challenges to Sentence—Appellate Waiver.*

While a student at Oklahoma State University, defendant became addicted to Xanax, heroin, and fentanyl. In 2016, defendant sold 10 fentanyl "gel squares" to his roommate, Jonathan Messick, and another friend, Gabe Stewart. Several days later, after smoking marijuana and drinking alcohol, Messick and Stewart each ingested one of the fentanyl squares. Messick soon found Stewart unresponsive but breathing. Messick declined to call 911 and instead went to sleep. When he awoke the next morning, Stewart was dead. The medical examiner ruled that Stewart had died from the combination of alcohol and fentanyl.

Stewart's father contacted the FBI in 2017. Following interviews, the United States obtained an indictment against defendant, charging him with (1) conspiring to possess fentanyl with intent to distribute, and (2) knowingly and intentionally possessing fentanyl with intent to distribute. By this time, defendant had graduated, had successfully undergone rehabilitation to overcome drug addiction, and was working at a bank.

Defendant entered into a plea agreement and pleaded guilty to count 2 in return for the dismissal of count 1. He acknowledged in writing that the statutory maximum was 20 years in prison and that the judge could impose a sentence either above or below the advisory range. At sentencing, the court determined the advisory guideline sentencing range was between 6 and 12 months in prison. Both parties relied on the sentencing factors in 18 USC § 3553(a) and argued for a sentence outside the advisory guideline range. The district court applied the factors upward and imposed a 48-month sentence. Defendant appealed, contending that his sentence was both procedurally and substantively unreasonable.

The Tenth Circuit first determined that defendant waived his appellate arguments challenging the procedural reasonableness of his sentence. In particular, the written waiver expressly waived the right to appeal "the manner in which the sentence is determined." The appellate arguments challenging the procedural reasonableness of the sentence therefore fell squarely within the scope of the waiver. Next, defendant knowingly and voluntarily waived his appellate rights. The appellate waiver was set forth in the plea agreement and addressed during the plea colloquy. Finally, the Tenth Circuit concluded that enforcing the waiver would not result in a miscarriage of justice.

After noting that defendant did not waive his appellate arguments challenging the substantive reasonableness of the sentence, the Tenth Circuit held that the district court did not abuse its discretion in imposing a 48-month sentence. The district court clearly explained its reasons for imposing the sentence. In particular, the court chose to weigh the fact that the offense involved a dangerous illicit drug that resulted in Stewart's death heavier than defendant's post-offense rehabilitation. While another court might have reasonably imposed a shorter sentence, the above-guideline sentence was not arbitrary, unreasonable, or outside the range of permissible choice. The Tenth Circuit also noted that other circuits have upheld upward-variant sentences as substantively reasonable based on the danger posed by fentanyl.

The sentence was therefore affirmed.

No. 20-4054. Dansie v. Union Pacific Railroad Co. 8/2/2022. D.Utah. Judge Carson. *Americans with Disabilities Act—Interactive Reasonable Accommodation Process—Family Medical Leave Act—Request for Supplemental Jury Instructions.*

Defendant schedules conductors using an on-call system and requires they report for duty within two hours. In addition to federally mandated rest periods, conductors receive paid vacation leave and personal leave under a union agreement. The union agreement also provides conductors with reasonable unpaid personal "layoffs," where an on-call conductor schedules as unavailable yet is called for duty.

Plaintiff has lived and worked with an HIV-positive diagnosis for 20 years. He has AIDS and testicular cancer that is in remission. Because of these medical conditions, plaintiff requires ongoing treatment. He began employment with defendant in 2004 but was terminated for an alleged safety violation in 2014. This termination was overturned by an appeals board. Plaintiff returned to work in 2016 but had temporarily lost eligibility for Family Medical Leave Act (FMLA) leave.

Plaintiff then repeatedly sought to use paid leave to cover his illness or medical appointments. Defendant denied the requests. Plaintiff then requested what he believed was a reasonable accommodation under the Americans with Disabilities Act (ADA). His physician noted that defendant's unclear scheduling and attendance requirements prevented him from providing an estimate of days off with certainty, but roughly estimated that five additional days per month were required. Plaintiff asserts he was then informed that the accommodation request was approved. Defendant disputes this, and internal correspondence showed that defendant believed the five additional days off was too much time.

Plaintiff testified that before termination, he asked for a dialogue with his manager and a representative of the disability management office. No one from management intervened, however, and plaintiff's supervisors charged him with attendance policy violations three times. Although plaintiff received a letter informing him that defendant approved him for FMLA leave, defendant terminated his employment one month later.

Plaintiff brought suit, alleging violations of the ADA and FMLA. The district court granted defendant's motion for summary judgment on the ADA claim, concluding that plaintiff did not

request a plausibly reasonable accommodation and failed to satisfy his prima facie burden. The parties then went to trial on the FMLA claim, and the jury returned a verdict in defendant's favor. Prior to the verdict, the district court declined to provide supplemental jury instructions.

Under the ADA, employers and employees are required to engage in an interactive process to determine whether a reasonable accommodation can be made. The employee must first provide notice of disability and any resulting limitations. The Tenth Circuit concluded that plaintiff met this requirement. Further, based on the record evidence, the Tenth Circuit determined that a reasonable jury could find that defendant failed to engage in the interactive process. Communication broke down when defendant refused to clarify its definition of "full-time" employment. Next, plaintiff presented three plausibly reasonable accommodations—allowing more time off work, allowing the use of paid leave days until FMLA qualification, or reassignment to an available regular-schedule position. This evidence was sufficient for the failure to accommodate claim to survive summary judgment.

Next, the Tenth Circuit held that the district court did not abuse its discretion by refusing to give supplemental jury instructions regarding FMLA and denying plaintiff's motion for a new trial. The general instructions were sufficient for the jury to determine whether defendant had shown that it would have discharged plaintiff regardless of his request for FMLA leave. The request for an instruction as to whether plaintiff was entitled to FMLA leave was therefore not central to the case.

The district court's grant of summary judgment on the ADA claim was reversed, and the decision to decline to give supplemental jury instructions on the FMLA claim was affirmed.

No. 21-1069. Cruz v. Farmers Insurance Exchange. 8/3/2022. D.Colo. Judge Moritz. *Employment Discrimination—42 USC § 1981—Summary Judgment—FRE 801(d)(2)(D) (Admission by Non-Party Opponent)—Direct versus Circumstantial Evidence.*

Plaintiff, a Hispanic man of Mexican-American heritage, brought this action against Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, MidCentury Insurance Co., and Farmers New World Life Insurance Co. (collectively, Farmers). Plaintiff sold Farmers insurance policies as an independent contractor for over 30 years. In January 2017, a local resident called plaintiff's office and asked to be removed from Farmers' mailing list. According to plaintiff, the caller was rude and disrespectful, leading plaintiff to hang up on him. The sequence repeated. After the calls, the resident contacted a Farmers executive on LinkedIn and complained about plaintiff. Farmers' management requested that the district manager, also an independent contractor, investigate and resolve the issue. Meanwhile, the resident called back a third time and spoke with plaintiff's wife and office assistant. According to the subsequent district court complaint, the resident was raging and belligerent. Plaintiff's wife hung up after the caller called her profane names and refused to calm down. Following the investigation, the district manager emailed two senior Farmers' managers, who were employees, to summarize the incident. Farmers proceeded to caution plaintiff to maintain professionalism and noted that further incidents could jeopardize plaintiff's contract.

This was not the end of the matter, however. When the senior managers learned that plaintiff's wife had sent an email to the district manager stating that she carries, and if threatened by the belligerent resident, "I will blow a hole in him the size of Uganda," they renewed the investigation. According to the complaint, following the additional investigation, the district manager called plaintiff's wife to tell her that Farmers wanted to terminate the contract and that "they don't want a brown man running around—some crazy brown man running around with a gun." Farmers subsequently terminated plaintiff's contract.

Plaintiff appealed the determination to an internal review board, which upheld the termination. He then filed suit under 42 USC § 1981, alleging that Farmers terminated the contract based on race. The district court granted Farmers' motion for summary judgment, finding that the direct evidence of discrimination (the "brown man" comment) was inadmissible hearsay. The court also held that plaintiff failed, on the basis of circumstantial evidence, to meet his burden to show that the proffered reason for terminating the contract was a pretext for discrimination. Plaintiff appealed.

At issue was whether Farmers intended to discriminate on the basis of race. A plaintiff may prove intentional discrimination under this element with either direct evidence or circumstantial evidence that satisfies the burden-shifting framework under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Plaintiff contended that the district court erred in holding that the district manager's comment was inadmissible hearsay.

Hearsay testimony that would not be admissible at trial is not sufficient to defeat a motion for summary judgment. Under FRE 801(d)(2)(D), a statement is not hearsay if it "is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Although the district manager was not an employee, the Tenth Circuit concluded that he was an agent, based on the common-law definition from the *Restatement (Third) of Agency*. Here, Farmers directed the district manager's work with respect to the investigation and reopening the investigation. Further, the statement was made within the scope of the agency relationship, because the district manager was involved in the decision-making process affecting the employment action. The Tenth Circuit therefore held that the district court abused its discretion in refusing to admit the statement under FRE 801(d)(2)(D).

The Tenth Circuit next rejected Farmers' argument, made in oral argument, that the statement did not constitute "direct evidence." Direct evidence is evidence that, if believed, proves the existence of a fact in issue without inference or presumption. The Tenth Circuit determined that the comments illustrated a discriminatory motive, and there was a nexus between the comment and the termination decision. The statement therefore raised a genuine issue of material fact as to whether the contract was terminated based on race, and the Tenth Circuit therefore declined to address

plaintiff's argument that he could also establish discrimination through circumstantial evidence.

The Tenth Circuit reversed the district court's order granting summary judgment and remanded the case for further proceedings.

No. 21-1125. Peck v. McCann. 8/9/2022. D.Colo. Judge Ebel. *Constitutionality of Colorado Children's Code Records and Information Act—First Amendment—Standing—Ripeness—Strict Scrutiny Analysis.*

Plaintiff, an attorney who represents parents and other family members in child abuse cases in Colorado juvenile courts, challenged the constitutionality of CRS § 19-1-307 (Section 307) of the Colorado Children's Code Records and Information Act. After plaintiff made statements to the newspaper *Westword* suggesting that Denver Human Services filed a case without evidence and solely on the basis of a family member's statement, the juvenile court magistrate issued an order stating that plaintiff may have disclosed information in violation of Section 307. The court took no further action against plaintiff, and she was not contacted by law enforcement. There was no evidence that the Denver district attorney or the Denver city attorney had ever prosecuted an individual for violating Section 307. However, the defendant government entities did not disavow an intent to prosecute plaintiff or anyone else under Section 307.

Section 307 generally requires that "reports of child abuse or neglect and the name and address of any child, family, or informant or any other identifying information contained in such reports . . . be confidential." This confidentiality provision is enforced by two penalty provisions. Section 307(1) provides that except as otherwise provided in statute, "reports of child abuse or neglect and the name and address of any child, family, or informant or any other identifying information contained in such reports shall be confidential," and any person who violates this provision is guilty of a class 2 petty offense. Section 307(4) provides that a "person who improperly releases or who willfully permits or encourages the release of data or information contained in the records and reports of child abuse or neglect to persons not entitled to access such information" commits a class 1 misdemeanor.

Plaintiff filed an action in the US District Court of Colorado seeking an order declaring that Section 307 is unconstitutional and enjoining its enforcement. Along with stipulated facts submitted by the parties, plaintiff filed a sworn declaration stating that although she will not disclose identifying information, she desires in the future to rely on child abuse reports to call out misconduct by government officials and employees to the public. The parties submitted cross-motions for summary judgment, and the district court agreed with plaintiff's position and enjoined enforcement of Section 307(1)(c) and (4). Defendants appealed.

