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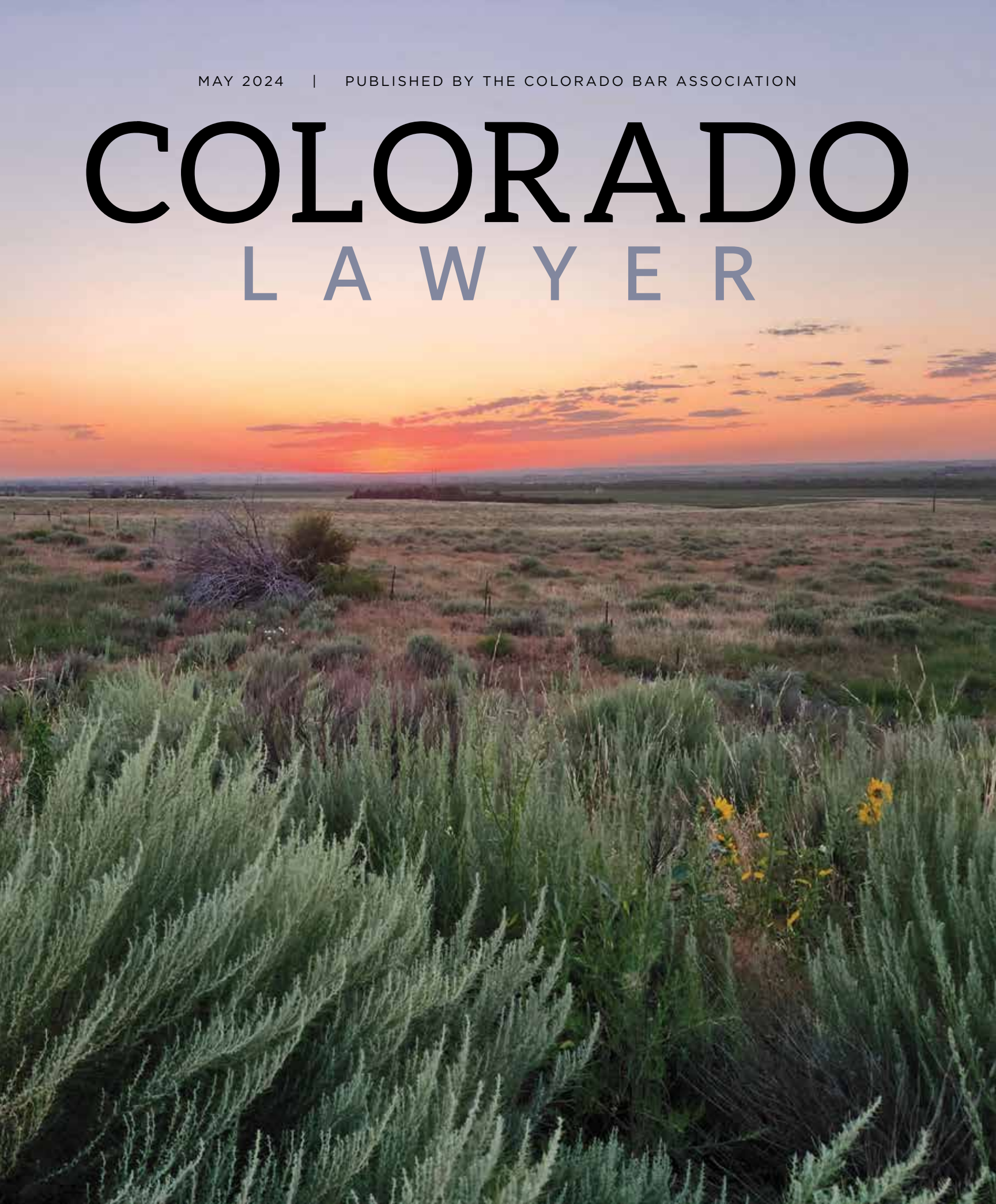
# COLORADO LAWYER

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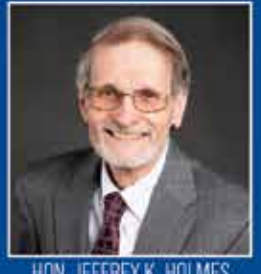
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## FEATURES



**ON THE COVER:** This month's cover photo of a colorful sunset over the plains was taken by Mark Cohen near the town of Sedgwick in northeastern Colorado. Cohen is an attorney with over 40 years of experience specializing in business and real estate litigation. A former chair of *Colorado Lawyer*'s Advisory Board, he now serves as coordinating editor of the Contract Law column. In 2022, Governor Polis appointed Cohen to serve on the Colorado Combative Sports Commission.

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**EDITORIAL OFFICES**
1290 Broadway, Ste. 1700
Denver, CO 80203

cl.cobar.org

Susie Klein, Managing Editor
(303) 907-1828, sklein@cobar.org

Liz Daniels, Legal Editor
(303) 824-5383, ldaniels@cobar.org

Kate Schuster, Graphic Designer
(303) 824-5312, kschuster@cobar.org

**ADVERTISING**
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# Abraham Lincoln's Perseverance

BY GABRIEL KALOUSEK (GUEST AUTHOR)

Over 20% percent of adults in the United States live with a mental illness.[1] The majority of public discussion about mental health addresses education, community support, treatment, and stigma. While these topics are needed to help alleviate suffering, one topic is rarely discussed: the skills an individual gains through the struggle with their mental illness. This article focuses on one of those skills: perseverance.

One notable figure who persevered despite mental illness is Abraham Lincoln. Abraham had at least four risk factors for the development of a mental illness:

- a history of mental illness in a blood relative;
- stressful life situations, such as financial problems or a loved one's death;
- a childhood history of abuse or neglect; and
- few healthy relationships.[2]

Yet Abraham persevered throughout his life.

## Abraham's Childhood and Family History of Mental Illness

A brief look at Abraham's early years demonstrates all four risk factors. Abraham described his mother, Nancy, as "intellectual, sensitive and somewhat sad."[3] His father, Thomas, "often got the 'blues,' and had some strange sort of spells, and wanted to be alone all he could when he had them."[4] Abraham's great-uncle told a court that he had "a deranged mind."[5] His uncle, Mordecai Lincoln, had mood swings. All three of Mordecai's sons were considered "melancholy" men.[6] One cousin's moods swung wildly between melancholy and mania. Another cousin had a daughter committed to the Illinois State Hospital for the Insane. Another family member referred to his own condition as "the Lincoln horrors."[7]

Throughout his childhood, Abraham also faced major life stressors. When Abraham was 9, his mother, aunt, and uncle all died of the same illness. After Nancy's burial, Thomas abandoned Abraham and Abraham's sister Sarah to find a new wife. Abraham and Sarah were left in a "wild region" where "the panther's scream filled the night with fear and bears preyed on the swine."[8] When Thomas returned with his new wife seven months later, his wife observed that the floorless cabin lacked a door and the children were living like animals, "wild—ragged & dirty."[9] Things did not get much better for Abraham with his father at home. Abraham was a voracious reader and became his own teacher. This created tension with his father because Abraham was expected to be in the fields doing strenuous physical labor beginning at age 8. Occasionally, his father would destroy Abraham's books or whip him.

## Abraham Leaves Home and Faces His First Major Depressive Episode

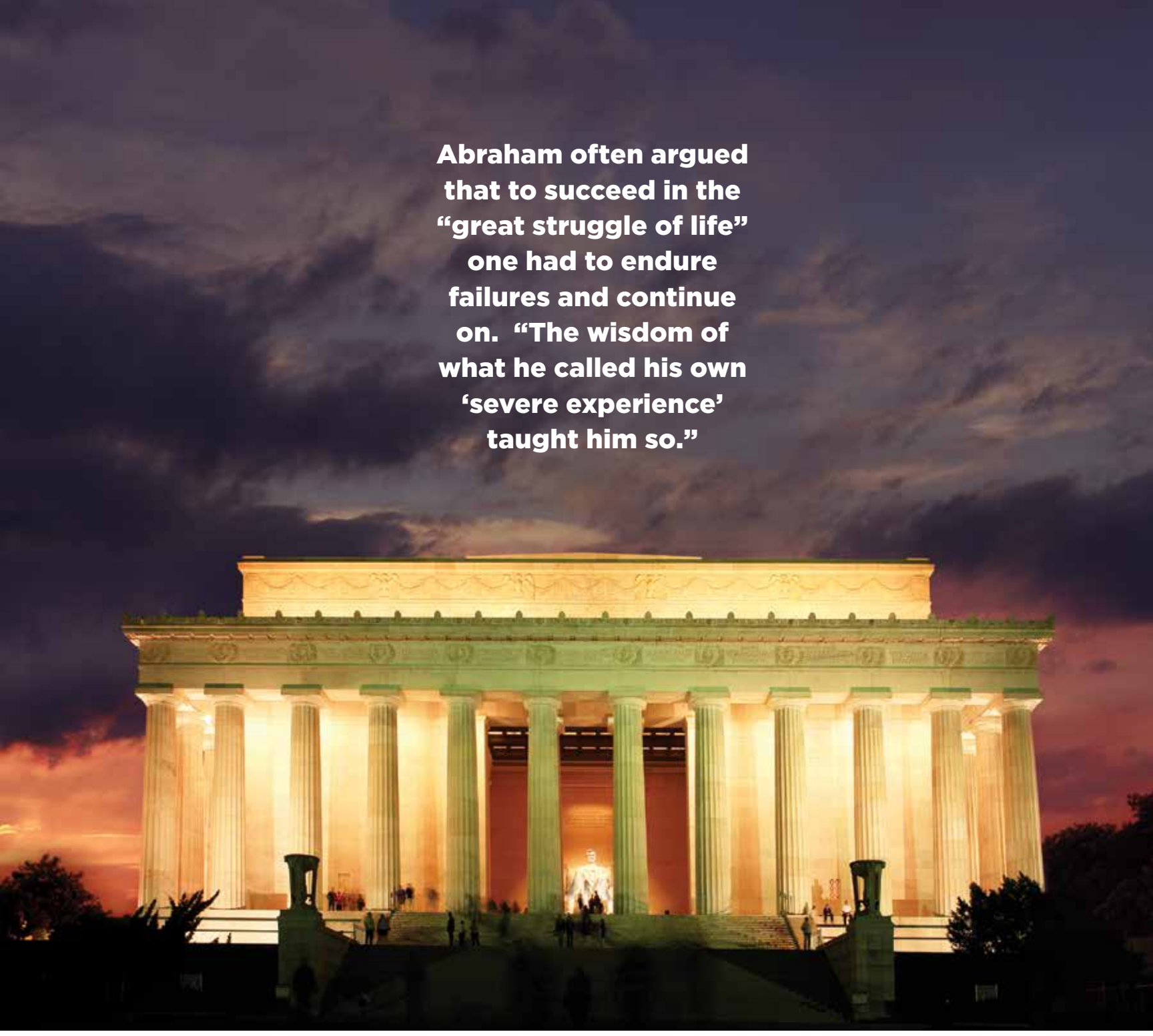
Although Abraham was engulfed by sadness at times, the endless battle with his father made Abraham more determined and ambitious. Abraham finished his indenture at 21 and immediately left to create a path for himself in the world.[10] He moved to New Salem, Illinois, and, at age 23, declared himself a candidate for the Illinois General Assembly. Although the outcome was uncertain, Abraham stated he had been "too familiar with disappointments to be very much chagrined."[11] Abraham lost, but he stated only after being defeated "some 5 or 6 times" to "never try it again."[12] At age 25, Abraham ran for the state legislature again and won. Between legislative sessions, Abraham read the law, but "studied with nobody."[13]

At the age of 26, there was serious concern about Abraham's mental health. At the time, Abraham was studying the law day and night and also helping tend to the sick during an epidemic. When his friend Anna Rutledge fell ill, Abraham visited her often, and it was obvious to others that Abraham was distressed. Anna died of her sickness, and Abraham emotionally collapsed. He became emaciated, avoided human contact, and would wander off into the woods alone with his gun. Abraham told a mentor many times that he felt like committing suicide.

Friends and mentors rallied around Abraham. A justice of the peace watched over Abraham in his home for two weeks. Abraham's friends also kept watch over him and would lock him up if necessary. The following year, Abraham related that "although he appeared to enjoy life rapturously . . . he was so overcome with mental depression, that he never dare carry a knife in his pocket."[14] This is considered Abraham's first major depressive episode.

## Abraham's Battle With Depression Continues

When Abraham was 32, Illinois entered its third year of a recession. Before the recession hit, Abraham advocated for the development of transportation infrastructure. Illinois took on debt to complete the projects. Three years into the recession, the debt from the project



**Abraham often argued that to succeed in the "great struggle of life" one had to endure failures and continue on. "The wisdom of what he called his own 'severe experience' taught him so."**

crippled the state, Illinois' credit rating was destroyed, and thousands lost their homes. Abraham took responsibility for the project and announced his retirement from the state legislature. Abraham realized his reputation had been compromised and the "burdens he had sought to lift from the people had instead been multiplied."[15] At the same time, Abraham broke off his engagement to Mary Todd. This hurt Abraham's sense of honor and humiliated Mary once it became common knowledge. That winter, Abraham's close friend Joshua Speed was planning to leave Illinois to join his family in Kentucky. As a result of these circumstances, Abraham experienced his most severe major depressive episode.[16]

Abraham remained bedridden, unable to eat or sleep, and "unfit to carry out his duties . . . . "[17] A fellow lawyer stated that Abraham was "delirious to the extent of not knowing what he was doing" and spoke incoherently.[18] Doctors believed Abraham was "within an inch of being a perfect lunatic for life."[19] Abraham wrote to his law partner, stating that "I am now the most miserable man living . . . . To remain as I am is impossible; I must die or be better . . . ."[20] Joshua Speed stayed with Abraham during this extraordinarily difficult time in his life. It was during this long, difficult, and hard-fought depression that Abraham developed clarity

for the reason he would live. Abraham told Joshua that he wished "to link his name with something that would redound to the interest of his fellow man."[21] Abraham also used humor and wit during his life in part to cope with his chronic depression. During the next decade of his life, Abraham rebuilt what he had lost, step by step.[22]

Despite battling depression, Abraham ultimately became president, confronted a divided nation, and had several other notable accomplishments, some of which are mentioned here. He issued the Emancipation Proclamation after making it clear that the issue was made up in his mind and the responsibility was his.[23] Incompetent generals were replaced by order of Abraham.[24] The 13th Amendment passed with Abraham's help.[25]

### The Wisdom of Abraham's Experience: Perseverance

Focusing solely on Abraham's struggles does not accurately describe the complex human being he was. There are dozens of books highlighting how Abraham, even during his darkest hours, provided leadership and achieved significant political victories. Abraham regarded depression as a misfortune, not a fault. "Fault implies a failure or a weakness for which a person should be held to account . . . . Misfortune is an unhappy circumstance, something bad that happened to a blameless good person."[26] Abraham's journey shows how he handled the misfortune of depression.[27]

During a difficult time for the Union during the Civil War, Abraham's friend Orville Browning came to visit him at the White House. Abraham was in the library and left instructions that he was not to be disturbed. Orville went in anyway. Abraham appeared "weary, care-worn, and troubled."[28] Orville expressed concern that Abraham's health was suffering. Abraham responded, "Browning, I must die sometime."[29] Although clearly suffering, Orville found Abraham working to guide the nation through the war and lay new foundations for future generations. "The struggle of today, is not altogether for today . . . it is for a vast future also."[30]

Abraham shared his message of perseverance with others. Abraham told a boy who had been rejected by Harvard to keep trying and that "there is no evidence that you may not yet be a better scholar, and a more successful man in the great struggle of life, than many others, who have entered college more easily."[31] Abraham told his law partner that what matters is that a person "keeps up his labors and efforts."[32] Abraham often argued that to succeed in the "great struggle of life" one had to endure failures and continue on.[33] "The wisdom of what he called his own 'severe experience' taught him so."[34]

"If things look dark, push harder.—Sunshine and blue sky are just beyond. If you are entangled, push—if your heart grows feeble, push, push. You'll come out glorious, never fear. You are on the right track, and working with the right materials. So push along, keep pushing."[35]

### A Final Lesson

Today, there are many treatment options available for numerous categories of mental illness. Engage in services when suffering takes hold, and persevere. A short anecdote about Abraham offers a gentle reminder for anyone encountering difficult times.

Abraham was riding with a group to a city. The group rested in a dense grove of plum and crabapple trees. After some time, the group readied to ride out. However, Abraham was missing. One member said, "[W]hen I saw him last, he had caught two little birds in his hand, which the wind had blown from their nest, and he was hunting for the nest."[36] When Abraham returned to the group, he said, "I could not have slept tonight if I had not given those two little birds to their mother."[37]

The lesson is to treat yourself as Abraham treated the birds, with tender kindness.

**Gabriel Kalousek** is a Colorado assistant attorney general in the human services unit, where he provides general counsel on behavioral health issues. Previously, he was an assistant county attorney representing Weld County on all mental health and substance use cases. He is the current president of the Colorado Disability Bar Association.

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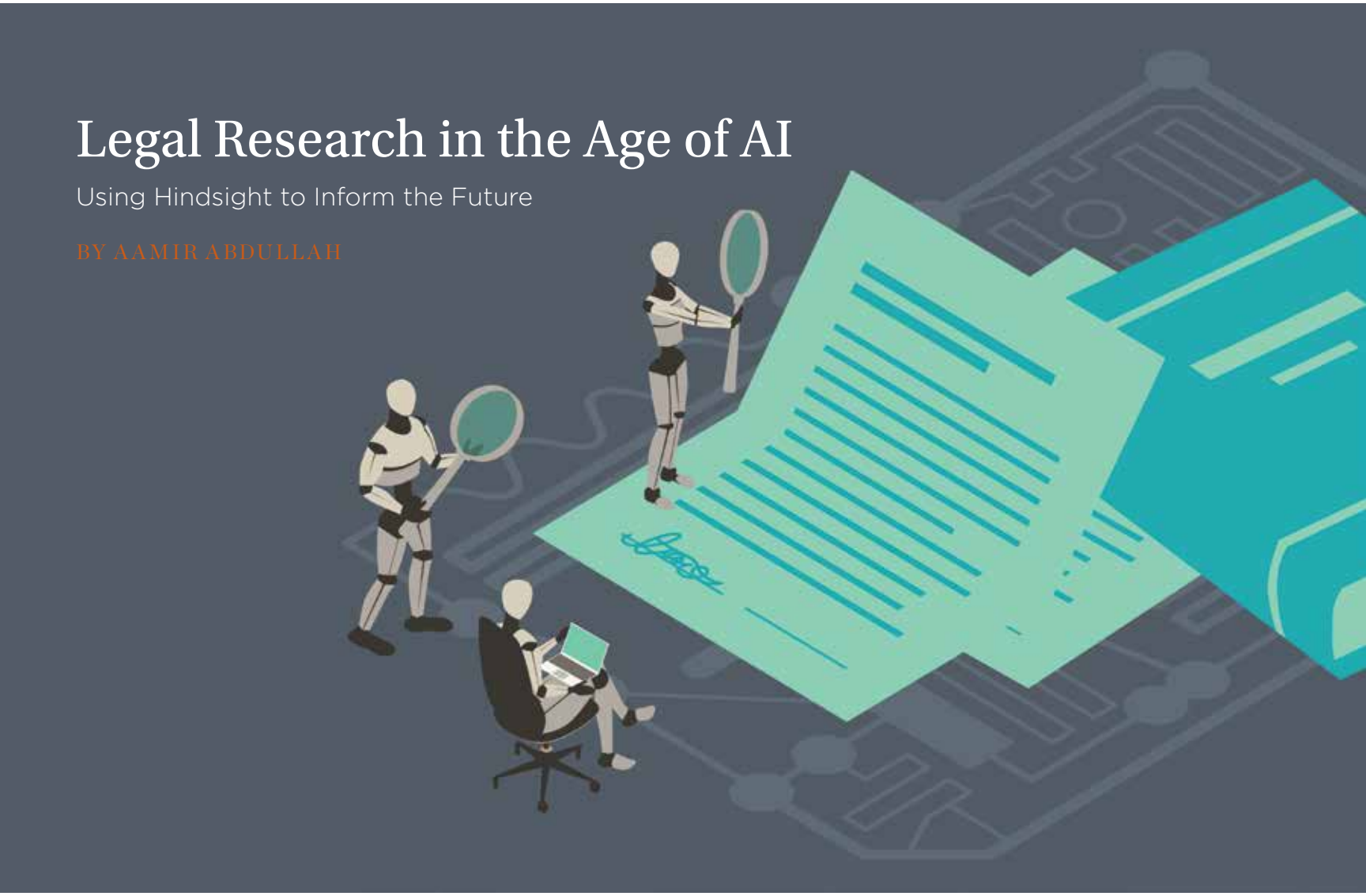
# Legal Research in the Age of AI

## Using Hindsight to Inform the Future

BY AAMIR ABDULLAH

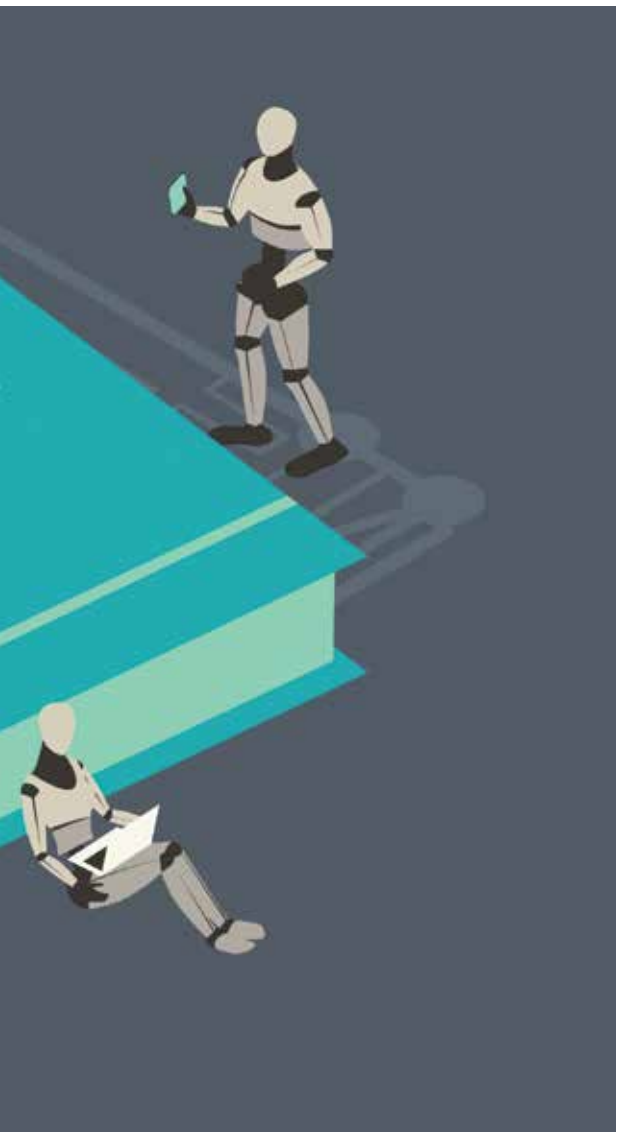


Many, many years ago, the release of the Internet revolutionized the world. The World Wide Web sped up globalization by making communication, the transfer of knowledge, and commerce globally accessible in a matter of minutes. Ever since this transformative technology was released to the masses, every technology company has been seeking the next "Internet"—the next big thing. In recent memory, the next big thing has taken the form of digital assistants, blockchain, and, as of late, generative artificial intelligence (AI).

Generative AI technology provides plenty of promise and peril. This technology has appealed to a wider society, not just the legal field. People throughout the world have extensively extolled its virtues. The common human can simply log on to any social media platform and be inundated with influencer after influencer exclaiming that learning to use generative AI should be everyone's first priority. Professionals are also being overwhelmed with numerous articles from trade blogs, magazines, and newsletters that discuss the effective use of generative AI for specific tasks in their field.

The three most widely known generative AI platforms are Open AI's ChatGPT, Google's Gemini (formerly known as Bard), and Anthropic's Claude. At the time of this writing, these three platforms were all available to sign up for and use, albeit at a cost for their premium products. Within the legal profession, companies have, or are working toward, ways of using generative AI in meaningful ways. RELX's LexisNexis,[1] Thomson Reuters' Westlaw,[2] and Bloomberg Industry Group's Bloomberg Law[3] are all experimenting with adding generative AI to their legal research platforms. Most have released these generative AI features to law schools, law firms, and other select groups for testing and implementation. Even the company that merged with Fastcase, vLex, offers a generative AI legal assistant.[4] As these releases are being worked on, each of these companies is doing its best to advertise its generative AI products to legal professionals.

For many, generative AI appears to fulfill a promise made so long ago by legal research



platform providers—to streamline the legal research process so lawyers can maximize value to the client in other avenues. Although legal professionals are being overloaded with information regarding generative AI, it is important to remind ourselves that it is merely another tool in the legal resources tool belt. It is crucial that as the profession starts to embrace this new tool, we ground ourselves in the foundation of our practice—ethical decision-making, exceptional client service, and solid legal research processes. This article provides a brief overview of generative AI, discusses one lawyer's (mis)use of generative AI, and explains how some foundational research methods can be successfully paired with generative AI.

## Hey, Generative AI, Tell Me About Yourself

The term "AI" has been bandied around for quite some time. Siri, Alexa, Cortana, and the rest of the digital assistant ilk are types of AI. Natural language searching on Google and Bing, and within the leading legal research platforms, is also a kind of AI. "In its simplest form, AI is the overarching description for technologies that use computers and software to create intelligent, humanlike behavior."[5]

Generative AI, on the other hand, refers to a very specific type of AI. In its simplest terms, generative AI can generate new content based on prompt inputs.[6] This differs from the examples above as the output provided is actually new, whereas digital assistants and natural language sourcing simply direct the user to already existing content. Depending on the generative AI platform, this generated content can be video, graphical, or textual. As noted by Colin E. Moriarty in a recent *Colorado Lawyer* article, "lawyers have a special interest in generative AI because it seems capable of performing or assisting with many of the mechanical aspects of law practice, such as document review, legal research, legal writing, and blogging."[7] This text-based AI-generated content is arguably where lawyers and generative AI are destined to meet.

Unfortunately, text-based generative AI has two large drawbacks. First, the generated content is not always accurate. Inaccuracies can range from answers that are categorically wrong to answers that cite to made-up resources. These inaccuracies have been termed "hallucinations." Second, the generated content is almost always presented as factual. Unlike Bing or Google, which provide websites with possible answers to a search query, the generated content provided by generative AI software is usually written authoritatively. This confident presentation can be deceptive and may lead researchers to believe that hallucinated results are, in fact, accurate.

## Colorado Springs Break

Most of us probably think we're immune to AI pratfalls, but last year at least two attorneys made headlines by filing documents to their respective courts with hallucinated cases pulled from generative AI platforms. The first confirmed submission was made by a New York licensed attorney. The second attorney was located closer to home, in Colorado Springs.

The Colorado attorney prepared a motion to set aside judgment.[8] In the motion, the attorney cited case law retrieved from ChatGPT.[9] The attorney did not read or review the cases and submitted the motion to the court.[10] At some point, the attorney learned the cases provided by Chat GPT were fabricated or wrong.[11]

Unfortunately, the attorney never informed the court of this issue, neither in writing nor at a hearing, and did not withdraw the motion.[12] The attorney also falsely attributed the mistake to an intern.[13] It was not until six days after the hearing that the attorney admitted to using ChatGPT. The attorney was suspended for his misconduct.[14]

## ChatGPT-ogether

This unfortunate example does not mean that generative AI should be avoided, but it does mean that traditional legal research methods are still needed. From a legal research perspective, the Colorado attorney failed to perform two key steps: (1) reading the cases, and (2) reviewing the cases. Both steps should have been covered in any introductory legal research course the attorney took prior to graduating law school.

### *Step 1: Reading the Cases*

Regardless of what technology they are using, an attorney must read every cited case and every cited resource. This is a time-consuming but necessary step in legal preparation that no tool will eliminate. Reading the cited material enables the attorney to (1) verify that the resource exists, (2) determine how the resource best applies to their client's current issue, and (3) refine their argument by determining whether the cited resource is truly the best to cite.

### *Step 2: Reviewing the Cases*

The attorney must also review (verify, refine, or update) every case regardless of what technology they are using. The Colorado attorney could have fulfilled this step by pairing the use of ChatGPT with any number of traditional

legal research platforms. This pairing could have taken various shapes, as discussed below.

**Manually searching for the cases.** This pairing is one of the more time-consuming ways to authenticate the cases promulgated by generative AI. Here, the researcher copies the case citation, party names, or docket number manually and conducts a search within a traditional legal research database such as Westlaw, Lexis, or Fastcase. Any hallucinated cases would not show up in the legal research database.

**Using a drafting tool.** This pairing offers a quicker approach to reviewing cases. Here, the researcher uses a legal research platform's legal drafting aid to review the reliability of cases cited within an uploaded document. These include:

- **Bloomberg Law's Brief Analyzer.** This tool uses a form of AI known as machine learning to review the accuracy of citations and quotes, check or locate authority, and more.[15]
- **Fastcase's Cloud Linking.** This free tool automatically creates hyperlinks in the uploaded document to the corresponding case located in Fastcase.[16]
- **Lexis+'s Document Analysis.** This tool leverages AI to scan uploaded documents for a variety of information, including providing a Shepard's analysis on citations within the document.[17]
- **Westlaw's Drafting Assistance.** This tool verifies citations by inserting KeyCite flags, checks the citation format, creates the Table of Authorities, and more.[18]

Each of these resources would, in theory, cut the time the legal researcher spends on checking citations by an exponential amount. This is especially true because each of these platforms allows researchers to drag and drop their documents into the platform. The researcher can then complete other tasks while the platform runs its analysis.

**Consulting a law librarian.** Finally, if a researcher cannot locate a case using a traditional legal research database, they can turn to a law librarian for help. It should be safe to assume that any case that both the researcher and a law librarian cannot find is probably hallucinated. This third method affords the researcher a second set of eyes to review whether a case exists.

## Conclusion

Ultimately, hindsight is 20/20, and we cannot travel back in time to fix our mistakes. Rather, we must press on and move forward—and continue to learn, grow, and improve. The Colorado attorney discussed in this article has learned a lesson and is attempting to leverage AI to democratize legal services.[19]

As for the rest of us, we can take a step back to appreciate the boon and follies that generative AI will have in the legal field. We can cautiously use emerging technology while simultaneously implementing the tried-and-true existing tech we were taught in law school. This does not mean we cannot learn new skills and innovate. Rather, we must cautiously implement these new tools in ways that do not harm the client or impede our candor to the court. CL

**Aamir Abdullah** is the instructional services and research librarian at the University of Colorado Law School's William A. Wise Law Library. Previously, he practiced law for over five years in Texas, where he handled both state and federal cases. Professor Abdullah is passionate about access to justice and the intersection of law and technology—aamir.abdullah@colorado.edu.

**Coordinating Editor:** Michelle Penn, michelle.penn@colorado.edu

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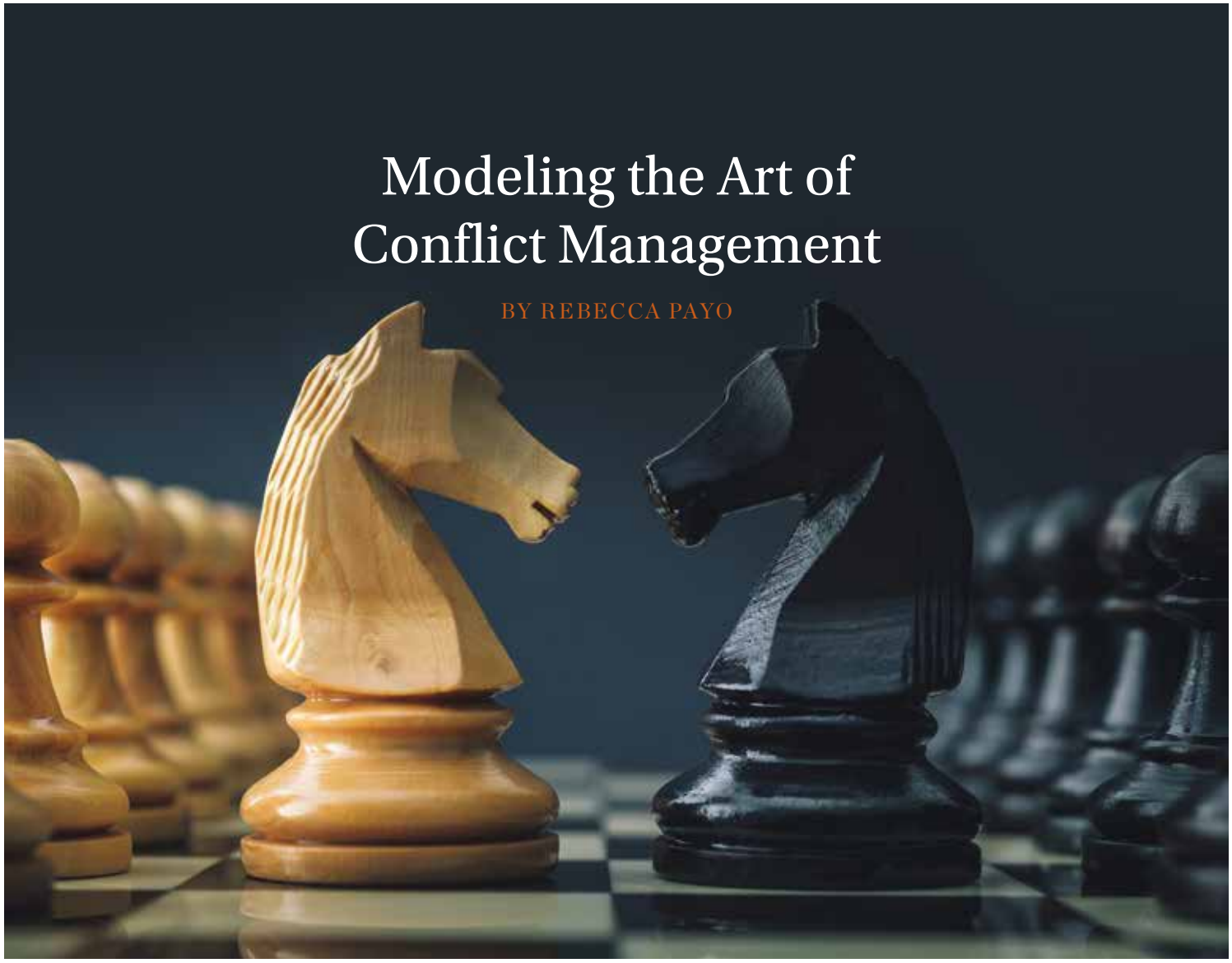


# Modeling the Art of Conflict Management

BY REBECCA PAYO

When I was applying to law school, I made the acquaintance of an attorney. In the conversation, I mentioned a conflict that I'd had with a stranger. I told him, "I showed her. I'm going to be a lawyer!" And I proceeded to recount how I had emotionally abused her. He gently showed his disapproval.

