



BOULDER COUNTY BAR NEWSLETTER

MAY 2011

A NEW APPROACH FOR MULTIPLE DUI OFFENDERS

BY KRISTAN WHEELER & ZACHARY MALKINSON

FRIDAYS AT THE BOULDER COUNTY JUSTICE CENTER

On Friday afternoons approximately 15 men gather in a Boulder county courtroom to find out if they get a reward or sanction. One by one they approach the podium and Judge David Archuleta talks to the men— young/old, blue-collar/starved-shirt— about their families, jobs and sobriety. One man discusses how he successfully resolved a conflict with a co-worker. He tells the judge that now that he has quit drinking he handles stressful situations such as disputes with others much better. He says, “I see the world differently now. I can relate to him now instead of arguing with him and making it worse.” Judge Archuleta congratulates him and discusses the impact a person can have on others in the way he chooses to approach a situation. He gives the man a couple of recreation center passes as an incentive for compliance and progress in treatment, a reward.

The next man isn’t doing as well. his urine test showed alcohol use. Judge Archuleta speaks frankly him. He tells him he is concerned about his

relapsing. The man admits that, when he learned about a debt going into collection, he chose to drink. Judge Archuleta says, “This is a serious violation and there will be a sanction. I’m going to put you in jail for the weekend and while you are in jail, I want you to think about learning not to respond in this way. I know you are capable of more than what you are doing.” The judge allows the man to call his employer before he is taken into custody to tell his employer he won’t be able to work this weekend. The consequences are immediate but not destructive or devastating to the man.

DUI INTEGRATED TREATMENT COURT

The stated mission of Boulder’s DUI Integrated Treatment Court (DITC) is to integrate substance abuse treatment, intensive supervision and substantial judicial oversight to promote public safety and individual responsibility, reduce crime and to improve the quality of life for participants and their families. The purpose of the

(continue on page 4)

MARK YOUR CALENDARS

Friday, May 13
Bench Bar Retreat
Judges, Lawyers, Facebook
Can’t We Just Be Friends?
4 ethics credits
CU Law School 1 - 5 PM

Tuesday, May 24
Annual Medical Legal
Legislative Dinner 5:30 PM
at the Boulder County Club
BCBA, Boulder Medical Society and
Legislative Representative from
Boulder County
Dinner \$40

BCBA Annual Meeting and
Awards Dinner on Thursday, June 2
Folsom Center Plate at 5:30 PM
Cost \$55 per person
Firm Tables (8) \$415
Nominations for the Award of Merit
and Young Lawyer are still be accepted
at the bar office until 5/9

Register for events at
www.boulder-bar.org/calendar

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CALENDAR OF EVENTS

Pre-registration is required for all BCBA CLE programs. Register by e-mailing lynne@boulder-bar.org, or pay online with a credit card at www.boulder-bar.org/calendar. You will be charged for your lunch if you make a reservation and do not cancel prior to the CLE meeting. BCBA CLE's cost for members is \$20 per credit hour, \$10 for New/Young lawyers practicing three years or less. \$25 for non-members.

Tuesday, May 10

Employment Law Section
Ethical Organization and
Creating a Code of Conduct

Presenter: Madeline Meachim, Chief
Deputy County Attorney
Noon at Caplan and Earnest
1 Ethic CLE \$20, Lunch \$10
\$10 for new/young lawyers

Tuesday, May 10

Elder Law Committee
Dementia, Testamentary Capacity, and
Vulnerability to Undue Influence

Presenters: Dr. Richard Spiegle, Dr. Haleh
Nekoerad Long and
Dr. Richard Spiegle
Noon-1:30 in Courtroom F
2 general CLE's \$40,

Wednesday, May 11

Solo/Small Firm Happy Hour
5:00 at The Rib House
13th and Walnut

Thursday, May 12

Business and Intellectual Property
IP Myths and Mistakes –
How to Avoid Them

Presenter: Professor Andrew Hartman
Noon at Hutchinson Black and Cook
1 CLE \$20, Lunch \$10

Thursday, May 12

ADR Roundtable Discussion
Noon Brown Bag Lunch
Boulder Justice Center Courtroom B

Friday, May 13

Availability of Legal Services Committee
Monthly brownbag meeting at
Boulder County Legal Services

Friday, May 13

Bench Bar Retreat

Judges, Lawyers and Facebook:
Why Can't We Be Friends?