To assess whether it had subject matter jurisdiction, the Tenth Circuit first determined that plaintiff lacked standing to challenge Section 307(1)(c). The Tenth Circuit noted that the plain text of Section 307(1)(a) limits its scope to identifying information only. Further, legislative history and state court case law support a narrow reading of Section 307(1). As interpreted, this section does not prohibit and penalize the disclosure of nonidentifying information, and plaintiff lacked standing.

Second, however, the Tenth Circuit held that Section 307(4) encompasses non-identifying information. The phrase "data or information contained in the records and reports of child abuse or neglect" is unambiguously broad. This provision was added in 2003 amendments to the Children's Code, and its language evinces an intent to be both broader and impose more severe penalties than Section 307(1).

Third, the Tenth Circuit held that plaintiff met the injury-in-fact requirement for standing. Standing requirements in the First Amendment context are more leniently applied. Here, plaintiff previously engaged in the type of speech affected, she stated a present desire to engage in the restricted speech, and there was an objectively justified fear of real consequences. As to the latter requirement, plaintiff had previously been scolded by a judge, the Colorado Department of Human Services certified to the federal government that it was enforcing Section 307 to obtain federal funding, and defendants did not disavow an intent to ever prosecute under Section 307.

Fourth, the Tenth Circuit concluded that the case was ripe. Ripeness issues focus on whether the harm asserted has matured sufficiently to warrant judicial intervention. The two central issues are the fitness of the issue for judicial resolution and hardship to the parties of withholding judicial consideration. For the reasons described in its standing analysis, the Tenth Circuit determined that there was a credible threat of prosecution, which imposed a hardship on plaintiff.

Fifth, the Tenth Circuit held that Section 307(4) failed the strict scrutiny test. The Supreme Court has held that facially content-based laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. Section 307(4) is a content-based restriction on speech that targets and prohibits speech based on its content—information from child abuse reports. While the state has a compelling interest in protecting child abuse information, the Tenth Circuit concluded that Section 307(4) is not narrowly tailored in that it reaches both identifying and non-identifying information.

Finally, the Tenth Circuit ordered limited remand to allow for the district court to determine whether Section 307(4) is severable from the rest of the statute.

The Tenth Circuit affirmed in part, striking down Section 307(4) as unconstitutional; reversed in part, finding that plaintiff did not state a valid challenge to Section 307(1); and remanded the case for the district court to assess whether Section 307(4) is severable.

No. 21-2058. United States v. Johnson. 8/9/2022. D.N.M. Judge Moritz. *Methamphetamine Possession with Intent to Distribute—Fourth Amendment—Motion to Suppress—Probable Cause for Warrantless Arrest—Illegal Search—Plain View Exception.*

Defendant was traveling on a Greyhound bus that stopped in Albuquerque for service. The passengers were required to disembark during the service. DEA agent Perry boarded the bus. As he was questioning other passengers, the agent observed defendant pick up a backpack and place it underneath the window seat.

Agent Perry proceeded to interview defendant and asked him whether he was traveling with luggage. Defendant denied having any luggage. He then consented to a pat-down search. When asked about the backpack under the seat, defendant confirmed it was his. Although it was later disputed, the district court concluded that defendant then gave the agent permission to search the bag for contraband.

Defendant proceeded to open the backpack and "self-search" it while attempting to block Perry's view. While defendant was self-searching the bag, Perry observed an oblong-shaped large bundle protruding from some clothing. Based on his experience, Perry believed the bundle contained illegal narcotics. Defendant did not immediately respond when asked what was inside the bundle. Perry then promptly arrested defendant. After defendant departed the bus, Perry reached inside the backpack and felt the bundle, which confirmed his suspicion. He and another agent then took the backpack to the DEA office, where without a warrant, Perry searched the backpack. This search uncovered two bundles, including one that tested positive for methamphetamine.

The government charged defendant with knowingly and intentionally possessing with intent to distribute over 500 grams of methamphetamine. Defendant moved to suppress. Following a suppression hearing, the court issued a short, two-page order denying the motion. Following a motion for reconsideration, the court issued a more detailed order, explaining that Perry had probable cause for the arrest and that the warrantless search was valid because it was a "foregone conclusion" that the backpack contained contraband. Defendant entered a conditional guilty plea, reserving his right to appeal the denial of his motion to suppress. He was sentenced to 10 years in prison and 5 years of supervised release. Defendant appealed.

The Tenth Circuit first held that the district court did not abuse its discretion in concluding that agent Perry had probable cause to arrest defendant. Based on the totality of the facts, including (1) defendant's lie whether the backpack was his, (2) defendant's self-search while attempting to obstruct Perry's view of the backpack, and (3) Perry's visual identification of the clothing bundle, the Tenth Circuit concluded that Perry had probable cause to arrest defendant. Likewise relevant but accorded less weight in the analysis were the facts that (1) defendant placed the backpack under the seat next to him, (2) defendant said he lacked identification, and (3) defendant failed to answer Perry's final question.

Next, the Tenth Circuit addressed defendant's contention that the resulting bus search violated the Fourth Amendment. The plain-view exception provides an exception to the warrant requirement. It applies if (1) the officer was lawfully in a position from which the object seized was in plain view, (2) the object's incriminating character was immediately apparent, and (3) the officer had a lawful right of access to the object. Initially, the Tenth Circuit rejected the government's argument that Perry's conduct on the bus did not amount to a search at all. An officer violates a passenger's reasonable expectation of privacy when the officer touches the luggage in a manner that exceeds how a fellow passenger or transportation employee would. The Tenth Circuit next concluded that the incriminating character of the backpack and bundle was immediately apparent. However, the Tenth Circuit held that the district court erred in concluding that the contents of the bundle was a foregone conclusion. An officer may conduct a warrantless search of a container in plain view only if its contents are a foregone conclusion. The cases cited by the district court were distinguishable, and the facts of this case were more akin to cases in which the Tenth Circuit held that contents could not be searched without a warrant.

For the same reasons, the Tenth Circuit held that the warrantless search of the backpack and bundle at the DEA office violated the Fourth Amendment. Because the search on the bus was illegal, Perry could not rely on those new, unlawfully obtained facts to justify the later search at the DEA office. Moreover, the additional evidence obtained on the bus did not raise Perry's probable cause to the "virtual certainty" required for the exception to apply.

Lastly, the Tenth Circuit rejected the government's argument that it should be permitted to assert new grounds to support the evidence's admission on remand.

The Tenth Circuit therefore affirmed the ruling that there was probable cause for the arrest and seizure of the backpack and bundle. Due to the warrantless search of the container in violation of the Fourth Amendment, the district court's denial of the suppression motion was reversed, defendant's conviction and sentence were vacated, and the matter was remanded.

No. 21-2007. United States v. Woody. 8/19/2022. D.N.M. Judge Ebel. *Aggravated Sexual Abuse—Fourth Amendment—Consensual vs. Investigative Detention—Fifth Amendment Right Against Self-Incrimination—FRE 803(4) Hearsay Exception—Substantive Unreasonableness Challenge to Sentence.*

In 2016, Jane Doe 1, an 8-year-old member of the Navajo Nation, told her father that defendant, her stepfather, had been sexually abusing her. Her father brought her to a hospital, where Jane Doe 1 told the attending ER physician that defendant had been molesting her, with the last incident occurring about 30 days before. The physician reported the abuse to Navajo Nation Social Services, which referred the case to the FBI.

In April 2018, two FBI special agents located defendant, who was repairing a car in a driveway. They suggested speaking somewhere with more privacy and moved into defendant's niece's mobile home. Defendant initially denied the allegations, but after one of the agents told him that if the abuse was a "one time thing" it would be "no big deal," he said he might have done it when he was drunk. Defendant then admitted that he once in fact molested Jane Doe 1 but denied other instances against her or other victims.

Following this interview, the FBI agent spoke with Jane Doe 2, whose mother had been married to defendant for about 10 years until a separation in 2006. Jane Doe 2 reported multiple instances of abuse by defendant. In October 2018, defendant agreed to meet with the agents at a state police station for a polygraph exam and interview. The agent told defendant he was free to leave at any time. He also provided a *Miranda* form to defendant, and defendant said

he understood his rights. Defendant agreed to answer questions without an attorney present and signed the advice-of-rights form. Before beginning the polygraph, upon questioning, defendant admitted to abusing Jane Doe 2 and to additional abuse of Jane Doe 1.

A grand jury charged defendant with aggravated sexual abuse of Jane Doe 1 and two counts of sexual contact with Jane Doe 2. Defendant filed motions to suppress the statements he made in the interviews. The district court denied the motions. The court also determined that the ER physician's statements were admissible under the hearsay exception for statements made for the purpose of medical diagnosis. The jury convicted defendant on all 3 counts. A Presentence Investigation Report (PSR) recommended a life sentence. The district court ultimately agreed and sentenced defendant to life imprisonment on each count, to run concurrently. Defendant appealed.

The Tenth Circuit first held that defendant's Fourth Amendment rights were not violated through the April 2018 encounter because the encounter was consensual. Based on a list of factors and the totality of the circumstances, the Tenth Circuit concluded that defendant did not show that a reasonable person in defendant's position would have felt he was not free to decline the officers' requests or otherwise terminate the encounter. Further, the FBI agent's lie about one instance being "no big deal" went to the consequences of a confession and did not amount to coercion violative of the Fourth Amendment.

Second, the Tenth Circuit concluded that defendant's Fifth Amendment rights were not violated when he was interrogated in October 2018 without an attorney present. Even if he was in custody, defendant plainly waived his *Miranda* rights before making the incriminating statements.

Third, while the ER physician's testimony that Jane Doe 1 told him defendant abused her was hearsay, the statement was admissible under the FRE 803(4) exception for a statement made for medical diagnosis or treatment. Under precedent, a sexual abuser's identity is admissible where the abuser has such an intimate relationship with the victim that the abuser's identity becomes reasonably pertinent to the victim's proper treatment. Here, the statement was pertinent because it was necessary to determine if Jane Doe 1 was in a safe environment.

Fourth, the Tenth Circuit rejected defendant's contention that the life sentence was substantively unreasonable in light of the factors in 18 USC § 3553(a). The sentence was within the guideline range calculated by the PSR. While the district court identified 22 factors that put downward pressure on the sentence, it identified 53 factors that put upward pressure on the sentence. Certain mitigating facts did not demonstrate that the district court's thorough analysis of the relevant factors was an abuse of discretion.

The convictions and sentences were affirmed. CL

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.

Summaries of Published Opinions

July 7, 2022

2022 COA 71. No. 19CA1364. People v. Archer. *Child Abuse Resulting in Death—Sufficiency of Evidence—Expert Scientific Evidence—Co-Conspirator Statements.*

Defendant was part of an itinerant religious group comprising five adults and four children traveling in two vehicles. Ceus and defendant are the biological parents of two of the children. The other two children (the victims) were the daughters of another group member. Ceus was the group's spiritual head, but she made decisions with defendant. The group met Blair, who owned undeveloped land and invited the group to stay there. The victims were banished to a vehicle in an isolated part of the property to work on their spiritual development and died after being deprived of food, water, and other assistance. Defendant and Blair then covered the car with a tarp to hide the bodies. By the time authorities learned what had happened, the victims' bodies were so badly decomposed that the medical examiner was unable to determine the cause of death. However, the medical examiner testified that the deaths were likely due to starvation, dehydration, hypothermia, or some combination of these factors. Defendant was convicted of two counts of child abuse resulting in death and one count of accessory to a crime.

On appeal, defendant argued that the evidence presented at trial was insufficient to sustain his convictions for child abuse resulting in death because (1) he did not take actions that injured the victims and (2) he had no special relationship with the victims requiring him to act to save them. A child abuse conviction requires that the defendant knowingly or recklessly caused serious bodily injury to a child. Here, there was sufficient evidence that defendant engaged in affirmative acts of mistreatment. Therefore, his relationship with the victims was irrelevant. Further, the prosecution presented sufficient evidence to establish that defendant's actions were knowing or reckless because he was aware that the victims were confined to a car during the summer and then abandoned there without food or water, but he did nothing to help them. Accordingly, the evidence presented at trial was sufficient to support the convictions.