I left the interaction confused—wasn't the point of being a lawyer beating up the other person and showing who's on top? "Cross me—you'll have hell to pay!" had been my uninformed interpretation of the profession.

I've since come to view the profession differently. I now understand that the best lawyers strive to minimize conflict and that conflict management is an artform requiring practice, creativity, and dedication to the craft. Moreover, I believe that we have a professional duty to model civility as we hone our conflict management skills. This article discusses how we can be role models for colleagues, clients, and the public as we navigate conflict in our work.

## Productive Conflict and the Adversarial System

How do we manage conflict? As attorneys, we deal with conflict constantly and are players in an adversarial system. This system has been developed over centuries and acknowledges that conflict occurs within a society and that Western culture has created a way to manage these conflicts.[1] Contrary to public perception, a large part of what we do is deescalate conflict. As we mentor new attorneys, we demonstrate competency in the skills of being an attorney, but we also show the art of managing and directing conflict.

We're taught in law school to see both sides of an issue. We do this to find the strengths and weaknesses in our position and assess the same in the opposing side. In analysis and negotiation, we review in what areas compromise can occur. Our judicial system

exercises and displays built-in guardrails to acknowledge conflict and prevent escalation. In his article "Our Constitutionalized Adversary System," Freedman states,

> People who have grievances against one another come to lawyers as an alternative to fighting it out physically. "We" don't set the parties fighting. Rather, society, through the legal system, channels people's grievances into socially controlled, nonviolent means of dispute resolution. We—the lawyers—play an indispensable part in that constructive societal process.[2]

How do we translate this essential need to new attorneys? How do we model this? New attorneys learn by doing, but a clear articulation of the method by a mentor with examples can prevent or at least help new attorneys navigate potential problems manifesting as insecurity, inefficiency, and unnecessary and unhelpful conflict with opposing counsel, the bench, and our clients.

In the practice of law, we throw all the opinions on the table and try to sort out the truth. One circumstance where we exercise this skill is when conducting an intake with a client. The client gives us their perspective. For their benefit, we sort through the story, finding the misperceptions, biases, and issues that are essential to the case that the client may initially skip over. What serves our clients best is an unfiltered view of the circumstances. In that objectivity, an attorney can analyze a case and anticipate the other side's strategy. Importantly, we set realistic expectations for our clients, while their desire is a mixture of legal and personal agendas. If we solely fight without acknowledging and understanding the leverage the opposing side may maintain, we are blindsided and fail to effectively advocate for our client.



It's apparent that in any negotiation, neither side is going to get entirely what they want; both sides leave something on the table. With a goal of resolution, we drill down to the essential issues for the client and explain how these can be attained through the law. We also assess the points a client will not budge on—that is, the client's hierarchy of priorities. When communicating with the opposing party, we may concede the more flexible aspects of the case to keep negotiations moving. If both sides are inflexible, it is guaranteed that neither will receive their optimal result. This leaves it to the judge to ultimately decide the outcome with the risk that our client's result is worse than if they had compromised in the first place.

Within this adversarial system, our ultimate goal is to bring some resolution to our clients, oftentimes after a painful and contentious experience, so that they can have some closure and move on to the next chapter of their lives—win or lose.

### Modeling Professionalism

But how do we handle ourselves in the courtroom? Do we treat the staff, opposing counsel, and the bench with respect and professionalism? As lawyers, we have the training, the experience, and the duty to impress these qualities onto attorneys entering the field, and to model this skill to the public.

When first starting out as an attorney, I was negotiating a contract dispute. It resolved favorably. A few months later, I received a call from a potential client who had been referred to me by opposing counsel. I asked the attorney why he had referred the client, and he simply replied, "You did good work." I proceeded to do contract work for him as he mentored me in his practice area, and needless to say, in his professionalism.

One of the best pieces of advice I received from a mentor was, "Make friends with opposing counsel—you never know when you might need a favor from them." He recommended this as a longtime criminal defense attorney. He gave the example that if he needed a prosecutor to exercise discretion, he had built the credibility necessary with the prosecutor when the client and case warranted it.

From another point of view, a dear friend of mine has been in law enforcement for over 25 years. Embarrassingly, in my ignorance, I hadn't realized my underlying stereotypes and had assumed that as a cop, he would be aggressive, intractable, and unable to compromise. Grateful for his patience and grace, I came to discover that he was one of the most skilled people I have ever seen manage conflict. I believe his excellence is due to the fact that he deals with exceedingly high-conflict situations, those that could cost his or another's life.

As attorneys, we experience higher levels of stress than many other professionals.[3] The consequences in our work are serious without a doubt, but with this is a gift—we have a high capacity for conflict. Further, despite the seriousness of our work, we maintain a civility and even collegiality within the profession. We can argue in a contentious proceeding and have lunch with opposing counsel afterward.

### Image and "Rambo Lawyering"

Some clients expect their attorneys to exhibit unprofessional behavior—they think attorneys are paid to be arrogant and aggressive. But the duty of competent and professional representation is determined by the Rules of Professional Conduct, not by the client's perception. Ultimately, the client is in charge of their case, and if their expectations are unfulfilled, they may look elsewhere to find an attorney who matches this image. Or if the client stays but insists upon an unfettered or unprofessional attack against the other side, these expectations may indicate future problems in representation. In the meantime, their dissatisfaction persists, and billing could potentially become a problem.

Along with this issue, an attorney may be confronted by unprofessional opposing counsel who uses "Rambo lawyering." As with the troublesome client, attorneys cannot allow another's tactics to sway their method of lawyering. Stay with the issues, maintain professionalism, and do not allow contempt to enter into representation. We are called to a high standard of professionalism and ethics. Staying true to one's values will prevent attrition and burnout.

### Different Perspectives and Strategies for Conflict

Another consideration is how conflict is perceived and managed by other populations, such as lawyers who are underrepresented in the profession. I am a petite Filipina with a quiet voice. As I am not a six-foot man with a booming voice, I developed a litigation style that expressed my strengths and what I value. My strategy when I enter the courtroom, in the best service to my client and with respect to the judicial system, is to present the most professional and even kind manner that demonstrates respect for everyone in the courtroom, particularly opposing counsel.

Partly, this was initially developed in my experience as a woman of color. I had been conditioned to think that if too aggressive, I would be labeled as belligerent or seen as having a "chip on my shoulder." To be sure, there are women of color who demonstrate a big presence and a commanding style, as well as six-foot men who are reserved and compromising like the sheriff mentioned earlier. But for me, as I developed as an attorney and grew as a person, I discovered that this approach is consistent with my beliefs, personality, strengths, and perspective on why I practice law. We all find what works best for us, and there are innumerable creative ways to manage conflict.

### Duty to the Public and to the Profession

In this time of incivility, there seems to be an irrational approach to conflict in the legal and public spheres. Mindful practice of law and professional responsibility can and should counteract this. We maintain the guardrails in our adversarial system. In our practice, we demonstrate that analysis and conflict lead to a deeper understanding of the issues. We have the long-standing tradition of a legal system that recognizes conflict will occur and provides a means to manage it before it escalates. Our justice system is an adversarial system where conflict is exercised to produce the most equitable result.

We do not practice in a vacuum. The practice of law is beyond what we do; it is what we represent. We are heralds of a legal system that has been developed over centuries. In our professional identity, we serve the public with our skills, but we project something more. We show how a fundamental institution of our country works. It is a privilege to be an attorney, and with any privilege comes responsibility. It is our duty to model how to manage and direct conflict in a healthy way and pass this responsibility to new lawyers.

When discussing this problem with colleagues, some senior attorneys will lament that these rules of civility are from times past. But in our Oath of Admission, we swear:

> I will maintain the respect due to courts and judicial officers; I will employ such means as are consistent with truth and honor; I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty; I will use my knowledge of the law for the betterment of society and the improvement of the legal system . . . .[4]

This is the oath we take and the legacy that we pass on to new attorneys. This is what needs to be seen by the public about the work we do. We lead by example, to be sure, but to specifically articulate this duty to new attorneys will communicate the principles of the profession, and why our legal system allows us to direct and manage conflict productively. This is our calling and the art of being an attorney.

**Rebecca Payo** is the director of mentoring and community engagement at CAMP. Before joining CAMP, she conducted a general practice in the areas of immigration, family law, and wills and trusts. Access to justice has been a driving force in her career.

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

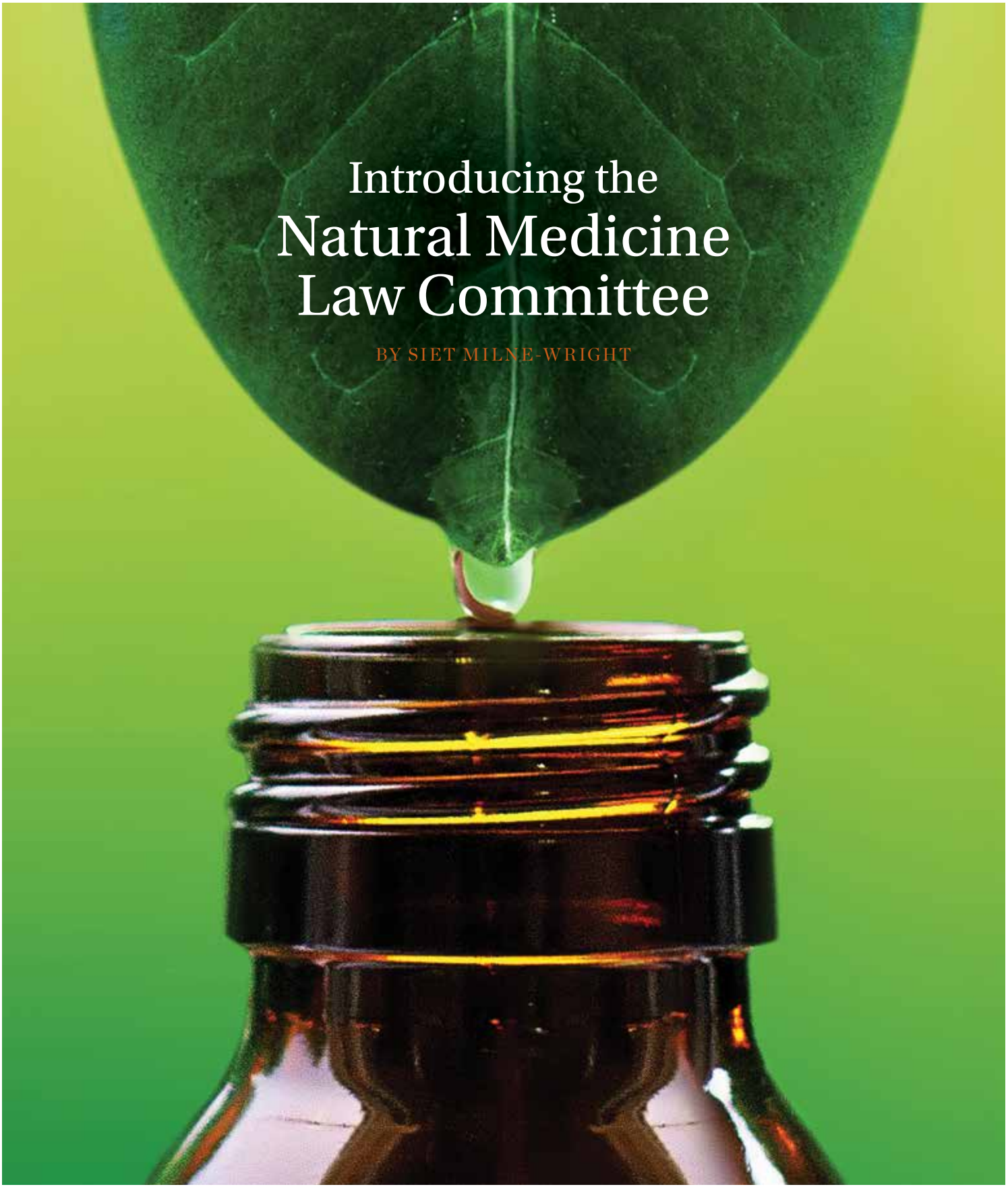
**NOTES**

1. Freedman, "Our Constitutionalized Adversary System," 1 *Chap. L. Rev.* 57 (1998), https://www.chapman.edu/law/_files/publications/CLR-1-monroe-freedman.pdf.

2. *Id.* at 68.

3. Johnson, "'Most Stressful Occupation in America': Lawyers," *Nat'l Jurist* (Feb. 6, 2023), https://nationaljurist.com/national-jurist/news/most-stressful-occupation-in-america-lawyers/#:~:text=Lawyers%20are%20among%20some%20of,stress%20than%20a%20blue%20one.%E2%80%9D.

4. Oath of Admission, https://coloradosupremecourt.com/Current%20Lawyers/Oath.asp.



# Introducing the Natural Medicine Law Committee

BY SIET MILNE-WRIGHT

In a groundbreaking move, Colorado voters ratified Proposition 122 in the autumn of 2022, heralding the decriminalization of psilocybin mushrooms and other natural medicine substances, under the Colorado Natural Medicine Health Act of 2022 (NMHA). This pivotal legislation not only decriminalized statutorily defined natural medicine but also laid down a regulated framework for the lawful cultivation, processing, and acquisition of psilocybin products.[1] This encompassed personal use or consumption at licensed healing centers under the supervision of trained facilitators.

Bolstered by this milestone, the Colorado General Assembly ushered in Senate Bill 290 during the 2023 legislative session, furnishing an additional legislative scaffold for the execution of the NMHA. Ongoing administrative rulemaking endeavors are poised to craft regulations governing facilitators and healing centers, and other license types, with the window for license applications slated to open in late 2024 or early 2025.

These legislative strides bear extensive ramifications, authorizing novel categories of economic activity and professional licensing. As the second state behind Oregon to enact laws decriminalizing and regulating natural medicine, Colorado is primed to spearhead the development of laws and optimal practices in this realm, echoing the success of the legal cannabis industry over the past decade. Oregon's soft launch of legalized mushrooms over the last two years has created an opportunity for Colorado to once again be the national benchmark, as psychedelic regulations are speculated to roll out in other states. Given the swift evolution of the legal and economic milieu surrounding natural medicine, it is imperative for Colorado residents to have access to adept and well-informed counsel as they traverse this transformative legal landscape.

Recognizing this critical necessity for expertise and guidance, CBA members have taken proactive strides by establishing the Natural Medicine Law Committee. This committee endeavors to address the intricate issues stemming from the decriminalization and regulation of natural medicine, serving as a conduit for stakeholders to contribute to the conscientious integration of substances covered in the NMHA.

## KEY INITIATIVES OF THE NATURAL MEDICINE LAW COMMITTEE

- ✓ Educational programming
- ✓ Networking events
- ✓ Internship opportunities
- ✓ Ethics guidance and development
- ✓ Social equity, diversity, and inclusion

### Mission and Objectives

The primary mission of the Natural Medicine Law Committee is to propel the integration of substances delineated in the NMHA within a legal and regulated framework. These substances encompass psilocybin, psilocin, mescaline, ibogaine, and dimethyltryptamine, collectively referred to as "natural medicine." The mission is to convene stakeholders and attorneys licensed in Colorado to furnish education, support, and guidance while advocating for enhanced practices and ethical standards within the natural medicine landscape.

The committee aspires to contribute to the emergence of a well-regulated, compassionate, and equitable landscape, fostering an environment where the potential medical, health, and spiritual benefits of these substances can be safely and legally realized. To achieve these objectives, the committee plans to undertake various initiatives, including educational programming, networking events, internship opportunities, ethics guidance and development, and a steadfast emphasis on equity and inclusion.

### Membership and Governance

Eligibility for committee membership extends to CBA members, with monthly meetings held to deliberate pertinent issues. The committee is overseen by a board comprising CBA members, with Lizzie Fanckboner and Lauren Devine serving as co-chairs.

During the January committee meeting, committee members convened to deliberate on topics such as the personal use of natural medicine and qualifications for administration under current legislation. Rulemaking periods were slated to commence in February and extend through the summer, with the Department of Revenue and Department of Regulatory Agencies (DORA) soliciting public comment on these regulations.

"As attorneys experienced in this field, our contributions in these discussions help us elucidate the crucial topics," said Fanckboner. "While there may be areas of disagreement, fostering informed rulemaking is paramount to addressing all aspects comprehensively."

With Colorado positioned to blaze yet another trail in an emerging field, the committee acknowledges the pressing nature of this multifaceted issue. The formation of this committee is both timely and indispensable in guiding the nation through uncharted territories.

"People are more likely to become interested in this issue after services are already underway," said committee member Adam Foster, "but it's imperative to submit our comments early, as these comments inform how DORA drafts the rules."

Should you wish to delve further into involvement with this committee, please contact Jess Ham at jham@cobar.org or visit https://www.cobar.org/For-Members/Committees for more information. CL

**NOTE**

1. Psilocybin is commonly found in certain species of psychoactive mushrooms.

# Avoiding Financial Fraud

BY AARON L. EVANS, KEITH D. LAPUYADE, AND JULIA HUITT

Mark, an attorney in Littleton, is staring at his computer in total disbelief. On Tuesday, he wired $750,000 to his client for proceeds from the resolution of a business settlement. On Thursday, his client called to tell him the money had not arrived in his account. Mark then verified the wire instructions with the client, which is when he realized that the wire instructions he used were fraudulent. The firm's bank could not reverse the transfer. Mark now faces the dauting task of notifying his malpractice carrier and hiring an attorney to act as his personal counsel in dealing with the insurance company (the malpractice carrier has coverage attorneys to represent its interests, which are not always the same as your interests; a personal counsel attorney can advise you on how to protect your interests as you go through the claims process). If only Mark had been aware of the constant threat of wire fraud that affects nearly every law firm.

Sally, a client of a law firm, receives a bill for $35,000, purportedly from the law firm's accountant (on a Sunday), with an urgent request to wire the funds as soon as possible. Sally is a realtor and is aware of wire fraud, but because she's flustered and trying to do several things at once, she goes ahead and wires the money per the email instructions. Luckily, Sally is able to claw the funds back before they leave her account, but that is not usually possible. After hearing of the incident, the firm reviews its policies and concludes that its internal controls over how wire transfers happen would not have stopped Sally from initiating the wire. The firm updates its retention agreement and its billing emails, along with the bills themselves, to indicate that the firm will *never* send wire instructions via email or request that payment be made by wire transfer.

Tom, an attorney, granted bill-paying authority to his office manager, Emily. Emily regularly receives high-dollar-amount invoices and pays them via ACH. At one point, Emily pays a $95,000 bill via ACH, and not long after, the vendor contacts her and asks why the payment was delayed. Emily then realizes her email had been compromised, and the scammer had inserted ACH instructions into an email purportedly from this vendor. The malpractice carrier denies the claim, but the cyber policy provides partial coverage.

Jane, a bookkeeper for a law firm, receives an email from the firm's receptionist asking her to change the bank account for her direct deposit. Jane makes the change, and on the day after payday, the receptionist comes to Jane and informs her that she never received her paycheck. Jane lets her know that she changed the direct deposit per her email, and the receptionist tells her that she never requested that her direct deposit be changed. Jane is horrified to realize that she sent that direct deposit to a scammer.

The examples above illustrate the types of attacks that lawyers and law firms face every day in this increasingly digital age. Further complicating matters, these attacks are becoming harder to detect as scammers develop newer, more sophisticated ways to deceive us. To protect our (and our clients') bank accounts, we must remain vigilant and use every tool at our disposal to avoid being the victim of financial fraud. This article explains some of the most common scams circulating right now and provides best practices for guarding against them.

## Common Scams

Most of us know not to click on links or attachments that originate from people we don't know, but there are now so many more ways for thieves to insert themselves into our financial picture. Below are some of the most common scams circulating right now.

### *Business Email Compromise*

Business email compromise (BEC) is a type of attack in which scammers get unauthorized access to a business email account, often through phishing or social engineering attacks, and once inside, use the trusted email to get financial information. This is what happened to Jane and the receptionist in the payroll scam above. Importantly, BEC scammers can continue the fraud even after the victim changes their email password by creating electronic rules that continue to divert some of the victim's emails to the scammer. In some cases, a completely

new email account is required once an attack has occurred.

**Prevention:** Talk with your IT professional about email security protocols, train employees on how to recognize phishing attacks, and put multifactor authentication in place for email access. Consider relying paper like we used to do before email intervened. For example, if an employee requests a change to their direct deposit account, get a voided check from the employee with the information for the new account.

### *Gift Card Fraud*

Scammers will spoof a supervisor's email saying that they are in a meeting but need the employee to go get gift cards from a store and send them pictures of the codes. They will indicate that it is critical that it be done right away. This type of scam is especially effective with newer employees, who won't be as aware of what a manager would or would not do.

**Prevention:** Teach employees to check (hover over) the sender's email address to see if it matches the purported sender's legitimate email address. In this type of fraud, the email accounts usually contain the supervisor's name, but the email address does not match the corporate email address. When onboarding new employees, warn them of this possibility and also let them know that the manager will never make requests like this. Employees should also be taught to be wary of any request that threatens a terrible outcome if the task isn't carried out right away. Urgency is a typical scammer tactic and a very strong sign that you're dealing with a scammer. The scammer wants you to do something before you stop and think.

### *Client Billing Fraud*

The scammer will spoof an email from another employee asking for a list of clients, their contact details, and the amount owed. The scammer will then send falsified emails to clients with payment instructions that send the funds to the scammer's bank account. This is what happened to Sally, the realtor. In Sally's case, had she not been able to stop the transfer, Sally could have argued she wasn't responsible for remitting money to the firm since she already remitted payment to the scammer and the firm didn't have the appropriate safeguards in place.

**Prevention:** Awareness is key. Alert your billing person of this type of fraud so they won't fall prey to an email like this. Educating clients is also necessary. Many firms are adding language to their engagement agreements detailing how their billing process works and from whom they can expect requests for payment; this information is reiterated on bills and on websites. For clients, typing the law firm's web address directly into the browser (not following links) and using their online payment option is usually the safest bet.

### *Wire Transfer Fraud*

Scammers will spoof an email with wire instructions that request that the money be sent to the scammer's bank account. This is by far the most expensive fraud perpetrated on law firms and other businesses. Once scammers gain access to your email through BEC, any email that says "wire transfer instructions" is a winning lottery ticket for them. They will send the changed wire instructions with your email address (or one that closely resembles your email), including signatures, and attempt to redirect those funds. This is the type of scam Mark fell victim to.

**Prevention:** Once you have a relationship with a client that may involve wire transfers, tell them upfront that you will never change wire instructions in the middle of the process, nor will you send an urgent email requesting them to wire money. Never rely exclusively on written

wire instructions. Once you receive or send wire instructions, you must verbally verify them. You can't rely on the phone number in the email for verification, because a scammer can change the phone number in the email as well. Use a known number (for instance, the other party's phone number as listed on their website) and call them to verify the wire instructions.

Because scammers use automated software to scan for keywords, using email subject lines with "wire instructions" is like waving a red flag. Although we've all been taught to use accurately descriptive subject lines when emailing, this is one instance where something more vague, like "document request," would be the better choice. Another way to avoid emailing wire instructions is to use a service such as ShareFile; saving the wire transfer instructions to the file-sharing service means it has been encrypted during transit, so it's much less likely to be compromised.

Additionally, callers are now able to make calls that spoof phone numbers for people who use VoIP phone systems. This means even if the call appears to be from your client, unless you can verify something that only the client would know, it's possible you're talking to a scammer. If you have any doubt about the identity of the person on the other side, ask them questions only your client would know the answer to, such as the nature of the legal matter or who their insurer is (anything that would not have been on an email chain).

### Best Practices

There are people sitting in office buildings around the world who do nothing other than try to figure out new ways to separate you (and your clients) from your money. There really is no surefire way to avoid fraud, because even as we put safeguards in place, the scammers continue to evolve their tactics. At a basic level, every computer should have updated virus protection software installed, and all operating systems should have the latest updates installed. Firms should have password change policies in place, either enforced through their IT provider or requested on a monthly or quarterly basis.

According to Loren Sheets of DiscoverySoft IT,[1] here are some basic things you can do to avoid having your email compromised:

**There are people sitting in office buildings around the world who do nothing other than try to figure out new ways to separate you (and your clients) from your money. There really is no surefire way to avoid fraud, because even as we put safeguards in place, the scammers continue to evolve their tactics.**

- Be suspicious! If it looks even a little bit off, it may very well be from a scammer.
- Verify the email address of anyone who sends you a suspicious-looking email or requests sensitive information. In Microsoft Outlook, you can hover your mouse over the sender's name to see more information about that sender (email, phone number, etc.). But note that scammers have gotten better at spoofing email addresses, so even one that appears to be from the correct person may still be a scam. If there is ever any doubt, it is best to email or call the sender directly, using their known contact information.
- If you get an email from an outside vendor (e.g., Microsoft, Adobe, Amazon, Gmail), never click on the link in the email to reset your password or to conduct business with that vendor. If you receive a legitimate-sounding request from a vendor, go directly to their website (and type it in yourself, ensuring that the web address is correct).
- Don't use public Wi-Fi (coffee shops, airports, etc.) while using your laptop; hackers can intercept the information going across public networks and steal your passwords, gaining access to your email and your online activities.
- Use multifactor authentication wherever possible. This adds an additional layer of security for any confidential sites.
- Even if you use an email client, such as Outlook, know how to log in to your web-based email to monitor for server-side rules that are redirecting your email to an unknown party.
- If your computer starts acting differently, you could have a virus. Contact your IT professional and ask them to scan your computer to see if there's an issue.
- If you have any doubt about the legitimacy of an email, send it to your IT professional and ask them to review.

For wire fraud specifically, awareness is the first step. At your next firm meeting, talk about the possibilities of wire fraud and specifically educate the people who have financial responsibility within your firm. Have a written policy in place that outlines the prevention steps above.

### What About Malpractice Insurance?

An attorney's typical reaction after learning of this type of breach, and after recovering from the headache and nausea associated with the issue, is to find solace in the fact that there is malpractice coverage that should afford protection under these circumstances. After all, the attorney or the firm's employees were simply negligent, not guilty of any intentional or fraudulent misconduct. Think again.

Professional liability policies frequently limit or exclude coverage for these types of cyber liability claims under the definitions, conditions, and/or exclusions in the policy. Insurers frequently cite cyber exclusions, intentional acts, and criminal acts, even though the intentional and criminal acts were not those of the insureds.

In one case, the law firm immediately restored the lost funds and sought reimbursement from its insurance carrier. The carrier took the

position that these were funds that the firm was legally obligated to pay and therefore did not fall within the definition of "damages" in the policy.

One example of an exclusion is:

> Any claim for conversion, misappropriation, wrongful disbursement, improper comingling or negligent supervision by any person or client of trust account funds or property, or funds or property of any other person, *held or controlled at any time by an Insured* in any capacity . . . .

Courts analyzing the same or similar language have concluded the language (1) is unambiguous, (2) excludes coverage for any claims arising from or in connection with the conversion or misappropriation of client funds or property by anyone, and (3) does not require misconduct by an insured.[2]

In *ALPS Property & Casualty Insurance Co. v. Murphy*, an attorney negotiated a settlement agreement for his client in a collection action involving a bank, with the client agreeing to pay the bank a confidential settlement amount. The attorney subsequently received an email from a criminal actor posing as the bank's counsel with wire instructions for the settlement payment.[3] The attorney provided the wire instructions to the client, who then wired the funds to the criminal actor's account; the bank never received the settlement payment, and the funds were lost. The firm sought coverage for the lost funds, and the insurance carrier denied coverage.

The attorney's insurance carrier argued that the exclusion applied to exclude coverage for the claim because it arose from or in connection with the conversion or misappropriation of funds held or controlled at any time by an insured in any capacity or under any authority.[4] The court noted that the exclusion "states that the control may be 'at any time' and in any capacity or under any authority" and determined that "Murphy had the power and authority to direct the settlement payment during the time when he received and forwarded the instructions, so he controlled his client's funds."[5] The court noted that "the language of the exclusion is quite broad, encompassing any claim either 'arising from' or 'in connection with' certain actions 'by any person,' not only the insured."[6]

Lawyers cannot assume that there is insurance coverage for actions and omissions that result in the loss of client funds as a result of cyber schemes. Be familiar with your policy, especially the exclusions. Many exclusions and limitations are added by endorsement, so be familiar with the endorsements to the policy too. Your insurance broker can tell you what the policy covers, but their comments are not binding; the policy is. If you do not have someone in-house who is experienced with reviewing and interpreting insurance policies, consider retaining an experienced practitioner once a year to audit your renewal policy to make sure you have adequate coverage and coverage for which you think you are paying.

In addition, every lawyer and law firm should consider purchasing cyber coverage, which is a separate coverage, often with a different insurance carrier. The cyber policy should address issues relevant to a law practice, such as phishing, and specify that these types of claims are covered and not excluded under the cyber policy. Moreover, any discussion related to such coverage should be held with the insurance broker and/or in consultation with insurance coverage counsel, and should be confirmed in writing.

## Conclusion

Awareness is the first step in protecting yourself and your law firm from financial fraud. Staying up to date on the latest scams and understanding how to avoid them is the second. While writing this article, we saw a new type of scam emerge where a stranger "accidentally" sends funds to a person through Venmo, and then asks the person to send the funds back. The person then sends the money back, only to discover that the original funds sent were through a stolen credit card. When the fraud is discovered, a chargeback is issued, removing the original funds from the Venmo account. The correct response is to let Venmo handle the return and not get involved.

As noted above, scammers are constantly evolving their attacks. The best defense is to make reviewing scams and computer intrusions part of your continuing education plan. CL



**Aaron L. Evans** is managing partner at Evans Case LLP, a probate litigation, personal counsel, and civil litigation firm in Denver. He has been practicing law for over 25 years with a focus on litigation in both elder and probate law, as well as handing all forms of estate administration—(303) 757-8300, evans@evanscase.com. **Keith D. Lapuyade** has more than 30 years of litigation experience in insurance law, bad faith, and fiduciary liability and has extensive experience with the representation of attorneys, physicians, and other professionals—(303) 757-8300, keith@evanscase.com. **Julia Huitt** is an accountant and CPA candidate with over 15 years of experience in billing and accounting for law firms in the Denver area. She owns LawyerCFO, a company focused on financial management for attorneys—(303) 209-9022, julia@lawyercfo.com.

**Coordinating Editor:** Chris Little, clittle7892@gmail.com

### NOTES

1. Loren Sheets, lsheets@discoverysoftinc.com, is a CEO and senior network administrator at DiscoverySoft, which has been providing full-service information technology support in Colorado since 1999.
2. *ALPS Prop. & Cas. Ins. Co. v. Murphy*, 473 F.Supp.3d 585, 592–93 (N.D.W.Va. 2020) (exclusion was "broad" and excluded coverage for settlement payment lost to criminal actors after insured innocently provided fraudulent wire instructions to client's bank); *Attorney Liab. Prot. Soc'y, Inc. v. Whittington Law Assocs., PLLC*, 961 F.Supp.2d 367, 372 (D.N.H. 2013) (exclusion was "clear and unambiguous" and applied to "the misappropriation of, simply, 'funds' that are 'held or controlled by an Insured in any capacity or under any authority'"); *Fid. Nat'l Title Ins. Co. of N.Y. v. OHIC Ins. Co.*, 619 S.E. 2d 704, 708 (Ga.App. 2005). *See also Accounting Res., Inc. v. Hiscox, Inc.*, 2016 U.S. Dist. Lexis 135450 (D.Conn. Sept. 30, 2016) (accounting firm's professional liability policy excluded a claim that arose from theft of funds accomplished by criminal computer hackers regardless of who had done the theft or misappropriation).
3. *Murphy*, 473 F.Supp.3d 585.
4. *Id.* at 592.
5. *Id.* at 593.
6. *Id.* at 592.

# So You're a Lawyer—Now What?

BY MARTINE VENTELLO AND KENDALL GODLEY

Welcome to the second edition of "Redlines and Deadlines." By now, you've made it through law school, conquered the bar exam, and likely seen firsthand just how little the law practice of real life resembles the law practice of dramas like *Law and Order* and *Suits*. So, now what?

It's natural to feel a mix of emotions as you start your career in the legal field. No worries—we've got you covered! Whether you're gearing up for your first day as a practicing attorney or looking to enhance your professional journey, this guide offers 10 practical tips to help you navigate your new career and build your professional reputation.

### 1. Prepare for Your First Day at Your New Job

Preparation is the key to a smooth first day. Before you start, familiarize yourself with the firm or organization where you'll be working. Research its practice areas, recent cases or projects, and key individuals. Review any materials provided by your employer, such as employee handbooks or orientation packets. Having a solid understanding of your new workplace will help ease any first-day jitters and demonstrate your enthusiasm for joining the team.