Presenters: Judicial Officers from the 20th
JD, Representatives from the Supreme
Court Disciplinary Counsel's Office,
Colorado State Judicial
and CBA Professional Liability
12:45 Registration • 4:30 Reception
4 Ethics CLE's \$80, \$60 for new/young
lawyers, \$100 for non-members
Parking permits available

Tuesday, May 17

Paralegals and All Lawyers
Utilization of Paralegals

Presenter: Debra Hindin-King, Chair of the
National Federation of Paralegal
Associations Strategic Planning Committee
and Rocky Mountain Paralegal Association
Noon at Caplan and Earnest
1 CLE \$20, Lunch \$10

Wednesday, May 18

Family Law

Forensic Toxicology, What it can do and
how it can hurt you.

Presenter: Sarah Urfer

Noon brownbag in Courtroom C
1 CLE \$20, \$10 for new/young lawyers

Wednesday, May 18

Real Estate Law

Top 10 Issues in Lease Listing Agreements
and Lease Commission Agreements, includ-
ing the new broker lien statute

Presenter: Bruce Dierking

Noon at Hutchinson Black and Cook, 921
Walnut, Suite 200
1 CLE \$20, Available in Longmont at Grant,
Grant and Goiran, LLC. If you'd like to
attend in Longmont, you must call the Bar
office at 303-440-4758.

Thursday, May 19

Bankruptcy Roundtable Luncheon
Noon at Agave Restaurant
28th and Valmont

Tuesday, May 24

Annual Medical-Legal
Legislative Update

Boulder Country Club,
7350 Clubhouse Road

6 PM cash bar, 6:30 dinner,
7 PM discussion with legislators,
lawyers and doctors
\$35 for dinner and 1 CLE

Wednesday, May 25

Taxation, Estate Planning and Probate
Decanting Trusts: A Tool for Flexibility

Presenter: Greg Densen

Noon at Hutchinson Black and Cook,
CLE \$20, Lunch \$10

Available in Longmont at Flanders, Elsberg,
Nash, Herber & Dunn LLC.

Thursday, June 2

Annual Meeting and Awards Dinner
Folsom Stadium Center Plate, \$55
5:30 PM cocktails, 6:15 dinner

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MEDIATION IN THE BOULDER COUNTY PROBATE COURT

BY KIM GENT AND CHRISTOPHER SARSON

The 20th Judicial District has developed a pilot project for mediation in probate cases. This article provides a summary of the history and status of the project.

About 20 years ago the district used mediation in County Court cases for the first time. Since then the court has expanded the role of mediation into a variety of cases, including family, environmental, labor, government, landlord-tenant, and neighborhood disputes. Most recently, as outlined in the March Boulder Bar Newsletter, ADR is being used in Small Claims Court cases.

Mediation has a number of advantages over litigation. In mediation parties actively participate in forging an agreement, so they tend to be more invested in the process than if the court ordered a resolution. Additionally, mediation tends to be less expensive than litigation. Mediation is particularly well-suited to probate and other types of disputes concerning seniors, where underlying relationship issues may hinder resolution of issues. Of the many styles of mediation available, "facilitative" or "interest-based" mediation is most commonly used in probate/elder law cases. The mediator, a neutral party, helps the parties identify their issues and, importantly, their interests, then helps them generate and evaluate options that may solve their problems. In the hands of a good mediator, mediation has the power to bring parties to a better level of understanding about each other, to establish family harmony and to resolve both monetary and relationship issues that may be raised in probate.

In 2010 the Denver Probate Court, under Judge C. Jean Stewart, instituted a volunteer mediation program. Between April and December

2010, the program had an 85% resolution rate of the 16 cases referred to the mediation program.

At the same time in Boulder, Judge Thomas Mulvahill was working with the Boulder Elder Mediation Workgroup, a group of experienced lawyers and mediators, to develop a similar program. This has culminated in a pilot project now in operation in the Boulder Probate Court under Chief Judge Roxanne Bailin's direction. Judge Bailin chooses cases involving pro se and/or indigent parties that are suitable for mediation and signs a mediation order, which is sent to the parties. Together with pertinent information about the case and the parties, the order is sent to the workgroup's volunteer coordinator, who assigns to each case two volunteer mediators, one an attorney with experience in probate law and the other a trained mediator. Mediations are held in the Boulder County Justice Center on Wednesday afternoons. If a memorandum of understanding is reached, Judge Bailin may be able to review the agreement that afternoon.

In addition to the mediations, the workgroup, in conjunction with the Boulder County Bar sections and the Denver volunteer mediation pro-

gram mentioned above, is developing some relevant CLE training topics.

The pilot project started in April and will be evaluated at the end of 2011 to determine its effectiveness. If it continues, the Boulder workgroup hopes to accept new volunteer mediators twice a year.