Defendant also argued that the trial court abused its discretion by admitting, and then declining to strike, expert scientific evidence on hair follicle analysis. CRE 702 favors admissibility of scientific evidence if it is reliable and relevant. Here, the trial court held a two-day hearing pursuant to *People v. Shreck*, 22 P.3d 68, 77, 79 (Colo. 2001), on the admissibility of the hair follicle analysis, which purported to show that the victims died of starvation. The trial court's decision was well within its broad discretion. Defendant's further argument that the expert testimony should have been excluded under CRE 403 because it was unreliable and therefore prejudicial was similarly rejected because the trial court's reliability determination was not an abuse of its broad discretion.

Lastly, defendant contended that the trial court erred in relying on CRE 801(d)(2)(E) to admit out of court statements made by Ceus as a co-conspirator. However, the trial evidence and the prosecutor's offer of proof supported the trial court's finding of a conspiracy, and even if the rulings were incorrect, defendant did not challenge the court's alternative grounds for admitting each statement.

The judgment of conviction was affirmed.

2022 COA 72. No. 21CA1768. People in the Interest of M.W. *Dependency and Neglect—Remote Testimony—Sex Offender Management Board Evaluation—Appealable Orders.*

The Mesa County Department of Human Services (Department) filed a dependency and neglect proceeding based on allegations that father had sexually assaulted his daughter M.W., that she lacked proper parental care, and that her environment was injurious to her health and welfare. An adjudicatory hearing was held before a jury. Father filed a motion for permission to call two out-of-state witnesses to testify via Webex. The juvenile court denied the motion. Based on the jury verdict and mother's admission that M.W. was dependent or neglected, the court entered an order adjudicating M.W. dependent or neglected as to both parents. Before the dispositional hearing, the Department filed a treatment plan requiring father to complete a Sex Offender Management Board (SOMB) evaluation. Father objected, arguing that it was not reasonably calculated to render him a fit parent and violated his constitutional rights against self-incrimination and to be free from criminal sanctions absent a criminal conviction. The juvenile court rejected father's argument and adopted the treatment plan.

On appeal, father argued that it was reversible error to exclude the remote testimony, citing administrative orders encouraging trial courts to authorize remote appearances during the pandemic. However, a juvenile court has discretion to consider remote testimony under CRCP 43. Here, the court did not abuse its discretion because the proposed testimony was only marginally relevant, father failed to show that testimony concerning family dynamics was not available from other witnesses, and technology issues presented potential problems.

Father also argued that the juvenile court erred by adopting a treatment plan that required him to complete an SOMB psychosexual evaluation and comply with the resulting recommendations. He maintained that by doing so, the juvenile court imposed a criminal requirement without him having been convicted of a sex offense. As an initial matter, the Court of Appeals held that a parent may appeal the content of the initial dispositional order, including treatment plan provisions, simultaneously with an appeal of an adjudicatory order.

The Court then turned to the merits, noting that dependency and neglect proceedings are not criminal in nature and are not intended to punish parents, while SOMB evaluations and treatment protocols are designed for convicted sex offenders and are built around the premise of guilt. The treatment protocols also create significant dilemmas for parents who wish to exercise their constitutional right to remain silent with respect to matters that may incriminate them. Accordingly, the use of a psychosexual evaluation and treatment under SOMB standards does not fulfil the basic and essential purpose of the treatment plan, which is to address the issues that gave rise to the adjudication so parents and their children may be safely reunited. Therefore, a parent may not be required over their objection to complete an SOMB psychosexual evaluation as a condition of their treatment plan if the parent has not been convicted of a qualifying sexual offense. Accordingly, the juvenile court erred.

The adjudicatory order was affirmed. The SOMB evaluation and compliance portion of the treatment plan was vacated and the case was remanded for modification of the treatment plan.

July 14, 2022

2022 COA 73. No. 20CA0629. People v. Crabtree. *DUI—Prior Convictions—Penalties for Traffic Offenses Involving Drugs and Alcohol.*

Defendant was arrested and charged with DUI (fourth or subsequent offense). He waived his right to counsel after the trial court gave him an advisement pursuant to *People v. Arguello*, 772 P.2d 87, 92 (Colo. 1989), and he proceeded to trial pro se. Defendant was convicted as charged. In a subsequent hearing, the court found by a preponderance of the evidence that he had four prior alcohol-related driving convictions, so it elevated the misdemeanor DUI conviction to a class 4 felony.

On appeal, defendant argued that his conviction must be reversed because the totality of the circumstances indicates he was unable to knowingly and intelligently waive his right to counsel. Here, while many of defendant's statements during trial seem nonsensical, they do not suggest he was unable to understand the proceedings. Rather, defendant's statements track the beliefs of the "sovereign citizenship" movement to which defendant adheres. Further, other statements defendant made during trial show that he understood the proceedings. In addition, defendant received a proper advisement. Accordingly, defendant's decision was knowing and voluntary, his waiver was valid, and the trial court did not err.

Defendant also argued that the trial court plainly erred by not requiring the People to prove the fact of his prior alcohol-related driving convictions to the jury beyond a reasonable doubt. Under controlling authority when defendant was tried, in a felony DUI prosecution the fact of a defendant's prior convictions was considered a sentence enhancer that didn't have to be submitted to a jury or proved beyond a reasonable doubt. Following defendant's trial, the Colorado Supreme Court decided *Linnebur v. People*, 2020 CO 79M, which clarified that, in a prosecution for felony DUI, the fact of a defendant's prior alcohol-related convictions must be proved to the jury beyond a reasonable doubt. Given *Linnebur*'s holding, it is clear the trial court erred by not submitting the issue to the jury. Further, while the error was not obvious at the time of trial, it became obvious during the appeal. Accordingly, defendant can benefit from the law change on appeal.

The judgment was affirmed in part and reversed in part, and the case was remanded for further proceedings.

2022 COA 74. No. 20CA1669. In re Marriage of Wenciker and Bolen. *Post-Dissolution of Marriage Proceeding—Motion to Modify—Emergency Motion—Endangerment.*

Father moved post-dissolution of marriage to modify parenting time and to change decision-making from joint decision-making to sole decision-making by him. His motion largely rested on allegations of endangerment that he had asserted and failed to prove in connection with an emergency motion to restrict parenting time that the court previously denied. Following a two-day hearing, the court granted the motion to modify.

On appeal, mother argued that the court's denial of father's emergency motion to restrict parenting time barred the court from relying on the same facts to grant the motion to modify. As an initial matter, the Court of Appeals determined that the parties' older child turned 18 while this appeal was pending, so mother's appeal as to the older child is moot. Turning to the merits, the Court found that the plain language of the relevant statutes doesn't bar a court from considering allegations contained in a previously denied emergency motion to restrict parenting time. Thus, proven allegations of endangerment that are the same as those raised in a failed emergency motion to restrict parenting time can support a subsequent motion to substantially change parenting time or modify decision-making. Therefore, the court did not err.

Mother also argued that even if father could rely on allegations predating the denial of his emergency motion to restrict parenting time, the court's findings aren't supported by the record. The trial court has broad discretion when modifying parental responsibilities. Here, the court's findings that mother and stepfather physically and emotionally abused the children and that the children were endangered in their care were supported by the record, including testimony from a child and family investigator and the children's therapist.

The appeal was dismissed as to the parties' older child. The order was affirmed as it relates to the younger child.

2022 COA 75. No. 21CA0206. Matter of Brockman Disability Trust. *Colorado Uniform Trust Code—Disability Trusts—Trust Modification or Termination.*

Brockman's wife was gravely injured in a car accident. He petitioned to establish the Mendy Brockman Disability Trust (Trust), with himself as trustee, so his wife could remain financially eligible for Medicaid. The Colorado Department of Health Care Policy and Financing (Department) determined that the Trust conformed to federal and state requirements for disability trusts, and the court approved the Trust. Based on a subsequent review of Mrs. Brockman's financial resources, the El Paso County Department of Human Services (El Paso Department) determined that she no longer qualified for Medicaid because she had resources outside of the Trust that exceeded the $2,000

Medicaid resource limit. The Department then demanded that the Trust be terminated and that it be reimbursed $422,486.60 for medical assistance paid on behalf of Mrs. Brockman.

Mrs. Brockman did not appeal the El Paso Department's determination. Instead, she sought declaratory and injunctive relief in the US District Court for the District of Colorado. The federal court dismissed the case for lack of subject matter jurisdiction after concluding that interpretation of the Trust was a matter of state law and there was no statutory basis for federal court jurisdiction. Mrs. Brockman did not appeal the dismissal. Following the dismissal, the Department filed a petition to terminate the Trust in the El Paso County District Court. The court granted the petition.

On appeal, Brockman argued that the federal court's substantive analysis in its order dismissing the case for lack of subject matter jurisdiction, which stated that the Trust had not terminated, required the district court and Court of Appeals to give the order preclusive effect. However, a court that determines it lacks subject matter jurisdiction has no authority to address or opine on matters beyond the question of subject matter jurisdiction. Accordingly, the federal court's analysis on the merits is legally void and is not entitled to preclusive effect here.

On the merits, Brockman argued that the district court erred by terminating the Trust because Mrs. Brockman did not consent to termination under CRS § 15-5-411(2). Here, the plain language of the Trust requires termination upon Mrs. Brockman's death or her ineligibility for Medicaid in Colorado. Mrs. Brockman did not appeal or challenge the Department's determination that she was financially ineligible for Medicaid benefits in Colorado. Therefore, the Trust terminated by its own terms, and CRS § 15-5-411(2) was not applicable.

Brockman further argued that the district court erred by failing to apply CRS § 15-5-411(5) and not requiring a factual determination that Mrs. Brockman's interests will be adequately protected before permitting the Trust's termination. This section is inapplicable, where, as here, a trust terminates by its terms under CRS § 15-5-410(1)(a).

Brockman also contended that the district court erred by terminating the Trust because Department of Health Care Policy and Financing Regulation 8.100.7.E.6.b.i.e, 10 Code Colo. Regs. 2505-10, is inconsistent with federal and state law. However, this regulation is not inconsistent with federal law.

Brockman further contended that the Colorado regulation is inconsistent with CRS § 15-5-411(2). This section specifically excepts disability trusts by its express terms, so the Colorado regulation, which mandates when disability trusts terminate, is not inconsistent with CRS § 15-5-411(2).

Lastly, Brockman argued that the district court erred in granting the Department's petition to terminate the Trust after he filed a motion to dismiss under CRCP 12(b)(5) and before he filed an answer to the Department's petition. Even if the district court procedurally erred, it properly terminated the Trust, so any error did not affect the substantial rights of the parties.

The order was affirmed.

2022 COA 76. No. 21CA0223. Nation SLP, LLC v. Bruner. *Forum Non Conveniens—Final Judgment on the Merits—Issue Preclusion.*

This action arose from a dispute between investors and businesses created to develop oil and gas properties in Australia. The parties were previously involved in a case filed in the US District Court for the District of Colorado. The federal case was dismissed on forum non conveniens grounds in light of pending Australian litigation, defendants' consent to jurisdiction in Australia, and the fact that Australian law governed most of the claims. No appeal was taken from the dismissal of the federal action, and the Australian case was later dismissed. In the present action, plaintiff alleged that defendants had fraudulently concealed their plans to exclude plaintiff from earnings contracts. Defendants moved to dismiss, arguing that the federal court's dismissal of the prior action on forum non conveniens grounds barred the present suit under res judicata. The district court dismissed the case.

On appeal, plaintiff argued that the district court erred by dismissing its case based on the federal court's dismissal of a variation of the same case on forum non conveniens grounds. Dismissal of an action by a court in another jurisdiction on forum non conveniens grounds is not a judgment on the merit. Thus, it has no preclusive effect on a similar action in a Colorado trial court, and the district court erred.