### 2. Arrive Early and Prepared

Plan to arrive early on your first day to allow ample time for any unforeseen delays. Being punctual shows your reliability and commitment to your new role. Bring essential items such as a notebook, a pen, identification, and any paperwork or documents requested by your employer.

It's also a good idea to keep a pen and notebook on your person throughout the day (and throughout the rest of your career), especially when taking instructions from assigning attorneys. Legal professionals often speak quickly and provide detailed instructions, and having a pen and notebook handy allows you to quickly jot down important information. This ensures that you capture all relevant details and can refer back to them as needed when completing your tasks. Additionally, taking notes demonstrates your attentiveness and professionalism, as well as your commitment to executing assignments accurately. By being prepared with the necessary tools, you'll be better equipped to tackle your responsibilities and make a positive impression on your colleagues from day one.

### 3. Be Trustworthy

Building trust is paramount to your success in the legal profession, especially as a young attorney. Senior attorneys and clients alike rely on your integrity, professionalism, and competence to handle complex legal matters. Establishing your trustworthiness involves consistently delivering on your commitments, maintaining confidentiality, upholding ethical standards, and being detail oriented.

Attention to detail is indeed a cornerstone of trust-building within the legal field. Whether you're meticulously reviewing contracts for accuracy, analyzing case law with precision, or drafting intricate legal documents, a keen eye for detail is invaluable. It's a skill that adds value to your team from day one. While you may delve into the substantive aspects of law later on, your focus on the finer points can

significantly enhance the quality of your work. Your ability to identify nuances, catch potential issues, and produce error-free documents not only bolsters your credibility but also fosters trust among colleagues and clients. However, it's crucial to understand that attention to detail goes beyond mere perfectionism—it's about ensuring the integrity and reliability of your work product. A simple misspelling in a party name or a typo in the first line of a document can cast doubt on the entirety of your work, whether it's viewed by a client, opposing counsel, or the court. By consistently demonstrating meticulous attention to detail, you reinforce your reputation as a reliable and trustworthy legal professional, earning the confidence of those you work with.

On the other hand, owning up to your mistakes also plays a critical role in building trust. As a new attorney, it's inevitable that you will encounter challenges and make errors along the way. However, how you handle those mistakes speaks volumes about your character. When you make a misstep, take ownership of it and strive to rectify the situation promptly and transparently. By exhibiting humility, honesty, and a willingness to learn from your mistakes, you show that you are committed to delivering the highest standards of professionalism and ethical conduct. This level of accountability not only fosters trust among your colleagues and clients but also reinforces your reputation as a dependable and trustworthy legal professional. As you navigate your legal career, remember that admitting fault and taking corrective action when necessary is not a sign of weakness, but rather a demonstration of strength and integrity that ultimately enhances your credibility and fosters stronger relationships within the legal community.

In addition to attention to detail and being accountable, it's essential to trust yourself as a smart and capable attorney. Recognize your strengths, acknowledge your achievements, and have confidence in your ability to tackle challenges and overcome obstacles. Trusting yourself instills confidence in others and reinforces your credibility as a competent and reliable legal professional. By embracing your intelligence, skills, and potential, you'll inspire trust in your colleagues, clients, and yourself, paving the way for a successful and fulfilling legal career.

### 4. Introduce Yourself and Build Relationships

Your first day is an excellent opportunity to start building relationships with your colleagues and support staff. Introduce yourself to as many people as you can, with a firm handshake and warm smile. Take note of people's names and showcase your attentiveness and respect by recalling names and addressing people personally. Be approachable, friendly, and open to connecting with others.

Since the pandemic, remote work has become increasingly common. If your workplace has a hybrid policy, make an effort to spend time in the office or find alternative ways to interact with your colleagues, such as meeting for coffee, lunch, or happy hour. Ensure you're not missing out on valuable opportunities to connect and collaborate with your coworkers. Building rapport early on will foster a supportive and collaborative work environment, which is essential for your success as a new attorney.

Additionally, it's important to recognize the value of support staff, such as paralegals or legal assistants. They often possess valuable insights into the firm's operations, procedures, and client matters. By establishing a cooperative relationship with them, you can improve your work product while demonstrating your appreciation for their contributions to the team. In the legal profession, success and teamwork go hand in hand. Leveraging the expertise of support staff can be instrumental in achieving your professional goals.

### 5. Seek Feedback and Guidance

Don't shy away from seeking feedback and guidance from senior attorneys and mentors. Solicit constructive criticism on your work product and performance, as it provides a valuable opportunity for improvement. A willingness to learn from your experiences is an essential component of a growth mindset, which is integral to your development as a successful lawyer. Remember, it's all right not to have all the answers immediately. Building strong relationships with mentors and advisors is key—these connections may very well become long-lasting sources of support and guidance as you navigate your legal career. These relationships provide a space where you can vent frustrations and work through challenges, ultimately helping you grow both personally and professionally along the way.

### 6. Listen and Learn

Approach your first day with a mindset of curiosity and openness to learning. Pay close attention during orientation sessions, meetings, and introductions, absorbing as much information as possible. Take notes on firm/organization policies, procedures, and expectations, and don't hesitate to ask questions if something is unclear. Your willingness to listen and learn will demonstrate your commitment to your role and your eagerness to contribute to the team.

Moreover, it's crucial to recognize the importance of speaking up and asking questions when you encounter uncertainty. As a new attorney, you're embarking on a journey of continuous learning, and seeking clarification is an essential part of that process. On the other hand, before asking a question, make an effort to figure it out on your own. Research the issue, review relevant materials, and consider possible solutions. You may be surprised how many things are "googleable."

If you're still unsure, don't hesitate to voice your concerns or ask for further explanation. Your colleagues and supervisors are there to support you and help you succeed, and they'll likely appreciate your proactive approach to understanding your responsibilities. Remember, asking questions demonstrates your commitment to delivering high-quality work and ensures that you're on the right track. So embrace the opportunity to seek guidance and clarification—it's a sign of strength, not weakness.

### 7. Be Proactive and Volunteer

Demonstrate your initiative and enthusiasm by volunteering for assignments and projects on your first day. Express your interest in getting involved in various aspects of the firm's practice areas and initiatives. Seek opportunities to assist senior attorneys with their caseloads or contribute to ongoing projects. By being proactive and engaged from the outset, you'll showcase

your value as a motivated and committed team member.

Embracing this proactive approach is particularly important for junior attorneys, who often grapple with uncertainty regarding the duration and significance of their assigned tasks within the broader context of the legal practice. One strategy to navigate this challenge is to adopt the principle of "under-promise and over-deliver." This approach entails setting realistic expectations regarding the time frame or outcome of a task and then surpassing those expectations through diligent effort and superior results. With limited experience, junior attorneys may struggle to accurately gauge the time required for tasks or their overall impact. However, by embracing the under-promise and over-deliver mindset, you can effectively manage expectations, communicate transparently about your capabilities and workload, and ultimately deliver a work product that exceeds expectations.

### 8. Become a Master of Organization and Time Management

Being organized is essential for success as a new attorney. Start by organizing your workspace, ensuring that it's conducive to productivity and efficiency. Keep your desk clear of clutter, creating designated areas for different tasks and documents. Additionally, establish a system for managing your digital files, such as organizing them into folders and using descriptive file names. This will help you locate documents quickly when needed and avoid wasting time searching for information.

When receiving assignments, take the time to review them carefully and create a plan of action. Break down complex tasks into smaller, manageable steps, and set deadlines for each stage of the project. Keep track of your progress and deadlines using a planner, calendar, or notetaking software such as Microsoft OneNote.

Maintaining a well-organized schedule is also crucial. Prioritize your tasks based on urgency and importance, and allocate time for both work and personal commitments. By staying organized and managing your time effectively, you'll be better equipped to meet deadlines, avoid last-minute stress, and maintain a healthy work-life balance.

Overall, being organized not only enhances your productivity but also demonstrates your professionalism and attention to detail. It instills confidence in your abilities and fosters trust among your colleagues and supervisors. As you embark on your legal career, prioritize organization as a cornerstone of your success.

### 9. Maintain Professionalism and Confidentiality

As a licensed attorney, you are held to the highest standards of professionalism, integrity, and confidentiality. Respect client confidentiality and avoid discussing sensitive matters outside of work. Adhere to firm policies and professional ethics at all times and conduct yourself with professionalism and discretion in your interactions with clients, colleagues, and third parties. Your adherence to ethical standards will build trust and credibility with clients and colleagues alike.

### 10. Reflect and Plan for the Future

At the end of your first day, take 30 minutes to reflect on your experiences and accomplishments. Celebrate your achievements and acknowledge any challenges you may have encountered. Use this reflection period as an opportunity to jot down goals for your future development and career advancement. For short-term goals, identify areas where you excel and areas where you can improve, and develop a plan to address them in the coming days and weeks. For long-term goals, write down specific 3-, 5-, and 10-year plans. By setting clear goals, you'll be better positioned to achieve success in your legal career. Remember, it's a long career.

### Conclusion

Your first day as a licensed attorney marks the beginning of an exciting and fulfilling journey in the legal profession. By following these practical tips and approaches, you can navigate your first day with confidence and set the stage for a successful and rewarding career. Remember to approach each day with enthusiasm, curiosity, and a willingness to learn and grow. With dedication, perseverance, and a commitment to excellence, you'll make a lasting impact as a trusted advocate and advisor in the legal community. Best of luck on your journey as a new attorney! CL


**Martine Ventello** is an associate at Davis Graham & Stubbs LLP in Denver. Her practice focuses on general corporate transactional, securities, and asset management matters—(303) 892-7413, martine.ventello@dgslaw.com. **Kendall Godley** is an associate at Davis Graham & Stubbs LLP in Denver. His practice focuses on corporate governance, securities, and mergers and acquisitions—(303) 892-7308, kendall.godley@dgslaw.com.

**Coordinating Editor:** Amanda Huston, ahuston@cp2law.com

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# Embracing the Inevitable

## Integrating AI Technologies in Mediation

BY RYAN SEARSON

*This article discusses current and potential future uses of artificial intelligence in mediation and suggests how mediators can best integrate AI technologies into their practice.*

Given current trends in technology, mediators need to understand artificial intelligence (AI) and have a plan to work with and synthesize AI into their practices. AI is growing rapidly, leading to advancements in a number of fields.[1] While technological advancements are typically encouraged, one of the most alarming concerns arising from the growth of AI is the fear that it will replace human workers, with 300 million jobs worldwide expected to be impacted by AI and two-thirds of US jobs at risk from some form of AI automation.[2] The legal field is often considered a fertile area for AI automation and large language model learning.[3] For example, ChatGPT demonstrated the reality of AI's advancement in recent years when it "sat for" the July 2022 bar exam and scored near the 90th percentile of test-takers.[4] A majority of mediators are attorneys or retired judges, so AI's integration into the legal field will undoubtedly have implications for mediation.[5]

This article explores the current and future impact of AI on dispute resolution and suggests ways for mediators to incorporate AI into their practice. It gives a brief background on AI, discusses current and emerging AI mediation technologies, considers the strengths and weaknesses of humans and AI in mediation, and provides suggestions for how mediators can partner with these tools to reach optimal mediated outcomes for clients.

## A Short AI Primer

While there are many definitions of "AI," it is generally understood to be "[t]he theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages."[6] AI relies on machine learning, which encompasses "technologies and algorithms that enable systems to identify patterns, make decisions, and improve themselves through experience and data."[7] Natural language processing (NLP) "is a machine learning technology that gives computers the ability to interpret, manipulate, and comprehend human language."[8] Further, "[g]enerative AI represents an advanced subset of NLP models called [large language models] designed to produce human-like text."[9]

Mediators have previously embraced technologies such as videoconferencing, online mediation platforms, and electronic document management, and will likely also find benefits to using AI-based technology.[10] As discussed below, AI is particularly strong in generating and exploring optimal solutions. Given mediation's goal of achieving fair resolutions when taking into account each party's best alternative to a negotiated agreement (BATNA) and worst alternative to a negotiated agreement (WATNA), the value of AI mediation tools in generating legitimate resolutions is apparent.[11] AI mediation tools can identify and analyze mediation patterns, which can allow mediators to manage expectations in relation to the BATNA and WATNA of any given mediation.[12]

## Current and Future Uses of AI in Mediation

The "fourth party" is a term often used to refer to technology that assists with resolving disputes online.[13] The term was coined as a metaphor for online dispute resolution (ODR), where the fourth party is considered "foundational" and "becoming more capable all the time."[14] Fourth-party dispute resolution has been in use for years. For example, at least as early as

“Today, AI technology is being used in mediation in two primary ways: (1) in a supportive role where a mediator supplements their work with AI or (2) in a substitutive capacity where AI takes on the essential functions of a mediator.”

2014, over 90% of eBay's 60 million annual disputes were being handled with no human intervention.[15] AI is considered a tool underlying the fourth party and, with the continued development of AI, the future could include AI-powered fourth parties performing "case research and evaluation (perhaps helping us to envision our [zone of potential agreement], conflict coaching, communication reframing, evaluation of alternatives to a potential settlement, enforcement of outcomes, document drafting and submission to legal bodies, or even automated negotiation or binding algorithmic evaluations."[16] Some have even argued that AI technology could be considered a third party—both in terms of resolving disputes independent of human intervention and also, at least with regard to intake and preliminary communications with mediation parties, in assisting a human mediator by summarizing the conflict and providing potential solutions.[17]

Today, AI technology is being used in mediation in two primary ways: (1) in a supportive role where a mediator supplements their work with AI or (2) in a substitutive capacity where AI takes on the essential functions of a mediator.[18] One ODR divorce mediation system, Family Winner, currently uses AI in a supportive capacity. Each disputing party independently enters property items and their subjective values of the items into the mediation system.[19] Then, Family Winner uses AI "to come up with a nominally optimal solution for distribution."[20] The suggested solution can then be accepted or rejected; if rejected, the parties can rank the remaining contested items.[21]

Researchers have observed that decision support systems like Family Winner fail to adequately optimize "justice" or "fairness" metrics, which are arguably unique to humans.[22] Decision support systems have been found effective for certain types of conflicts (e.g., international disputes), but miss the mark on more subjective matters of importance that remain—at least for now—in the domain of humanity.[23] A tool like Family Winner can add value to, but not replace, a human mediator because often resolving disputes is based on an individual's motivations, values, and emotional judgment of fairness.[24]

Adding value based on party interests and perceptions of fairness is where AI can fall short. Fairness is subjective and "can be distilled into four basic, competing principles or rules—equality, need, generosity, and equity."[25] A party is more likely to perceive an outcome as fair when the outcome more closely aligns with the outcome they anticipated at the outset of negotiation.[26] When two disputing parties have a wide gap in their anticipated outcome, at least one party will likely perceive the negotiated outcome as unfair unless value can be created to bridge the divide. While AI tools are considered neutral and thus arguably able to "ensure fairness and promote trust among the disputing parties," the subjective nature of fairness in mediation requires human emotional intelligence to provide disputants with "analysis and support to make the final decisions they subjectively perceive as fair."[27]

Stated differently, decision support systems like Family Winner require "substantial human input."[28] With this in mind, substitutive AI systems in mediation "are still subject to slow development" but are improving at a rapid rate.[29] The ability of these substitutive tools' ability to generate proposed resolutions is especially promising. For example, Split-Up, a case reasoning system (a system that applies past outcomes of cases to the current situation), examines 94 different factors in a divorce and provides suggestions based on the outcomes of previous cases exhibiting similar facts.[30] Moreover, these tools could help resolve the access to justice problem for many, particularly those disputants with limited resources, as these AI systems are efficient, especially when resolving low-value cases.[31]

While the above examples show the utility of AI-assisted ODR platforms in family law cases, systems like ChatGPT that can handle a number of different tasks may also prove especially valuable to mediators. ChatGPT was recently used by an experienced mediator, Myer Sankary, in the background of a landlord-tenant dispute.[32] While the landlord and tenant were able to reach a resolution of a $270,000 settlement without the use of AI, ChatGPT impressively arrived at a very similar recommended figure of $275,000.[33]

There are a variety of other tools available that are less robust in solution generation but nevertheless add a great deal of convenience for disputants, such as eBay's high-volume ODR system and ICANN's uniform domain-name dispute-resolution system.[34] One such online dispute resolution tool is currently being developed by the Colorado courts for pilot use in

small claims court matters.[35] When deployed, this tool will allow parties to explore resolutions with the assistance of a facilitative mediator—all of which will be done online and asynchronously so that the participants do not need to travel to a courthouse or mediation office.[36] With a range of options available and perhaps unavoidable, now is the time for mediators to understand the role AI tools can play in resolving disputes and explore ways to incorporate these tools into their practice.

### How AI Can Assist Mediators

Even as it improves, AI's best use in mediation will likely be to assist rather than replace a human mediator. Indeed, when prompted if AI could replace a human mediator, ChatGPT provided the following response:

> As an AI language model, I can provide information and suggestions based on data and algorithms, but I cannot replace the role of a human mediator. A mediator is a trained professional who helps parties in conflict to reach a mutually agreeable solution. A mediator often relies on a combination of communication skills, active listening, empathy, and the ability to recognize and address power imbalances to help people in dispute find common ground. While I can provide general information on conflict resolution, I cannot replace the human qualities that a mediator brings to the process. Mediation often involves emotional intelligence, which is an area where AI models like myself still have limitations.[37]

As suggested by the ChatGPT response, the *sine qua non* of effective mediators is "a pronounced capacity for empathy, compassion, and a desire to understand others."[38] Human mediators can make parties feel empowered, which can promote resolution.[39] Ultimately, as has been noted widely, AI cannot replace "human mediators' interpersonal approach and innovative problem-solving capabilities."[40]

Human mediators, however, have flaws. They have limited cognitive capacity, which can slow down mediation or prevent optimal results.[41] This limitation also means human mediators can only take on so many disputes at once. Humans also cannot avoid cognitive biases, which can severely impact impartiality.[42] Such biases, as well as everyday stressors, can also lead to inconsistent results. Finally, while ethical mediators make every effort to preserve confidentiality, human nature can result in (often inadvertent) lapses in confidentiality.[43]

AI excels in many of the exact areas in which human mediators are limited. With regard to capacity, AI systems "are able to quickly store, analyze, and access vast amounts of data."[44] AI systems are not physically limited. They can run nonstop and become scalable to "help with the ever-increasing number of disputes that can be resolved with mediation."[45] AI systems can also better guard confidentiality, which could mean parties to a dispute are more willing to share embarrassing or private details.[46]

However, AI is not without imperfections. For example, AI can reflect biases and inconsistencies because the systems are trained by humans with biases.[47] Therefore, using AI requires a human component to monitor for consistency and bias, or lack thereof. Algorithmic transparency and human monitoring are necessary to compensate for any preprogrammed biases embedded in AI technology.[48] AI tools tend to be less prone to human cognitive biases when humans work with AI to monitor for algorithmic bias.[49] By working together, humans and AI tools can minimize their respective weaknesses to help mediators work more efficiently toward better solutions.

As mediators and attorneys integrate AI into their practice, they need to stay informed about how ethical requirements are evolving to reflect AI's role in the legal field. Particularly notable for attorneys representing clients in mediation is an ABA competency mandate for attorneys to understand relevant technology such as AI.[50] All attorney mediators participating in ODR should also be aware of the ethical framework that governs ODR and technological systems (like AI) employed in dispute resolution.[51] Although the use of AI by attorneys is in its early stages, there are a number of ethical and professional conduct issues that attorneys must consider, particularly related to providing client-specific information to an AI system, and there are not necessarily definitive answers yet.[52] Such issues include confidentiality, informed consent, bias, and liability.[53] For example, while AI systems can theoretically better guard confidentiality, attorneys using AI systems must consider issues of attorney-client privilege, the use of personally identifiable information, and information security when using AI systems with client data to ensure they are not violating any rules in their jurisdiction.[54]

In Colorado, there is an ongoing discussion as to whether and how conduct rules should be amended to accommodate the rise and usage of AI tools.[55] Critics of AI in the legal field point to real-life AI blunders as understandable concerns with the use of AI and argue that attorneys "cannot carelessly cede professional responsibility to AI."[56] Ultimately, there are a number of professional conduct and ethical considerations at play, and interested attorneys should be active in these discussions in order to "lead the responsible adoption of artificial intelligence."[57]

### A Synergistic Approach to Using AI in Mediation

A synergistic approach—interactions "that when combined produce a total effect that is greater than the sum of the individual elements"—is the best way to balance the strengths and weaknesses of human mediators and AI mediation tools.[58] Mediators already understand how to find integrative solutions that maximize value and result in win-win solutions for the parties.[59] Partnering with AI for better mediated outcomes should come as second nature to mediators. Combining AI with mediation practice synergistically can assist mediators in finding more, or better, integrative solutions to the complex problems often presented during mediation. AI tools cannot yet replace human mediators, and the human element required during the mediation process casts doubt about whether these tools will ever be able to completely do so.[60] But mediators can use these tools now to enhance their practice. Human mediators can view AI mediation tools as a synergistic helper to make their practice more efficient, preempt potential shortcomings or blind spots, assist in brainstorming solutions, and assist in finding optimal solutions. ChatGPT has already been shown to assist mediators in a number of

ways, such as searching for and interpreting information, responding to mediator questions, generating possible dispute resolutions, formulating questions, and offering communication tools.[61] These tools are available now, and they can be extremely useful to practicing mediators.

AI systems work best when "trained," and a mediator should think of AI systems as virtual colleagues. Examples of steps that a mediator could use to train and evaluate an AI tool are described below.

1. Feed an AI-powered mediation tool the relevant rules, guidelines, and best practices related to the mediator's practice areas.
2. Provide other inputs (information about parties, goals, and other important factors related to the background of disputes) and previous resolutions from a sampling of prior mediated disputes.
3. Prompt the mediation tool to recommend possible solutions, which the mediator could use as suggestions for the parties to consider before or during mediation.
4. Compare these AI-recommended solutions with non-AI solutions recommended or considered in the dispute.
5. Evaluate the potential shortcomings of the AI's solution compared to the shortcomings encountered in the actual resolution of the dispute without using AI.

Some questions a mediator may consider in comparing the actual resolution with the AI-generated resolution include:

- Why were the resolutions different? What were the differences in how the AI mediation tool and the parties prioritized key factors?
- Which resolution best maximizes the interests of the parties?
- Which resolution seems more equitable and would be considered by a party as "fair"?
- Did the AI mediation tool's solution address an issue of bias that the parties or mediator did not detect? Did the AI mediation tool's solution reflect bias, inaccuracy, or inconsistency?

After considering these issues, a mediator could feed the AI mediation tool additional data or knowledge that the mediator believes may have been relevant, party-specific priorities. This may impact the "weight" used in the future by the AI mediation tool for specific factors and thus may bridge the gap in an instance where the mediator believes the suggested resolution could have been improved.

Alternatively, if the AI mediation tool's proposed resolution was a good or better alternative, the mediator could use that to improve their own knowledge and practice. Over time, AI mediation tools would, through specifically tailored data, become better suited at performing helpful tasks, such as providing an answer to a query, brainstorming questions or possible solutions, or drafting a stipulation. Eventually, the AI mediation tool could perform a majority of the routine and repetitive work for simpler disputes. This would allow a mediator to handle simpler disputes at a lower cost, increase workload capacity, and focus on more complex disputes.

"AI mediation tools are another form of technology that mediators can integrate into their practices, as they have done with email, remote mediation software, calendaring tools, and billing software. AI-powered mediation tools are best thought of as tools to assist, rather than replace, human mediators."

## Conclusion

AI mediation tools are another form of technology that mediators can integrate into their practices, as they have done with email, remote mediation software, calendaring tools, and billing software. AI-powered mediation tools are best thought of as tools to assist, rather than replace, human mediators. Incorporating AI tools and feeding them data and preferences will allow them to generate better results. Using AI could mean more options for parties and increased efficiency for mediators, allowing mediators to focus on bringing human qualities to the table to help parties overcome impasses in the most complicated disputes. Ultimately, mediators who synthesize AI mediation tools into their practices will be better situated than those who ignore them, as widespread adoption of tools like ChatGPT will lead parties to expect mediators to adopt these tools. CL

**Ryan Searson** is a JD candidate in the class of 2026 at the University of Denver Sturm College of Law. He is employed as a financial regulatory analyst with Foley & Lardner LLP, supporting the firm's securities enforcement and litigation practice—rsearson26@law.du.edu. He sincerely thanks Professor Wesley Parks at Denver Law for his guidance, useful comments, and edits of this article.

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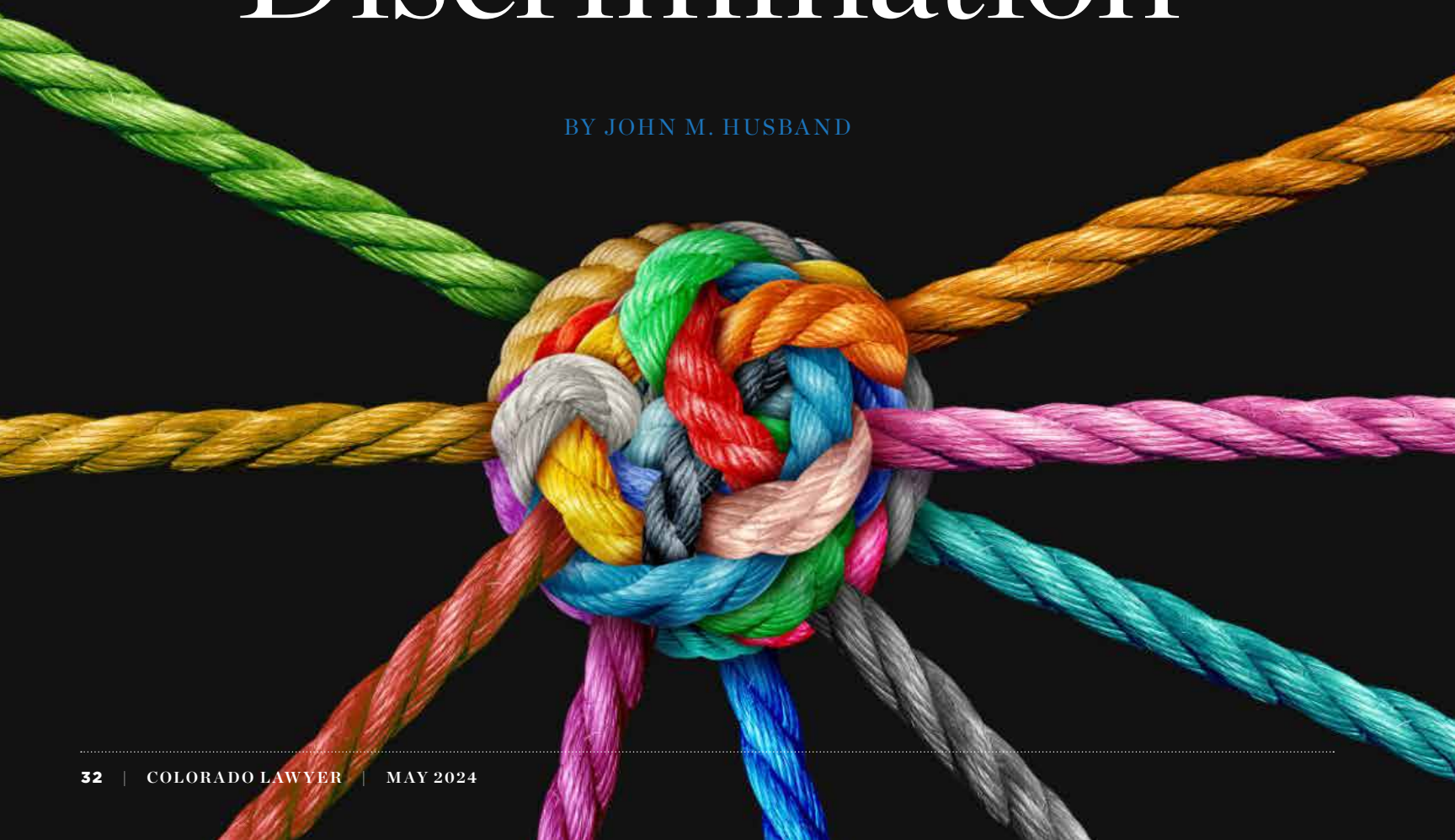
# Diversity, Equity, and Inclusion, and Reverse Discrimination

BY JOHN M. HUSBAND



*This article discusses how a recent US Supreme Court decision dealing with racial discrimination combined with a split in the US courts of appeals on standards of proof in reverse discrimination cases could send DEI challenges to the US Supreme Court.*

Diversity, equity, and inclusion (DEI) is a frequent topic in the news.[1] Many employers, companies, and law firms have developed and endorsed DEI plans and policies designed to recruit, retain, and increase leadership opportunities for historically underrepresented groups. At the same time, these programs have come under scrutiny from both legislative and court challenges claiming that DEI initiatives discriminate on the very factors they seek to avoid by favoring certain groups over others. Adding to the debate, the US Supreme Court has also weighed in on these complex issues with a recent significant decision dealing with racial discrimination. This article briefly reviews that decision but primarily focuses on a circuit court split regarding the criteria for reverse discrimination cases and discusses how challenges to DEI programs could end up before the US Supreme Court.

## US Supreme Court Holds That All Racial Discrimination Is Unlawful

The US Supreme Court in *Students for Fair Admissions v. President and Fellows of Harvard College* (SFFA) ruled against race-conscious admissions policies at Harvard College and the University of North Carolina.[2] The Court found that the policies employed by those institutions violated the Equal Protection Clause of the Fourteenth Amendment because they (1) lacked focused and measurable objectives, (2) used race as a stereotype or negative factor, and (3) had no end point.[3] The Court noted that the policies employed by those institutions provided a benefit to some applicants at the expense of others and did not promote the goals of ensuring campus diversity.[4] Harvard's admission process, for example, led to fewer white and Asian students being admitted.[5] The Court reinforced the principle that all racial discrimination is unlawful, no matter the intention. The Court held that eliminating racial discrimination means eliminating all of it, including when using admissions decisions as a way to achieve racial balance.[6] Although the 6-to-3 ruling was specific to higher education, its application has significant implications for employers, both public and private. Employment actions dealing with hiring, promotion, terms and conditions of employment, and initiatives designed to improve DEI practices will likely be challenged based on the reasoning used in this decision.

## Attorneys General Have Differing Views

Soon after the SFFA decision, the Republican attorneys general of 13 states sent a letter to Fortune 100 chief executive officers directing them to avoid using racial preferences in employment and contracting decisions. The letter warned: "If your company previously resorted to racial preferences or naked quotas to offset its bigotry, that discriminatory path is now definitively closed. Your company must overcome its underlying bias and treat *all* employees, *all* applicants and *all* contractors equally, without regard for race."[7] A response filed by the Democratic attorneys general from 21 states takes exception to the abandonment of racial equity policies and programs and supports DEI initiatives, noting that "corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination. In fact, businesses should double-down on diversity-focused programs because there is still much more work to be done."[8]

## Title VII Prohibits Discrimination

Employment affirmative action programs and workplace DEI initiatives are governed by both federal and state employment discrimination laws, including Title VII of the Civil Rights Act of 1964.[9] Considering and favoring any individual on the basis of race, sex, or national origin in employment decisions is generally illegal under discrimination laws.[10]

Although it did not directly address discrimination in the context of Title VII, the SFFA decision lays the foundation for future challenges to the rationale supporting workplace diversity programs. Challenges to these programs are likely to take the form of so-called reverse discrimination cases, with plaintiffs alleging that DEI programs favor certain groups over others on the basis of race, national origin, or sex. Title VII prohibits all forms of discrimination and has successfully been used as a basis for claims of discrimination against white applicants and employees.[11] For example, Starbucks recently lost $25.6 million in damages to a white manager in a reverse discrimination case.[12]

## Circuit Courts Are Split on Reverse Discrimination Standard

In a Title VII case, a plaintiff must establish a prima facie case of discrimination and must demonstrate that (1) they belong to a protected class, (2) they were qualified for the job, (3) they were rejected despite being qualified, and (4) similarly situated individuals outside their protected class were treated more favorably.[13] Several courts impose an additional requirement when a plaintiff pursues a reverse discrimination case. These courts require the plaintiff to show background circumstances to support the suspicion that the defendant is that "unusual employer" that discriminates against the majority. It is this additional requirement that will be the focus of reverse discrimination litigation going forward.

The US circuit courts of appeals are conflicted on the required evidence needed in a reverse

discrimination case. The Tenth Circuit Court of Appeals[14] is joined by the Sixth,[15] Seventh,[16] Eighth,[17] and DC Circuits[18] in applying the additional "background circumstances" element to an employee's bias claim under Title VII when that employee is not a member of a minority. The Third[19] and the Eleventh Circuits[20] have expressly rejected the "background circumstances" rule. The First,[21] Second,[22] Fourth,[23] Fifth,[24] and Ninth[25] Circuit courts simply do not apply the "background circumstances" rule.

The Tenth Circuit, in *Notari v. Denver Water Department*, noted that

> it is appropriate to "adjust[] the prima facie case to reflect" the reverse discrimination context of a lawsuit because "the presumptions in Title VII analysis that are valid when a plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of an historically favored group."[26]

The employee in *Notari* was a male who was denied a promotion in favor of a less qualified female. The court went on to say that in any reverse discrimination case, an employee must establish the requisite "background circumstances" to meet their prima facie burden to show that these background circumstances support an inference that the defendant is one of those unusual employers that discriminates against the majority.[27]

The Sixth Circuit, in December 2023, determined a case that included a concurring opinion critical of the rule.[28] The employer in that case defeated an appeal in which a female employee, Ames, alleged discrimination based on sexual orientation. Ames alleged she was denied a promotion and demoted because she was heterosexual and that her sexual orientation caused her to lose her job. She was demoted and replaced by a gay man and denied a promotion that was instead given to a gay woman. The court found that Ames had established key elements of a prima facie case for sexual orientation discrimination under Title VII, but the claim failed because Ames did not show background circumstances suggesting that her employer is the unusual employer who discriminates against the majority.[29] The court said Ames needed to come forth with either (1) evidence that a member of the relevant minority group made the challenged job decision or (2) statistical proof of a pattern of bias against members of the relevant majority group.[30] The court stated Ames made neither showing.