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

2022 COA 77. No. 21CA0318. Nakauchi v. Cowart. *Due Process—Child Support—Income Withholding Orders.*

Nakauchi was required to pay monthly child support directly to J.H. pursuant to a child support order. J.H. inaccurately reported to Jefferson County Child Support Services (County) that Nakauchi had not made her monthly payment. Subsequently, without notice to Nakauchi, the County issued an income withholding order (IWO) to Nakauchi's employer directing the employer to withhold her child support obligation from her wages and remit the funds to the Family Support Registry (FSR) to be paid to J.H. The employer withheld money from Nakauchi's wages per the County's directive. Nakauchi contacted the County and provided documents proving that she had not missed a payment and made a payment to the FSR for 12 months' worth of child support. The County rescinded the IWO shortly thereafter.

Nakauchi then sued, in their official capacities, two county employees and two state employees who were involved in administering child support services, alleging that (1) they violated her due process rights under 42 USC § 1983 by failing to give her advance notice of the IWO and an opportunity to be heard, and (2) CRS § 14-14-111.5 is unconstitutional on its face because it does not require notice before an income assignment is issued. She sought declaratory and injunctive relief but not damages. Ultimately, the court ruled that (1) the County deprived Nakauchi of due process, but the claim was not actionable under § 1983, and (2) CRS § 14-14-111.5 is constitutional. The court issued a statewide injunction requiring that in direct pay cases, child support enforcement agencies must provide notice to the obligor when they activate a forward-looking IWO.

Following the trial court's judgment, the State issued a memo notifying all local child support offices to begin providing noncustodial parents in direct pay cases with concurrent notice when issuing a forward-looking IWO. The County began affording direct pay obligors the 14-day notice that Nakauchi sought in her complaint for forward-looking IWOs. Defendants then filed a joint motion for summary judgment, arguing that Nakauchi's claims had become moot while the litigation was pending. The court denied the motion.

On appeal, defendants argued that the trial court erred in its mootness analysis and the case remains moot on appeal. A case is moot when a judgment would have no practical legal effect on the existing controversy. But a defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice. Here, although the County effectively granted Nakauchi the relief she sought, it did so voluntarily, so the circumstances of this case fit squarely into the voluntary cessation exception to the mootness doctrine. Further, defendants admitted in their opening answer brief that, after the trial court's judgment, the County reneged on its policy change and has since dispensed with the advance notice and implemented a policy of providing only concurrent notice for direct pay obligors in forward-looking IWO cases. Thus, the trial court correctly concluded that Nakauchi's claims were not moot at the time of trial, and the case is not moot on appeal.

Turning to the merits, the Court of Appeals held that the deprivation of Nakauchi's wages implicated her due process rights, and defendants' no notice policy did not comport with due process. Further, forward-looking IWOs must be preceded by notice and an opportunity to contest the IWO on a limited basis (e.g., that there is an error in the obligor's identity or in the amount of support due). Accordingly, the court's order of injunctive relief, which required only concurrent notice, did not sufficiently remedy the IWO's procedural infirmities.

Nakauchi contended that the trial court erred by finding that the County defendants cannot be held liable for the due process violation under § 1983. However, the record supports the trial court's findings that the County defendants were merely carrying out state policy not to provide notice to direct pay obligors.

The rulings that Nakauchi's due process rights were violated and that the County defendants cannot be held liable under § 1983 were affirmed. The portion of the judgment determining that due process requires affording direct pay obligors only concurrent notice was reversed. The case was remanded for the court to modify its injunction to mandate advance notice and an opportunity to challenge the IWO.

2022 COA 78. No. 21CA0666. Leonard v. Interquest. *Colorado Open Records Act—Documents Evidencing Receipt or Expenditure of Public Funds—Care, Custody, or Control of Documents.*

Interquest North Business Improvement District (District) is a public entity that finances, operates, and maintains public improvements for properties within its boundaries. The District has contracted with Nor'wood Development Group and its related entity InterQuest Marketplace LLC (collectively, developer) to provide public improvements and has paid the developer approximately $15 million in public funds. Leonard and the Deepwater Point Co. (Leonard) requested certain documents under the Colorado Open Records Act (CORA) from the District. Part of Leonard's CORA request sought the production of "[c]ontracts with those who performed the construction and consulting work for the installation of the public improvements paid for by the District" and "[i]nvoices and payments made to Nor'wood and Interquest Marketplace, LLC, or any related entity of either, for work or services performed on behalf of the District." The District claimed that it produced all responsive documents in its possession, but it did not produce all the requested documents, so Leonard sued. The district court ordered production of some of the documents but denied the request for documents that were not in the District's possession.

On appeal, Leonard contended that the district court misconstrued CORA by denying the request for construction contracts and payment records on the ground that the documents were not in the District's possession. When a public entity has a contractual right to access documents from a third party, that entity has directed the third party to have care, custody, or control of the documents. Here, the District had the contractual right to condition payments to the Developer on receipt of the construction contracts and payment records. Accordingly, the documents are used for a public purpose and are therefore public records within the meaning of CORA, and the public entity must produce those documents upon a proper CORA request. Accordingly, the district court erred.

The judgment denying access to the construction contracts and payment records was reversed. The case was remanded for further proceedings, including proceedings to determine whether any statutory redactions to the records are necessary and to determine the amount of additional attorney fees to which Leonard is entitled.

July 21, 2022

2022 COA 79. No. 21CA0439. Stickle v. County of Jefferson. *Premises Liability—Colorado Governmental Immunity Act—Partial Waiver—Dangerous Condition of a Public Building.*

Plaintiff parked her car in the parking structure at the Jefferson County (County) Courts and Administration Building. She walked through the parking structure where the walkway is separated from the parking surface by a raised curb requiring a step down. The walkway and the parking surface were the same shade of gray except for the edge of the curb, which was painted yellow. Plaintiff did not see the step down from the walkway to the parking surface, and she fell and fractured her arm. She brought a premises liability claim against the County alleging that her fall resulted from a dangerous condition caused by negligent maintenance. The County moved to dismiss for lack of subject matter jurisdiction under CRCP 12(b)(1), arguing that plaintiff could not show that the County had waived its immunity under the Colorado Governmental Immunity Act's (CGIA) waiver provision for a dangerous condition of a public building. The trial court denied the motion.

On appeal, the County argued the trial court erred in concluding that the parking structure was a public "building" under the CGIA.

The CGIA provides public entities sovereign immunity from tort injuries, but sovereign immunity is waived in an action for injuries resulting from a dangerous condition of a public building. Here, the parking structure was constructed and designed to be permanent, and the International Building Code (IBC), adopted by both the County and the City of Golden (where the parking structure sits), includes parking structures in its definition of "building." Therefore, based on the CGIA's plain language, the parking structure is a public building. Further, the parking structure falls within the sovereign immunity waiver provision of CRS § 24-10-106(1)(c). Accordingly, the trial court did not err.

The County also argued that even if the parking structure were a public building, the County was immune from plaintiff's claim because her injury resulted from inadequate design rather than from a dangerous condition caused by negligent maintenance. The County is responsible for the parking structure's maintenance, which included a resurfacing project involving a new topping to the walkway, curb, and parking surface to prevent corrosive substances from seeping into the concrete. This resulted in a finish to both the walkway and the drive surface with the same color. The new topping material helped preserve the facility from decline or failure, which falls within the CGIA's definition of maintenance. Accordingly, the dangerous condition resulted, at least in part, from maintenance.

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

2022 COA 80. No. 21CA1006. In re Marriage of Thorburn. *Post-Dissolution of Marriage Proceeding—Motion to Restrict Parenting Time—Emergency Motion—Endangerment—Imminent—New Evidence—Jurisdiction.*

The parties' dissolution of marriage decree incorporated a parenting plan for their son J.C.T., under which he would live primarily with mother. The parties also agreed to a step-up parenting time schedule for father, beginning with an overnight every week with the goal of equal time in nine months. Mother moved to restrict father's parenting time under CRS § 14-10-129(1)(b)(I) and (4), alleging that during father's most recent parenting time, J.C.T. suffered a gash on his forehead requiring eight stitches. Following an emergency hearing, the magistrate issued an oral ruling and directed mother's attorney to draft a proposed order. Both parties submitted proposed orders, and the magistrate signed father's order. Mother filed a motion to set aside the order, asking the magistrate to reconsider the selection of father's proposed order. Father petitioned for district court review. The district court adopted the magistrate's decision and denied mother's motion to the extent that it sought review of that decision but remanded the case to the magistrate with directions to resolve mother's motion as it related to the form of the written order. Father then filed a notice of appeal, and given the pending appeal, the magistrate on remand declined to entertain mother's motion to set aside based on lack of jurisdiction.

On appeal, father argued that the district court order should be vacated for lack of subject matter jurisdiction because the parties never consented to the magistrate's jurisdiction. However, the Colorado Constitution vests district courts with general subject matter jurisdiction in civil cases, and domestic relations cases are civil in nature. Accordingly, the magistrate and district court had subject matter jurisdiction to hear the action, including mother's motion to restrict parenting time. Further, CRM 6(b)(1)(B) gives magistrates the power to preside over all motions to modify parental responsibilities without the parties' consent, so regardless of the parties' consent, the magistrate had authority to preside over mother's motion.

Mother contended that the district court's order is not final and appealable because her motion to set aside the magistrate's approval of father's proposed order remains pending before the magistrate on remand. A magistrate's decision that fully resolves an issue or claim is final under CRM 7(a)(3). A party may obtain review of a magistrate's final decision in a proceeding where consent was not necessary by petitioning the district court for review under CRM 7(a)(5). Once a district court enters its order on review, a party may appeal to the Court of Appeals. Here, father invoked district court review of the magistrate's decision to continue his supervised parenting time. After adopting the decision, the district court remanded the case to the magistrate to resolve any dispute as to the written order's form. The district court could not, under CRM 7, remand the issue to the magistrate, who would have lacked authority to act. In addition, mother described her motion as one for reconsideration, which falls under either CRCP 59 or 60(b). But, a magistrate cannot rule on a motion to reconsider under either of these rules, so mother's reconsideration motion was effectively denied. Thus, the district court's order and the underlying magistrate's decision are final and appealable, and the Court has jurisdiction to hear the appeal.

On the merits, father contended that the magistrate used an inaccurate definition of "imminent" and thus applied an improper legal standard when deciding mother's motion to restrict parenting time. Mother argued that even if "imminent" was wrongly defined, the magistrate properly applied the endangerment standard when continuing father's supervised parenting time. A CRS § 14-10-129(4) motion requires the movant to allege, but not prove, at the emergency hearing that the child is in imminent danger. This statute is a means of triggering a hearing within 14 days and an immediate parenting time restriction pending that hearing. Once a hearing is held on the motion, the court must apply CRS § 14-10-129(1)(b)(I), the "endangerment standard," which requires a finding that parenting time would endanger the child's physical health or significantly impair the child's emotional development, to continue any parenting time restriction. Here, the magistrate deemed mother's allegations of imminent danger to be sufficiently pleaded, set an emergency hearing within 14 days, and imposed a supervised parenting time requirement pending the hearing. Following the emergency hearing, the magistrate made the necessary findings under § 14-10-129(1)(b)(I), supported by the record, that father endangered J.C.T. Thus, the magistrate properly continued father's parenting time restriction while allowing father to work on safer parenting skills.

Father further argued that the district court erred as a matter of law by not reopening the

proceeding under CRM 7(a)(8) based on new evidence—a child welfare referral assessment from the Jefferson County Division of Children, Youth and Families, which concluded that the referral related to father was unfounded. However, the district court here was reviewing a magistrate's decision restricting parenting time and was not required, as a matter of law, to defer to an independent child welfare referral assessment in conducting that review.

The order was affirmed. The case was remanded for consideration of mother's request for appellate attorney fees.

2022 COA 81. No. 21CA1411. People in the Interest of C.C. *Dependency and Neglect—Adjudicatory Jury Trial—Conversion of Jury Trial to Bench Trial—Waiver of Right to Jury Trial.*

The Denver Human Services Department filed a petition in dependency and neglect regarding the children, and the juvenile court appointed a guardian ad litem (GAL) for mother. Mother denied the allegations and requested a jury trial at the adjudicatory phase of the proceedings, which was granted. However, after mother failed to arrive on time for the adjudicatory jury trial, the court dismissed the jurors and converted the jury trial to a bench trial. After the bench trial, the court adjudicated the children dependent and neglected.

On appeal, mother argued that the juvenile court erred by converting the jury trial to a bench trial because she did not waive her statutory right to a jury trial. Parents have a statutory right to demand a jury trial at the adjudicatory hearing phase of dependency and neglect cases, and a waiver of that right must be voluntary. Before a court determines whether a waiver has occurred, it should inquire about the parent's whereabouts and the circumstances of their absence before converting a jury trial to a bench trial, especially when the parent's counsel and GAL arrive on time and are ready to proceed. Here, mother's counsel and GAL were on time for the trial, but the court did not ask either of them why mother was running late or whether they wanted to proceed in her absence. Instead, the court waited 10 minutes after the scheduled start time and then released the jurors. Under these circumstances, mother's failure to appear for trial on time did not constitute a waiver of her statutory right to a jury trial. Therefore, the court erred, and the ruling was not harmless.

The judgment was reversed and the case was remanded for a new adjudicatory trial by jury.

July 28, 2022

2022 COA 82. No. 18CA2319. People v. Lancaster. *Bribery—Official Proceedings—Sexual Assault—Prior Act Evidence.*

Defendant and J.C. lived in the same apartment complex. They met when defendant asked then 13-year-old J.C. to shovel snow from around his car. Thereafter, J.C. helped defendant with household chores every week or so in exchange for money. J.C. began using drugs and alcohol at age 14. He frequented defendant's home more often to make money to support these habits, and he attended parties there. J.C. began drinking alcohol with defendant, and the frequency of their drinking together and the amount of alcohol they drank increased. Defendant also began initiating sexual encounters with J.C. that involved masturbation and oral sex. On more than one occasion, defendant gave J.C. money after the sexual encounter and told him not to tell anyone about it. During one encounter, J.C. agreed to have anal sex with defendant, but he went home when the pain became too great. After he went into alcohol and drug treatment, J.C. stopped seeing defendant. Six months into his sobriety, J.C. told his counselor about the sexual abuse, and he subsequently reported the abuse to the police. A jury convicted defendant of sexual assault on a child under 15, unlawful sexual contact of a child, sexual assault (victim incapable of appraising the nature of his conduct), contributing to the delinquency of a minor, and two counts of bribery.

On appeal, defendant argued that there was insufficient evidence to show that J.C. was incapable of appraising the nature of his conduct when he agreed to engage in anal sex with defendant, so his conviction of sexual assault (victim incapable of appraising the nature of his conduct) was unsupported. However, the prosecution presented sufficient evidence that J.C. was incapable of appraising the nature of his conduct because, among other things, J.C. was 15 at the time of the sexual assault, he weighed approximately 95 to 100 pounds, he drank 10 to 12 mixed drinks throughout the day, and he testified that he could not stand up, walk a straight line, or see straight.

Defendant also argued that there was insufficient evidence to support his bribery convictions because he gave J.C. money in exchange for his silence before any official proceedings were initiated. Whether a defendant may be convicted of bribery does not depend on whether an "official proceeding" has been initiated; it depends on whether the defendant believes the witness or victim is or will be participating in pending or future official proceedings. Here, defendant gave J.C. money after sexually assaulting him and asked him not to tell anyone or defendant would go to jail. A reasonable jury could conclude that defendant believed that J.C. would be called to testify in a future criminal proceeding and that he gave J.C. the money to influence his future testimony. Therefore, the evidence was sufficient to support the bribery convictions.

Lastly, defendant contended that the trial court erroneously admitted prior act evidence under CRE 404(b) and CRS § 16-10- 301, because that evidence was too dissimilar and remote in time to be logically relevant to this case, its prejudicial effect substantially outweighed its minimal probative value, and it was insufficient to establish a pattern as alleged by the prosecution. In sexual assault prosecutions, other act evidence is admissible for any purpose other than propensity. Before admitting evidence under CRE 404(b) and CRS § 16-10-301, the trial court must perform an analysis to determine whether (1) the evidence relates to a material fact, (2) the evidence is logically relevant, (3) the logical relevance is independent of the intermediate inference that the defendant was acting in conformity with his or her bad character, and (4) the evidence has probative value that is not substantially outweighed by the danger of unfair prejudice. The court must also determine, by a preponderance of the evidence, that the other act occurred and the defendant committed the act. Here, the trial court analyzed these factors in admitting evidence that defendant befriended M.O. before

inviting him to his home, gave M.O. alcohol before initiating sexual contact, and followed a similar progression of sexual contact with M.O. Further, the trial court read a limiting instruction before J.C.'s testimony and provided the jury with a written limiting instruction before deliberations. Accordingly, the court did not abuse its discretion in admitting the prior act evidence.

The judgment was affirmed.

2022 COA 83. No. 19CA1629. People v. Garcia. *Motor Vehicle Theft—Disqualification of Judge—Structural Error—Sufficiency of Evidence.*

Defendant took his employer's truck without permission and drove it off the road and across a drainage ditch, where it broke down. The next morning, defendant's friend helped him tow the damaged truck back to his employer's shop. Defendant was charged with first degree aggravated motor vehicle theft. In April 2018 Hopkins, then a deputy state public defender, appeared on behalf of defendant at a pretrial readiness conference. Both parties conceded that Judge Hopkins was appointed to the district court bench in July 2018 and then presided over the remainder of defendant's case, including all pretrial hearings, the trial, and sentencing. Defendant was convicted as charged.

On appeal, defendant argued that Judge Hopkins was statutorily disqualified from presiding over his case because of her prior involvement in the case as his counsel and that this amounts to structural error. Under CRS § 16-6-201(1)(c), a judge of a court of record is disqualified to hear or try a case if the judge was counsel in the case. Here, Judge Hopkins appeared as counsel for defendant at the pretrial readiness conference and was therefore required to disqualify herself. Further, because Judge Hopkins was presumed by statute to be biased, defendant's trial was "before a biased judge," which is structural error.

Defendant also challenged the sufficiency of the evidence to convict him of first degree aggravated motor vehicle theft. He maintained that the evidence did not show that he knowingly caused damage to the truck because there was no evidence addressing the manner in which he drove the vehicle. Here, the evidence included testimony that the truck was driven through draws and over bumps and was extensively damaged, and defendant admitted that he "wrecked" the truck. The jury could reasonably infer from this evidence that defendant knowingly drove the truck over rough terrain for a considerable distance and knew that his conduct would almost certainly damage the truck. Accordingly, sufficient evidence supported the conviction.

The judgment of conviction was reversed and the case was remanded for a new trial on the original charge before a different judge.

2022 COA 84. No. 20CA1339. People v. Whiteaker. *Double Jeopardy—Fifth Amendment—Presumption of Innocence—Lesser Included Offenses—Jury Instructions.*

Defendant lived with her husband and his biological daughter (stepdaughter). After defendant and stepdaughter got into an argument, husband told stepdaughter to go to her grandmother's house. Defendant sent several text messages to grandmother telling her to send stepdaughter home, insulting grandmother, and threatening to call the police. Defendant then drove to grandmother's house and entered through the unlocked front door. Grandmother told defendant to leave, and a physical confrontation ensued between them. Husband intervened, and while he struggled with defendant, she punched him two or three times. Defendant was convicted of second degree burglary, first degree criminal trespass, third degree assault, and harassment.

On appeal, defendant argued that the trial court violated her right against double jeopardy by not merging her conviction for first degree criminal trespass into her conviction for second degree burglary. However, the Colorado Supreme Court has held that first degree criminal trespass is not a lesser included offense of second degree burglary, so the court did not err.

Defendant also argued that the trial court reversibly erred by denying defense counsel's request that the jury instructions refer to her by name. She asserted that references to "the defendant" in the instructions violated her right to due process. However, references to "the defendant" in jury instructions do not undermine a defendant's presumption of innocence, and using the term "the defendant" in jury instructions does not undermine the accused's right to counsel. Here, the trial court did not abuse its discretion by denying defense counsel's request because (1) it was not required to grant it, (2) the jury instructions accurately stated the governing law, and (3) three females with defendant's last name were involved in this case, which could have confused the jury.

Defendant also contended that the trial court violated her right to present a defense by including initial aggressor language in the self-defense instruction and by rejecting her tendered supplemental instruction explaining the term "initial aggressor." The trial court did not err by providing the jury with the initial aggressor language because the prosecution presented some evidence that defendant was the initial aggressor. Further, defendant's tendered supplemental instruction did not fit the facts of the case and therefore could have confused the jury. Accordingly, the court's instructions did not violate defendant's right to present a defense.

The judgment of conviction was affirmed.

2022 COA 85. No. 20CA1603. Giron v. Hice. *Colorado Governmental Immunity Act—Sovereign Immunity Waiver—Operation of Motor Vehicle Owned or Leased by Public Entity—Emergency Vehicle Exception.*

Officer Hice of the Olathe Police Department was on speed patrol when his radar detected a vehicle driving in the opposite direction going over 70 mph in a 55-mph zone. Officer Hice made a U-turn at the next available emergency turnaround and accelerated to catch up to the vehicle. The patrol car recorded that Officer Hice's speeds reached 103 mph as he approached an intersection where Walter Giron and his brother Samuel Giron were in Walter's van (with a trailer attached) waiting to turn left. Officer Hice saw the van and swerved right in an attempt to avoid a collision, but the front of his patrol car struck the passenger side of the van. At the time of impact, Officer Hice was traveling around 75 to 80 mph. Walter and Samuel died from their injuries, and Officer Hice was seriously injured.

Nichele Giron, individually and as personal representative of the estate of Walter Giron; Amanda Giron; and Thomas Short, as personal

representative of the estate of Samuel Giron (collectively, the Girons) filed a tort action against Officer Hice and the Town of Olathe (Olathe). Olathe filed a motion to dismiss, later joined by Officer Hice, asserting governmental immunity. Olathe and Officer Hice argued that he had his emergency lights activated at the time of the incident, and that although he was speeding, his driving did not endanger life or property. Following a hearing under *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993), the district court dismissed the complaint, determining that Officer Hice and Olathe were immune from suit because Officer Hice had activated his emergency lights 5 to 10 seconds before the collision. The district court also determined that Officer Hice did not operate his vehicle in a manner that endangered life or property.

On appeal, as an initial matter, Officer Hice and Olathe contended that whether Officer Hice failed to activate his lights in sufficient time to alert Walter and Samuel was not preserved because the Girons only asserted in district court that the officer completely failed to activate his emergency lights before the collision. However, the district court made specific findings that Officer Hice's emergency lights were activated for a sufficient amount of time before the collision to alert others to his presence, which demonstrates that this contention was adequately raised for the court to have considered and rejected it. Consequently, the Girons preserved this issue.

On the merits, the Girons contended that any sovereign immunity granted to Officer Hice and Olathe was waived under CRS § 24-10-106(1)(a) and that the waiver exception under CRS § 42-4-108(2) and (3) did not apply because Officer Hice had not activated his emergency lights or sirens; or alternatively, even if he did activate his lights, he drove in a manner that endangered life or property. Based on the plain language of CRS § 42-4-108—an exception to the immunity waiver under CRS § 24-10-106(1)(a)—an officer is not entitled to immunity when the officer does not activate the vehicle's emergency lights or sirens for the entire time the officer exceeds the speed limit and is in pursuit of an actual or suspected law violator. Here, Officer Hice's emergency lights were only activated for the last 5 to 10 seconds of the pursuit before the collision with Walter's van, and his siren was never activated. Therefore, the district court erred when it determined that Officer Hice and Olathe were entitled to immunity.