"The court went on to say that in any reverse discrimination case, an employee must establish the requisite 'background circumstances' to meet their prima facie burden to show that these background circumstances support an inference that the defendant is one of those unusual employers that discriminates against the majority."

Judge Kethledge issued a concurring opinion to express his disagreement with the "additional background circumstances" requirement, suggesting that it should be eliminated.[31] He noted that Title VII prohibits discrimination for any employee based on sex or other protected categories.[32] In his view, having different evidentiary burdens imposed on different workers based on their different demographic groups is discrimination in and of itself against an employee and prohibited by Title VII:

> The "background circumstances" rule is not a gloss upon the 1964 Act, but a deep scratch across its surface. The statute expressly extends its protection to "any individual"; but our interpretation treats some "individuals" worse than others—in other words, it discriminates—on the very grounds that the statute forbids.[33]

Judge Kethledge concluded:

> Respectfully, our court and others have lost their bearings in adopting this rule. If the statute had prescribed this rule expressly, we would subject it to strict scrutiny (at least in cases where plaintiffs are treated less favorably because of their race). And nearly every circuit has addressed this issue one way or another. Perhaps the Supreme Court will soon do so as well.[34]

## Conclusion

The US Supreme Court's decision in SFFA could pave the way for increased reverse discrimination challenges to DEI programs and lead to major implications on an issue with significant social, political, and employment philosophies. Do decisions intended to promote equity discriminate against members of certain categories? Are differing standards of proof legal? Given the split in the circuit courts of appeal, there will be conflicting decisions until these issues are resolved by the US Supreme Court. CL

**John M. Husband** is a partner in Holland & Hart, LLP's labor and employment practice group in Denver. He is a fellow of the College of Labor and Employment Lawyers and has a nationally recognized labor and employment practice—jhusband@hollandhart.com.

**Coordinating Editor:** John M. Husband, jhusband@hollandhart.com

## NOTES

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4. *Id.* at 2168–69.

5. *Id.*

6. *Id.* at 2161–62, 2172.

7. Kobach et al., Letter from attorneys general of Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Mississippi, Nebraska, South Carolina, Tennessee, and West Virginia to Fortune 100 CEOs 6 (July 13, 2023), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf.

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9. Civil Rights Act of 1964 § 7, 42 USC §§ 2000e et seq.

10. *See* 42 USC § 2000e-2(a). *See, e.g., United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

11. *See, e.g., Phillips v. Starbucks Corp.*, 624 F.Supp. 3d 530 (D.N.J. 2022).

12. *Id.* (race was the determinative factor in the termination decision).

13. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

14. *Notari v. Denver Water Dep't*, 971 F.2d 585, 588–89 (10th Cir. 1992).

15. *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822 (6th Cir. 2023).

16. *Mills v. Health Care Serv. Corp.*, 171 F.3d 450 (7th Cir. 1999).

17. *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004).

18. *Parker v. Balt. & Ohio R.R.*, 652 F.2d 1012, 1017–18 (D.C.Cir. 1981).

19. *Iadimarco v. Runyon*, 190 F.3d 151, 157–62 (3d Cir. 1999).

20. *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011).

21. *Williams v. Raytheon Co.*, 220 F.3d 16, 18–19 (1st Cir. 2000).

22. *Aulicino v. NYC Dep't of Homeless Servs.*, 580 F.3d 73, 80–81 & n.5 (2d Cir. 2009).

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27. *Id.*

28. *Ames*, 87 F.4th 822.

29. *Id.* at 825 (citing *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020)).

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32. *Id.*

33. *Id.*

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# Navigating Colorado's New Abandoned Wills Depository

BY CHARLES E. ROUNDS

*This article offers a step-by-step guide for depositing abandoned original wills under the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act and addresses the benefits and risks of retaining clients' original estate planning documents.*

Attorneys who regularly serve as custodians of original wills know that it is common for the creators of the wills to move, change their telephone numbers, or become unresponsive. The creator's intent could be jeopardized if the custodian loses contact and is unable to update the original will if the creator wants to make changes. Loss of contact can also hinder the attorney's ability to take the necessary steps to administer the estate or transfer the will to a new custodian if necessary. Colorado now has a mechanism for estate planning attorneys, trust departments, and other fiduciaries who retain clients' original wills to dispose of abandoned wills when they have lost touch with these clients.

The Colorado Electronic Preservation of Abandoned Estate Planning Documents Act[1] (Act) was signed into law in 2019. It provides for the establishment of a depository to hold original abandoned will documents[2] to be administered by the Colorado State Court Administrator (SCA). However, the development of the administrative system for accepting and holding wills took time. The effective date of the Act was changed from January 1, 2021, to January 1, 2023, and the system was not fully operational for the public's use until the fall of 2023. This article is a practical guide for using the depository.

## Overview of the Act

In passing the Act, the legislature recognized that when professionals who are custodians for original wills are unable to locate the wills' creators, it is in the best interest of the custodians, the creators, and the creators' representatives to deposit the wills in a central place.[3] Under the Act, the SCA does not physically hold the original abandoned will but instead stores an electronic copy of the original.

"Colorado now has a mechanism for estate planning attorneys, trust departments, and other fiduciaries who retain clients' original wills to dispose of abandoned wills when they have lost touch with these clients."

In instances where the creator of the document has become unresponsive, the state's process for submitting an abandoned will may be appealing. However, the submission of an abandoned will to the SCA is intended to be an option of last resort, and a practitioner can use the abandoned will depository created under the Act only when they cannot locate the creator after a diligent search. Moreover, nothing in the Act revokes the requirement to "lodge" an original will after the death of the will's creator. Under CRS § 15-11-516, the current custodian of any original will is still required to deliver it to the appropriate court within 10 days of death, regardless of whether a probate will eventually be opened. Therefore, if during the search for the will's creator, a custodian discovers evidence of the creator's death, the use of the depository is inappropriate. Instead, the custodian should deliver the original physical will to the clerk's office of the probate court with the proper jurisdiction.

In cases where using the depository is appropriate, once will custodians have successfully transferred electronic copies of the wills to the SCA, they can physically destroy the originals in their possession. It should alleviate the practitioners' stress to know that there is now a systematic method for disposing of the "dusty" old original wills they have been holding for decades on behalf of now unresponsive clients. However, practitioners should be aware of the system's shortfalls.

First, it is time-consuming. There are a number of required steps to be taken before depositing the will and then destroying the original. Second, there is a fee. Each will deposit currently costs $39.50, and there is likely no client to bill, so the firm absorbs the cost. If practitioners only have a few original wills at issue, the time and fees are not prohibitive; however, if they intend to rely on the system for disposing of a high volume of wills, time and fees could become excessive. Finally, although language in the Act references "estate planning documents," the depository only accepts "will documents" at this time.[4] What does a practitioner do with abandoned original powers of attorney, living wills, and other forms of estate planning documents? There is currently no option for submitting these documents to the SCA, so the depository assists with the disposal of just one of multiple types of original estate

planning documents that practitioners routinely keep for clients. Despite these drawbacks, many practitioners will likely find the depository a useful tool that is relatively easy to use.

### Step-by-Step Procedure for Depositing Abandoned Original Wills

Though it contains several steps, the process to submit abandoned wills is not terribly complex. Practitioners interested in using the depository should start by becoming familiar with the "Abandoned Estate Documents" page on the Colorado Judicial Branch website.[5] This page contains the specific steps and requirements for submitting a document, as well as the applicable JDF forms (975, 976, and 977), instructions (JDF 974), and Chief Justice Directive (23-01).[6] This is also the page where practitioners will submit the necessary documents and where any parties can search the database for names and last known addresses of any creators with uploaded wills.

Below are the general steps from start to finish for practitioners to successfully dispose of original abandoned will documents in their possession.

1. Identify candidates whose original wills you possess who have been unresponsive, unable to be located, or unable to be reached. Determine where to document efforts to search for the will's creator (through client management software, spreadsheet, etc.).

2. Conduct a search for the will's creator using at least two of the seven forms of contact listed on the Filing Statement for the Submission of Abandoned Estate Planning Documents to the State Court Administrator's Office (JDF 975) (filing statement). Calling or emailing the creator using their last known contact information is usually the most practical, but other options include searching a telephone directory covering the geographic area of the last physical address; conducting a general Internet search for the creator or their relatives; or attempting to contact an heir. Specific websites that may be helpful with these efforts include Accurint (requires a LexisNexis login), Legacy (for obituaries), and Find a Grave. Sometimes county property records and district and Denver probate court records can also be helpful.

> "Retaining wills for clients can provide several benefits to the clients and their representatives and beneficiaries, and there are multiple tools and best practices that can help reduce the associated risks."

3. Send a letter to the creator's last known address stating that if the creator does not take possession of the original document within 90 days of the mailing date of the letter, then the custodian will file an electronic copy of the will with the SCA and destroy the original. The letter should be sent via first-class or certified mail to the last known address of the creator, or "in care of" the lessee(s) of a safety deposit box. The custodian should then calendar 90 days from when the letter is mailed. If the creator has not responded after the 90 days elapse (even if the letter was returned "undeliverable" to the custodian before the end of the 90-day period), then continue with the next steps.

4. Download and print the filing statement from the SCA's webpage; it cannot be completed on the webpage. Fill out the filing statement and mark the boxes indicating the steps taken to try to reach the creator. Mark the applicable box indicating that the creator was either unresponsive or unable to be reached after 90 days, and list the title, date, category, and number of pages of each document being submitted.

5. After completing the filing statement, submit it via the SCA's webpage, along with a scanned copy of the original will(s). You should receive an email confirming the submission.

6. If the submission is accepted, the SCA will send another email with confirmation of its acceptance and a link to submit payment. The link will remain active for seven days, and once the link is activated you will have 30 minutes to submit payment. If payment is not received within that time frame, you will need to contact the SCA for a new link.

7. Once payment has been received, the SCA will email a final confirmation a few days later stating that the documents have been accepted into the system. At that time, the custodian can physically destroy the original will.

### Searching the Depository and Requesting Copies

The SCA's webpage also allows the public to electronically search the depository under a creator's first name, last name, or last known address. This will be another useful tool for creators or their families, as well as attorneys, in circumstances in which they are attempting to locate missing wills. Someone searching the depository can identify persons whose wills are stored in the system; however, they do not have access to view or print the documents. To acquire a document, creators or their authorized fiduciaries or devisees[7] can request a certified copy by submitting JDF 976–Request for Certified Estate Planning Documents.[8] Creators can also remove their will documents from the depository by filing JDF 977–Request for Deletion.[9] There is no account or login required to use the SCA webpage to access or upload these forms.

### Benefits and Burdens of Retaining Original Wills

Although it was standard practice for many decades,[10] in recent years some practitioners have shied away from retaining clients' original wills, perhaps due in part to risks associated

with losing contact with clients over the years. Now that there is a mechanism for disposing of abandoned wills, perhaps practitioners who previously refused to retain wills on this basis might reconsider. Retaining wills for clients can provide several benefits to the clients and their representatives and beneficiaries, and there are multiple tools and best practices that can help reduce the associated risks.

### *Benefits to the Client*

Many clients feel more comfortable with their attorneys in possession of their original wills, particularly now that Colorado courts have discontinued their practice of accepting deposit of wills pre-mortem. Retaining the clients' original wills can protect against loss or fraud. Clients can easily misplace their original wills, especially if they experience deteriorating mental or physical health as they age. They may have to move out of their homes or from one care facility to another before their death. There is also frequently the risk that disgruntled family members might discover original wills among the clients' papers and clandestinely destroy or alter them.

Another benefit is that in many cases, the estate administration process can be expedited because the law firm that drafted the will is often retained to assist with the administration of a deceased client's estate. If the law firm already possesses the original will, the process of lodging the will with the courts and opening probate is easier. This can reduce costs to the estate and leave more funds for the client's beneficiaries. The firm would also already have significant information on the decedent's assets, intentions, financial affairs, and other relevant information in their file, which makes notifications and transfers to beneficiaries more efficient. Even when the law firm is not retained post-mortem, the client has the protection of the custodial firm lodging the will and notifying the necessary parties at the appropriate time.

### *Reducing Risks of Retaining Wills*

There are a number of tools available for reducing some of the more significant concerns associated with retaining original wills. For example, risk of loss of documents due to fire, flood, or theft can be mitigated by obtaining commercial liability insurance that covers the expenses to the firm of replacing these documents. Additionally, the firm can ensure an extra level of protection by storing clients' original wills in locked fireproof locations, establishing offices in secure buildings, and retaining electronic copies of all original wills. Electronic copies of original wills and other estate planning documents should be stored on the cloud and/or on discs that the firm updates and keeps off-site.

Concerns of not being notified of a client's death, relocation, or revocation or changes to the original will can be addressed through periodic communication with clients. This is even more important as the US population becomes increasingly mobile, partly due to more opportunities for people to work remotely. Regular mailings such as holiday cards, newsletters, or announcements of changes in the firm's location or attorneys can serve dual purposes by including address correction requests or forwarding instructions. For clients who have been discovered to have moved out of state, returning these clients' original documents and advising them to contact an attorney in the new location to review their documents is a best practice. Having staff monitor websites that publish obituaries is another possible precaution. The new SCA abandoned will depository can also ease practitioners' concerns about losing contact with a former client or being unable to locate a client's nominated personal representative or devisees. This depository will also help solo practitioners who are retiring and unable to reach clients to return their documents.

These tools make it reasonable for a law firm to offer to clients, in the right circumstances, the benefits of holding their original wills, as long as the firm is willing to assume the burden of undertaking precautions to reduce the associated risks.

## Conclusion

Estate planning attorneys are not mere scriveners. They are counselors and safeguards against incapacity, mistake, undue influence, and duress in the execution of wills. Holding the original wills that they have prepared for clients allows attorneys to provide further assurances that the clients' testamentary intent will be honored. Numerous practical and legal solutions exist that can reduce the risks in doing so. CL

**Charles "Chad" E. Rounds** is a partner at Kirch Rounds & Bowman PC in Aurora. His practice focuses on estate planning, estate administration, trust administration, and probate. He has specific expertise in real estate issues arising in the trust and estate area—crounds@dwkpc.net. He thanks the firm's legal assistant, Diamond L. Clark, for her contribution to the writing of this article, and credits her with being a pioneer in successfully depositing an abandoned will with the Colorado State Court Administrator.

**Coordinating Editors:** David W. Kirch, dkirch@dwkpc.net; Emily L. Bowman, ebowman@dwkpc.net

### NOTES

1. CRS §§ 15-23-101 et seq.
2. The Act's name is a misnomer, as only original "will documents" can be submitted to the SCA. *See* CRS §15-23-103(13). "Will documents" include, but are not limited to, formally executed wills, holographic wills, codicils, will revocations, and memoranda for disposition of tangible personal property.
3. CRS § 15-23-102.
4. CRS § 15-23-103(13).
5. The page can be accessed from the Colorado Judicial Branch website by clicking on "Administration," then clicking "Court Services," then choosing "Abandoned Estate Documents" in the menu under "Units" on the lefthand side. The specific webpage is https://www.courts.state.co.us/Administration/Unit.cfm?Unit=estate-doc.
6. Practitioners are advised to continually check the webpage for future updates, information, and forms.
7. The requestor must include with the submission proof of identification and, where applicable, proof of authority.
8. This form can be found at https://www.courts.state.co.us/Forms/PDF/JDF976.pdf.
9. This form can be found at https://www.courts.state.co.us/Forms/PDF/JDF977.pdf.
10. Recognizing the appropriateness of practitioners retaining original wills, the American College of Trust and Estate Counsel (ACTEC) has issued ethical commentaries and guidance on the process and best practices. *See* ACTEC Commentary to Model Rules of Professional Conduct 1.15 (Safekeeping Property).

# News From the CBA, Local Bars, and More

COMPILED BY STAFF

*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.*

## State High School Mock Trial Tournament

On the weekend of March 8–9, twenty-four of the top high school mock trial (HSMT) teams from nine different regional tournaments around the state competed for the title of state champion. When it came to the final round, there were two undefeated teams—2023 reigning champs Forge Christian/Home School and Glenwood Springs. It was a close call, but Glenwood Springs came out on top during the championship round and advanced to the national HSMT tournament in Delaware. Stay tuned for those results!

This tournament would not have been possible without the 150-plus attorneys, judges, and other community members who served as volunteers. The final round was judged by an incredible panel, including Supreme Court Justice Richard Gabriel, Colorado Bar Foundation Chair Connie Talmage, Litigation Section Chair David Seserman, Appellate Judge Sueanna Johnson, and Juvenile Court Judge Pax Moultrie. The CBA is grateful to have such a strong community to support these students!

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1 The final two teams: Forge Christian/Home School and Glenwood Springs.
2 The winning moment.
3 Glenwood Springs with their championship trophy.

## Estate Planning Basics CLE

On February 15 and 16, CBA-CLE and Metro Volunteer Lawyers hosted a two-day Estate Planning Basics CLE. Thirteen trust and estate practitioners and judges gathered to teach newcomers to the practice area some of the foundational aspects of estate planning.

Did you know the CBA Trust and Estate Section has a committee for lawyers new to trust and estate practice? The Trust and Estates Practice Support Committee meets on the first Wednesday of the month. For more information, email section liaison Emma Baxter at ebaxter@cobar.org.

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1 Attendees take notes during the two-day CLE.
2 Presenters recap the morning's topics, clarify points, and field questions.

## March Leadership Visits

CBA President Catherine Chan attended Larimer County Bar Association's Term Day on March 1. The event began with a breakfast social hour and featured organizational updates, words from President Chan, 50-year member recognition (Peter Bullard, Gary Davis, Roger Clark, Randy Starr, Steve Ray, Earl Edwards, and William Gunn), and voting for the next slate of officers.

On March 8, CBA leadership visited the Heart of the Rockies Bar Association at the Scout Hut in Salida. Rachel Zancanella, the division engineer for the Arkansas River Basin, presented a CLE called "Navigating the Waters of the Arkansas Basin." This was followed by a CLE presented by Judge Jaclyn Casey Brown and Judge Amanda Hunter called "On the Road to Becoming a Judicial Officer."

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1 Judge Hunter and Judge Brown present on becoming a judicial officer.
2 Rachel Zancanella presents a CLE on basin and groundwater administration.

## Appeals Program Appreciation Event

On February 22, the CBA hosted an appreciation event for its 2023 appellate program volunteers. The appellate program comprises both a full-representation program and a monthly civil appeals clinic to assist Colorado residents around the state with cases in the Colorado Supreme Court and the Colorado Court of Appeals.

1 Chris Jackson, Matthew Simonsen, and Dean Batchelder receive a certificate of appreciation during the February event.
2 Thank you to our 2023 appellate program volunteers!

## MVL Welcomes Meghan Dill-Meinzer

Meghan Dill-Meinzer has joined Metro Volunteer Lawyers as program coordinator for the wills clinic. Dill-Meinzer has a bachelor's degree from Metropolitan State University and a paralegal certificate from the Community College of Denver. She has been a paralegal in both family law and criminal law, and she has been a member of the Colorado Divorce Law Group since its inception. Before joining MVL, she worked with CASA Denver, Colorado Organization on Adolescent Pregnancy, Parenting and Prevention, and Women Intentional about Success and Excellence (WISE).

# Law Day Essay Contest 2024

## Voices of Democracy

The CBA congratulates this year's Law Day Essay Contest winner, Luisa Villasenor! For the second year, the CBA recognized Law Day with a civics education essay contest for students across Colorado. Villasenor, an 11th grader at Cherry Creek High School in Greenwood, was awarded the top prize in the high school category. Her essay, reprinted below, responds to the prompt, "What is freedom of speech? Write about a specific speech in US history when a person used their voice to effect change."

### How "I Have a Dream" Changed Everything

Freedom of speech is a fundamental right that is valued in the United States and protected by the First Amendment to the Constitution. It allows people to express their opinions and beliefs without fear of censorship or government reprisals. This right enables an open exchange of ideas, empowers individuals to challenge the status quo, and contributes to social progress. Throughout history, many people have used their voice to bring about change and promote a more just and equal society.

In the United States, freedom of speech is a cornerstone of democracy, and it is essential for the functioning of a free and open society. Without the ability to freely express opinions and ideas, progress and social change would be severely hindered. It is through the open exchange of ideas that societies are able to grow, evolve, and address issues of inequality and injustice.

One of the most influential figures in American history is undoubtedly Dr. Martin Luther King Jr., a renowned civil rights leader who delivered his iconic "I Have a Dream" speech for jobs and freedom in Washington, DC on August 28, 1963. Dr. King was a champion for racial equality and an end to segregation in the United States, using his powerful voice to inspire hope, ignite change, and galvanize individuals into action. With more than 250,000 people gathered in front of the Lincoln Memorial (census.gov), his speech resonated deeply with the nation, as he passionately articulated a vision of a future where individuals would be judged by their character, not their skin color. In calling for an eradication of racism, discrimination, and inequality, Dr. King urged Americans to unite in the pursuit of a more equitable and inclusive society. This speech united individuals from all backgrounds in the pursuit of a more equitable society, showcasing his ability to inspire hope and ignite change through his unwavering commitment to racial equality and justice.

The enduring impact of Dr. King's "I Have a Dream" speech lies in its universal appeal and demonstrates a profound resonance across diverse audiences. King's iconic speech exemplifies the power of words to inspire and ignite change. Through the masterful use of imagery, such as his vision of children "not judged by the color of their skin but by the content of their character," King illustrates a vivid picture of a future founded on equality and unity. His words, like a symphony of justice, echo in the hearts of individuals from all backgrounds, transcending racial divides and awakening a shared desire for a better world. With each repetition of "I have a dream," King's message gains momentum, fueling the flames of a movement toward freedom, justice, and equality for all. By harnessing the universal values of dignity and fairness, Dr. King galvanizes a nation to join hands in pursuit of a society where every individual is judged not by their outward appearance, but by the richness of their humanity. In another example King says, "Let freedom ring from Stone Mountain of Georgia." This phrase is an invitation to freedom and equality everywhere, and a clarion call to combat segregation in the United States. The resonating power of Dr. King's speech lies in its ability to unite individuals from diverse backgrounds behind a shared vision of a more equitable and inclusive society, showcasing his unwavering commitment to inspire hope and ignite change in the pursuit of racial equality and justice.

The iconic speech of King's "I Have a Dream" stands as a powerful illustration of the transformative influence of free speech within a democratic society. By asserting his right to speak out against racial injustice and oppression, King shines a spotlight on the deep-rooted racism and discrimination that pervaded American society. His impassioned words serve as a rallying cry, urging individuals to confront their biases, resist institutional discrimination, and actively contribute to the creation of a more inclusive and equitable social order. King's speech reverberates throughout a generation, galvanizing activists, leaders, and ordinary citizens to unite in the struggle against racism and advocate for civil rights and social justice. King's iconic speech not only highlights the transformative power of speech in a democratic society by shedding light on racial injustice, but also underscores the crucial role of freedom of expression in driving positive societal change and advancing principles of justice and equality.

The unmistakable honesty and clarity of King's word choice in his speech reinforces the critical role of free speech in fostering a healthy democratic environment. The freedom to voice opinions, challenge authority, and effect positive transformation is fundamental to the essence of democracy. King's adept use of rhetoric ignited activity that brought about substantial advancements in the civil rights movement within the United States.

His enduring legacy serves as a poignant testament to the dynamic impact of free speech and the necessity of utilizing one's voice to champion principles of justice, equality, and human rights, thereby inspiring future generations to pursue social change through the power of expression. King articulates his resounding belief in the power of free speech to drive positive social change through the acknowledgment of the challenges that come with safeguarding this fundamental right, particularly in contentious issues like hate speech and misinformation that can harm marginalized communities.

It is equally important to recognize that freedom of speech is not without its challenges. There are often debates and discussions about the boundaries of free speech, especially when it comes to hate speech, which incites violence, and spreads misinformation. Examples of hate speech during King's time are that of Bull O'Connor, Alabama Governor George Wallace, and others who publicly sided with the Ku Klux Klan in antagonistic rallies against King and other civil rights' demonstrators. While it is crucial to protect the right to express opinions, it is also important to consider the impact that certain forms of speech can have on marginalized communities and the potential harm that it can cause, as seen in the archived footage of civil right marchers being arrested and beaten or bitten by police dogs. While freedom of speech is a fundamental right essential for the functioning of a democratic society, it is imperative to address the challenges it poses, especially in regard to hate speech and its potential harm to marginalized communities.

Freedom of speech is a vital right that is fundamental to the functioning of a democratic society. Dr. Martin Luther King Jr.'s "I Have a Dream" speech serves as a powerful example of the impact that free speech can have in inspiring, uniting, and mobilizing people toward a common goal. It is through the exercise of this right that individuals are able to challenge the status quo, advocate for change, and contribute to the betterment of society. As we continue to navigate the complexities of free speech, it is important to uphold this fundamental right while also being mindful of the responsibilities that come with it.

# 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*.

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- Relocation of a law practice
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### Questions?

Contact Melissa Higham at mhigham@cobar.org.

## LAWYERS' ANNOUNCEMENTS **DEADLINES**

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

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


**January 15, 2024, marks the end of an era and the start of Giovanni Ruscitti's second act at Berg Hill Greenleaf Ruscitti.**

Ruscitti, one of the firm's founding partners, began his tenure as managing partner in 2016. With a vision of growth and change, Giovanni was determined to bring his experience working with many C-Suite executives, serving on and advising numerous boards, and his MBA background into new leadership concepts that would ultimately lead the firm away from some of the more traditional legal industry methods.

This progressive leadership helped the firm achieve a broader commercial practice and service to the state and nation's most prominent industries. This vision and leadership also supported the firm through some of the world's most challenging times. The historical events in 2020, 2021, and 2022 change every aspect of running a law firm and how we view and live our everyday lives," says Ruscitti. "You could not successfully run a business if you ignored those impacts. Many thought leaders that I follow say, 'If you change the way you look at things, the things you look at will change.'" Giovanni shares that he remembers challenging himself and the firm's leadership team. He prioritized the BHGR team as individuals first, allowing them to serve their clients better. There was a pretty immediate emphasis on flexible work schedules and even an optional 4-day work week, mental health and wellness, and the creation of committees to help the firm navigate changes in mentorship, social issues, and improved compensation packages.

Reflecting on the expected, the unexpected, and the adaptation, Giovanni's vision carried through. "...[W]e exceeded all of my expectations, and I'm very proud of what we accomplished," he says.

Looking ahead, Giovanni is ready to embrace his "second act" as the firm's new Chairman and General Counsel. "While I will no longer be responsible for day-to-day management, I am very excited to stay in a leadership position and serve as a strategic advisor to our new managing partner and management committee," says Giovanni. His role as general counsel will allow him to share what he has learned as a managing partner and his experience representing large corporations. "I am not retiring or slowing down in any way. In fact, I love practicing law and serving as an arbitrator and mediator, and I will continue to do so for a long time. But I am embracing the role of being a 'modern elder,' a term coined by Chip Conley, which allows me to continue to learn from our younger attorneys while at the same time sharing what I have learned. I also published my first book in 2022, which became an Amazon best seller, and I enjoyed speaking nationally about the book and about legal topics. I see myself writing books and speaking nationally on various topics related to leadership, law, and life."

As for the firm, Giovanni looks forward to watching the next generation of leaders emerge, grow, and continue BHGR's legacy.

CHAIRMAN + GENERAL COUNSEL

# Giovanni Ruscitti

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# In Memoriam

**Howard Irving Rosenberg**

*April 10, 1927–February 25, 2024*

Howard Rosenberg, longtime professor at the University of Denver Sturm College of Law (Denver Law), died on February 25, 2024, at his home in Denver. He was 97.

Howard was born on April 10, 1927, in Chicago, Illinois, the son of Phillip and Lena Rosenberg. After high school, he reported for duty to the US Army the day the Japanese surrendered and served 15 months in Germany. After his military service, he graduated from Roosevelt University and received his law degree from DePaul University.

In the 1950s Howard moved to Denver, where his pursuit of social justice flourished as a staff attorney and then as executive director of the Legal Aid Society of Metropolitan Denver. During his 17 years with the Legal Aid Society, Howard had the opportunity to work with students from Denver Law. Then, in 1967, he accepted a position at Denver Law, teaching classes and helping students gain courtroom experience in his role as director of the student law office. He became widely regarded as a foremost expert regarding clinical legal education—most particularly in the area of criminal law—and received Denver Law's Outstanding Faculty Award in 2002. In 2014, at age 87, he retired as professor emeritus after 47 years with the school.

Howard's service to the greater Colorado legal community was also extensive. He was one of four attorneys who founded the Thursday Night Bar (now known as Metro Volunteer Lawyers), which provides pro bono legal services to low-income clients. He served as president of the Denver Bar Association and received the organization's highest honor, the Award of Merit. He received the Colorado Bar Association's Jacob V. Schaetzel Award, conferred on those who have made significant contributions in the delivery of legal services to low-income citizens of Colorado. And he was a longtime member of the Colorado Supreme Court Civil Rules Committee.

In recognizing Howard's lengthy and distinguished career, Denver Law Dean Bruce Smith stated:

> Although the clinical program at the University of Denver Sturm College of Law proudly dates from 1904—the first at any US law school—it was Howard Rosenberg who brought our clinical program into its modern age. With vision, passion, and an unflinching commitment to social justice, Howard taught decades of law students that law is a noble, mission-driven, and transformative profession. He will be dearly missed by his many grateful students, colleagues, friends, and clients.

Howard is survived by his wife Kristen Dutton; children David Rosenberg (Suzanne Kent Rosenberg), Paul Rosenberg (Mauge Wevar Rosenberg), and Hyla Rosenberg; five grandchildren; and two great-grandchildren. He was preceded in death by his stepson Matthew Dutton Simcox (Leslie Hakze).

A celebration of life will be held at a later date at the University of Denver Sturm College of Law. (For more information, please email elizabeth.fatta@du.edu.)

Memorial contributions may be made to the University of Denver Sturm College of Law (Clinical Program Endowed Fund), P.O. Box 910585, Denver, CO 80291-0585, or the Legal Aid Foundation of Colorado, 1120 Lincoln St., Ste. 701, Denver, CO 80203.


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# Formal Opinion No. 147

## Expecting the Unexpected: Ethical Considerations in Succession Planning

**Adopted on January 18, 2024**

### I. Introduction and Scope

This opinion examines a lawyer's ethical obligations, along with best practices, for developing a succession plan for an unexpected event that prevents the lawyer from practicing law. For purposes of this opinion, a succession plan is defined as those things a lawyer should take into account when developing a plan for an unexpected event that precludes the lawyer from practicing, such as the lawyer's incapacity, disability, or untimely death. Succession planning is not only a practical consideration for lawyers, but also is consistent with a lawyer's duty of diligence in Colorado Rule of Professional Conduct (Colo. RPC or Rule) 1.3.

The opinion details fundamental considerations that a lawyer (the planning attorney) should prepare for prior to the unexpected happening to protect client interests, many of which pertain to client files and property. Quite a few of these considerations flow from basic compliance with certain Colorado Rules of Professional Conduct.

The opinion also details best practices for another lawyer (the assisting attorney) to consider when implementing the succession plan after the unexpected event occurs, such as continuing representation of the planning attorney's clients and returning files and property. For purposes of this opinion, best practices are those practices which may be beneficial to the planning attorney in the succession planning process and the assisting attorney in carrying out the succession plan, and which the Committee encourages lawyers to consider. They are not, however, ethical obligations pursuant to the Colorado Rules of Professional Conduct, nor are these best practices intended to establish a legal duty or standard of conduct.

The opinion additionally outlines procedures behind inventory counsel appointment pursuant to Colorado Rule of Civil Procedure 244. This opinion does not discuss succession planning in regard to transferring client responsibilities within a firm when an unexpected event occurs, nor does it address short-term absences due to an unexpected event.

### II. Syllabus

The Colorado Rules of Professional Conduct do not formally call for succession planning. They do suggest that having a succession plan comports with a lawyer's duty of diligence in Colo. RPC 1.3. Comment [1] to Colo. RPC 1.3 explains a lawyer should "take whatever lawful and ethical measures are required to vindicate the client's cause or endeavor." To meet this requirement, a lawyer should develop a specific plan for an unexpected event that renders a lawyer unable to practice law to mitigate adverse impacts on clients.

The Rules expressly support the inclusion of succession planning in certain lawyers' duty of diligence in Comment [5] to Colo. RPC 1.3. That comment provides:

> To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

Comment [5] to Colo. RPC 1.3 emphasizes the need for solo practitioners to have a succession plan. Succession planning is vital for solo practitioners because clients will not be able to turn to a lawyer in the same firm to continue their cases. Without a succession plan for guidance, another lawyer is unlikely to have the institutional knowledge about the solo practitioner's procedures with respect to managing cases and other administrative aspects of the practice to efficiently assist clients, including facilitating the important task of returning client property.

The American Bar Association's Standing Committee on Ethics and Professional Responsibility opined that "[a]s a precaution to safeguard client interests, the sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death." ABA Comm. on Ethics and Prof. Resp., Formal Op. 92-369, "Disposition of Deceased Sole Practitioners' Client Files and Property" (1992), p. 2. This guidance from three decades ago remains pertinent.

The danger of neglected client matters, and associated liability risks, can exist in firms of any size as well, since each lawyer may have their own way of organizing their cases, keeping their calendars, and contacting clients. Therefore, the Committee encourages all lawyers think about and formulate a plan to protect current and past clients if the unexpected happens.

### III. Analysis

#### *A. Why Attorneys Should Have a Succession Plan*

Not planning for the unexpected can have serious and undesirable consequences for the planning attorney's clients. Clients who have active cases with upcoming transactional or limitations deadlines, scheduled events or meetings, court appearances or trials, may be harmed if those deadlines or appearances pass without someone taking steps to protect the client's interests. All clients will need their

files promptly returned to them or transferred to another lawyer. Clients with active matters will also need unearned fees refunded to them in order to retain new counsel in their ongoing legal matters.