Olathe and Officer Hice contended that because the district court found that Walter had "sufficient time" to react to the presence of Officer Hice's vehicle once the emergency lights were activated, there is no record basis to maintain that the accident resulted from Officer Hice's failure to use emergency lights at any time. Sovereign immunity will exist where a plaintiff alleges facts proving a minimal causal connection between the injuries and the specified conduct. Here, Officer Hice operated the vehicle that directly collided with Walter's van and resulted in the injuries sustained by Walter and Samuel. The Girons did not have to allege, and the court did not have to determine, more of a causal connection between the public entity's conduct and the injuries. For purposes of jurisdiction under the Colorado Governmental Immunity Act (CGIA), Walter's and Samuel's injuries resulted from the operation of an emergency vehicle pursuing a law violator without activating its lights or sirens while exceeding the speed limit. This brings the Girons' claims within the scope of the CRS § 24-10-106(1)(a) immunity waiver. Therefore, Officer Hice and Olathe are not immune from liability under the CGIA for Walter's or Samuel's injuries and may be subject to potential liability in tort.

The judgment of dismissal was reversed and the case was remanded to reinstate the complaint.

2022 COA 86. No. 20CA1992. Portley-El v. Department of Corrections. *Prisoner's Commitment Name—Religious Land Use and Institutionalized Persons Act—Mootness—Voluntary Cessation Exception.*

Portley-El is an inmate at the Colorado Department of Corrections (DOC). The DOC has a policy requiring inmates to use their "commitment name" on all prison documents (the naming policy). The commitment name is the name on the mittimus when the inmate is committed to the DOC. Portley-El's commitment name is Patrick Portley. Shortly after his incarceration, Portley-El converted to the Moorish Science Temple of America (MSTA) faith. In accordance with his religious beliefs, Portley-El began to use a "religious" name, created by adding the suffix "El" to his former last name. He did not legally change his name. Subsequently, prison officials denied him services for failing to comply with the naming policy. Portley-El sued the DOC and various prison employees, alleging that the naming policy violates his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). While the litigation was pending, the DOC voluntarily stopped enforcing the naming policy against Portley-El and moved for summary judgment on the ground that Portley-El's RLUIPA claim was moot. The trial court granted the motion and entered judgment in favor of the DOC.

On appeal, Portley-El argued that under the "voluntary cessation" exception to mootness, the RLUIPA claim is not moot because the DOC has not demonstrated the requisite unlikelihood that the naming policy will be reinstated. A claim is moot when the relief sought, if granted, would have no practical legal effect on an actual existing controversy. Voluntary cessation may moot a claim where (1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief has completely and irrevocably eradicated the effects of the alleged violation. Based on the record, it is unclear whether the DOC will resume enforcement of the naming policy, and it has pursued the right to maintain the policy throughout this litigation, including in this appeal. Further, the naming policy is still in effect; the DOC has not amended the relevant administrative regulation. Accordingly, the claim is not moot.

The DOC argued that even if the RLUIPA claim is not moot, affirmance is still proper because it is entitled to judgment as a matter of law on the claim. However, disputed issues of fact preclude summary judgment in favor of the DOC.

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

2022 COA 87. No. 20CA2051. Scholle v. Ehrichs. *Health-Care Availability Act—Damag-*

es—Limitation of Liability—Collateral Source Evidence—Contract Exception.

Scholle was severely injured as a result of elective back surgery performed by Drs. Ehrichs and Rauzzino at HCA-HealthONE, LLC, d/b/a Sky Ridge Medical Center (the Hospital). Two years after the surgery, Scholle filed the present medical malpractice action against Drs. Ehrichs and Rauzzino and the Hospital (collectively, defendants). After a 22-day trial, the jury determined that Dr. Rauzzino was 45% responsible, Dr. Ehrichs 40% responsible, and the Hospital 15% responsible for $9,292,887 in economic damages to Scholle. The trial court stated that it would subsequently (1) adjust the jury's award of damages in accordance with the Colorado Health-Care Availability Act (HCAA) and (2) enter judgment nunc pro tunc to the day of the jury's verdict, for purposes of calculating interest. Approximately three months after the jury's verdict, the trial court, in a written order, found that good cause existed for allowing damages in excess of the $1 million HCAA cap. Nearly 10 months after the jury's verdict, and after significant post-trial litigation, the trial court determined in a written order that (1) judgment would enter as of that date (as opposed to date the jury returned its verdict); (2) prejudgment interest was part of the damages award; (3) Scholle was entitled, as of that date, to $5,040,278.31 in prejudgment (prefiling, post-filing, and post-verdict) interest; and (4) final judgment would, then, enter in the amount of $14,997,980.28, with each of the three defendants liable according to the jury's previous allocation of fault.

On appeal, Dr. Rauzzino contended that the trial court erred by denying his motion for directed verdict because there was insufficient evidence to show that he breached a duty of care owed to Scholle by operating despite risks associated with Scholle's diabetes, using a physician assistant during surgery, and using the Medtronic device. Here, there was testimony that the standard of care in the presence of elevated A1C levels required a postponement of surgery and that the Medtronic device had not been seated properly. Therefore, the trial court properly denied the motion for directed verdict with respect to this part of Scholle's case.

The Hospital contended that the trial court erred by denying its motion for directed verdict because it did not breach any duty to provide adequate blood products, regardless of whether a massive transfusion protocol was activated. The Hospital did not dispute that it had a legal duty to have adequate blood products on hand to respond to an emergency involving excessive blood loss during surgery. Rather, it maintained that Scholle's claims against the Hospital were premised on facts demonstrably proven to be false. However, the evidence was sufficient to support a reasonable conclusion that the Hospital breached its duty to have available and to timely provide appropriate blood products for Scholle's emergency room surgery, and that Scholle's injuries were a reasonably foreseeable consequence of that breach. Thus, the trial court properly denied the Hospital's motion for directed verdict on this ground.

The Hospital also argued that it had no duty to stock EVAR arterial stents and any negligence on its part was not a proximate cause of Scholle's injuries. Scholle presented expert opinion that a hospital of the Hospital's size with a vascular surgeon and an emergency room treating patients with ruptured abdominal aortic aneurysms should have foreseen the need for, and thus stocked, EVAR kits. Further, Scholle presented evidence that the Hospital's failure to stock the EVAR kits was a proximate cause of Scholle's injuries; a reasonable inference could be made that, but for the kits not being immediately in stock and available, Scholle would have experienced massive blood loss for less time, and consequently, the extent of his injuries would have been less severe. Therefore, the Hospital was not entitled to a directed verdict on this ground.

Defendants contended that the trial court reversibly erred by instructing the jury on physical impairment as a category of damages separate and apart from noneconomic damages. Where, as here, the HCAA applies, the trial court should not have informed the jury that physical impairment and disfigurement is a separate category of damages; instead, the court should have referenced it, if at all, under the noneconomic category of damages. However, the error was harmless, given the jury's award of $0 in noneconomic damages.

Defendants also contended that the trial court erroneously gave the jury a "thin-skull plaintiff" instruction. A thin-skull instruction is appropriate in tort cases when the defendant seeks to avoid or reduce liability by calling attention to the plaintiff's preexisting conditions or predisposition to injury and asserts that the plaintiff's injuries would have been less severe had the plaintiff been an average person. Here, on cross-examination, defense counsel asked a question directed at determining whether Scholle's diabetes increased the likelihood of experiencing injuries for which he sought damages. Thus, it was subject to being interpreted as an attempt to avoid or reduce damages for injuries that an average or normal person would not have experienced. Because that one question raised thin-skull issues, the court did not abuse its discretion by giving the jury a thin-skull instruction. Even if the court erred, defendants failed to demonstrate how they may have been prejudiced as a result of the instruction.

The Hospital also contended that the court incorrectly provided a negligence per se instruction to the jury because the regulations the court used in crafting that instruction cannot, as a matter of law, serve as the basis for a negligence per se claim. However, the Hospital did not object on this ground at trial, so the Court of Appeals declined to address this new argument.

Defendants also argued that the trial court erred in refusing to strike $456,848 in past medical expenses as lacking any evidentiary support. Here, the evidence supports only an award of $5,543,151.74, so the jury's award of $6 million must be reduced to that amount.

Defendants further argued that the trial court erred in including $1,429,832 in prefiling, prejudgment interest from the date of Scholle's surgery (August 26, 2015) to the date he filed his complaint (May 11, 2017) in a judgment in excess of the HCAA's damages cap. Prefiling, prejudgment interest is part of "damages" capped under the HCAA, subject to being uncapped upon a showing of good cause and unfairness, unless another statute provides

otherwise. There is neither a statute nor case law stating otherwise, so the trial court did not err by considering the prefiling, prejudgment interest as part of the damages award, subject to being uncapped upon a showing of good cause and unfairness.

Defendants also argued that the trial court erred by concluding that good cause existed to exceed the HCAA's $1 million damages cap, and without properly applying the HCAA's collateral source provision. A court may exercise its discretion to consider factors it deems relevant when determining whether a movant qualifies for an exception to the cap. Here, while some factors the court relied on were proper, Scholle did not produce evidence that he owed money to third-party payers or providers. Therefore, the trial court should not have taken this "fact" into consideration and thus abused its discretion in considering it. Further, the court's improper consideration of Scholle's purported repayment obligations was a significant factor in the decision to allow a judgment in excess of the HCAA's damages cap and was therefore not harmless.

Lastly, defendants contended that the trial court erred by failing to enter judgment, as it said it would, nunc pro tunc to November 21, 2019, the date the jury returned its verdict. Instead, it entered judgment nearly 10 months later, on September 16, 2020, which resulted in additional prejudgment interest and increased the final judgment by nearly $1 million. Here, the court's failure to enter judgment nunc pro tunc, without a good reason, was manifestly unfair and thus an abuse of discretion. Consequently, the damages part of the judgment must be set aside and recalculated as if judgment was entered nunc pro tunc to the date of the jury's verdict.

The judgment was affirmed in part and reversed in part, and the matter was remanded with directions.

2022 COA 88. No. 21CA1331. People in the Interest of T.W. *Dependency and Neglect—Subject Matter Jurisdiction—Authority to Act—Deferred Adjudication—Allocation of Parental Responsibilities.*

The Morgan County Department of Human Services (Department) filed a dependency and neglect proceeding over concerns that the child was being mistreated while in the care of mother and her husband. The child's father lives in California, and he had not seen the child in approximately eight years when the case was filed. The juvenile court placed the child with maternal cousins and, based on the parties' agreement, entered an order deferring whether the child should be adjudicated dependent or neglected for six months. Father moved for an allocation of parental responsibilities (APR) for the child to him, and mother objected. Ultimately, the juvenile court held an evidentiary hearing on father's APR motion, temporarily placed the child in father's custody, and authorized video visits with mother. After a review hearing several months later, the court entered an APR order that kept the child in father's custody, authorized parenting time for mother, and awarded decision-making authority between the parents. The court then certified the APR order into a separate domestic relations case and closed the dependency and neglect case.

On appeal, mother contended that the juvenile court lacked subject matter jurisdiction to grant the APR because it had not adjudicated the child dependent or neglected. A juvenile court has continuing subject matter jurisdiction in a dependency or neglect action after the entry of a deferred adjudication but lacks authority to enter an APR order unless the child has been formally adjudicated dependent or neglected or the court has accepted an admission from the parents that the child should be adjudicated dependent or neglected. Here, mother made no admission that the child had been or should be adjudicated dependent or neglected. Because no such admission was made and no order of adjudication had entered against mother, the juvenile court lacked legal authority to enter a permanent APR order.

The judgment was vacated and the case was remanded.

August 4, 2022

2022 COA 89. No. 20CA1125. In re Estate of Chavez. *Power of Attorney—Civil Theft—Breach of Fiduciary Duty—Unjust Enrichment—Promissory Estoppel—Treble Damages.*

Marie Chavez lived on a 10-acre ranch and supported herself with monthly pension payments from her husband's estate. She executed (1) a will that devised the ranch to her son Gilbert and his wife, and (2) a general durable power of attorney and a medical durable power of attorney designating Gilbert as her agent. Marie was placed in a rehabilitation and retirement facility, and Gilbert managed her finances and maintained the ranch. He expressed concerns to his sister Teresa and Marie's attorney about Marie's financial stability and her generosity to Gilbert's sisters. Thereafter, at Marie's request, Gilbert drafted and recorded a quitclaim deed transferring the ranch to Gilbert and his wife without consideration. He kept the transfer a secret from the rest of the family and did not reveal the transfer to Marie's attorney until approximately 10 months after recording the quitclaim deed. Gilbert also changed the locks at the ranch and donated most of Marie's personal property inside the house. He continued to use Marie's money to maintain the ranch and later changed his status on Marie's bank account from agent to joint owner. Teresa ultimately learned about the deed transferring the ranch to Gilbert. Marie asked to return to the ranch, but Gilbert refused the request, and when Marie's attorney asked Gilbert to allow her to return to the ranch, Gilbert again refused. Marie later executed a general durable power of attorney and medical durable power of attorney naming Teresa as her agent. Teresa asked Gilbert for Marie's bank records, which he refused to provide. Teresa then obtained the records from the bank and discovered that Gilbert had transferred more than $59,000 from Marie's account into his commercial bank account. Teresa was subsequently appointed as special conservator for Marie and demanded return of funds that were used for expenses associated with the ranch and transferred from Marie's bank account into Gilbert's commercial bank account. Gilbert complied with the demand and paid Teresa's attorney $70,901.17. The court later ordered Gilbert to allow Teresa access to the ranch to inventory Marie's personal property, but when Teresa arrived, she was unable to locate any personal property because Gilbert had already donated most of it.

Teresa, as Marie's conservator and personal representative to her estate, filed a petition to

void the quitclaim deed and brought claims against Gilbert for breach of fiduciary duty, unjust enrichment, and civil theft related to the transfer of the ranch and the money transfers from Marie's bank account. Gilbert asserted a cross-claim of promissory estoppel for the quitclaim deed. A jury returned verdicts for the estate on the breach of fiduciary duty and unjust enrichment claims. It also returned a verdict for the estate on the civil theft claim, but only for the money transferred out of Marie's account. The jury returned a verdict in Gilbert's favor on the promissory estoppel claim and declined to rescind or void the quitclaim deed. The court entered an order for the estate for breach of fiduciary duty and civil theft, awarding the estate $775,000 in damages. It then entered an order for Gilbert on the promissory estoppel claim and ruled that he could retain title to the ranch. The court declined to enter an order in the estate's favor on the unjust enrichment claim and found that the award duplicated the awards on the breach of fiduciary duty and civil theft claims. The court further found that the estate and Teresa, as special conservator, were entitled to surcharges and awarded them attorney fees and costs on their successful claims. The court denied Gilbert's request for attorney fees and costs.

On appeal, Gilbert argued that the trial court precluded him from presenting his theory of the case by erroneously rejecting his jury instructions on (1) undue influence, (2) capacity, (3) knowledge of an agent imputable to the principal, and (4) acknowledged deeds. However, any error in rejecting the proposed instructions was harmless because the jury found for Gilbert on the promissory estoppel claim, and he did not explain how the lack of these instructions prejudiced him. Further, undue influence and capacity are not elements of civil theft, and Gilbert was not precluded from arguing that he moved money from Marie's account to his own account to protect it. None of the proposed instructions were relevant to the elements of breach of fiduciary duty and unjust enrichment. In addition, the jury agreed with Gilbert's theory of the case that the quitclaim deed transferring the ranch to Gilbert was valid, and the trial court gave effect to the jury's verdicts when it found that Marie intended to transfer the ranch to Gilbert by signing the quitclaim deed and that title to the ranch remained with Gilbert. Lastly, to the extent Gilbert contended that the jury should have decided all the claims asserted against him, any verdict on the equitable claims would have been advisory and thus not binding on the trial court. Therefore, the trial court did not abuse its discretion in rejecting the jury instructions.

Gilbert also contended that the jury's verdicts in the estate's favor on the breach of fiduciary duty, unjust enrichment, and civil theft claims were inconsistent with its verdict in his favor on the promissory estoppel claim. However, Gilbert's counsel failed to object to the general verdicts before the jury was discharged, so he waived the inconsistent verdicts issue for purposes of appeal.

Gilbert also challenged the sufficiency of the evidence to support the breach of fiduciary duty, unjust enrichment, and civil theft verdicts. However, the record contains sufficient evidence that Gilbert (1) breached his fiduciary duty when he retained title to the ranch by way of the quitclaim deed, (2) was unjustly enriched by the transfer of the ranch without consideration and by the money transfers out of Marie's account, and (3) obtained $70,901.17 of Marie's funds with the intent to deprive her of those funds.

Lastly, Gilbert contended that, as the prevailing party on appeal, the trial court's award of attorney fees and costs to the estate should be reversed. However, there was no error in the trial court's order in the estate's favor.

The estate contended that the trial court erred by deducting the returned funds from the jury's damages award before trebling the damages. To be awarded treble damages, a plaintiff need only prove that the defendant committed acts constituting the statutory crime of theft. If a plaintiff proves the elements of civil theft by a preponderance of the evidence, the trial court lacks discretion to decline to award treble damages. Here, the court erred by deducting the $70,901.17 repaid to the estate from the jury's damages verdict before trebling the actual damages; it should have first trebled the amount of actual damages and then subtracted the $70,901.17 repaid.

The award on the civil theft claim was reversed in part and the case was remanded to award the estate $212,703.51 in treble damages on that claim. The order was otherwise affirmed.

2022 COA 90. No. 21CA0295. In re Estate of Davies. *Wills—Colorado Uniform Guardianship and Protective Proceedings Act—Conservator—Property of Protected Person—Required Court Approval.*

Wong, an estate planning attorney, was appointed as conservator for Davies. At Davies's request, Wong prepared a will for Davies that left his estate to his friends and caregivers Ryno and DeHerrera. Davies signed the will in the presence of a notary public and two witnesses. After Davies died, Wong applied for informal probate of the will and appointment as personal representative of Davies's estate. The district court granted the application. Scarpella, Davies's cousin, petitioned to set aside informal probate and for adjudication of intestacy, alleging that Davies's will had been procured by undue influence. Scarpella moved for summary judgment on the ground that Davies's will was invalid because Wong prepared the will without obtaining required court approval under CRS § 15-14-411(1)(g). The court granted summary judgment and removed Wong as personal representative. Scarpella then filed a motion for surcharge against Wong, arguing that Wong breached his fiduciary duties to Davies by making the will without court approval. Before the motion was resolved, the parties filed a stipulation asking for certification of the summary judgment order as final pursuant to CRCP 54(b) and a stay of the surcharge action pending appeal, both of which the court granted.

On appeal, Wong, Ryno, and DeHerrera argued that the district court erred by invalidating Davies's will. CRS § 15-14-411(1)(g) states that a conservator may make a protected person's will only after receiving court approval and giving notice to interested persons. Here, however, Wong merely drafted the will; Davies himself executed the will in compliance with CRS § 15-11-502. Therefore, CRS § 15-14-411(1)(g) did not apply and the district court erred by invalidating the will.

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

2022 COA 91. No. 21CA0322. Galef v. University of Colorado. *Personal Injury—Premises Liability—Colorado Governmental Immunity Act—Waiver—Dangerous Condition of a Public Building.*

Galef was walking down a recently mopped staircase in his dormitory hall at the University of Colorado (University). There was no "wet floor" sign or other warning that the stairs were wet, and the stairs' black coloring made it difficult to see that they were wet. Galef slipped, fell down the stairs, and dislocated his shoulder, and the injury required surgical repair. Galef brought a premises liability claim against the University, asserting that he was an invitee to a public building under the Premises Liability Act (PLA) and the Colorado Governmental Immunity Act (CGIA). The University moved to dismiss under CRCP 12(b)(1), arguing that it had not waived its CGIA immunity to Galef's claim under the CRS § 24-10-106(1)(c) "dangerous condition of any public building" provision. The court ruled that the wet, black stairs and the University's alleged failure to warn they were wet did not amount to a "dangerous condition" within the meaning of the CGIA, and it dismissed the complaint.

On appeal, Galef argued that the trial court erred in concluding that a public entity does not waive its immunity for a premises liability claim based on a negligent failure to warn because without any other alleged negligent act or omission, such a failure cannot constitute a "dangerous condition" under the CGIA. The CGIA provides that a public entity waives sovereign immunity in an action for injuries resulting from a dangerous condition of a public building. Further, a public entity that provides a public building for public use owes a nondelegable duty to protect invitees under the PLA from unreasonable health and safety risks due to a negligent act or omission in constructing or maintaining the facility. A "dangerous condition" includes a public entity's failure to warn of a hazardous physical condition in a public building when (1) the dangerous condition is not attributable solely to the building's inadequate design, and (2) the public entity's duty to warn of a hazard falls within its duty of maintenance. Here, it is undisputed that mopping stairs is part of the University's maintenance plan for the dormitory. Accordingly, the University's alleged negligent failure to warn Galef of wet, slippery stairs was a negligent omission in maintaining the dormitory within the meaning of a "dangerous condition." The trial court therefore erred by excluding the University's alleged failure to warn Galef from its "dangerous condition" analysis.

Galef also argued that the court erred in concluding that he failed to demonstrate that the mere difficult-to-detect wetness of the black flooring was a dangerous condition. Here, Galef successfully demonstrated that the imperceptibly wet, slippery stairs posed an unreasonable risk to the public's health and safety. Therefore, together with other undisputed facts, Galef sufficiently demonstrated that his injuries resulted from a dangerous condition of a public building. Accordingly, the University waived its immunity under the CGIA as a matter of law.

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

August 11, 2022

2022 COA 92. No. 20CA1912. People v. Moss. *Sentencing—Restitution—Proximate Cause—Pecuniary Loss.*

Moss was charged with numerous offenses relating to her unlawful possession of a motor vehicle. She pleaded guilty to aggravated motor vehicle theft and first degree criminal trespass of the victim's apartment. The remaining charges were dismissed. The dismissed charges and the charges to which Moss pleaded guilty alleged that the offenses occurred "on or about November 19." The prosecution requested $4,187.19 in restitution. Following a hearing, the district court ordered Moss to pay $461.13 in restitution for the cost to replace the vehicle's transmission fluid and battery, and for towing costs.

On appeal, Moss challenged the restitution award on two interrelated grounds. She argued that the need to replace the transmission fluid and the battery were not related to any charged crime and, alternatively, that the restitution was not directly related to an element of the crimes for which she was convicted. Restitution means a victim's pecuniary loss that was proximately caused by a defendant's conduct and that can be reasonably calculated and recompensed in money. While restitution need not be tied to a specific element of the crime, a defendant cannot be ordered to pay restitution for uncharged conduct, and any pecuniary loss must be tied to the defendant's conduct on the dates of the offenses for which the defendant is convicted. Here, the prosecution presented no evidence that the need to replace the transmission fluid or the battery stemmed from defendant's conduct on or about November 19. Therefore, the evidence did not establish that defendant caused the claimed damage to the vehicle during her unlawful possession, and the district court erred by ordering restitution for the transmission fluid and battery.

The restitution order as to the transmission fluid and battery was reversed and the case was remanded with directions to impose restitution for the towing costs only.

2022 COA 93. No. 20CA2105. Herrera v. Santangelo Law Offices, P.C. *Legal Services Agreement—Arbitration Provision—Colorado Uniform Arbitration Act—Arbitration Award—Sanctions.*

Touchstone Home Health LLC (Touchstone) contracted for legal services from Santangelo Law Offices, P.C. (Santangelo). As part of their fee agreement, Touchstone and Santangelo (the parties) agreed to arbitrate controversies or claims arising from their relationship. Years later, the parties' relationship ended, and Santangelo sought to collect its unpaid legal fees and demanded arbitration pursuant to the fee agreement. Herrera entered his appearance in the arbitration as Touchstone's attorney. The parties rejected opposing settlement offers. Herrera then asserted in an email to the arbitrator that the parties had reached a settlement, but Santangelo disputed this assertion. Santangelo moved for sanctions against Touchstone and Herrera in his personal capacity. Herrera disclaimed an obligation to arbitrate his individual liability for sanctions and sought declaratory relief establishing that the arbitrator lacked authority to enter sanctions against him. Following hearings, the arbitrator determined that Herrera's conduct was sanctionable and ordered him to

personally pay Santangelo $148,184.15 in fees and expenses. The parties later settled their fee dispute but did not resolve the arbitrator's sanctions award against Herrera individually. Herrera moved the district court to vacate the arbitrator's sanctions award. The court denied the motion and confirmed the award.