The absence of a plan for the unexpected may also have undesirable consequences for the assisting attorney who will have to figure out on their own how to protect the planning attorney's clients. In the absence of a succession plan, the assisting attorney may not be able to take the first step of logging onto the planning attorney's devices and accounts without knowing the passwords. The assisting attorney may not even know where to find the devices, or what cloud drive the planning attorney used for file management, without some type of advance instruction. The assisting attorney may be fielding calls from clients about their cases or the status of advance payments. Without diligent bookkeeping by the planning attorney, determining what funds the planning attorney held, and for whom, may be a formidable obstacle. A succession plan is a roadmap for the assisting attorney to tend to the planning attorney's clients' needs efficiently and effectively.

Not planning for the unexpected may also have undesirable consequences for a multi-person practice by impacting the firm's overall productivity. Dealing with the practice-wide ramifications of a lawyer's unplanned withdrawal from a firm can greatly consume time and resources. This may negatively impact the other lawyers' ability to continue to work on existing client matters.

Having a succession plan lessens the risks described. It is also a helpful way to organize and streamline an existing practice. Creating a succession plan involves thinking about how to direct the assisting attorney step-by-step. A planning attorney must think about how information is accessed and stored, how deadlines are calendared, how client files are organized and where they are kept, whether client ledgers are up-to-date, and the availability of accounting records.

Outside the various legal risks and issues created by not having a plan in place, the absence of a succession plan can significantly burden the planning attorney's spouse, family members, or other loved ones at a difficult time. Without a succession plan, the responsibility to transition clients, distribute property, and wind-down a practice could fall on the planning attorney's personal representative or close family. These persons will already be navigating grief and uncertainty. Thus, developing a succession plan to have an assisting attorney to handle these matters protects not only clients, but also loved ones. It also avoids situations where a non-lawyer third party accesses confidential client information.

Last, attorneys should consider the financial implications of not having a succession plan. File disposal, including shredding and mailing files, as well as potentially paying an assisting attorney for his or her time to wind down a practice, are all potential costs. Determining how these expenses will be paid as part of a succession plan may result in cost savings, as opposed to leaving these decisions to an assisting attorney, personal representative, or inventory counsel to deal with on an urgent basis.

### *B. Considerations for Planning and Assisting Attorneys*

A lawyer's duty of diligence and obligation to protect client interests should compel development of a plan for an unexpected event that results in a lawyer's disability, death, or incapacity. For many lawyers, particularly those in solo practice, this means creating a formal succession plan. This opinion approaches the issue, and embedded ethical considerations, by looking first at the need to protect client files. It then turns to protecting client funds in the event of the unexpected. From there, this opinion details the importance of a planning attorney's regular communication with clients. This opinion then explores the unique considerations involved for those assisting attorneys who assume representation of the planning attorney's clients.

### *C. Protecting Clients: Client Files*

#### 1. Maintaining Client Files

As a best practice, planning attorneys should maintain client files in an orderly fashion. This includes making one client's file distinguishable from others, regardless of the format used to store client files. It also includes keeping client files in a secure location. Doing so is consistent with a lawyer's duty of confidentiality. Colo. RPC 1.6(a) outlines a lawyer's duty to keep information related to the representation of a client confidential, absent client consent to disclosure of information. Colo. RPC 1.6(b) lists circumstances where disclosure of client confidences may be permissible. Colo. RPC 1.6(c) mandates lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Last, Colo. RPC 1.9(c)(2) explains a lawyer shall not "reveal information relating to the representation" of a former client. Accordingly, a foundational step in creating a succession plan is to have an organized system for maintaining client files to safeguard confidential information in them.

Planning attorneys should be vigilant not to intermingle documents related to different client matters in the same file, whether that file is a tangible, physical file, or one kept electronically. Keeping files distinct reduces the risk of inadvertent disclosure when returning the file. Planning attorneys should similarly be mindful of storing client files in locations where other individuals could potentially access the files and information in them. For example, storing files on shared devices, or in storage along with other personal documents and items, risks the inadvertent disclosure of confidential information. These best practices comport with all lawyers' duties to protect client confidences. Further, organized client files will lessen an assisting attorney's workload.

The question arises of what papers must be retained as part of a client file. Comment [1] to Colo. RPC 1.16A instructs that: "[a] client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice." Elaborating on what constitutes a client file, the Committee opined in Formal Opinion 104 that a client's file:

> . . . includes, but is not limited to: those documents and other property the client provided; originals and copies of other papers and documents the lawyer possesses

relating to the representation that the client reasonably needs to protect the client's interest, and documents in electronically accessible and editable format . . . .[1]

Planning attorneys should be mindful of what documents must be retained in a file both during the course of active client representation and upon conclusion of the matter.

A final consideration for file maintenance in the context of succession planning is Colo. RPC 1.16A's instructions regarding client file retention. RPC 1.16A(b) establishes a baseline that lawyers in private practice must keep client files for ten years following termination of the representation of a client matter if the client has not been given notice of the lawyer's intent to destroy the client's file. After that decade, the lawyer may destroy the file provided the lawyer does not know of any "pending or threatened legal proceedings" and the lawyer has not agreed to otherwise maintain the file.

Colo. RPC 1.16A(a) provides that lawyers in private practice may not need to keep a client file for ten years if:

- The lawyer delivers the file to the client.
- The client authorizes destruction of the file in a writing signed by the client and the lawyer is not aware of any pending or threatened legal proceedings.
- The lawyer gives written notice to the client of the lawyer's intention to destroy the file after a specific date in the notice and there is a minimum of thirty days between the date of the notice and the date of destruction and provided, again, there are no known or threatened legal proceedings the lawyer is aware of.

The Committee encourages planning attorneys to focus on the possibilities suggested by the third point, as well as Colo. RPC 1.16A(d) which explains that lawyers may satisfy the notice requirements to clients of their file retention policies by providing notice in a fee agreement or other writing delivered to a client. Developing a policy for how long a lawyer will keep files, and communicating the policy to clients during the course of the representation, allows the lawyer to destroy files after a certain period of time. Such a policy also avoids having to find clients and obtain their permission to destroy a file years after the representation ends. It also avoids undesirable situations of physical client files stacking up in storage facilities, basements, attics, or offices. In the context of succession planning, minimizing a lawyer's practice footprint by destroying files after a set date will reduce the amount of work an assisting attorney must undertake to wind down the planning attorney's practice.

Lawyers who represent clients in criminal defense matters should familiarize themselves with Colo. RPC 1.16A(c), which has specific requirements for the amount of time a file must be maintained depending on the nature of the client's conviction and, in many circumstances, whether or not the sentence was appealed.

Planning attorneys developing a file retention policy should consider other relevant rules and statutes related to the maintenance and destruction of client files. Colo. RPC 1.16A(e) explains that the rule does not "supersede or limit a lawyer's obligations to retain a client's file that are imposed by law, court order, or rules of a tribunal." For example, Colo. RPC 1.15D(a) requires that a lawyer maintain copies of invoices or fee agreements in the client's file for a period of seven years; a requirement discussed in greater detail later in this opinion. C.R.C.P. 121 Section 1-26(7) requires lawyers to keep copies of documents filed electronically in Colorado state courts for two years. Planning attorneys should also take into account the limitation periods for malpractice actions or attorney misconduct complaints.

**2. Distributing Files**

One of the assisting attorney's primary duties is to distribute client files. Depending on how the client choses to move forward with their case, the file will be given to the client directly, forwarded to the client's new counsel, or destroyed. To help in this process, planning attorneys should, as a best practice, make essential information about client whereabouts readily accessible. Storing contact information with a client file, or in a client list, will make this process easier.

An assisting attorney will also want to determine if immediate action needs to be taken in discrete matters. This helps the assisting attorney prioritize which clients to contact immediately and those with less urgency. This can be accomplished by checking the planning attorney's calendar, docket, or case files. A succession plan with instructions on how to view and access this information will save the assisting attorney time and effort. To facilitate file return, planning attorneys should include in their succession plan information on where to locate passwords to access electronically-stored files as well as digitally-maintained calendars.

If the assisting attorney determines that a client matter requires immediate attention, the assisting attorney should promptly contact the client and notify them of the situation and explain options for moving forward. The assisting attorney will likely need to arrange to quickly return the file to the client or forward it to successor counsel. Doing so may incur costs. Accordingly, planning attorneys may want to outline in a succession plan how the assisting attorney can access funds to pay these costs.

If the assisting attorney plans to assume representation of the planning attorney's clients, the assisting attorney may not need to return a file, but should be prepared to ask for continuances or extensions of time as necessary, as well as to file substitutions of counsel. If the assisting attorney does not intend to assume client representation, the assisting attorney may nonetheless want to mention to clients the desirability of informing the court of the situation in those matters where there is ongoing litigation.

The assisting attorney who intends to take over client representation should plan to review the file and contact the opposing party or third parties when imminent action is needed. In these situations, the assisting attorney should check the case file to ascertain whether the person is represented by counsel, in which case Colo. RPC 4.2 may prohibit direct communication with the opposing party or third party.

Paramount to client file distribution is maintaining the confidentiality of information in the file. To accomplish this, and as an additional best practice, a planning attorney might consider informing clients at the outset of the representation of the name of their assisting attorney so that clients understand who might contact them if an unexpected event leads to

the planning attorney's incapacity. As part of informing clients, planning attorneys may wish to have clients consent to having their files returned by the identified assisting attorney.

Meanwhile, to protect the confidentiality of information in client files, if an assisting attorney has unclaimed files that clients do not wish to receive, or where the client has not responded to communications seeking to return the file, assisting attorneys should securely destroy the information in the file. This may be accomplished by shredding physical files. Electronic devices should be overwritten or electronically recycled, permanently destroying client data. These steps will also require the assisting attorney have access to funds to accomplish the tasks, highlighting the need for a planning attorney to consider how the assisting attorney will pay for the costs involved in winding up a practice. The Colorado Rules of Professional Conduct do not affirmatively require client files be disposed of in a certain way. Regardless, the duty to protect client confidences should guide a planning attorney or assisting attorney's when disposing of client files.

**3. Conflicts of Interest**

As discussed, an essential step an assisting attorney will take implementing a succession plan is to return files. This will most likely necessitate reviewing files. Planning attorneys and assisting attorneys should be particularly mindful of potential conflicts of interest that might arise for an assisting attorney in this process. Even if an assisting attorney does not intend to represent clients of the planning attorney, if the assisting attorney has a conflict, he or she should avoid reviewing information in a file that may compromise the client interests during the file return process, as a best practice. This is especially so if the assisting attorney has reason to suspect the interests of the client whose file the assisting attorney is reviewing are adverse to interests of a current or former client of the assisting attorney.

Colo. RPC 1.7 sets forth when a conflict of interest exists. Colo. RPC 1.7(a)(2), in conjunction Colo. RPC 1.9(c), extends conflict of interest protection to former clients, third persons, and when the lawyer has a personal interest in the matter. Assisting attorneys who intend to assume representation of client matters need to run a conflicts check as though these are new clients of the assisting attorney's firm. If a conflict of interest emerges, then the assisting attorney should ask another lawyer to handle the case. Meanwhile, planning attorneys should consider potential conflicts in speaking to colleagues who might serve as an assisting attorney. They should evaluate the risk that the assisting attorney's

practice might feature representation adverse to clients of the planning attorney or vice-versa. The more likely that conflicts will arise, then the planning attorney might want to approach another colleague to serve as assisting attorney.

***D. Protecting Clients: Client Property***

Protecting clients' property is an essential duty under multiple Colo. RPCs. Proper trust account reconciliation and appropriate record keeping as required by the rules facilitates the effective winding down of a law practice, as does putting in place procedures that enable an assisting attorney to distribute funds held in trust.

**1. Trust Account Reconciliation**

Careful adherence to obligations related to trust account reconciliation will be important in the event of a lawyer's death, disability, or incapacity. Colo. RPC 1.15C(c) provides that lawyers shall reconcile their trust account no less than quarterly as to both individual clients, and in the aggregate, using bank statements. This task may be delegated to a non-lawyer under a lawyer's supervision. Trust account reconciliation enables the lawyer to determine that the balance in trust reflects that shown in individual client ledgers. If an incapacitating event takes a planning attorney away from practice, it will be incumbent upon the assisting attorney to ascertain ownership of funds in trust and make appropriate disbursements. Regular trust account reconciliations as required by Colo. RPC 1.15C(c) will facilitate the assisting attorney's work.

**2. Keeping Records Related to the Trust Account**

Rules related to those records that must be maintained in association with a trust account are of immeasurable importance to reducing harm to clients and liability risks if a lawyer unexpectedly suffers a disability, becomes incapacitated, or passes away.

Colo. RPC 1.15D(a)(1)(A) is a detailed rule related to trust account record keeping that planning attorneys should carefully review. The rule says a lawyer shall have a record keeping system "identifying each separate person for whom the lawyer or law firm holds funds ... and adequately showing" the following:

- The date and amount of each deposit in trust.
- The name and address of each payor of the funds deposited.
- The name and address of each person for whom the funds are held and the amount held for the person.
- A description of the reason for each deposit.
- The date and amount of each charge against the trust account and a description of the charge.
- The date and amount of each disbursement.
- The name and address of each person to whom the disbursement is made and the amount disbursed to the person.

The rule provides that lawyers must keep this information for a period of seven years. Lawyers can comply with this rule by maintaining a general trust account ledger and an individual client ledger. Regardless of how a lawyer chooses to comply with this rule, these records will be indispensable for an assisting lawyer's work identifying the owners of funds in trust if a lawyer cannot do so because of death, disability, or some other incapacitating event.

The importance of keeping information required by Colo. RPC 1.15D(a)(1)(A) cannot be understated in the succession planning process. Clients who have paid advance fees will need any unearned fees returned if they wish to hire new counsel. These clients usually will also need the unearned fees returned promptly so they can obtain new representation. Those clients expecting disbursement of settlement proceeds will also look to the assisting attorney to make sure they receive their settlement proceeds if the planning attorney has not already disbursed the proceeds. Third parties, such as lienholders with an interest in funds in a lawyer's trust account, also will need these funds turned over to them. Accordingly, planning attorneys must scrupulously maintain these records, as the rule requires. They also need to explain to an assisting attorney where to find these records as a component of a succession plan.

Other record retention rules that may prove consequential include the mandate in Colo. RPC 1.15D(a)(3) that lawyers keep copies of fee agreements for a period of seven years. Continuing with this series of rules, lawyers should be mindful of Colo. RPC 1.15D(a)(4). This rule requires lawyers to keep "[c]opies of all statements to clients and third persons showing the disbursement of funds or the delivery of property to them or on their behalves" also for a period of seven years. Additionally, Colo. RPC 1.15D(a)(5) requires lawyers to keep copies of all bills issued to clients for seven years. Meanwhile, Colo. RPC 1.15D(a)(7) requires maintenance, in either paper or electronic format, of all bank statements and all cancelled checks, also for a seven-year period. A lawyer's compliance with these several provisions of Colo. RPC 1.15D(a) will allow another lawyer who is called upon to determine the disposition of funds in trust to do so with precision.

There are many scenarios that might cause an assisting attorney to rely on these records. The assisting attorney may need to consult the fee agreement to determine the exact amount of a refund if the client ledger is not up to date as to the point in time where the planning lawyer stopped practicing. Without these records, the lawyer charged with winding down the practice of a lawyer who cannot practice confronts a daunting task of recreating an accounting for the trust account in the absence of accurate information. Having procedures to comply with Colo. RPC 1.15D's record keeping requirements protects client interests in the event of a lawyer's inability to practice.

**3. Distributing Funds from Trust**

As a best practice, a planning attorney should consider how to facilitate an assisting attorney's disbursal of funds from the planning attorney's trust account. A planning attorney may want to consult with the financial institution where the planning attorney's trust account is located to understand what procedures apply and what forms might be needed. A planning attorney may also wish to designate the assisting attorney as an authorized signer on the planning attorney's trust account effective upon the planning lawyer's death, disability, or other incapacity. Planning attorneys should bear in mind when considering who might serve as an assisting attorney the instruction in Colo. RPC 1.15C(b) that "[o]nly

a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account."

Assisting attorneys charged with disbursing funds from the planning attorney's trust account should familiarize themselves with Colo. RPC 1.15B(k), which provides instructions on what to do with funds in trust where the owner of the funds cannot be identified or located. Colo. RPC 1.15B(k) specifically provides that if reasonable efforts to identify or locate the owner of the funds are unsuccessful, these unclaimed funds should remain in trust or may be remitted to the Colorado Lawyer Trust Account Foundation (COLTAF) by following instructions available from that organization.[2]

### *E. Protecting Clients: A Planning Attorney's Duty to Communicate*

Planning attorneys should remember their duty to communicate with clients. Colo. RPC 1.4(a)(3) requires lawyers keep clients reasonably informed about the status of the matter. Keeping clients updated regarding case developments, deadlines, and obligations that arise in the course of representation, such as discovery requirements or mandatory disclosures, will help clients be better informed should something unexpectedly happen to a planning attorney. Having procedures in place to regularly update clients on the status of their case, even if it is to explain that there are no new developments, accords with a lawyer's obligations under Colo. RPC 1.4(a). This protects clients should an unplanned event lead to a lawyer's inability to practice.

### *F. Unique Considerations for the Assisting Attorney — Continuing Client Representation*

Lawyers should keep in mind that once the unexpected event occurs, the focus of ethical considerations turns from those regarding the planning attorney toward those imposed on the assisting attorney. The assisting attorney plays a crucial role in the implementation of a succession plan. The assisting attorney takes on various responsibilities to ensure the protection of clients and the winding down of the planning attorney's practice. A significant benefit of having a succession plan in place is to help guide the assisting attorney and prevent them from stumbling over ethical issues.

As discussed above, a fundamental part of a succession plan is for the assisting attorney to inform clients of the planning attorney's inability to continue representation due to the occurrence of the unexpected event. By designating an assisting attorney in the succession plan, there is an additional benefit for both the client and the assisting attorney in that the assisting attorney can offer to continue to represent the planning attorney's clients. The client benefits by having a solid referral from the planning attorney to a lawyer who has at least a general familiarity with the planning attorney's practice, making the transition to a new lawyer smoother. The assisting attorney benefits from obtaining a new client without concern for violating the ethical rules regarding soliciting potential clients known to have pending legal matters.[3]

It is always within the client's discretion whether to retain the assisting attorney to continue the representation. Colo. RPC 1.17(c)(2) requires lawyers selling a practice to notify clients of their right to retain other counsel. The same principle applies when an assisting attorney offers to assume representation of the planning attorney's clients. Further, the assisting attorney needs to keep in mind that if a client wants to hire them for legal services, the assisting attorney must comply with Colo. RPC 1.5's requirements concerning provision of a fee agreement and the content of a fee agreement.[4] Assisting attorneys should also, as mentioned, be sure to perform a conflicts check before taking over the representation.

### *G. Agreement to Close Practice*

The foremost best practice for a successful succession plan is for the plan to be in writing, often called an Agreement to Close Practice.[5] Such an agreement begins by designating the parties in the succession plan (planning attorney, assisting attorney, and authorized signors for trust accounts). A basic agreement gives consent to the assisting attorney to close the practice, and it outlines the specific duties the assisting attorney is authorized to take, such as accessing the planning attorney's office and computers, contacting the courts and others regarding the unexpected event, and examining and distributing client files.

A comprehensive agreement to close a practice will contain additional provisions to manage the closure of the planning attorney's practice, beginning with direction on who will make the determination of the planning attorney's disability or incapacity and defining the criteria to use to determine disability or incapacity. It would authorize the assisting attorney to provide clients with final accounting statements and to reconcile and distribute funds for trust accounts and potentially operating accounts. Such an agreement may indemnify the assisting attorney. It may also explicitly allow the assisting attorney to offer to continue representation of clients.

An agreement to close a practice makes the process straightforward for the assisting attorney. Nonetheless, the implementation of a succession plan requires work and thought by the assisting attorney. The duties associated with closing a practice are legal services for which the assisting attorney may receive payment. A best practice is for the planning attorney and assisting attorney to address the issue of compensation directly in the agreement. A planning attorney has options for guaranteeing compensation, including possibly obtaining a specific life insurance policy with the assisting attorney as beneficiary or maintaining a savings account naming the assisting attorney as a signee when the succession plan goes into effect.

A succession plan sets forth a roadmap for the assisting attorney to follow if an unexpected event occurs that renders the planning attorney unable to continue to practice law. A best practice is for the planning attorney to also supply specific directions on how to implement the succession plan – from how to access information, such as the planning attorney's calendar and active case files – to how to distribute client files. The planning attorney can provide this instruction by creating a manual in conjunction with developing his or her succession plan. The instruction should contain specific, step-by-step procedures for implementing the plan. Simply put, it is easier to wind-down an organized practice than an unorganized practice.

The more inclusive and detailed an Agreement to Close Practice is, the easier it will be for the assisting attorney to know when his or her work is complete. In this respect, an Agreement to Close Practice should address essential administrative issues, such as directing the assisting attorney to contact an internet service provider and cancel the service, shut down a firm's website, and provide information on phone services so that those may be terminated. Similarly, the agreement might instruct the assisting attorney to notify the U.S. Postal Service of the closure of the law office. The agreement may also provide information on any office space lease so that the assisting attorney may terminate that at the appropriate time.

***H. Inventory Counsel—C.R.C.P. 244***

In the absence of a formal succession plan, Colorado Rule of Civil Procedure 244 provides a mechanism for winding down a lawyer's practice through the court appointment and supervision of a lawyer to return client files and client property. The appointed lawyer is often referred to as "inventory counsel." Inventory counsel takes possession of files and funds and carries out protective measures to safeguard clients' interests.

C.R.C.P. 244.3(a) and (b) explain that in the event of a lawyer's death, transfer to disability inactive status, general disappearance, or where there are exigent circumstances that require the protection of client files, Attorney Regulation Counsel may seek protective appointment of counsel to take possession of files and funds, as well as law office management documents. Attorney Regulation Counsel may seek this protective appointment by filing a petition for appointment of protective counsel ("inventory counsel") with the chief judge of the judicial district where the lawyer in question maintained an office, or where client files and property may be found. Such petitions identify a lawyer to be appointed to gather client files and property and take protective measures, such as returning the files or destroying them depending on their age and whether the files are active.

Filing of a petition for inventory counsel appointment creates a civil case at the district court-level for the chief judge or designated judicial officer to oversee appointed inventory counsel's actions. This enables inventory counsel to file motions enabling them to obtain access to trust account records (if necessary), to disburse trust account funds, and to take other protective actions, such as obtaining court authorization to destroy unclaimed or inactive client files. Once inventory counsel has completed returning client files and disbursing client funds, they may seek an order discharging their appointment.

A lawyer's compliance with the Colorado Rules of Professional Conduct identified in this opinion, including those related to trust account reconciliation and recordkeeping, will make appointed inventory counsel's work easier.

C.R.C.P. 244 does not contemplate inventory counsel overtaking client representation, nor other tasks that might be incorporated in an Agreement to Close Practice, such as the administrative wind-up of a lawyer's practice. Colorado lawyers developing a succession plan may view identification of an attorney colleague to serve as court-appointed inventory counsel as a minimum step prior to developing a more detailed succession plan. Inventory counsel appointment does not require development of a succession plan. Court supervision enables inventory counsel to accomplish many of the tasks that might otherwise be formally spelled out in a succession plan, such as accessing trust account records maintained by a bank, disbursal of funds in trust, and authorization to destroy files. Thus, in the absence of an actual succession plan, having a colleague willing to step-in to be inventory counsel is a basic way to protect clients if something unexpected happens to a lawyer.

## IV. Conclusion

By addressing the key considerations outlined in this opinion, such as file organization and retention, trust account management and record keeping, assisting attorney responsibilities, and the creation of a comprehensive Agreement to Close Practice, lawyers can ensure the continuity of their clients' interests and a smooth transition in the event of death, disability, or incapacity. As a minimum step, lawyers should consider identifying a colleague to serve as court-appointed inventory counsel in the absence of a formal succession plan. Ultimately, a well-crafted succession plan provides peace of mind for lawyers, safeguards clients' interests, and eases the burden on loved ones during challenging times. CL

**NOTES**

1. CBA Formal Op. 104, "Surrender of the File to the Client Upon Termination of the Representation" (2018).

2. Information on how to remit unclaimed funds to COLTAF, as well as an unclaimed funds remittance sheet, may be found at www.coltaf.org.

3. Colo. RPC 7.3(a) defines solicitation in the context of providing legal services. Colo. RPC 7.3(b) prohibits a lawyer from soliciting legal services to a potential client by person-to-person communication, except as otherwise provided. However, the prohibition does not apply to a person who has a prior professional relationship with the lawyer. The designation of an assisting attorney in a succession plan exempts the assisting attorney from the prohibition on soliciting new clients in this manner.

4. CBA Formal Op. 143, "Foundations of a Fee Agreement" (2021), provides guidance on the structure and suggested terms of a lawyer's fee agreement.

5. The Office of Attorney Regulation Counsel offers a handbook regarding succession planning, including template forms. It is Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Death or Incapacity (2019). It may be found at: https://www.coloradosupremecourt.com/PDF/Regulation/Closing_Practice.PDF. It includes checklists for planning and assisting attorneys, along with various template forms.

# Formal Opinion No. 148

## Ethical Issues When a Lawyer Includes a Client in a Group Email or Text to Counsel for Other Parties

**Adopted March 6, 2024**

### I. Introduction and Scope

This opinion addresses ethical issues that arise when a lawyer includes the lawyer's client in a group email or text to counsel for other parties, including ethical issues for both the lawyer who sends the communication ("sending lawyer") and the lawyer who receives it ("receiving lawyer"). Concerns include unauthorized disclosure of information relating to the representation of a client, communication with persons represented by counsel, and the extent of any implied consent for communication with a person represented by counsel.

### II. Syllabus

Three Colorado Rules of Professional Conduct (Colo. RPC or Rules) are implicated. They are Colo. RPC 1.1 (Competence), Colo. RPC 1.6 (Confidentiality of Information), and Colo. RPC 4.2 (Communication with Person Represented by Counsel). This Opinion discusses each Rule and how they impact the ethical obligations of the sending lawyer and receiving lawyer involved in a group email or text.

A sending lawyer who includes the lawyer's own client in a group email or text to counsel for other parties divulges the client's contact information and creates a risk that the client (even if "bcc'd")[1] will send a reply that divulges additional information relating to the representation to the other counsel. A lawyer therefore should not include the lawyer's client in group emails or texts to counsel for other parties unless the client gives informed consent.

The Colorado Bar Association Ethics Committee (Committee) also opines in this Opinion that the sending lawyer who has included the lawyer's own client in a group email or text to other counsel has impliedly consented to having the sending lawyer's client included in a reply from a receiving lawyer. A receiving lawyer therefore does not violate Colo. RPC 4.2 by including the sending lawyer's client in a reply, subject to the limitations addressed below.

The sending lawyer can avoid these issues simply by sending the group email or text only to the receiving lawyer, and then separately forwarding it to the sending lawyer's own client (hereafter referred to as the two-email alternative).

When there is implied consent to the sending lawyer's client being included in a reply, the receiving lawyer should direct the reply to the sending lawyer, not the client. The sending lawyer also should limit the lawyer's reply to the topic raised by the sending lawyer and send the reply within a reasonable period of time to avoid using the email as a pretext later to communicate with the sending lawyer's client.

The receiving lawyer also should make reasonable efforts to not include in a reply, for example: (i) anyone to whom disclosure of information is not allowed by Colo. RPC 1.6; (ii) anyone who is represented by counsel in the matter whose counsel has not given consent for direct communication with that counsel's client; or (iii) anyone whose identity the receiving lawyer cannot determine. Reasonable efforts may vary depending on the circumstances, including the substance or nature of the communication. The receiving lawyer can avoid the risk of unauthorized disclosure of information and the risk of improperly communicating with a represented person simply by sending a reply only to the sending lawyer and letting the sending lawyer decide to whom, if anyone, to forward the reply.

### III. Discussion and Analysis

#### *A. Duty of Competence*

A lawyer has a duty of competence under the Colorado Rules of Professional Conduct. Colo. RPC 1.1 states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

One element of maintaining competence is keeping up with changes in communication technologies used in the practice: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and changes in communications and other relevant technologies . . . ." Colo. RPC 1.1, cmt. [8]. A sending lawyer who contemplates including the sending lawyer's own client in a group email or text to counsel for other parties should be aware of, and avoid, potential negative consequences of doing so.

Also, as a matter of professionalism, lawyers can avoid misunderstandings and potential pitfalls associated with the use of group communications such as emails and texts by conferring proactively with each other and their respective clients at the outset of a matter about the use and parameters of group communications, if any.

#### *B. Confidentiality of Information*

One potential negative consequence of including a client in a group email or text to other counsel is the risk of revealing information about the client, or the representation of the client, that Colo. RPC 1.6 protects from disclosure. Colo. RPC 1.6(a) states:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or disclosure is permitted by paragraph (b).

Colo. RPC 1.6(b) identifies a few specific and narrowly drafted exceptions to the general prohibition on revealing information, but

none of those exceptions allow the disclosure of information for purposes of convenience or speed in communications. Colo. 1.6(c) extends the lawyer's obligation to safeguard confidential information by requiring a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

The scope of "information relating to the representation of a client" under Rule 1.6 is very broad. "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as required by the Rules of Professional Conduct or other law." Colo. RPC 1.6, cmt. [3]. Colorado's Presiding Disciplinary Judge and disciplinary hearing boards, citing Comment [3], have acknowledged the broad scope of information considered confidential under Rule 1.6. *See People v. Isaac*, 470 P.3d 837, 840 & n. 13 (Colo. O.P.D.J. 2016) (even the client's identity may be confidential under certain circumstances); *People v. Albani*, 276 P.3d 64, 70 (Colo. O.P.D.J. 2011); *People v. Hohertz*, 102 P.3d 1019, 1022 (Colo. O.P.D.J. 2004).[2]

By including a client in a group email or text to counsel for other parties, the sending lawyer reveals at a minimum the email address, or phone number, of the lawyer's client. In a matter where the sending lawyer has been retained by the client's insurer to represent the client—for example, in a personal injury matter—by including a representative of the insurance company, the sending lawyer might reveal information as basic as the fact that there is insurance coverage, the identity of the insurance company, and the identity of the representative making decisions on behalf of the insurance company. Likewise, in the context of a corporate or governmental client, the sending lawyer might be revealing the identity of the person within the entity with whom the lawyer communicates about the subject of the representation. The sending lawyer also might reveal the identity of the person within the entity who makes decisions on behalf of the entity regarding the subject of the representation.

There is also a risk that the sending lawyer's client, or representative of the client or client's insurer, will use the software's "reply all" feature, either intentionally or inadvertently, to respond to the communication. By doing so, the lawyer's client, representative of the client or the client's insurer, could potentially communicate information relating to the representation, which might include particularly sensitive information, directly to counsel for other parties.

The risk of inadvertent disclosure of confidential information is not eliminated by the sending lawyer's inclusion of the client or client representative as a "bcc" rather than a direct addressee. For example, in *Charm v. Kohn*, 27 Mass. L. Rptr. 421, 2010 WL 3816716, at *1 (Mass. Super. Sept. 30, 2010), a lawyer sent an email to opposing counsel and included his client as a "bcc." The client, intending to communicate only with his own counsel, responded to the email using the "reply all" function, thereby also transmitting his response simultaneously to opposing counsel. When opposing counsel used the email response as an exhibit in opposition to a motion for summary judgment, the sending lawyer moved to strike the exhibit. Although the trial court ultimately struck the email as an exhibit because it inadvertently disclosed an attorney-client communication, the court noted that the client's mistake was "of a type that is common and easy to make; indeed, there may be few e-mail users who have not on occasion used the reply all function in a manner they later regretted." 2010 WL 3816716, at *2. The court also stated that the lawyer's practice of including the client as a "bcc" on emails to opposing counsel gave rise to a foreseeable risk that the client would respond exactly as he did, and the court noted that the client in fact had made the same error of mistakenly replying to all, including opposing counsel, six months earlier. *Id.* The trial court admonished the lawyer and his client not to expect similar indulgence again: "They, and others, should take note. Reply all is risky. So is bcc. Further carelessness may compel a finding of waiver." *Id.* The trial court also stated that, "Lawyers should advise clients to be careful, and should avoid practices that exacerbate risks." *Id.*

Another example of unintentional disclosure of information by a person included as a "bcc" in an email is *People v. Maynard*, 483 P.3d 289 (Colo. O.P.D.J. 2021). In that case, a lawyer under suspension from the practice of law in Colorado assisted *pro se* defendants in a defamation lawsuit in Wisconsin. Even though she was under suspension in Colorado and did not hold an active license to practice in any other state, she drafted pleadings for the *pro se* defendants to sign and file in court. *Id.*, at 291 & 295. She was found out when she replied all to an email one of the *pro se* defendants sent to opposing counsel and "bcc'd" to her. *Id.*, at 294–95. As the result of her unauthorized practice of law, she now has been disbarred. *Id.*, at 302.

The sending lawyer can avoid the risk of disclosure of information protected under Colo. RPC 1.6 simply by using the two-email alternative. *See* N.Y. City Bar Ass'n Comm. on Prof. Ethics, Formal Op. 2022-03, "Copying Clients on Email Communications with Other Counsel" (2022) (NYC Opinion 2022-03), p. 1.

### *C. Client's Informed Consent*

Rule 1.6(a) provides that a lawyer may reveal information relating to the representation of a client if the client gives informed consent. Colo. RPC 1.0(e) defines informed consent as "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comment [6] to Rule 1.0 advises, in pertinent part:

> The lawyer must make reasonable efforts to ensure that the client . . . possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client . . . of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's . . . options and alternatives . . . . A lawyer need not inform a client . . . of facts or implications already known to the client . . . nevertheless, a lawyer

> who does not personally inform the client . . . assumes the risk that the client . . . is inadequately informed and the consent is invalid . . . .

There may be situations where a client is agreeable to certain information being revealed to counsel for other parties as the result of the client being included in group emails or texts. Some examples include revealing the client's email address, phone number, identity of the representative of a client organization, or identity of a client's insurer and insurance representative. There also may be situations where lawyers and their respective clients all want to be directly involved in group communications. For example, lawyers and their respective clients in transactional matters may all want to be directly involved in group communications to efficiently exchange drafts of business documents or proposed contracts. Additionally, in ongoing business dealings between organizations, the client representatives may want all parties and their lawyers to be continuously and promptly updated. Moreover, in a family law case, the parties and lawyers may desire immediate communication regarding childcare arrangements or the health needs of a child.[3] This would be permissible under Rule 1.6(a) as long as the client gives informed consent. *See* NYC Opinion 2022-03, p. 3.

Such informed consent should include an advisement by the sending lawyer to the client about: (1) the risks of sensitive information being revealed to other counsel by mistake; (2) the risk that a communication that was intended to be confidential between the client and the sending lawyer could be mistakenly sent to other counsel, as in *Charm v. Kohn*, discussed above; and (3) the risk that such an intended confidential communication from the client that includes other counsel might be determined to be a waiver of attorney-client privilege. This informed consent also should advise the client of any reasonably available alternatives, such as the two-email alternative.



***D. Lawyer's Implied Consent to Other Counsel's Communication With Lawyer's Client***

Colo. RPC 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

This rule protects clients against "possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation." Colo. RPC 4.2, cmt. [1].

A sending lawyer who chooses to include the lawyer's client in a group email or text to counsel for other parties should anticipate that a receiving lawyer might respond by using the "reply all" feature, thereby transmitting a communication simultaneously to all addressees, including the sending lawyer's client. The sending lawyer frequently invites a reply from the other counsel. Even where the sending lawyer does not invite a reply, the sending lawyer should be aware that the other recipients, including other counsel, may send a reply. By including the client in the group email or text, the sending lawyer has created a situation leading to a potential communication from the other counsel to the sending lawyer's client.

The New Jersey Advisory Committee on Professional Ethics considered the issue and opined that a group email which includes the sending lawyer's client is analogous to the lawyer initiating a conference call with opposing counsel and including the calling lawyer's client on the call. By initiating the call in that manner, the lawyer has consented to opposing counsel speaking on the call and thereby consented to opposing counsel communicating with both the lawyer and the lawyer's client. See N.J.

Advisory Comm. on Prof. Ethics, Op. 739, "Rule 4.2—Lawyers Who Include Clients on Group Emails and Opposing Lawyers Who 'Reply All'" (2021) (NJ Opinion 739), p. 2. As stated in NJ Opinion 739: "Lawyers who initiate a group email and find it convenient to include their client should not then be able to claim an ethics violation if opposing counsel uses a 'reply all' response. 'Reply all' in a group email should not be an ethics trap for the unwary or a 'gotcha' moment for opposing counsel." *Id.*, p. 1.

The Restatement of the Law Governing Lawyers notes that in representing a client, a lawyer may communicate on the subject of the representation with another represented person when the other person's lawyer "has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the conversation. Similarly, consent may be implied rather than express, when direct contact has occurred routinely as a matter of custom, unless the opposing lawyer affirmatively protests." Restatement (Third) of the Law Governing Lawyers § 99, cmt. j (Am. Law Inst. 2000).

The Colorado Supreme Court has held that, in certain circumstances, a lawyer's consent under Rule 4.2 to an opposing counsel's direct communications with the lawyer's client may be implied. *In re Wollrab*, 420 P.3d 960, 968–69 (Colo. 2018). In *Wollrab*, an attorney discipline case, the respondent lawyer, who had represented a client on several matters over the years, entered into a business transaction with the client. Although the client had separate counsel regarding the business transaction, the respondent and the client continued to have considerable direct discussions with each other about the proposed deal. The client's separate counsel was aware of that fact, yet neither attempted to prohibit or limit those discussions nor objected when the respondent prepared an option contract and had the client sign it out of the presence of the client's separate counsel. Accordingly, the court concluded that the separate counsel had impliedly consented to the respondent communicating directly with the client about the business transaction and, therefore, the respondent had not violated Rule 4.2. *Id.*, at 969.

The American Bar Association (ABA) has considered the issue of a lawyer including the lawyer's client in an email or text to counsel representing another person. ABA Standing Comm. on Ethics & Prof. Responsibility, Formal Op. 503, "'Reply All' in Electronic Communications" (2022) (ABA Formal Opinion 503). The ABA concluded that the sending lawyer impliedly consents under Rule 4.2 to a receiving lawyer's "reply all" response which includes the sending lawyer's client. Like the New Jersey Advisory Committee, the ABA reasoned:

> Similar to adding the client to a videoconference or telephone call with another counsel or inviting the client to an in-person meeting with another counsel, a sending lawyer who includes the client on electronic communications to receiving counsel generally impliedly consents to receiving counsel "replying all" to that communication. The sending lawyer has chosen to give receiving counsel the impression that replying to all copied on the email or text is permissible and perhaps even encouraged.

Thus, this situation is not one in which the receiving counsel is overreaching or attempting to pry into confidential lawyer-client communications, the prevention of which are the primary purposes behind Model Rule 4.2.

ABA Formal Opinion 503, pp. 2–3.

The Virginia Supreme Court approved an opinion from the Virginia State Bar's Standing Committee on Legal Ethics, which similarly concluded that "a lawyer who includes their client in the 'to' or 'cc' field of an email has given implied consent to a reply- all response by opposing counsel." VA Legal Ethics Op. 1897, "Rule 4.2—Replying All to an Email When the Opposing Party is Copied" (2022) (VA Opinion 1897), p. 1. Virginia's Opinion 1897 aligns with New York City Bar Association Committee's opinion on the same issue. See NYC Opinion 2022-03, p. 6.

Consistent with the authorities cited above, this Committee's opinion is that a sending lawyer who includes the sending lawyer's client in a group email or text to counsel for other parties has impliedly consented to the client being included in a reply. Consequently, a receiving lawyer who includes the sending lawyer's client in a reply does not violate Colo. RPC 4.2.

To avoid implied consent, the sending lawyer should not include the client as an addressee or a "bcc" in group emails or texts to counsel for other parties. Instead, the sending lawyer should use the two-email alternative.

### *E. Extent of the Sending Lawyer's Implied Consent*

The implied consent provided by the sending lawyer is limited, however. It does not give the receiving lawyer carte blanche to communicate with the sending lawyer's client. This is so for several reasons.

First, the implied consent is limited to addressing in the reply the topic raised in the sending lawyer's email or text. Colo. RPC 4.2 prohibits the receiving lawyer from addressing additional matters relating to the representation, if the receiving lawyer is aware that the sending lawyer's client was included in the initial email or text, and the receiving lawyer includes the sending lawyer's client in the reply. *See* ABA Formal Opinion 503, p. 3; VA Opinion 1897, p. 3–4; *see also* N.Y. City Bar Ass'n Comm. on Prof. Ethics, Formal Op. 2009-01, "The No-Contact Rule and Communications Sent Simultaneously to Represented Persons and Their Lawyers" (2009) (NYC Opinion 2009-01) ("Even when consent is implied, it is not unlimited. Its scope will depend on the statements or conduct of the represented person's lawyer, and it will have both subject matter and temporal limitations").[4]

Second, if the receiving lawyer replies only to the sending lawyer's client, that would violate Colo. RPC 4.2. *See* NJ Opinion 739, p. 2, n.1; NYC Opinion 2022-03, p. 7. If the sending lawyer "bcc's" the sending lawyer's client and the sending lawyer's client replies to all, the receiving lawyer may not then respond to the sending lawyer's client because it cannot reasonably be said that the sending lawyer has given prior consent to such a communication from the receiving lawyer. NYC Opinion 2022-03, p. 7.

Third, the implied consent provided by the sending lawyer is limited to a reasonable period of time under the applicable circumstances. *See* NYC Opinion 2009-01. The receiving lawyer should not use "reply all" as a pretext to com-

municate with a sending lawyer's client if the passage of time has made a reply to the initial email or text moot. NYC Opinion 2022-03, p. 7.

***F. Revocation of Consent***

In this Committee's opinion, a sending lawyer who does not wish to consent to a reply that includes the sending lawyer's client should not attempt to negate consent by incorporating a statement to such effect in the specific email or text that includes the sending lawyer's client, or in a prior generalized communication. Although ABA Formal Opinion 503 suggests that such steps might overcome a presumption of implied consent, the opinion acknowledges that the better approach is the two-email alternative. *See* ABA Formal Opinion 503, p. 3 ("If the sending lawyer would like to avoid implying consent when copying the client on the electronic communication, the sending lawyer should separately forward the email or text to the client."). In this Committee's opinion, attempting to avoid implied consent by a statement in the specific email or text that includes the sending lawyer's client, or in a prior generalized communication, could either intentionally or unintentionally create an ethics trap or a "gotcha moment" for the receiving lawyer. *See* NJ Opinion 739, p. 1. A receiving lawyer who replies to a group email or text might: (1) mistakenly fail to remove the sending lawyer's client before sending the reply; (2) not know which email address or phone number in the group communication is associated with the sending lawyer's client; or (3) forget that the sending lawyer weeks or months earlier had stated that including the sending lawyer's client in a group communication did not signify consent to include the sending lawyer's client in a reply. In this Committee's opinion, therefore, a boilerplate disclaimer would be ineffective to avoid implied consent.

A sending lawyer who already included the client in a group email or text to other counsel (thereby impliedly consenting to a receiving lawyer including the sending lawyer's client in a reply), however, can later revoke that consent in a separate communication. For example, the sending lawyer could send a follow-up communication to explain that the sending lawyer included the sending lawyer's client in the initial communication, identify the email address or phone number of the sending lawyer's client, and clearly state that the receiving lawyer should delete that email address or phone number before replying to the initial communication. If a receiving lawyer had already sent a reply that included the sending lawyer's client, the sending lawyer could state in the follow-up communication that the receiving lawyer does not have consent to include the sending lawyer's client in any further replies to the initial communication. To avoid any argument of repeated implied consent, the sending lawyer should not include the sending lawyer's client in the follow-up communication. Instead, the sending lawyer should separately forward the follow-up communication to the sending lawyer's client.

***G. Inadvertent Disclosure of Information by Receiving Lawyer***

A lawyer who receives a group email or text from a sending lawyer has had no control over who the sending lawyer included in the group communication. For example, the sending lawyer might have included (either with the consent of the sending lawyer's client, or improperly without that consent) a third person having no direct involvement in the matter at issue, such as an investigator or a media representative. Alternatively, the sending lawyer might have improperly or mistakenly included persons represented by counsel without having their counsels' consent to communicate with them directly. If the receiving lawyer were to "reply all" in such a situation, the receiving lawyer potentially could disclose information relating to the representation of the receiving lawyer's client in violation of Colo. RPC 1.6 or could potentially

communicate with a person represented by counsel in violation of Colo. RPC 4.2.

Colo. RPC 1.6(c) requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." As noted earlier in this opinion, confidentiality under Colo. RPC 1.6 "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." C.R.C.P. 1.6, cmt. [3].

Colo. RPC 4.2 prohibits a lawyer from communicating about the subject of representation with a person the lawyer knows to be represented by another lawyer in the matter without the other lawyer's consent (unless the lawyer is authorized to communicate by law or court order). A sending lawyer who represents one party in a matter cannot consent to direct communication with a different party who is represented by a different lawyer.

The receiving lawyer therefore should make reasonable efforts to not include in a reply, for example: (i) anyone to whom disclosure of information is not allowed by Colo. RPC 1.6); (ii) anyone who is represented by counsel in the matter whose counsel has not given consent for direct communication with that counsel's client; or (iii) anyone whose identity the receiving lawyer cannot determine. Of course, reasonable efforts may vary with the circumstances, including the substance or nature of the particular communication.[5] The receiving lawyer can avoid the risk of inadvertent or unauthorized disclosure of information and the risk of improperly communicating with a represented party simply by sending a reply only to the sending lawyer and letting the sending lawyer decide to whom, if anyone, to forward the reply.

As a matter of professionalism, the sending lawyer could help avoid these pitfalls by identifying for the receiving lawyer any persons included as an addressee in a group email or text who are not counsel for a party to the matter. The sending lawyer and receiving lawyer also could avoid these pitfalls by conferring with each other—by telephone or separate email—about who the addressees are and whether they ethically may be included in any reply.

## IV. Conclusion

A lawyer who includes the lawyer's client in a group email or text to counsel for other parties discloses the client's contact information, namely, email address or phone number. The sending lawyer also risks the disclosure of additional, potentially sensitive, information relating to the representation if the lawyer's client sends a reply that includes the other counsel, which can happen even if the sending lawyer has bcc'd the client. A sending lawyer therefore should not include the sending lawyer's client in group emails or texts unless the client has given informed consent for the lawyer to do so. Also, this Committee's opinion is that the sending lawyer, by including the sending lawyer's client in a group email or text, has impliedly consented to the other counsel sending a reply that includes the sending lawyer's client. The sending lawyer can avoid these issues simply by using the two-email alternative.

A lawyer who receives a group email or text that includes the sending lawyer's client may send a reply that includes the sending lawyer's client only if: (1) the reply is directed to the sending lawyer, not the sending lawyer's client; (2) the reply is limited to the topic addressed by the sending lawyer; and (3) the reply is sent within a reasonable period of time and not used as a pretext later to communicate with the sending lawyer's client. The receiving lawyer should make reasonable efforts in light of existing circumstances, which may include the substance or nature of the particular communication, not to include in a reply anyone to whom disclosure of information is not allowed by Colo. RPC 1.6, anyone who is represented by counsel in the matter whose counsel has not given consent for direct communication with that counsel's client, or anyone whose identity the receiving lawyer cannot determine. The receiving lawyer can avoid these concerns simply by sending a reply only to the sending lawyer and letting the sending lawyer decide to whom, if anyone, to forward the reply. CL

### NOTES

1. Thetechedvocate.org explains the history of the terms "cc" and "bcc." "CC stands for carbon copy. This term originated from the days when people used carbon paper to make copies of documents. Now, with email, CC refers to the process of sending a copy of an email to someone other than the primary intended recipient. . . . BCC, on the other hand, stands for blind carbon copy. This means that when you send an email, you can add a recipient to the BCC field, so that they receive a copy of the email too, but their name will not be visible to any of the other recipients. This is particularly useful when you want to send an email to multiple people, but don't want others to know who else received the email." Matthew Lynch, *What Do CC and BCC Mean in An Email* (June 8, 2023), available at https://www.thetechedvocate.org/what-do-cc-and-bcc-mean-in- an-email.

2. The opinions issued by the Presiding Disciplinary Judge and disciplinary hearing boards offer valuable guidance to attorneys on conduct that has resulted in discipline and the basis for (and severity of) discipline imposed against Colorado lawyers. They are not binding precedent for future cases because only decisions of the Colorado Supreme Court have stare decisis effect in attorney discipline proceedings. *In re Roose*, 69 P.3d 43, 47–48 (Colo. 2003).

3. In the transactional setting, lawyers and their clients frequently desire that all clients and client representatives be included in the email chains so that all constituents are aware of and involved in the communication. In such circumstances, so long as the lawyers communicate their consent to such an approach at the beginning, after obtaining informed consent from their clients, replying all to group communications would be appropriate.

4. NYC Opinion 2009-01 may be downloaded at https://www.nycbar.org/member-and- career-services/committees/reports-listing/reports/detail/formal-opinion-2009-01-the-no-contact- rule-and-communications-sent-simultaneously-to-represented-persons-and-their-lawyers.

5. The Rules define reasonableness with respect to a lawyer's conduct as "denot[ing] the conduct of a reasonably prudent and competent lawyer." Colo. RPC 1.0(h).

# Formal Opinion No. 149

## Ethical Obligations for Lawyers Engaging in Virtual Practice

**Adopted March 8, 2024**

### I. Introduction and Scope

The COVID-19 pandemic resulted in many lawyers adopting alternative methods of providing legal services, including incorporating virtual procedures into their practices. While the pandemic has ended, the pandemic fundamentally changed how the legal community views virtual practice options. The legal community continues to provide services in hybrid environments (both the physical office and remotely) and even completely virtually.[1] This opinion addresses the Colorado Rules of Professional Conduct (Colo. RPC or Rules) that lawyers should consider when engaging in any type of virtual law practice.

### II. Syllabus

The American Bar Association (ABA) broadly defines a virtual law practice as a "technically enabled law practice beyond the traditional brick-and-mortar firm."[2] The absence of a traditional physical law office can create new issues with respect to certain ethical rules that a lawyer in a traditional setting may not confront. These rules include Rule 1.1 (competence), Rule 1.3 (diligence), Rule 1.4 (communication), Rule 1.6 (confidentiality), Rules 5.1 and 5.3 (proper supervision), and Rule 5.5 (unauthorized practice of law).

Since the pandemic, the ABA has published two opinions addressing the model versions of these rules and how they apply to virtual practice. *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 495, ABA Opinion 498. ABA Opinion 495 focuses on guidance for attorneys practicing remotely from jurisdictions in which they are not licensed and associated potential pitfalls. ABA Opinion 498 gives more general guidance to lawyers and law firms practicing virtually and discusses best practices for complying with the ABA Model Rules of Professional Conduct.

This opinion compares the Colo. Rules with these ABA opinions and the opinions of other jurisdictions to provide guidance for Colorado lawyers practicing law in virtual and hybrid environments.

### III. Analysis

#### *A. Rule 1.1 (Competence)*

Under the Colo. RPC, a lawyer has a duty of competence. Colo. RPC 1.1 states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The duty of competence requires a lawyer not only have expertise in their practice area, but also, generally, in the technology needed to practice law and rules regarding the use of technology in their practice.[3] Although Colo. RPC 1.1 itself is silent on technological expertise, comment [8] to the rule explains that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and *changes in communications and other relevant technologies*, [and] engage in continuing study and education . . . ." Colo. RPC 1.1, cmt [8] (emphasis added).

According to ABA Opinion 498, ABA Model Rule 1.1 takes the competency requirement regarding technology one step further. In 2012, the ABA modified comment [8] to ABA Model Rule 1.1. Similar, in part, to Colorado's RPC 1.1, ABA Model Rule 1.1 cmt. [8] states that "[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, [and] engage in continuing study and education . . . ." ABA Model Rule 1.1, cmt. [8] (emphasis added).

The Wisconsin Ethics Commission also has addressed virtual practice. It cited Comment [8] to ABA Model Rule 1.1 as defining basic technological competence to include, at a minimum, "knowledge of the types of devices available for communication, software options for communication, preparation, transmission and storage of documents and other information, and the means to keep the devices and the information they transmit and store secure and private." Wisc. Prof. Ethics Comm., Formal Ethics Opinion EF-21-02, "Working remotely," p. 2 (Jan. 29, 2021) (Wisconsin Opinion 21-02).

Unlike ABA Model Rule 1.1 cmt. [8], Colo. RPC 1.1 cmt. [8] does not include a reference to assessing the benefits and risks of technology. The practical application of this distinction has not been litigated in Colorado, however, and Colo. RPC 1.1 cmt. [8] makes specific reference to staying aware of changes in "communications and other relevant technologies." This Committee therefore recommends Colorado lawyers follow the best practices discussed in Section IV below.

#### *B. Rule 1.3 (Diligence)*

Colo. RPC 1.3 requires lawyers to act with reasonable diligence and promptness when representing a client. Colo. RPC 1.3 cmt. [1] gives substance to the duty of diligence by stating that "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer . . . ."[4] ABA Opinion 498 interpreted ABA Model Rule 1.3's analog to this comment, explaining that lawyers *must* "pursue a matter on behalf of a client despite opposition, obstruction[,] or personal inconvenience to the lawyer." ABA Opinion 498, p. 2. Opinion 498 suggests that ABA Model Rule 1.3 cmt. [1] means that a lawyer is held to the same core diligence standards regardless of any unique or additional challenges that a lawyer might encounter when practicing virtually.

Wisconsin also addresses the duty of diligence in the context of virtual practice and the unique challenges it presents. Wisconsin's opinion emphasizes that the duty requires reasonable diligence, "which implies that particular circumstances may affect the parameters of this duty." Wisconsin Opinion 21-02, p. 3. In the context of practicing remotely, difficulties with providing diligent representation can be avoided if a firm has systems in place to access files, conduct research in a timely fashion, and facilitate collaboration with others, notwithstanding a lawyer's non-physical presence.

Wisconsin's opinion also mentions that included within the duty of diligence is the issue of contingency and succession planning. Wisconsin Opinion 21-02, p. 3. The opinion goes so far to say that "[d]evelopment of a succession plan is part of the lawyer's duty to provide competent and diligent representation." *Id.* For solo practitioners, the opinion directs lawyers to reach out to other lawyers to develop a plan to protect clients in the event of the lawyer's impairment. *Id.* In the firm context, management should plan for other members of the firm to become responsible for the unavailable lawyer's cases. *Id.* In support of its position, the Wisconsin opinion references ABA Model Rule 1.3, cmt. [5], which states:

> To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.
>
> *Id.*

Colo. RPC 1.3 cmt. [5] is identical to the ABA Model Rule. This comment, however, only *suggests* that due diligence includes the development of a succession plan. Although not required by Colo. RPC 1.3 expressly, succession planning should be a vital consideration when a lawyer is practicing virtually.[5] The lawyer's physical separation from others heightens the risk that others may be unaware when a lawyer unexpectedly becomes incapacitated or dies. The Committee, therefore, urges lawyers with virtual practices, and solo practitioners in particular, to safeguard their clients' interests by creating a contingency or succession plan as a best practice, even though it is not a technical requirement of the duty of diligence.

### *C. Rule 1.4 (Communication)*

Colo. RPC 1.4 requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . . keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information . . . ." Colo. RPC 1.4(a)(2)–(4). ABA Opinion 498 concludes that nothing in ABA Model Rule 1.4[6] limits these obligations to face-to-face interactions. This Committee agrees. Communication when working virtually includes a variety of media—such as telephone, email, video conferencing, and texting—often eliminating any in-person interactions with clients. A lawyer therefore needs to ensure that a potential client is able to utilize the different media or the lawyer will be unable to inform and consult with the client as required.

Similarly, an opinion issued by the Virginia Standing Committee on Legal Ethics regarding virtual law practices states that "although the method of communication does not affect the lawyer's duty to communicate with the client, if the communication will be conducted primarily or entirely electronically, the lawyer may need to take extra precautions to ensure that communication is adequate and that it is received and understood by the client." VA Legal Ethics Op. 1872, "Virtual Law Office and Use of Executive Office Suites" (Oct. 2, 2019), p. 1 (Virginia Opinion 1872). In a previous ethics opinion, Virginia State Bar's Standing Committee on Legal Ethics concluded that a lawyer could permissibly represent clients with whom the lawyer had no in-person contact because "Rule 1.4 in no way dictates whether the lawyer should provide that information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is *what* information was transmitted, not *how*." VA Legal Ethics Op. 1791, "Is It Ethical Not To Meet Face-to-Face With Your Client If You Communicate By E-mail or Telephone Instead" (Dec. 22, 2003), p. 2.

Virginia nevertheless cautioned that Rule 1.4(b) also requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Virginia Opinion 1872, p. 2. To "explain" a matter implies a lawyer must take steps beyond merely providing information to ensure that a client is actually in a position to make informed decisions. *Id.* For example, a lawyer cannot simply upload information on a client portal and assume that their duty of communication is fulfilled without some confirmation from the client that they have received and understood the information provided. *Id.*

The Committee agrees that a lawyer should ensure that a client communication is received and understood, regardless of the method of transmittal. It is important to note that whether confirmation from the client that the virtual information has been sufficiently received and understood may depend on the facts of the situation, such as the sophistication of the client or the complexity of the information being conveyed. This obligation therefore may require that the lawyer follow-up with the client to discuss the information provided and to answer any questions, whether the follow-up is in writing, by telephone, or even in person.

### *D. Rule 1.6 (Confidentiality)*

The duty of confidentiality under Colo. RPC 1.6 prohibits lawyers from revealing information relating to the representation of a client, unless specific circumstances apply. As part of this duty, Colo. RPC 1.6(c) specifies that a lawyer must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." According to ABA Opinion 498, this means that lawyers, especially when practicing virtually, must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information. ABA Opinion 498, p. 3. Reasonable methods may vary across platforms or storage devices.

Comment [18] to Colo. RPC 1.6 provides a non-exhaustive list of factors to help a lawyer determine whether the efforts to safeguard confidential information are reasonable. Factors in determining reasonableness include, but are not limited to, "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)." Colo. RPC 1.6 cmt. [18]. ABA Opinion 498 adds that "lawyers must employ a 'fact-based analysis' to these 'nonexclusive factors to guide lawyers in making a reasonable efforts determination.'" ABA Opinion 498, p.3 (citing ABA Comm. on Ethics and Prof. Resp. Formal Op. 477R, "Securing Communication of Protected Client Information" (revised May 22, 2017) (ABA Opinion 477R).

Rule 1.6's comments explain that the responsibility to prevent client information from ending up in the hands of unintended recipients "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy." Colo. RPC 1.6 cmt. [19]. Special circumstances, however, may warrant special precautions, taking into consideration factors such as "the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement." *Id.*

ABA Opinion 498 reiterates that transmitting information protected under Rule 1.6(a) is generally permissible where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. The ABA's position relies on the ABA Opinion 477R, which states "[t]he Model Rules do not impose greater or different duties of confidentiality based upon the method by which a lawyer communicates with a client. But how a lawyer should comply with the core duty of confidentiality in an ever-changing technological world requires some reflection." ABA Opinion 477R, p. 2. Opinion 477R explained that the ABA's adoption of Model Rule 1.6(c) and Comments [18] and [19] does not require specific security steps in all cases. *Id.* It also does not suggest that any breach in security is an automatic rule violation. The rule requires lawyers only to take "reasonable efforts" to secure client information. *Id.*

Virtual practice along with virtual communications therefore requires a fact-specific analysis to determine "reasonable efforts." As noted in Wisconsin's opinion, "[p]erhaps no professional obligation has been impacted more by technology than the duty of confidentiality." Wisconsin Opinion 21-02, pp. 3–4. Although the use of technology has increased convenience, it also has increased the risk of inadvertent disclosure of confidential client information. This Committee agrees with Wisconsin's interpretation of Comments [18] and [19] to Rule 1.6, including its conclusion that:

> What information is protected and the exceptions that require or permit disclosure remain unchanged. What has changed, however, is the variety of circumstances under which the lawyer's responsibility to protect the information from unwarranted disclosure. Compliance with these duties can be complicated, particularly when the lawyer is working remotely, physically separated from co-workers, staff, and the information to be protected.
>
> *Id.*, p. 6.

### *E. Rules 5.1 and 5.3 (Responsibilities of Supervising Lawyers Regarding Lawyers and Nonlawyer Assistants)*

Lawyers who have managerial or direct supervisory authority over other lawyers shall make reasonable efforts to ensure that the other lawyers conform to the Rules of Professional Conduct. *See* Colo. RPC 5.1(a) & (b). Rule 5.1 cmt. [2] notes that "[s]uch policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised." Rule 5.3 extends a lawyer's duty to supervise to the conduct of nonlawyers employed or associated with the lawyer. *See* Colo. RPC 5.3(a) & (b).

This Committee agrees with the ABA's conclusion that "[p]racticing virtually does not change or diminish [these] obligation[s]." ABA Opinion 498, p. 3. If anything, practicing virtually may enhance these obligations. Managerial lawyers practicing virtually must create and tailor policies and practices that ensure all firm members and internal or external assistants operate in accordance with the lawyer's obligations that firm tasks are completed in a competent, timely, and secure manner. This can be accomplished by routine and frequent communication and other interactions with associates, legal assistants, and paralegals. Such connections "are also advisable to discern the health and wellness of the lawyer's team members." ABA Opinion 498, p. 7.

ABA Opinion 498 stresses the importance of supervising lawyers monitoring how lawyers and lawyer assistants use their own devices to access, transmit, or store client- related information. Security policies for personal device use should be heightened by: (1) requiring strong passwords for devices, routers, and to any virtual private network (VPN); (2) ensuring timely installation of updates; (3) ensuring the ability to remotely wipe any lost or stolen devices; (4) ensuring that staff member's family or others do not have access to client-related information; and (5) ensuring that client data and documents will be adequately and safely archived and available for later retrieval.

ABA Opinion 498 also cites the recommendations from the New York County Lawyers Association Ethics Committee for supervising lawyers to include in their firm's practices and policies. ABA Opinion 498, p. 6, n. 24. Representative examples include: (1) "[m]onitoring appropriate use of firm networks for work purposes"; (2) "[t]ightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach"; (3) "[m]onitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product)"; (4) "[e]nsuring that working at home has not significantly increased the likelihood of an inadvertent disclosure"; and (5) having periodic check-ins. *Id.* (citing N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020, "Obligations When Lawyers Work Remotely" (2020)).

Wisconsin echoed the ABA's position, stating "[o]versight . . . can be particularly challenging when those supervised are working in different, remote locations, separate from their supervisor and each other." Wisconsin Opinion 21-02, p. 7. To help achieve the level of supervision envisioned by the rules, the Wisconsin ethics committee suggests conducting regular video-conference meetings to develop structure to adhere to schedules, facilitate collaboration, and communication. Other strategies to facilitate remote work efficiencies include "[r]egular mandatory training, review of the circumstances of a remotely working lawyer, the assignment of experienced mentors to new lawyers, and the creation of teams." *Id.* Managing lawyers should consider which of these types of measures are appropriate in their work environment to ensure the people they supervise comply with the Rules and should communicate these policies clearly to employees.

***F. Rule 5.5 (Unauthorized Practice of Law)***

The pandemic greatly increased the number of lawyers practicing not only virtually, but remotely, away from the jurisdictions in which they were admitted. For example, a lawyer admitted to practice in Colorado might work remotely from a residence in Hawaii, even though the lawyer is not admitted to practice in Hawaii.

Rule 5.5 prohibits a lawyer from engaging in the unauthorized practice of law in other jurisdictions, among other things. Colo. RPC 5.5(a). Rule 5.5(a)(2) prohibits a lawyer from "practic[ing] law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction . . . ." Colo. RPC 5.5(a)(2).

A lawyer admitted to practice in Colorado who is considering practicing remotely in a jurisdiction where the lawyer is not admitted to practice therefore must determine whether the law of the other jurisdiction permits them to do so.[7] If a lawyer admitted to practice in Colorado practices remotely in a jurisdiction where the lawyer is not admitted to practice and the other jurisdiction does not permit remote practice, then the lawyer might be in violation of the law of both the other jurisdiction and Colo. RPC 5.5(a)(2).

ABA Formal Opinion 495 analyzes this issue through the framework of ABA Model Rule 5.5 and does not attempt to opine about the applicable law in all the states. *See* ABA Comm. On Ethics and Prof. Resp., Formal Op. 495, "Lawyers Working Remotely" (Dec. 16, 2020), p. 1. ABA Formal Opinion 495 concludes:

> It is not this Committee's purview to determine matters of law; thus, this Committee will *not* opine whether working remotely by practicing the law of one's licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so. *Id.* (emphasis added).

Likewise, this Opinion does not opine about the law of other jurisdictions regarding remote practice and virtual practice. In general, though, jurisdictions that have addressed this issue have done so in different ways. At least ten states have addressed this issue through their state Rules, mostly their versions of Model Rule 5.5. These states are Arizona (Az. RPC 5.5(d)), Connecticut (Conn. RPC 5.5(f) & commentary), Hawaii (Hi. Rule 5.5, cmt. [3]), Minnesota (Mn. RPC 5.5(d)), New Hampshire (N.H. RPC 5.5(d)(3)), New York (N.Y. Ct. Rules, § 523.5 Working From Home), North Carolina (N.C. RPC 5.5(d)(2)), Ohio (Ohio RPC 5.5(d)(4) & cmt. [22]), South Carolina (S.C. RPC5.5, cmt. [4]), and Vermont (Vt. RPC 5.5 and Board's Note—2022 Amendment).

Other jurisdictions have addressed this issue by opinion. These are the District of Columbia (D.C. Comm. Unauthorized Practice L. Formal Op. 24-40 (2020)), Florida (Fla. Advisory Op.—Out of State Attorney Working Remotely from Florida Home, No. SC20- 1220 (May 20, 2021)), Pennsylvania (Penn. & Phil. Bar Ass'ns, Joint Formal Op. 2021- 100 (2021)), and New Jersey (N.J. Comm. on Unauthorized Practice of Law & N.J. Comm. on Prof'l Ethics, Joint Op. 59, "Non-New Jersey Licensed Lawyers Associated With Out- of-State Law Firms or Serving as In House Counsel to Out-of-State Companies Remotely Working from New Jersey Home" (Oct. 6, 2021).

## IV. Considerations and Best Practices for Virtual Practice Technologies

Given the wide array of technical devices, services, and protections thereof, lawyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with the Colorado Rules. With technology inevitably evolving, there is also an ongoing obligation to periodically assess whether existing systems are providing adequate adherence to the rules.

ABA Opinion 498 and opinions from other states provide guidance on specific virtual practice technologies a lawyer should consider when engaging in a virtual practice. To assist Colorado lawyers in making these assessments, adopting policies, and implementing appropriate training for attorney and non-attorney staff they supervise, this opinion summarizes suggested best practices for some common virtual practice tools.

***A. Hardware/ Software***

As a best practice for hardware, this Committee recommends that all devices (such as desktop computers, laptops, tablets, portable drives, phones, and scanners/copiers) be protected with security features and additional reasonable security measures. USB drives or other external hardware should be avoided unless they are owned or supplied by the firm or authorized by the firm and supplied by another trusted source. ABA Opinion 498, p. 11. Law firm managers should consider whether it is feasible for lawyers and staff to only use hardware issued by the firm or authorized by the firm.