On appeal, Herrera contended that the sanctions award must be vacated because he did not agree to arbitrate issues of attorney sanctions, either individually in the arbitration hearing or as a nonparty bound to the fee agreement. An agreement to arbitrate can only be invoked by a signatory to the agreement and only against another signatory, subject to narrow exceptions. Here, Herrera was a nonparty to the fee agreement and did not fall within any of the exceptions that may bind a nonparty to such agreement, so the fee agreement did not bind Herrera to the arbitrator's authority. Further, Herrera did not personally agree to the arbitrator's authority to impose sanctions.

Herrera also argued that the arbitrator had no authority to sanction him. An arbitrator can only act within an arbitration agreement's scope, with authority granted by that agreement or by law. As stated above, Herrera was a nonparty to the fee agreement, and no Colorado statute or civil procedure rule gives arbitrators the authority to sanction a party's attorney. Therefore, the arbitrator lacked authority to sanction Herrera personally. Accordingly, the district court erred in denying Herrera's motion to vacate and instead confirming the award.

The judgment was reversed and the case was remanded with instructions to vacate the arbitration award against Herrera.

August 18, 2022

2022 COA 94. No. 21CA0739. Ditirro v. Sando.

Deprivation of Rights—Peace Officers—Employer Indemnification—Attorney Fees and Costs.

Colorado State Patrol (CSP) troopers Sando and Simon pulled over Ditirro on suspicion that he was driving under the influence of alcohol. After a roadside sobriety test, Ditirro was arrested. He filed a complaint in the Adams County District Court alleging that during the arrest, Sando and Simon assaulted him and caused him physical and mental injuries. He brought claims for civil rights violations under state law and 42 USC § 1983 against Adams County, Commerce City, Sando, Simon, CSP, and "Doe Defendants." Commerce City removed the case to the US District Court for the District of Colorado and moved to dismiss the claims against it for failure to state a claim upon which relief can be granted. While this motion was pending, Ditirro filed a first amended complaint that did not include the § 1983 claims. Accordingly, the federal court was deprived of jurisdiction, and it remanded the case to the Adams County District Court.

Ditirro refiled his first amended complaint in the Adams County District Court alleging, among other things, that all defendants failed to supervise Sando and Simon. Adams County and Commerce City moved to dismiss the claims for failure to state claims upon which relief can be granted. In his response to those motions, Ditirro asked the court for leave to amend his first amended complaint again. The court denied this motion as well as a subsequent motion for reconsideration of the matter. Ultimately, the district court dismissed the claims against Adams County, Commerce City, Sando, Simon, and CSP, and it granted their requests for attorney fees under CRS § 13-17-201. Ditirro appealed, and a Court of Appeals division dismissed the portions of Ditirro's appeal challenging the district court's orders dismissing, for lack of jurisdiction, his claims against Sando, Simon, and CSP. The division deferred consideration of Sando's, Simon's, and CSP's requests for appellate attorney fees until this division adjudicated Commerce City's request for appellate attorney fees. (Adams County did not request an appellate attorney fees award.)

As an initial matter, the Court determined it had jurisdiction over Ditirro's appeal of the orders granting Adams County's and Commerce City's motions to dismiss. Ditirro argued that the district court erred by granting Adams County's and Commerce City's motions to dismiss because CRS § 13-21-131(4) provides a cause of action against law enforcement entities. CRS § 13-21-131 authorizes private civil rights actions against individual peace officers but not against the peace officers' employers. Further, § 13-21-131(4) allows peace officers to obtain indemnification from their employer only under certain circumstances. Accordingly, the district court did not err by dismissing Ditirro's claims against Adams County and Commerce City.

Ditirro also argued that the district court abused its discretion by denying his motion to amend his first amended complaint to reassert the § 1983 claims that he voluntarily dismissed while the case was pending in federal court. However, Ditirro did not have the right to amend his first amended complaint; the district court had discretion to grant or deny his motion for leave to amend. Here, Ditirro's actions suggest that he voluntarily dismissed his § 1983 claims to defeat the federal court's jurisdiction and to force his case to be remanded to the Adams County District Court. Therefore, the record supports the district court's finding that Ditirro's attempt to reassert his § 1983 claims in state court following the remand was "dilatory at best, possible bad faith at worst."

Ditirro further contended that the district court abused its discretion by denying his motion for reconsideration of its order denying his motion for leave to amend his first amended complaint. However, the court did not abuse its discretion by denying Ditirro's motion for leave to amend, nor did it abuse its discretion by denying the motion for reconsideration.

Lastly, the Court awarded appellate attorney fees to Commerce City, Sando, Simon, and CSP, and appellate costs to Commerce City.

The judgment in favor of Adams County and Commerce City, and the orders denying Ditirro's motion for leave to amend his first amended complaint and denying his motion for reconsideration, were affirmed. The case was remanded to determine the appellate attorney fees and costs to be awarded.

August 25, 2022

2022 COA 95. No. 19CA1317. People v. Vergari.

Jurors—Challenge for Cause—Peremptory Challenges—Opinion Testimony—CRE 403—Prosecutorial Misconduct.

Defendant was involved in a road rage incident with Miscles and was charged with second degree assault. During voir dire, Juror F.M. expressed hesitation about applying

defendant's presumption of innocence, and defense counsel challenged him for cause. The trial court explained to Juror F.M. that the prosecution had the burden of proof and that if it failed to meet that burden, defendant "must be found not guilty." Juror F.M. ultimately agreed that if the prosecution failed to meet its burden, he would find defendant not guilty. The trial court then denied defense counsel's challenge for cause. Defense counsel did not use his remaining peremptory challenges to remove Juror F.M. from the jury. Defendant was convicted as charged.

On appeal, defendant argued that the trial court abused its discretion by failing to grant his challenge for cause to Juror F.M. A party waives a claim of error by failing to use peremptory challenges to correct a denial of a challenge for cause. Defendant made the strategic decision to not exercise a peremptory challenge as to Juror F.M. and therefore waived his claim that the trial court erred by denying his challenge for cause.

Defendant also argued that the trial court reversibly erred by allowing a witness to narrate two video exhibits. Here, it was improper for the witness to opine on events in the video recordings because he did not witness the events firsthand, had no personal knowledge about the video recordings or what they depicted, and did not provide a more informed perspective or understanding based on his expertise in forensic imaging. However, any error was harmless because the trial court explained to the jurors that they could view the videos and draw their own conclusions from them. Therefore, the jury was free to disregard the witness's opinion and reach its own conclusions.

Defendant also contended that the trial court reversibly erred by precluding cross-examination of a witness about Miscles's aggressive character traits. Here, under CRE 403, the trial court precluded defense counsel from rebutting the witness's statement that Miscles "is not an aggressive person." Assuming, without deciding, that the trial court abused its discretion by precluding cross-examination, any error was harmless because it did not substantially influence the verdict or affect the fairness of the trial proceedings.

Lastly, defendant argued that the prosecutor committed reversible misconduct during closing argument by making statements that were not based on facts in evidence and by referring to improper character evidence. Here, while some of the prosecutor's statements were improper, they were not flagrantly so, and they did not cast serious doubt on the reliability of the jury's verdict. Accordingly, there was no reversible error.

The judgment was affirmed.

2022 COA 96. No. 21CA0118. Fresquez v. Trinidad Inn. *Health-Care Availability Act—Arbitration Agreements—Agency—Actual Authority—Apparent Authority.*

Plaintiff's mother Trujillo moved into Trinidad Inn, a skilled nursing facility. Plaintiff coordinated Trujillo's admission to Trinidad Inn with a social services assistant who had him sign admission papers, including a "Voluntary Agreement for Arbitration" (the arbitration agreement), which provided for binding arbitration of disputes among the parties. Trujillo died six months after her admission to Trinidad Inn. Plaintiff filed a negligence suit against Trinidad Inn, Inc.; C&G Health Care Management, Inc., which owns, operates, and manages Trinidad Inn; and Fransua, as administrator of Trinidad Inn (collectively, defendants). Defendants moved to compel arbitration based on the arbitration agreement. The district court denied the motion on grounds that the arbitration agreement was invalid.

On appeal, defendants argued that the district court erred in ruling that the arbitration agreement was invalid because Trujillo granted plaintiff actual authority to bind her to the arbitration agreement. An agent's actual authority includes acts necessary to accomplish what the principal directed the agent to achieve. Actual authority to make health-care decisions for a patient and to sign documents needed for the patient's admission to a health-care facility includes the authority to bind the patient to an arbitration agreement only where the patient has granted the agent (1) an unlimited power of attorney or (2) specific authority to bind the patient to an arbitration agreement. Here, the parties agree, and the record reflects, that Trujillo did not execute a power of attorney appointing plaintiff as her agent before he signed the arbitration agreement. Further, nothing Trujillo said or did indicated that she knew of the arbitration agreement or intended to give plaintiff authority to sign away her right to a trial in a court of law. Accordingly, plaintiff lacked actual authority to bind Trujillo to the arbitration agreement, and the district court did not err.

Alternatively, defendants contended that plaintiff had apparent authority to bind Trujillo to the arbitration agreement. An agent has apparent authority to affect a principal's legal relations with third parties when a third party reasonably believes, based on the principal's manifestations, that the agent has authority to act on the principal's behalf. Here, Trujillo made no manifestations indicating that plaintiff had authority to bind her to the arbitration agreement, so defendants could not have reasonably believed that plaintiff had apparent authority to sign the arbitration agreement on her behalf. Further, because Trujillo never knew of the existence or terms of the arbitration agreement, she did not ratify the arbitration agreement.

The order denying the motion to compel arbitration was affirmed and the case was remanded for further proceedings.

Arthur Woods Porter

Arthur and his wife Kristen have been married for 18 years. Each was previously married, and together they formed a blended family of six. They recently moved from Colorado Springs to Castle Pines, where they plan to retire—one day!

PROFILE

Hometown:
Born and raised in Darien, Connecticut

Law School:
The American University Washington College of Law

Lives in:
Castle Pines

Works at:
Arthur W. Porter, P.C.

Practice Area:
Family Law

CBA Member Since:
1983

Describe yourself in five words.
Passionate, dedicated, positive, kindhearted, and funny.

What is one of the most positive experiences you've had as a lawyer?
Time and again, my practice has allowed me to positively impact the lives of families, especially children. The best example was the chance I was given to help one child pursue his Olympic Team dream.

What is your favorite place to escape to in Colorado?
We love to be on the water. Any chance we get, we enjoy boating at either Horsetooth Reservoir in Ft. Collins or Pueblo Reservoir. It's such a great way to relax and recharge.

Outside of the law, what are your hobbies?
My serious avocation is restoring and racing historic BMW racing cars. This hobby came to me from a client who offered to pay his bill with an old race car. Since then, I have restored 26 cars (now on the 27th) and raced all over the world. Check out www.motoporter.com!

Favorite place you've traveled to:
We've been privileged to have traveled extensively. But far and away our most memorable trip was to Barcelona, Spain. What a city!

What's your favorite board game?
We love the look, feel, and challenge of an intense set of backgammon matches. We play on a vintage Crisloid board. Big and clunky. It can get pretty intense!

How do you find work/life balance?
This is an easy one. Work is important. It's a calling of sorts. But at the end of the day, it's a means to an end. Peter Sellers was quoted as saying: "You have to live before you die, or you'll die before you live." Don't forget it!

What do you consider your greatest achievement?
I've had achievements throughout life. Plaques and trophies are nice. But greatest of all is successfully creating our blended family of six and raising four amazing kids. CL

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