Best practices include carefully reviewing licensing terms of service for both hardware and software systems to ensure client confidentiality is protected. "For example, terms and conditions of service may include provisions for data-soaking software systems that collect, track, and use information. Such systems might purport to own the information, reserve the right to sell or transfer the information to third parties, or otherwise use the information contrary to lawyers' duty of confidentiality." *Id.*, p. 4, n. 17.[8]

The duty to evaluate a vendor's terms and services to determine whether they adequately protect client information includes consulting with someone qualified to make such an assessment if the lawyer cannot do so independently. Virginia Opinion 1872, p. 1.[9]

ABA Opinion 498 states that lawyers may also need to rely on information from technology professionals and vendors for general assistance and lawyers must ensure that these individuals and companies comply with confidentiality and other ethical duties. In such circumstances, the ABA suggests that "[w]hen appropriate, lawyers should consider use of a confidentiality agreement, and should ensure that all client-related information is secure, indexed, and readily retrievable." ABA Opinion 498, p. 7.[10] The Virginia and ABA opinions are based upon ABA Model Rule 1.6(b)(6),[11] which does not have a similar counterpart in the Colorado Rules. Utilizing outside professionals to evaluate technology methods, systems, and security, therefore, is not a requirement in Colorado but rather a prudent practice a lawyer may want to consider.

***B. Accessing Client Files and Data***

Lawyers working remotely must have reliable and consistent access to client records and files. If such information is accessed through a cloud service, "the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 "Ethical Obligations Related to Disasters" (Sept. 19, 2018). In addition to requiring a strong password, a reasonable precaution to reduce the likelihood of unauthorized access to firm information and firm networks is to use multi-factor authentication. Wisconsin Opinion 21-02, p. 10. Lawyers should also make sure that client data is regularly backed up and that secure access to backup data is available in the event of a data loss. Finally, lawyers should be aware of any statutory requirements regarding data breaches and consider adopting a corresponding data breach policy in case data is lost or hacked and a plan for disclosing data losses or breaches to impacted clients.[12]

***C. Virtual Meeting and Videoconferencing Platforms***

For video conferencing services, lawyers should explore whether a virtual meeting platform offers higher tiers of security for businesses/enterprises plans compared to its free or consumer platform plans. Any recordings or transcripts should be secured and, if the platform will be recording conversations with the client, then client consent is required.[13] To avoid jeopardizing the attorney-client privilege and violating the duty of confidentiality, the lawyer should take steps so that client-related meetings are not overheard or seen by third parties in the household or other remote locations unless the third parties are assisting with the representation.

Multiple opinions cite the following steps recommended by the FBI to provide adequate security for video meetings and conferences: "use the up-to-date version of the application; do not make the meetings public; require a meeting password; do not share the link to the video meeting on an unrestricted publicly available social media post; provide the meeting link directly to the invited guests; and manage the screen-sharing options." Wisconsin Opinion 21-02, p. 12.[14]

***D. Virtual Document and Data Exchange Platforms***

Platforms that exchange virtual documents and data need to appropriately archive the documents and data for later retrieval and ensure that the service remains secure. Additionally, a lawyer should consider whether the information being transmitted is or needs to be encrypted, both in transit and in storage.

ABA Opinion 477R provides guidance on these issues. In the opinion, the ABA reasoned that the use of unencrypted routine email is generally an acceptable method of exchanging lawyer-client communication because "unen-

crypted email poses no greater risk of interception or disclosure than other non-electronic forms of communication." ABA Opinion 477R, p. 5. The opinion also cautions, however, that it is not always reasonable to rely on the use of unencrypted email due to cyber-threats and the proliferation of other electronic communications devices, such as mobile applications, message boards, and unsecured networks, which may lack the basic expectation of privacy afforded to email communications. *Id.* Lawyers must therefore continuously consider on a case-by-case basis how they virtually exchange documents and data about client matters by applying the reasonableness factors contained in Rule 1.6 cmt. [18], discussed in Section III(D) above.

In addition to documents and data exchanged by email, lawyers should not open suspicious attachments or click unusual links in text messages, posts, online ads, or other forms of communication. A lawyer should also consider using websites that have enhanced security, such as those beginning with "HTTPS" rather than "HTTP,"[15] where practical.

### *E. Smart Speakers, Virtual Assistants, and Listening-Enabled Features*

Lawyers should be aware that devices and services such as smart speakers and virtual assistants have listening capabilities, as well as the ability to record conversations.[16] These devices and features therefore should be disabled unless the technology is used to assist the lawyer's practice and the lawyer has ensured that the applicable terms of service adequately protect client confidentiality. Failure to do so exposes client and other sensitive information to unnecessary and unauthorized third parties and increases the risk of hacking.

## V. Conclusion

The post pandemic world is a different environment for many lawyers by allowing them greater opportunities to practice virtually, either in full or in part. These opportunities, however, are accompanied by unique ethical considerations under the Colorado Rules of Professional Conduct, which apply uniformly to lawyers who work in physical offices and those who practice virtually. In particular, virtual practice may create new challenges when ensuring a lawyer's compliance with their obligations of competence, diligence, proper communication, confidentiality, supervision of other lawyers and nonlawyers, and the unauthorized practice of law. CL

### NOTES

1. This Opinion uses the terms "virtual practice" and "remote practice" synonymously.

2. ABA Comm. on Ethics and Prof. Resp., Formal Op. 498, "Virtual Practice" (2021), p. 1 (ABA Opinion 498).

3. *See, e.g.*, Chief Justice Directive 23-03 (regarding virtual proceedings policy); 2023 COLO. SESS. LAWS, Ch. 415 (regarding remote participation in residential evictions).

4. ABA Model Rule 1.3 cmt. [1] and Colo. RPC 1.3 cmt. [1] are identical.

5. *See* CBA Formal Op. 147, "Expecting the Unexpected: Ethical Considerations in Succession Planning" (Jan. 18, 2024) (providing guidance and discussing ethical considerations when developing a succession plan).

6. ABA Model Rule 1.4 and Colo. RPC 1.4 are identical.

7. The opinion is purposely limited to address this single scenario because Colorado lawyers are most likely to engage in this situation when practicing virtually. This opinion does not address other possible scenarios such as a lawyer licensed in and practicing the law of another jurisdiction while living in Colorado or a lawyer licensed in Colorado and living in Colorado while practicing the law of another jurisdiction in which they are licensed; *see also Can Out-of-State Attorneys Reside in Colorado?* Office of Attorney Regulation Newsletter (Colorado Supreme Court) November 2020.

8. *See also INSIGHT: Zooming and Attorney Client Privilege* (lawyers must understand that if video conferences are recorded, the vendor may retain a copy under the terms of service), available at https://www.google.com/search?q=INSIGHT%3A+Zooming+and+Attorney+ Client+Privilege&rlz=1C1GCEJ_enUS1028US1028&oq=INSIGHT%3A+Zooming+and+Attorney+Client+Privilege&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIGCAEQRRg60gEHNTg2ajBqNKgCALACAA&sourceid=chrome&ie=UTF-8.

9. *See also* VA Legal Ethics Opinion 1818, "Whether the Client's File May Contain Only Electronic Documents With No Paper Retention?" (Sept. 30, 2005) (concluding "that a lawyer could permissibly store files electronically and destroy all paper documents as long as the client was not prejudiced by this practice, but noted that the lawyer may need to consult outside technical assistance and support for assistance in using such a system.").

10. *See also* Mo. Bar Informal Advisory Op. 20070008 (opining that "[i]t is permissible" for a lawyer to contract with a third party vendor to electronically scan closed files to store them); Mo. Bar Informal Advisory Op. 20050068 (opining it is permissible for lawyer "to hire an answering service to answer phones during non-business hours" as long as lawyer makes reasonable provisions and enters into appropriate agreements to protect client confidentiality).

11. VA RPC 1.6(b)(6) states "[t]o the extent a lawyer reasonably believes necessary, the lawyer may reveal . . . information to an outside agency necessary for . . . office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential."

12. *See* ABA Formal Opinion 483, *Lawyers' Obligations After an Electronic Data Breach or Cyberattack* (2018); see also C.R.S. § 6-1-716 (requiring notification of security breach); C.R.S. § 6-1-713(1) (requiring "[e]ach covered entity in the state that maintains paper or electronic documents during the course of business that contain personal identifying information shall develop a written policy for the destruction or proper disposal of those paper and electronic documents containing personal identifying information."); C.R.S. § 6-1-713.5 (providing for protection of personal identifying information). The applicability and application of these statutes is beyond the scope of this opinion.

13. *See* CBA Formal Op. 112, "Surreptitious recording of conversations or statements" (July 2003).

14. *See also* Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2020-300, "Ethical Obligations for Lawyers Working Remotely" (2020). The FBI article can be found here: https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-oftelecon ferencing-andonline-classroom-hijacking-during-covid-19-pandemic.

15. Wisconsin Opinion 21-02, p. 11.

16. *See* ABA Opinion 498, p. 6; *see also* Wisconsin Opinion 21-02, p. 12 (discussing these features and the risks and benefits associated with them).

# Disciplinary Case Summaries

**No. 23PDJ033 (consolidated with No. 23PDJ071). People v. Harro.** 3/8/2024. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Jolein Harro (attorney registration number 17182) for six months, with three months to be served and three months to be stayed upon Harro's successful completion of a one-year period of probation, with conditions. The suspension was effective on April 12, 2024.

In late 2018, Harro successfully moved to appoint a special master in her client's domestic relations case to obtain information regarding the client's former spouse's income, alleging in part that the opposing party had not fully responded to discovery requests. Harro then failed to reply to opposing counsel's draft nondisclosure agreement for almost two months. Later, she did not include any information in a status report detailing the specific documents that she believed were missing from the discovery requests. In late October 2019, counsel filed opposing requests for attorney fees and costs from the discovery disputes, but Harro failed to provide any legal or factual basis for her request, and she responded to the opposing party's motion 13 days after the deadline to do so. The special master denied Harro's motion, recommending that Harro's client pay $1,732.50 in attorney fees and costs to the opposing party and that the client bear the cost for one of the special master's reports. In 2020, the parties agreed to appoint the special master as arbitrator in the matter. Opposing counsel sent Harro a draft of the arbitration agreement in August 2020, but Harro did not communicate with him about the agreement until that November. Though Harro told opposing counsel at that time that she would provide a revised agreement in a few days, she did not do so until July 2021.

In a separate matter, Harro failed to respond in writing to emails from a client requesting information and legal advice. Harro later withdrew from the client's matter. Despite the client's requests in May, July, and August 2021 for an accounting, Harro did not send him a final bill until October 2021.

In a third matter, a client hired Harro's law firm in February 2021 to appeal a permanent protection order. Harro and a legal associate filed a joint entry of appearance. The associate filed a notice of appeal and a notice to set an appeal bond. The presiding court set the appeal bond on March 17, 2021. Though a staff member at Harro's firm sent the order via email to the client that day, neither Harro nor anyone else advised the client about the order, requested funds to pay the appeal bond, or indicated that the bond needed to be paid to proceed with the appeal. Because the bond was not paid, the appeal was not perfected; the court dismissed the appeal for failure to prosecute on April 6, 2021. About three days later, Harro sent the client a copy of the order dismissing the appeal, but she did not provide any information about the dismissal until April 21, 2021, after the deadline to pay the appeal bond had lapsed. Meanwhile, on March 19, 2021, Harro told the client that the associate working on his case had left the law firm. But the associate continued to perform work for the client for six more days.

In a fourth matter, Harro represented a client in a domestic relations case. Per the final orders in the case, the opposing party was to receive 30% of $33,566.11 that Harro had deposited in her trust account from the sale of the parties' marital residence. In January 2022, the presiding court ordered that the funds be paid directly to the party. But Harro did not disburse any of the funds, and the party moved for contempt on March 8, 2022, seeking payment of his portion of the proceeds. Approximately three days later, Harro made a partial payment of $7,069.83 to the party. Around that same time, she filed an affidavit of attorney fees and costs in the case even though the court had not entered an order entitling her to those fees. Harro then moved to hold back $3,000 from the funds owed to the party to cover her fees and costs for a contempt motion she had filed against the party the previous December. But the court denied the motion after finding that Harro did not cite any legal authority to support her request.

Through this conduct, Harro 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 1.4(a)(4) (a lawyer must promptly comply with reasonable requests for information); Colo. RPC 1.15A(b) (on receiving funds or other property of a client or third person, a lawyer must promptly deliver to the client or third person any funds or property that person is entitled to receive); Colo. RPC 3.1 (a lawyer must not assert frivolous claims); and Colo. RPC 3.4(c) (a lawyer must not knowingly disobey an obligation under the rules of a tribunal).

**No. 24PDJ020. People v. Kilby.** 3/15/2024. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Matthew Alexander Kilby (attorney registration number 51519) for one year and one day, all to be stayed pending Kilby's successful completion of a three-year period of probation with conditions. The probation was effective on March 15, 2024. The stipulation took into account significant mitigating factors.

In one matter, a client retained Kilby in a dissolution of marriage action for a $2,500 flat fee, which the client paid in advance. In error,

Kilby then treated the matter as an hourly fee case, withdrawing funds as if he earned them on an hourly fee basis. Kilby failed to timely file proof of mediation in the case. As a result, the presiding judge vacated the hearing, warning that the case would be dismissed if the parties failed to timely file a joint management certificate. The judge later dismissed the case for failure to comply. Over the next two months, the client emailed Kilby several times requesting an update, but Kilby never provided one. The client later contacted court personnel and learned her case had been dismissed. She then asked Kilby to withdraw and requested a refund. Kilby did not respond. Instead, about a month later, Kilby provided the client a notice of firm closure in which he explained he was experiencing health and personal issues that significantly affected his ability to represent clients. During the representation, Kilby had withdrawn from his trust account all the client's funds believing he earned them on an hourly basis. He later refunded the client's full retainer.

In a second matter, a client hired Kilby in a child custody matter. Kilby petitioned for allocation of parental responsibilities, and the parties mediated. About six weeks later, however, opposing counsel moved to compel and for sanctions, alleging that Kilby's client had failed to file financial disclosures despite several requests for compliance. The court granted the motion to compel in part, directing the parties to provide a status update at the pretrial conference. But Kilby and his client, who was not apprised of the conference, failed to appear. The court ordered them to appear and show cause why it should not impose sanctions. At the show cause hearing, Kilby and his client again failed to appear; neither was aware of the court's order because Kilby had not checked his e-filing notices. Just three days before the contested custody hearing, Kilby moved to withdraw as the client's counsel due to personal reasons. At the custody hearing, the client appeared, but Kilby did not. The court determined that Kilby engaged in improper conduct by, among other things, failing to make financial disclosures, attend the pretrial conference, and respond to the show cause motion and sanctions motion. The court ordered Kilby to pay opposing counsel's fees, which Kilby eventually paid. The client received Kilby's notice of firm closure but was unable to hire another lawyer due to lack of funds.

Through this conduct, Kilby violated Colo. RPC 1.3 (a lawyer must act with reasonable diligence and promptness in 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 1.15A(a) (a lawyer must hold client property separate from the lawyer's own property); and Colo. RPC 1.16(d) (a lawyer must protect a client's interests on termination of the representation, including by giving reasonable notice to the client and returning unearned fees).

**No. 24PDJ018. People v. Lindstrom.** 3/6/2024. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Timothy John Lindstrom (attorney registration number 50715) for one year and one day, all to be stayed pending Lindstrom's successful completion of a three-year period of probation, with conditions. The probation took effect on March 6, 2024.

Lindstrom and his former spouse agreed to dissolve their marriage through a plan made by order of the El Paso County District Court. Under the plan, each party is responsible to pay $250 worth of extraordinary medical expenses annually for their child. If either party incurs costs above that amount, they are to reimburse the other for those costs based on a percentage of their incomes. The party incurring the costs must show proof of payment, and the reimbursing party must pay within 30 days. The plan required Lindstrom to pay child support.

On September 8, 2022, the court issued an amended child support order requiring Lind-

strom to pay $931.69 a month in child support, a sum that encompassed $752.86 in actual child support and $178.83 toward retroactive child support arrearages arising from a modification. Under that order, Lindstrom was to pay down the arrearage over a 12-month period of time. But Lindstrom did not pay the full monthly amount between September and December 2022. In both September and October 2022, Lindstrom paid just $553.84 monthly in child support. In November and December 2022, he paid $860.02 each month. Lindstrom did not pay any child support for the three months between January and March 2023. Between April and November 2023, Lindstrom paid the full amount owed in child support.

In 2023, Lindstrom's former spouse presented receipts for extraordinary medical expense payments she incurred related to care for their child. Lindstrom did not pay his portion of these expenses within 30 days as the plan required.

On March 30, 2023, Lindstrom completed his Colorado attorney registration for 2023. Lindstrom certified in that process that he was in compliance with child support orders, even though he knew he was not in compliance.

On about December 22, 2023, Lindstrom made a $6,697.70 payment to his former spouse that included payment for all child support arrearages as well as for unpaid extraordinary medical expenses. This payment specifically encompassed support owed for payments he did not make in full in 2022 along with payments and interest for unpaid child support in January through March 2023. This payment also covered the retroactive support arrearages required by the court order of September 8, 2022. On January 31, 2024, the court entered an order adjusting Lindstrom's arrears balance to $0, effective that same day.

Through this conduct, Lindstrom violated Colo. RPC 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal) and Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

**No. 24PDJ014. People v. Malouff Jr.** 3/8/2024. *Stipulation to Discipline.*

The Presiding Disciplinary Judge approved the parties' amended stipulation to discipline and suspended Phillip F. Malouff Jr. (attorney registration number 09076) for six months, all to be stayed pending Malouff's successful completion of a one-year period of probation, with conditions. The probation took effect on March 8, 2024.

Malouff is a solo practitioner in La Junta. In July 2022, a client contacted Malouff to represent her in a quiet title action so she could sell a parcel of real estate. Malouff's fee agreement called for a prepaid retainer of attorney fees but also provided that Malouff would collect the retainer from proceeds of the property's sale. It further stated that any past-due fees, costs, and charges would be secured by a lien against all assets of the client, including real property protected from adverse claims. The client never paid the retainer or any fees, and Malouff never attempted to enforce a lien. Malouff has since removed the "lien" language from his standard fee agreement.

Malouff prepared and mailed a draft complaint to the client, who was out of state. The client reviewed and signed the complaint but did not notarize it. She then mailed it back to Malouff. At the time, Malouff was also a notary public in Colorado. After reviewing the complaint with the client by telephone, he asked whether he could notarize it for her. But he was not legally allowed to notarize documents remotely outside the signer's presence, and he did not comply with the remote notary provisions applicable in Colorado. Even so, the client agreed, and Malouff notarized the document with the statement, "Subscribed and sworn to before me in the County of Otero, State of Colorado, this 27th day of July, 2022." Malouff then filed the complaint.

In an answer, the opposing party called into question whether Malouff properly notarized the complaint. The opposing party also filed a complaint with the Notary Division of the Colorado Secretary of State, which opened an investigation. Soon thereafter, Malouff and the client fell out of contact. Malouff filed a reply on the client's behalf but then withdrew from the matter.

During the Secretary of State's investigation, Malouff admitted that the client did not sign the complaint in his presence or in Otero County. He voluntary resigned his notary license and admitted to violating CRS § 24-21-506, which provides that the signer must appear personally; CRS § 24-21-519, for failing to use his "official signature"; and CRS § 24-21-504(2), which prohibits a notary from performing a notarial act concerning a record in which the notary has a disqualifying interest. Malouff also agreed to be precluded from any future commission as a Colorado notary public. His agreements brought the Secretary of State's action to a close.

Through this conduct, Malouff violated Colo. RPC 1.8(a) (a lawyer must not enter into a business transaction with a client unless the client is advised to seek independent legal counsel and the client gives written informed consent to the transaction); Colo. RPC 3.3(a)(1) (a lawyer must not knowingly make a false statement of material fact or law to a tribunal); and Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). 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. 22-6203. United States v. Ware.** 2/28/2024. W.D.Okla. Judge Rossman. *Correctional Officers—Deliberate Indifference to Substantial Risk of Serious Harm—Use of Excessive Force—US Sentencing Guidelines—Downward Variance—Substantive Reasonableness of Sentence.*

Ware was a correctional officer at the Kay County Detention Center, where he eventually served as both a lieutenant and acting captain. In his supervisory capacity, Ware deliberately ordered two gang-affiliated Black inmates to be exposed to inmates associated with the Aryan Brotherhood. These groups were housed in separate areas and were never allowed out of their cells and into the common area at the same time. The Black inmates were physically attacked by other inmates. In a second instance, he ordered another inmate to be removed from his cell and handcuffed to a bench in the central hallway in a position that resulted in the inmate experiencing pain, redness, indentations, and peeling skin on his wrists. The inmate was left in this position for about an hour and a half. Ware was charged with willfully depriving the Black inmates of their rights to be free from a correctional officer's deliberate indifference to a substantial risk of serious harm while acting under color of law in violation of 18 USC § 242, and with willfully depriving the third inmate of his right to be free from the excessive use of force by a correctional officer while acting under color of law in violation of 18 USC §§ 242 and 2. Ware was convicted by a jury on all charges. The presentence investigation report calculated Ware's total offense level as 21, and his advisory US Sentencing Guidelines (USSG) range was 37 to 46 months in prison. Ware sought a downward variance under 18 USC § 3553(a). The district court denied the variance and imposed concurrent terms of 46 months of imprisonment.

On appeal, Ware argued that his sentence was substantively unreasonable because the district court failed to give adequate weight to his personal characteristics, including his military service, steady employment history, family ties and responsibilities, and lack of criminal history. However, the Tenth Circuit must defer to a district court's determination of the weight to be afforded to the statutory sentencing factors. Here, the district court thoroughly weighed each of the USSG § 3553(a) factors, detailed its reasoning, and imposed a sentence within the USSG that is presumptively reasonable.

The judgment was affirmed.

**No. 22-7028. United States v. Pemberton.** 3/4/2024. E.D.Okla. Judge Tymkovich. *State Court Jurisdiction—Indian Country—Motion to Suppress—Good Faith Exception to Exclusionary Rule—Sentencing Hearing—Right to Proceed Pro Se.*

In 2004, Pemberton was prosecuted and convicted in an Oklahoma state court for a murder committed in McIntosh County, Oklahoma. Since then, McIntosh County has been determined to straddle the Creek Nation and the Cherokee Nation reservations. Pemberton, an enrolled member of the Creek Nation, applied for postconviction relief in Oklahoma state court, contending that his conviction was invalid. He argued that the State of Oklahoma lacked jurisdiction over the crime because it occurred in Indian Country and he was an enrolled member of the Creek Nation at the time of the crime. The Oklahoma state court denied Pemberton's request to void his final state conviction, and the denial was affirmed on appeal. As state habeas proceedings were pending, a federal grand jury indicted Pemberton for the 2004 murder. Pemberton moved to suppress all evidence gathered and statements obtained during the 2004 state investigation. The district court denied Pemberton's suppression motion, and he was convicted on all counts. At sentencing, Pemberton asked to proceed without a lawyer. The district court denied his request, allowing appointed counsel to continue to represent Pemberton throughout the sentencing phase.

On appeal, Pemberton argued that the district court erred in denying the motion to suppress the evidence obtained during the 2004 murder investigation. He maintained that McIntosh County law enforcement lacked jurisdiction to investigate the crime, arrest him, or interrogate him because he was an enrolled tribal member on what was subsequently determined to be a reservation. It is undisputed that Pemberton's crime, arrest, and investigation occurred on what has retroactively been determined to be outside Oklahoma's jurisdiction, so the question was whether the officers were objectively reasonable in believing they had jurisdiction. Here, the historical record shows that government officials from the Creek Nation, the State of Oklahoma, and the United States held and expressed the belief that the Creek Nation reservation did not continue to exist after Oklahoma became a state. When Oklahoma became a state, the federal government stopped prosecuting serious crimes committed by Indians in federal court, and Oklahoma immediately began prosecuting those crimes in state court. Accordingly, the officers' decision to apply for a warrant issued by a state court judge was objectively reasonable, and they could reasonably rely on the judge's authority to issue the warrant. Therefore, the good faith exception to the exclusionary rule applied to the evidence discovered pursuant to the search warrant, and any resulting evidence was properly introduced at trial.

Pemberton also contended that evidence obtained from the warrantless arrest should have been suppressed. However, it is uncontested that the officers had probable cause to believe that Pemberton committed murder and that they acted with an objectively reasonable good-faith belief that they lawfully exercised jurisdiction

over that felony. Therefore, the district court did not err in denying Pemberton's motion to suppress evidence stemming from his arrest.

Pemberton further argued that the district court erred at sentencing by denying, without a formal hearing, his request to represent himself at sentencing. A hearing on this issue is generally a sufficient, but not a necessary, condition to a knowing waiver. Here, the district court properly analyzed whether Pemberton met the requirements to proceed pro se, determining that he focused on issues unrelated to sentencing, waited until one week before the sentencing hearing to make his request, and continuously ignored court procedures on filing motions. The court findings that Pemberton's request to proceed pro se was untimely and made for the purpose of delaying the sentencing are amply supported by the record. Accordingly, the district court did not violate Pemberton's constitutional right to represent himself when it denied his request to proceed pro se.

The denials of Pemberton's motion to suppress and request to represent himself at sentencing were affirmed.

**No. 22-1325. Bacote v. Federal Bureau of Prisons.** 3/5/2024. D.Colo. Judge Carson. *Federal Bureau of Prisons—Confinement Conditions—Injunctive and Declaratory Relief—Eighth Amendment—Prudential Mootness.*

Bacote was incarcerated in an administrative maximum facility in Florence (ADX-Florence). Based on his history of mental illness, Bacote filed an action for injunctive and declaratory relief from his confinement conditions. Holding that he had released most of his claims as part of a class action settlement by mentally disabled plaintiffs at ADX-Florence, the district court dismissed all but one of Bacote's claims and denied his request to file a fifth amended complaint. Bacote proceeded on the remaining claim, arguing that the Federal Bureau of Prisons (FBP) had violated his Eighth Amendment rights by acting with deliberate indifference to his mental disability. FBP psychology staff examined Bacote and concluded that he suffered from an intellectual disability and persistent depressive disorder. This diagnosis triggered FBP Program Statement 5310.16, which forbids the incarceration of inmates with persistent depressive disorders in ADX-Florence. Accordingly, FBP voluntarily transferred Bacote to a mental health ward in a different penitentiary in Pennsylvania. But before Bacote was transferred, the district court dismissed his Eighth Amendment claim, holding that he had failed to establish that FBP was deliberately indifferent to his disability. As this was the only remaining claim, the district court also entered judgment in FBP's favor.

On appeal, Bacote argued that the district court erred by (1) determining that the class action settlement released his claims, (2) denying him leave to amend his complaint, and (3) entering judgment for FBP. Inmates may seek injunctive or declaratory relief from the conditions of their confinement. However, Bacote failed to persuade the Tenth Circuit that a cognizable danger rather than a mere possibility of a recurrent violation existed because (1) Bacote was no longer subjected to the specific conditions from which he sought relief; (2) he requested judgment without any information about his current confinement conditions; (3) the record suggested that FBP gave Bacote conditions preferable to those about which he complained; and (4) even if Bacote had requested relief that could have a continuing effect, such relief would have required the Tenth Circuit to restrict the conduct of officials in another circuit. Therefore, the appeal was prudentially moot.

The appeal was dismissed.

**Nos. 22-1236 & 22-1250. Alex W. v. Poudre School District R-1.** 3/7/2024. D.Colo. Judge Rossman. *Individuals With Disabilities Education Act—Statute of Limitations—Disability Evaluations—Individual Education Program—Functional Behavior Analysis—Free Appropriate Public Education—Independent Neuropsychological Evaluation—Cost Reimbursement.*

Alex W. is a student with disabilities that include Down syndrome, autism spectrum disorder, and substantial hearing and vision impairments. In 2014, his parents enrolled him in the first grade in the Poudre School District R-1 (School District). The School District performed an initial evaluation of Alex, and his parents and the School District agreed that he would attend elementary school and participate in the Integrated Learning Supports program. In 2017, the School District conducted a triennial reevaluation of Alex (the 2017 reevaluation), which reassessed Alex's vision and hearing, general intelligence, cognitive and adaptive functioning, academic performance, and social and emotional abilities. The 2017 reevaluation acknowledged that Alex continued to struggle with behavioral challenges and that his nonverbal communication progress had plateaued. The School District thus modified Alex's 2017 individual education program (IEP) concerning his speech-language and occupational therapy services. The parents challenged the 2017 reevaluation and requested an independent educational evaluation (IEE) in those areas at public expense under 34 CFR § 300.502(b). The School District funded the IEE and worked with Alex's parents to obtain providers to perform it, but the parents continued to challenge the 2017 reevaluation results, and they requested that Alex undergo another publicly funded IEE in the area of neuropsychology. The School District refused, and Alex's parents paid $5,500 for the independent neuropsychological evaluation. In 2018 the School District also performed a functional behavioral analysis (FBA) at the parents' request, and when the parents also requested an independent FBA, the School District funded that also. In September 2018, Alex withdrew from the School District.

In 2018, Alex's parents filed a complaint with the Colorado Department of Education alleging that the School District denied Alex "a free appropriate public education" (FAPE) from 2014 to 2018 under 20 USC § 1400(d)(1)(A) of the Individuals with Disabilities Education Act (IDEA). The parents also requested reimbursement from the School District for the independent neuropsychological evaluation that they paid for in 2018. The School District moved for partial dismissal, contending that the claims about the 2014 and 2015 academic years were barred under the IDEA's two-year statute of limitations. The administrative law judge (ALJ) granted the motion. The case proceeded as to the 2016 and 2017 school years and, following an evidentiary hearing, the ALJ denied relief but ordered the School District to reimburse

the parents for the cost of the independent evaluation. The parents challenged the ALJ's decision on the FAPE claims in federal district court, and the School District counterclaimed for reversal of the reimbursement order. The district court affirmed the ALJ's decision in full.

On appeal, the parents challenged the dismissal of their 2014 and 2015 claims based on the IDEA's statute of limitations. However, the parents did not raise their argument or otherwise challenge the dismissal of claims that predate July 2016 in district court, so it was waived. Further, the parents summarily raised a new argument in their reply brief that the 2014 and 2015 claims are timely because they did not discover the extent of the School District's violations until 2017 and 2018. Because this argument was not raised in the opening brief, it was also waived.

The parents also contended that Alex was denied a FAPE because the School District did not properly address the behavioral components of Alex's disabilities. They maintained that the School District was required to conduct an FBA and develop a behavior intervention plan to create Alex's IEPs in 2016 and 2017. However, there is no support in the law for this position, and the School District did not fail to identify and address the behavioral aspects of Alex's disabilities. Further, the record shows that the School District considered, but rejected, conducting an FBA before developing Alex's 2016 and 2017 IEPs. Accordingly, the School District met its obligations under the IDEA.

The parents further argued that Alex was denied a FAPE because he did not make progress under his IEPs. However, an IEP does not guarantee a particular outcome, and Alex's IEPs were reasonably calculated to allow him to progress.

The parents also asserted that Alex was denied a FAPE because of the restructuring of his speech-language and occupational therapy services in the 2017 IEP. Here, the ALJ and the district court did not err in determining that the School District's "collaborative" approach was reasonably calculated to meet those needs. Further, the district court properly concluded that, even with reduced direct therapy hours, Alex's 2017 IEP complied with the IDEA.

The parents additionally claimed that Alex was denied a FAPE because the School District mistakenly concluded that he was not eligible for extended school year services. But the record here supports the conclusion that the School District provided Alex a FAPE without offering extended school year services.

Lastly, the parents asserted that Alex was denied a FAPE because, in crafting Alex's IEPs, the School District did not appropriately evaluate Alex's autism nor determine how best to instruct Alex to communicate. However, the record shows Alex's IEPs relied on autism-related assessments and tools and that the School District's strategies to improve Alex's functional communication skills met the legal requirement that his IEP be reasonably calculated to allow him to make progress. Accordingly, the School District fulfilled its IDEA obligations by providing Alex a FAPE during the 2016 and 2017 school years.

On cross-appeal, the School District argued that the ALJ and district court erred by determining that the School District was required to reimburse the parents for the cost of the 2018 IEE. The School District maintained that 34 CFR § 300.502 only requires a school district to fund one IEE each time a public agency conducts an evaluation with which the parent disagrees, and the School District had already funded an IEE earlier that year concerning the same School District evaluation. The plain text of the regulation supports the School District's position. Accordingly, the IDEA and its implementing regulations imposed no duty on the School District to fund the parents' request for a second IEE in response to the 2017 reevaluation or file a due process complaint to resist that request. Therefore, the district court erred in requiring the School District to reimburse the parents for the second IEE requested in June 2018.

The order in appeal No. 22-1236 was affirmed in full. The reimbursement order in cross-appeal No. 22-1250 was reversed.

**No. 23-1063. Young v. Colorado Department of Corrections.** 3/11/2024. D.Colo. Judge Tymkovich. *Mandatory Employee Training—Hostile Work Environment—Equal Protection—Title VII of the Civil Rights Act—Leave to Amend Complaint—Plausible Allegations.*

Young was employed by the Colorado Department of Corrections (DOC), which implemented a mandatory employee equity, diversity, and inclusion (EDI) training with materials from the Colorado Department of Public Health & Environment. Young complained through the DOC's formal complaint process that the EDI training was racially discriminatory and its teachings were abusive. The DOC informed Young that his complaint would not be investigated, and Young resigned from his employment. Young then sued DOC and the Colorado Department of Public Health & Environment (defendants). He subsequently amended his complaint to allege claims for (1) a hostile work environment under Title VII of the Civil Rights Act and (2) equal protection under 42 USC § 1983. Young asserted that the EDI training program violated Title VII by creating a hostile work environment and violated the Equal Protection Clause by promoting race-based policies. Defendants moved to dismiss the complaint. In his response to the motion to dismiss, Young did not request leave to amend his complaint or separately move to amend. The district court dismissed without prejudice the Title VII claim for failure to state a claim because Young failed to sufficiently plead that the alleged harassment was severe or pervasive, and it dismissed the equal protection claim for lack of standing because Young was no longer a DOC employee. The court cited Young's failure to request leave to amend in declining to sua sponte grant Young leave to amend his claims.

On appeal, Young argued that the district court erred in dismissing his Title VII complaint because he sufficiently pleaded that he was subjected to harassment and he plausibly alleged that the harassment was severe or pervasive to the extent that it changed his employment conditions and created an abusive working environment. Race-based training programs can create hostile workplaces when such programs combine official policy with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment. The training materials and resulting workplace policies must be so severe or pervasive that they both objectively and subjectively alter employment terms and create an abusive working environment. Here, Young plausibly alleged the first and third elements of a hostile work environment claim: membership in a protected class and harassment due to race. But while Young's complaint highlighted materials from the EDI training that he found strongly objectionable and alleged that the EDI training could promote racial discrimination and stereotypes within the workplace, Young did not allege that the training occurred more than once or that race-based harassing conduct from his coworkers or his supervisors occurred as a result of the training. Therefore, Young failed to allege the second and fourth elements of a hostile work environment claim: that he was subjected to unwelcome harassment that was so severe or pervasive that it altered the terms or conditions of his employment to create an abusive work environment. Accordingly, the district court did not err in dismissing the Title VII complaint.

Young also argued that the district court erred by dismissing his equal protection claim for lack of standing. However, Young resigned from DOC employment before bringing his lawsuit, did not plead constructive discharge, and has not requested reinstatement as part of his equal protection claim. Therefore, Young did not plead an ongoing injury that a favorable judgment will redress and thus failed to establish Article III standing to pursue his equal protection claim.

Lastly, Young contended that the district court erred by not sua sponte granting him leave to amend his complaint. Absent a request to amend, a district court may dismiss the action rather than sua sponte granting leave to amend. Accordingly, the district court's choice not to sua sponte grant leave to amend was not an abuse of discretion.

The dismissal of Young's claims and the denial of leave to amend were affirmed.

**No. 22-1034. United States v. Zhong.** 3/12/2024. D.Colo. Judge Eid. *US Sentencing Guidelines—Mandatory Minimum Sentence—Non-Guideline Sentence—Safety Valve Relief.*

Zhong and her husband Xian conspired to grow marijuana plants worth hundreds of thousands of dollars in the basement of their residence. Zhong was convicted of (1) conspiring to manufacture and possess with the intent to distribute 1,000 or more marijuana plants; (2) manufacturing and possessing with intent to distribute 1,000 or more marijuana plants; and (3) using and maintaining the residence for the purpose of manufacturing and distributing marijuana. Counts 1 and 2 each carried a 10-year mandatory minimum sentence. Before the sentencing hearing, Zhong and Xian moved for a non-guideline sentence of time served plus five years of supervised release, arguing that they met the requirements of US Sentencing Guidelines (USSG) § 5C1.2(a)(5) and 18 USC § 3553(f), which provide a "safety valve" for mandatory minimum sentences. In a letter in support of the motion (the letter), Zhong and Xian claimed that they truthfully provided the government with all the information they had concerning the offenses of conviction. Following a hearing, the district court found that neither the letter nor the testimony at the sentencing hearing was credible and that the letter was self-contradictory, and it denied the motion for a non-guideline sentence. The district court sentenced Zhong and Xian to the mandatory minimum of 120 months in prison on counts 1 and 2, and to 48 months in prison on count 3, to run concurrently.

On appeal, Zhong contended that the district court clearly erred by finding that she did not prove that she was eligible for the statutory safety valve. Before the sentencing hearing, a defendant seeking safety-valve relief must truthfully give the government all information and evidence that the defendant has concerning the offense. A district court may not grant a defendant's request for safety-valve relief when it would directly undermine the jury's verdict. And when a jury convicts a defendant of an offense with a mens rea element, the jury convicts the defendant of having certain information. Accordingly, a defendant seeking safety valve relief in this situation must provide information to the government to demonstrate their own mens rea. Here, when the jury convicted Zhong of all three counts, it necessarily found, beyond a reasonable doubt, that Zhong had a certain mens rea for each crime. But Zhong did not provide the government with information sufficient to prove that she possessed the mens rea for the crimes for which she was convicted, so she did not truthfully provide the government with all information she had concerning the offense within the meaning of § 3553(f)(5). Therefore, the district court correctly denied her safety valve relief.

The sentence was affirmed. CL

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# Summaries of Published Opinions

**March 7, 2024**

**2024 COA 25. No. 23CA0073. Hobbs v. City of Salida.** *Noise Abatement—Maximum Permissible Noise Levels—Colorado Noise Abatement Act—Preemption of Municipal Law—Noise Ordinances.*

Salida is a statutory city with a creative arts district that supports art and live music venues in its downtown. Salida adopted an ordinance authorizing it to issue amplified noise permits that allow local businesses to hold special events. Under the ordinance, permittees may hold musical events between May 2 and October 31, but no noise is permitted in excess of 85 db(A), and the authorized activity must end at 10 p.m. absent prior special approval from the city. Giant Hornet LLC, d/b/a High Side! Bar and Grill (High Side), is a bar and restaurant that routinely featured live musicians, and during the summer, it sponsored outdoor concerts on its patio. Hobbs owns a home that is located in an industrial zone across from downtown Salida. His southern property line is approximately 570 feet from High Side's outdoor patio. Between High Side and Hobbs's home there is a developed walking path, the Arkansas River, a railroad line, and a county road. Hobbs filed a noise complaint with Salida, asserting that the decibel level emanating from concerts on High Side's patio exceeded the limit set by the Colorado's Noise Abatement Act (Act), which generally limits the sound level for residential neighborhoods to 50 db(A) between 7 p.m. and 7 a.m., and that he measured noise levels on his property in the range of 51 to 78 db(A) between 7 and 9:30 p.m. The parties could not resolve the matter, and Hobbs filed a complaint against High Side, the City of Salida, and its administrator (collectively, defendants). Hobbs requested a declaratory judgment that the Act preempts Salida's sound amplification ordinance and, therefore, the sound amplification permits issued to High Side were null and void. The complaint also sought injunctive relief prohibiting Salida from issuing permits under the amplified sound ordinance and prohibiting High Side from hosting concerts exceeding the Act's general limits. Defendants moved to dismiss for failure to join indispensable parties and for judgment as a matter of law on Hobbs's claim for declaratory relief. The district court denied the motions to dismiss but entered judgment as a matter of law in favor of defendants.

On appeal, Hobbs contended that the district court incorrectly concluded that CRS § 25-12-103(11) allows Salida to issue amplified noise permits to for-profit entities to hold concerts on private property. He maintained that CRS § 25-12-108 preempts Salida's ability to issue sound permits that exceed the limitations set forth in the Act and that the Act authorizes permits only on property Salida owns. The Act does not contain any express or implied limitation that a political subdivision may only authorize permits for performances on land it owns. Further, § 25-12-103(11) exempts Salida's ordinance and the permits from the Act's general standards. In addition, the preemption language of § 25-12-108 does not apply to the present dispute. Accordingly, the amplified noise permits that Salida issued to High Side do not conflict with the Act, and the district court did not err.

All parties requested an award of attorney fees. Defendants failed to cite legal authority or develop argument in support of the request, so the court of appeals declined to further address their claim. And contrary to Hobbs's assertion, defendants' motions to dismiss were not substantially frivolous, groundless, or vexatious, as the court affirmed the district court's judgment as a matter of law on all of Hobbs's claims. Accordingly, the court denied Hobbs's request.

The judgment was affirmed.

**March 14, 2024**

**2024 COA 26. No. 19CA2313. People v. Lopez.** *Testimony Concerning the Truthfulness of Another Witness—Opening the Door Doctrine—Preliminary Witness Questions—Response to Jury Question.*

Lopez was charged with multiple counts of sexual assault on a child and incest concerning his son, daughter, and niece. His defense, which he advanced during voir dire and throughout trial, was that the children's allegations were due to suggestibility or coaching resulting from the undue influence of their maternal grandmother, who had custody of them. Lopez's son and daughter underwent forensic interviews about their sexual abuse allegations before trial. The forensic interviewer testified at trial as an expert that she did not see indications of coaching because the children provided experience-based details about the incidents. Lopez was found guilty of sexually abusing all three children and of possessing child pornography.

On appeal, Lopez argued that the trial court erred by admitting the forensic interviewer's testimony that the children did not appear to have been coached because the testimony vouched for the children's truthfulness and was thus inadmissible. Coaching testimony is ordinarily inadmissible. However, Lopez opened the door to the testimony by pursuing a defense that the children had been coached to report the abuse. The record clearly establishes that Lopez meant to suggest to the jurors that the allegations resulted from coaching or improper influence by certain identifiable

people. Therefore, the district court did not err by admitting the forensic interviewer's coaching testimony.

Lopez also contended that the trial court erred in responding to the jury's question about whether it could return verdicts on fewer than all the charges. He maintained that the trial court should have responded "yes" to the question and that by instead referring the jury back to the "separate and distinct charges" instruction, the court gave a coercive instruction, since the jury was deadlocked. However, the court's decision not to inform the jury that it could hang was within the range of reasonable responses to the jury's question. Further, it was undisputed that the jury's note did not indicate a deadlock, and the court's instruction permitted the jury to find Lopez guilty or not guilty, or fail to reach a verdict, so it was not coercive.

Lastly, Lopez asserted that the court committed reversible error by asking his son, who was 10 years old at the time, preliminary questions before he testified. Lopez maintained that the court's questions were the functional equivalent of a child competency proceeding rather than an age-appropriate oath, and that conducting the proceeding in front of the jury improperly bolstered his son's credibility. However, the court's questions were aimed at determining whether his son could tell the difference between truth and falsehood, so they were part of an age-appropriate oath. And even assuming that some questions resembled a child competency hearing, any error was harmless.

The judgment was affirmed.

**2024 COA 27. No. 21CA1808. People v. Hood.** *Unlawful Sexual Behavior—Rape Shield Statute—DNA Testing—Relevancy of Evidence—Exclusion of Relevant Evidence.*

Hood moved in with family members, including his cousin and his cousin's daughter, K.H., who was 15 years old at the time. K.H. alleged that Hood came into her room one night and sexually assaulted her. K.H. testified that the day after the assault, she showered and changed clothes and then went to school. While at school, K.H. told her boyfriend about the assault and then called her father and told him. Later that day, K.H. went to the hospital and was examined by a sexual assault nurse examiner, who took cheek, anal, external vaginal, and cervical swabs. The Colorado Bureau of Investigation's analysis of the swabs did not detect Hood's DNA, but DNA from at least one male contributor other than Hood was detected on the external vaginal swab. The prosecution filed a motion in limine to

exclude evidence of the other DNA profile under the rape shield statute. Defense counsel argued that there was no rape shield issue. The court granted the motion in limine. Hood was convicted of one count of sexual assault on a child by one in a position of trust and one count of unlawful sexual contact.

On appeal, Hood argued that the district court erred by misapplying the rape shield statute to exclude evidence that DNA from someone other than Hood was detected on the victim's external genitalia. By itself, DNA from someone other than the defendant that is found on a victim's external genitalia is not evidence of "specific instances of the victim's . . . prior or subsequent sexual conduct" that is deemed presumptively irrelevant under the rape shield statute. Accordingly, the court misapplied the rape shield statute to exclude the DNA evidence. Further, the DNA evidence was relevant under CRE 401 and not inadmissible under CRE 403, and the evidence was highly disputed, so its exclusion was not harmless.

The judgment of conviction was reversed and the case was remanded for a new trial.

### March 21, 2024

**2024 COA 28. No. 23CA0138. Aranci v. Lower South Platte Water Conservancy District.** *Colorado Taxpayer Bill of Rights—Water Conservancy Act—Mill Levy Rates—Collection of Taxes.*

The Lower South Platte Water Conservancy District (district) was formed under the Water Conservancy Act (Act), pursuant to which it imposes and collects a mill levy on all property within its boundaries. In 2019, the district increased its mill levy rate from 0.5 mill to 1.0 mill and continued to do so in 2020, 2021, and 2022. A group of property owners within the district sued the district, alleging that the increased mill levy rate without voter approval was unconstitutional under Colorado's Taxpayer's Bill of Rights (TABOR), Colo. Const. art. X, § 20. The complaint also sought class certification. The parties filed cross-motions for a determination of a question of law under CRCP 56(h) to determine whether the district's increased mill levy rate was constitutional under TABOR. The district court determined that the increased rate was constitutional under TABOR because CRS § 37-45-122(2)(a)(III), which controls how water conservancy districts fix their levy rates, predates TABOR and requires the district to fix the mill levy rate based on a mandatory, nondiscretionary formula. The court thus found that the district lacked discretion under the statute, so TABOR's voter approval requirement in Colo. Const. art. X, § 20 (4)(a) did not apply. The court also denied the request for class certification, and it entered final judgment for the district.

On appeal, the property owners argued that the district court erred by determining that the district's increased mill levy rate, without voter approval, was constitutional under TABOR. The Act provides the district numerous discretionary powers to acquire and manage property and to generate revenue, including the power to fix a mill levy rate and increase that rate in accordance with law. But TABOR supersedes conflicting state and local authority, and § 20(4)(a) requires a water conservancy district to obtain voter approval in advance to increase its mill levy rate under the Act. Accordingly, the district's increase of its mill levy rate from 0.5 mill to 1.0 mill in 2019 and subsequent years without voter approval was unconstitutional under TABOR. Therefore, the district court erred.

The judgment was reversed, including the denial of class certification, and the case was remanded for further proceedings to include a determination on whether the case shall be certified as a class action and whether the property owners may recover their reasonable attorney fees and costs on appeal under TABOR § 20(1).

### March 28, 2024

**2024 COA 29. No. 23CA0311. Stalder v. Colorado Mesa University.** *Colorado Anti-Discrimination Act—Americans With Disabilities Act—Intentional Infliction of Emotional Distress—Rights of Individuals With Service Animals—Legitimate Suspicions Doctrine.*

Stalder attended Colorado Mesa University (CMU) from 2019 through 2022. In 2020, Stalder obtained a dog, Ruger, which he trained to help him deal with his mental health issues. In 2021, Stalder entered the CMU gym with Ruger. Nordine, the CMU director of campus recreation, stopped Stalder and asked him about Ruger. Stalder told Nordine that Ruger was an emotional support animal. Nordine contacted Lang, CMU director of advocacy and health, who told Stalder that only service animals, as opposed to therapy dogs, were allowed in campus buildings and that Ruger was not allowed in any campus buildings. Stalder then registered Ruger as a service animal at USAServiceDogRegistration.com. Stalder went to the gym and presented Ruger's badge, but Lang responded that there was no registry for service animals under the Americans with Disabilities Act (ADA) and that the badge did not make Ruger a service animal. Ultimately, Lang told Stalder that he could not bring Ruger on campus unless Stalder provided documentation that Ruger was a trained service animal. Stalder sued CMU, Nordine, and Lang (defendants) under the ADA and the Colorado Anti-Discrimination Act (CADA), and brought an intentional infliction of emotional distress (IIED) claim. The district court granted summary judgment for defendants on all claims.

On appeal, Stalder contended that the district court erred by granting summary judgment on his ADA and CADA claims. Here, Stalder testified at his deposition that he adopted Ruger at the end of November 2020 and that by the end of January 2021, Ruger was trained as a service dog to remove him from situations that cause him to have post-traumatic stress disorder, anxiety, or depressional episodes, and was also trained to provide pressure therapy and remind Stalder when to take his medications. The tasks that Ruger performs go beyond merely providing Stalder with emotional support, well-being, comfort, or companionship, so Stalder's deposition testimony about Ruger's training and what tasks Ruger could perform is sufficient to demonstrate a genuine dispute of fact as to whether Ruger was a service animal in February 2021. The district court's grant of summary judgment was therefore improper.

Stalder also argued that there is a genuine factual dispute about whether defendants engaged in impermissible inquiry by asking him to release his medical records and show proof of Ruger's training before granting him an ADA accommodation, contending that

the "legitimate suspicions" doctrine does not apply. CMU maintained that federal courts have held that a public entity may engage in further appropriate inquiries when it has legitimate suspicions about whether a dog is a service animal and when such additional inquiry is not used for harassment. The applicable ADA regulation, 28 CFR § 35.136(f), allows public entities to specifically inquire on only two issues: whether the animal is required because of a disability, and what task the animal is trained to perform. Further, CMU cited no cases that support its use of the legitimate suspicions doctrine. Accordingly, the district court's reliance on this doctrine was erroneous.

Stadler further asserted that the district court erred by entering summary judgment for defendants on his IIED claim because it only considered the video of the interaction between him and Lang. However, the contents of the video and Stalder's additional allegations are insufficient as a matter of law to rise to the level of extreme and outrageous conduct required to support an IIED claim. Further, even assuming that Lang violated the ADA by requesting training documentation, this conduct also would not rise to the level of extreme and outrageous conduct necessary to support an IIED claim.

The judgment was affirmed as to the grant of summary judgment on the IIED claim. The judgment was reversed in all other respects and the case was remanded for further proceedings.

**2024 COA 30. No. 23CA0622. Simpson v. City of Durango.** *Colorado Open Records Act—Work Product Exceptions—Work Product Prepared for Elected Officials—Appellate Attorney Fees.*

Simpson made a public records request under the Colorado Open Records Act (CORA) for the City of Durango's (city) unaudited draft version of its annual independent financial audit report. The city declined to release any draft report, asserting that it was not a public record under CORA because it was "work product." Simpson filed suit, asserting that the city's failure to release the draft report violated CORA. The parties stipulated that the district court could decide whether the draft report was subject to public inspection by relying solely on the parties' briefs and affidavits, and that either party or the court could request an evidentiary hearing. No one requested an evidentiary hearing. Based on the limited record produced by the parties' stipulated procedure, the district court required the city to make the draft report available for public inspection on grounds that it did not meet CORA's definition of "work product," and it was not "prepared for elected officials."

As an initial matter on appeal, Simpson argued that the court of appeals lacks jurisdiction because the city, rather than the city clerk, filed the initial notice of appeal. However, the city's clerk, in her official capacity, is the records custodian for the city, so Simpson's underlying lawsuit, which named the clerk in her official capacity, was, in fact, a suit against the city. And though the city's notice of appeal should have included the clerk as an official-capacity defendant in its caption, the failure to do so is not jurisdictional, and the court properly exercised its authority under C.A.R. 43(c)(1) to ensure that the clerk was added to the caption as an official-capacity defendant.

On the merits, the city argued that the district court erred by determining that the draft report isn't exempt from CORA's disclosure requirements on grounds that it is not work product and not prepared for elected officials. The court held that the draft report is not "[w]ork product prepared for elected officials" under CRS § 24-72-202(6)(b)(II) because, on the record here, elected officials have no control over the final report's content and are not meaningfully involved in decisions involving the final outcome of the report or any decision based on its content.

Simpson also requested his appellate attorney fees under CRS § 24-72-204(5)(b). Simpson

successfully defended the district court's ruling that he was improperly denied the right to inspect the draft report, so he is entitled to his reasonable attorney fees incurred on appeal.

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

**2024 COA 31. No. 23CA0989. Colorado Department of State v. Unite for Colorado.** *Election Law—Initiative and Referendum—Fair Campaign Practices Act—Colorado Constitution Article 28, § 2(10)—Issue Committees—Major Purpose—Disclosure.*

Unite for Colorado (Unite) is a nonprofit issue advocacy corporation that was formed in Colorado in November 2019. Unite began operating in January 2020 with only two employees, Zvonek, an executive manager, and Kennedy, a registered agent and board member. Unite spent over $4 million to support or oppose three ballot initiatives on Colorado's 2020 ballot, which constituted approximately 23.44% of its total expenditures. Unite did not register with the Colorado Department of State (DOS) or disclose its contributions and expenditures. In August 2020, two registered voters filed a campaign finance complaint with the DOS against Unite alleging that Unite was an issue committee that had failed to comply with Colorado's disclosure and registration requirements. After a hearing, an administrative law judge (ALJ) found that Unite had a major purpose of supporting or opposing the ballot initiatives, as evidenced by its "continuous" spending, which "constituted a considerable portion of its total activities," and by its "funding [of] written and broadcast communications." The DOS entered a final order concluding that Unite had a major purpose of supporting or opposing the ballot initiatives and ordered Unite to comply with the statutory obligations of an issue committee and pay a fine of $40,000. The DOS then filed a complaint in district court to judicially enforce the final agency order. The district court reversed the final agency decision, concluding that the DOS erred by considering Unite's ballot initiative efforts in the aggregate rather than on a proposition-by-proposition basis, as required by statute, so the final decision was arbitrary, capricious, and contrary to law.

On appeal, the DOS argued that the district court erred by concluding that it was not authorized to consider an entity's aggregated ballot activity. The Fair Campaign Practices Act (FCPA) requires that ballot initiative advocacy groups (issue committees) register with the DOS and disclose their contributions and expenditures. Under the 2020 FCPA, an "issue committee" is any group that has a major purpose of ballot initiative advocacy or has accepted or made contributions or expenditures over $200 to support or oppose any ballot initiative. It is undisputed that an organization must satisfy both subsections to qualify as an issue committee. Further, CRS § 1-45-103(12)(a) provides that the statutory definition of "issue committee" has the same meaning as that set forth in Colo. Const. art. 28, § 2(10). Nothing in the constitutional text precludes the DOS from considering an entity's ballot spending in the aggregate. Accordingly, the DOS had authority to consider Unite's ballot initiative spending in the aggregate for the purpose of assessing whether Unite had a major purpose of ballot initiative advocacy. Further, considering the seven factors relevant to the "major purpose" analysis in 2020—including the organization's structure, purposes, activities, and expenditures—the DOS's final decision that Unite had a major purpose of ballot initiative advocacy in 2020 complied with the operative legal framework.

Unite contended that the registration and disclosure requirements in CRS § 1-45-108(1)(a)(I), (3.3), as applied to Unite, unconstitutionally compel speech and burden anonymous speech and association. However, the state has an informational interest in knowing who supports or opposes Colorado's ballot initiatives, and in what financial amount. Here, because the undisclosed spending exceeded $4 million, the state's informational interest was substantial, and the regulatory disclosure regime was narrowly tailored to the government's asserted interest. Further, Unite provided no evidence that it would lose contributions based on the disclosure requirement or that it had to spend exorbitant amounts of time or money to comply. Therefore, the registration and disclosure requirements were constitutional as applied to Unite.

Unite also argued that the 2020 "major purpose" test is unconstitutionally vague, as evidenced by the General Assembly's later repeal of the framework in favor of a bright-line rule. However, the 2020 framework sufficiently put Unite on notice that it could be fined for its failure to register and disclose, notwithstanding the district court's disagreement with the agency's interpretation of law.

Lastly, Unite asserted that the DOS's interpretation amounted to a new rule of law that it applied retroactively to Unite. However, the DOS's consideration of Unite's pattern of conduct, including all of its ballot initiative advocacy, in finding that it had a major purpose of supporting or opposing any ballot initiative was consistent with the multifactor analysis under controlling law at the relevant time and was not novel.

The judgment was reversed and the case was remanded with instructions to reinstate the DOS's final decision. CL

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# Summaries of Published Opinions

**March 4, 2024**

**2024 CO 12. No. 23SA171. In re Kiesnowski.** *Judicial Discipline—Sanctions.*

In this judicial disciplinary proceeding, the Supreme Court considered the amended recommendation of the Colorado Commission on Judicial Discipline (Commission) to (1) publicly censure now-retired Adams County District Court Judge Robert Kiesnowski and (2) order him to pay the costs incurred by the Commission in this matter. In reviewing the amended recommendation, the Court considered Judge Kiesnowski's exceptions. The Court concluded that the Commission properly found that Kiesnowski violated the Code of Judicial Conduct when he acted as counsel and exploited his judicial position for the benefit of his brother-in-law. The Court further concluded that because Kiesnowski is now retired, the appropriate sanction is the imposition of a public censure and an order requiring the payment of the Commission's costs in this matter.

Accordingly, the Court publicly censured now-retired Judge Robert Kiesnowski for violations of Canon 1, Rules 1.1, 1.2, and 1.3, as well as Canon 3, Rule 3.10, of the Colorado Code of Judicial Conduct. Additionally, the Court ordered now-retired Judge Kiesnowski to pay the costs incurred by the Commission in this matter in the amount of $4,966.95.



**March 11, 2024**

**2024 CO 13. Nos. 22SC399 & 22SC563. Gregory v. Safeco Insurance Co. of America; Runkel v. Owners Insurance Co.** *Homeowners' Insurance—Occurrence-Based Insurance Contracts—Notice-Prejudice Rule.*

In these cases, the Supreme Court considered whether the notice-prejudice rule, which allows an insurer to deny coverage based on a claim's untimeliness only if the insurer can show prejudice from the late notice, applies to occurrence policies in the context of first-party homeowners' property insurance claims. Specifically, the Court had to determine whether the policy considerations underlying its adoption of the notice-prejudice rule in the context of uninsured/underinsured motorist policies and third-party liability policies extend to occurrence-based, first-party homeowners' property insurance policies.

The Court concluded that the notice-prejudice rule applies to occurrence-based, first-party homeowners' property insurance policies for two reasons. First, recent cases have consistently applied the notice-prejudice rule to occurrence policies like those at issue here, in which the purpose of notice is to allow an insurer to investigate and defend against the claim and is not a fundamental term defining the temporal boundaries of coverage (unlike in a claims-made policy). Second, the policy considerations that the Court identified in *Clementi v. Nationwide Mutual Fire Insurance Co.*, 16 P.3d 223, 229–30 (Colo. 2001), for determining whether the notice-prejudice rule applies, namely, the adhesive nature of insurance contracts, the public policy objective of compensating tort

victims, and the inequity of granting the insurer a windfall due to a technicality, all support the application of the notice-prejudice rule here.

Accordingly, the Court reversed the decisions of the divisions below and remanded both cases for further proceedings consistent with this opinion.

**2024 CO 14. No. 23SA277. Godinez v. Williams.** *Colorado's Sex Offender Lifetime Supervision Act Parole Provisions as Applied to Juvenile Sex Offenders*—Graham v. Florida, *560 U.S. 48, 75 (2010), Parole Requirements for Nonhomicide Juvenile Offenders.*

In this case, the Supreme Court considered the following certified question of law from the Tenth Circuit Court of Appeals:

> Whether [Colorado's Sex Offender Lifetime Supervision Act (SOLSA), §§ 18-1.3-1001 to -1012, C.R.S. (2023),] requires, permits,or prohibits parole boards from considering maturity and rehabilitation.

The Court concluded that SOLSA (1) permits consideration of maturity and (2) requires consideration of rehabilitation.

## March 25, 2024

**2024 CO 15. No. 22SA273. In re People v. Maes.** *Criminal Law—Preliminary Hearings—Probable Cause—Reviewability of Magistrate Determinations—Colorado Rules for Magistrates—Final Order or Judgment—Timeliness.*

In this original proceeding, the Supreme Court held that a magistrate's probable-cause finding after a preliminary hearing is a "final order or judgment" under the Colorado Rules for Magistrates and is therefore reviewable by a district court. The Court further held that the time limit for petitioning for such district court review runs from the time the magistrate memorializes that determination in writing. Accordingly, the Court made the rule to show cause absolute.

**2024 CO 16. No. 22SC549. People in Interest of J.G.** *Searches and Seizures—Students—Reasonable Suspicion.*

In this case, the Supreme Court considered whether the Fourth Amendment and Article II, § 7 of the Colorado Constitution are offended when a high school student's backpack is searched for weapons in accordance with a preexisting safety plan.

J.G.'s school instituted a safety plan that required daily searches of his person and belongings. There was a brief lapse in enforcement of the plan at the beginning of J.G.' s 10th-grade year, but on the third day of school J.G. was searched and administrators discovered a loaded handgun in his backpack. In the court proceedings that followed, J.G. argued that the warrantless search of his backpack violated his right to be free from unreasonable searches and seizures.

The Court held that the two-part reasonableness inquiry laid out in *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985), applies to a search of a student conducted on school grounds in accordance with an individualized, weapons-related safety plan. Applying that test, the Court held that the search of J.G.'s backpack was reasonable under the Fourth Amendment.

**2024 CO 17. No. 22SC450. Essentia Insurance Co. v. Hughes.** *Uninsured/Underinsured Motorist Benefit—CRS § 10-4-609*—DeHerrera v. Sentry Insurance Co., *30 P.3d 167 (Colo. 2001)—Specialty Antique/Classic-Car Policies—Adjunctive Specialty Antique/Classic-Car Policies Functioning in Tandem With Standard Regular-Use-Vehicle Policies.*

The Supreme Court determined that an uninsured/underinsured motorist (UM/UIM) limitation deserves different treatment when it is found in a specialty antique/classic-car policy that contains certain terms. More specifically, the Court held that a specialty antique/classic-car policy that requires an insured to have a regular-use vehicle and to insure it through a standard policy that provides UM/UIM coverage may properly limit its own UM/UIM coverage to the use of any antique/classic car covered under the specialty policy.

An adjunctive antique/classic-car policy, which excludes UM/UIM benefits with respect to situations involving a regular-use vehicle but works in tandem with a standard regular-use-vehicle policy that provides UM/UIM coverage, satisfies both the language of CRS § 10-4-609 and the public policy goals underpinning the statute. Because that's precisely the type of specialty antique/classic-car policy at issue here, the Court concluded that the regular-use-vehicle exclusion in the UM/UIM provision is valid and enforceable under Colorado law.

Accordingly, the Court reversed the court of appeals' judgment and reinstated the district court's summary judgment in favor of the insurance company and against the insured.

**2024 CO 6M. No. 22S272. Martinez v. People.** [original decision published February 5, 2024] *Criminal Law—Restitution—Standard of Review—Proximate Cause.*

In this case, the Supreme Court held that clear error is the standard for reviewing a district court's determination of proximate cause for criminal restitution. In so doing, the Court rejected the division majority's reliance on the abuse-of-discretion standard. The Court further concluded that the district court did not clearly err in determining that Martinez was the proximate cause of the victim's pecuniary loss. Accordingly, the Court affirmed the division's judgment on other grounds. CL

These summaries of Colorado Supreme Court published opinions are provided by the Court; the CBA cannot guarantee their accuracy or completeness. Both the summaries and full opinions are available on the CBA website and on the Colorado Judicial Branch website.

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todd.seelman@lewisbrisbois.com

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cmjackson@hollandhart.com
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(303) 295-8107,
trvanbockern@hollandhart.com
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christina.gomez@judicial.state.co.us
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(303) 295-8000,
smasciocchi@hollandhart.com

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**Curt Todd**
(303) 955-1184,
ctodd@templelaw.comcastbiz.net

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**Courtney J. Leathers Allen**
(303) 893-3111,
allen@epfamilylawattorneys.com

### GOVERNMENT COUNSEL
**Mary Elizabeth Geiger**
(970) 947-1936, megeiger@garfieldhecht.com

### HEALTH LAW
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(303) 202-1001, letters@caseyfrank.com
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# Zeyen Wu

Zeyen Wu is a native Chicagoan who has lived in all four time zones in the contiguous United States. He has called Denver home for over a decade.

## PROFILE

**Hometown:**
Chicago

**Law School:**
UCLA School of Law

**Lives in:**
Denver

**Works at:**
US Attorney's Office

**Practice Areas:**
Affirmative civil rights cases/investigations—Americans with Disabilities Act, Fair Housing Act, discrimination against service members/veterans, public accommodations discrimination, language access

**CBA Member Since:**
To be honest, I'm a government lawyer, so on and off throughout the years!

**Pronouns:**
He/Him/His

**What are you passionate about?**
Justice. It's corny, but my one plug for my employer is that the vast majority of people who work for the Department of Justice want to do the right thing, get the right result, and put principles over personal gain, recognition, or short-sighted outcomes. Sometimes high-profile matters give the DOJ a bad reputation, but those are not representative of the work we do day in and day out.

**If you weren't a lawyer, you'd be:**
In the NBA. Coming out of high school at 5′8″ and about 135 pounds, I was a lock for the draft, but I just thought, I'll be giving up the potential of having an extremely fulfilling legal career.

**Social media network of choice:**
As a DOJ lawyer, I've been completely scared off from participating in social media, so I mostly don't. I do have LinkedIn, though, so feel free to find me and connect!

**Favorite Denver restaurant:**
It used to be Fruition, but I think they were hit hard by the pandemic. Safta is great, Mercantile Dining & Provision in Union Station is a favorite, and I recently went to Brutø for my birthday, which had the best bread I have ever eaten. Taking recommendations for others!

**Last movie you watched:**
Quiz Lady. What a fun movie, and it's always great to see more representation of Asian Americans in the media. Sandra Oh is hilarious.

**Favorite month and why:**
July. Hot month.

**Most random job you've ever had:**
I was an Uber driver for a short time—this was after I was working as a lawyer. It was fun.

**What's your favorite thing to cook?**
I don't cook complicated food, but I like to make staple dishes well. One of my favorites is just plain-old apple pie—the recipe is from my mom, so it gives me nostalgia for childhood, it's always a favorite with others, and it is so patriotic.

**If I had a dime for every time I heard (blank), I'd be a rich person.**
Flake rate. If you know, you know.

**What's your dream career?**
Personal counsel to Taylor Swift. I'd also do work for Travis on the side if he asks nicely.

**What do you consider your greatest achievement?**
I'm blessed to have a job where I can impact people's lives both on a direct individual level and in a larger systemic way. Anytime I resolve a case, I feel a sense of achievement.

**What advice would you give a new lawyer?**
Be darn sure you like the law and the practice of law. It's probably more advice for those considering law school, but it's not too late once you've graduated law school because you can do a lot of things with a JD outside of practicing law.

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