In related news, the Boulder County Bar list of ADR providers is being updated to include Probate/Elder Law as an area of expertise.

Finally, we'd like to pay tribute to the work and support of Judge Bailin, Probate Registrar John Lauce, and Supervising Clerk, Amy Mallander. They worked hard and long with the Workgroup Volunteer Coordinator, Jamie Lau, to get this project up and running.

Kimberly Gent is a partner in the law firm of Ebner & Gent LLC in Longmont. Her practice is in the areas of family, estate planning, mediation and ADR. She and Christopher Sarson are co-chairs of Boulder Elder Probate Mediation Workgroup.



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MULTIPLE DUI OFFENDERS *(continued from page 1)*

DITC is to help participants develop the skills necessary to attain long-term sobriety. Participants must progress through five phases in order to successfully complete the program.

The DITC is the brainchild of Chief Judge Roxanne Bailin. Judge Archuleta explained that, after Judge Bailin established the adult felony drug court, she saw a need for a similar court program to address multiple alcohol and substance abuse driving offenders. Drug court was not a “Boulder-ish,” feel-good diversion. Empirical evidence has shown drug court is efficient and successful. Since studies proved the drug court model was effective, a DUI/DWAI made sense. Judge

Archuleta described the all-too-common problem of multiple DUI/DWAI offenders failing at probation, failing at treatment, and re-offending because of an inability to get control of their addiction. Regular probation did not necessarily provide the treatment needed to avoid recidivism. DITC was created to remedy this problem.

Since DITC is only two years old, it is too early to measure long-term success. We don't yet know what happens to people five years after graduating DITC. However, the rate of failure has been quite low. In the meantime, DITC has overseen the treatment of dozens of Boulder County residents.

ELIGIBILITY FOR DITC

To be eligible to participate in this voluntary program, a participant must have 3 or more DUI/DWAI guilty pleas anywhere in the United States or 2 DUI/DWAI guilty pleas if the second was .20 or higher BAC and the defendant is before the court on a probation violation.

The DITC takes approximately 12-18 months to complete. The first of five phases begins with 84 days of incarceration in a work release setting. Participants are required to find and/or maintain suitable employment and adhere to a schedule set by the work release manager. A day reporting phase of 84 days follows the work release phase. Participants are frequently tested for alcohol and other substances since achieving and maintaining sobriety is one of the main goals of the DITC. To graduate, a participant must complete all treatment levels and court monitoring phases. The DITC treatment team must be satisfied that the participant has achieved a continuous pattern of sobriety and has a plan for long term self-sufficiency and sobriety.

WHY DITC IS EFFECTIVE

Judge Archuleta believes the treatment court works because of the inescapability of the issue. Most participants start in custody or they are looking at significant jail time as they have prior alcohol driving offenses. As defense attorneys, we often encounter the client who has missed his or her moment to make the connection between a new law offense and the addiction that caused it. It's possible for a person to lose that motivation to change when there is a lack of intervention. For many clients, the so-called “free pass” results in a new case.

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“I FIND WHAT I NEED WITHOUT WASTING THE CLIENTS’ TIME OR MONEY.”

BRIAN LEE, ASSOCIATE
NUTTER McLENNEN & FISH LLP, BOSTON

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PRESIDENT'S PAGE

GIVE US FREE

BY RICH IRVIN



This was what the defendants cried out to the court during their trial to determine their status-free or property (slaves) in *United States v Libbants and Claimants of the Schooner Amistad 40 US 518* (1841). The Amistad was a small slave ship delivering 49 slaves purchased in Cuba to the South in 1839. The slaves revolted and took over the ship. They were stopped by a Federal vessel and taken to Hartford Connecticut, where they were detained as "property" to be returned to their rightful owner. The trial hinged on whether they were property or wrongfully enslaved free Africans and thus entitled to freedom.

That was made into a movie by Steven Spielberg called "Amistad." I chose this movie because of a surprising synchronicity. First, it is the 150th anniversary of the start of the Civil War. April 12, 1861 the Confederacy opened fire on Ft. Sumter igniting the Civil War. As you might have guessed, I'm a true history buff believing that "History is not just about the past It also reveals the present." (David Von Drehle)

Second, the Amistad Trial, although slavery issue was ever-present in the background, it is at its core a real property case. The issue was whether the Amistad defendants were free

Africans enslaved illegally. In 1808 the international slave trade was made illegal, thus the initial transport of the Amistad 49 from Africa was illegal. In 1839 a free African could not be enslaved and transported for sale to the United States or Spain. Only a person born into slavery on a plantation could be sold like chattel.

When the Amistad was detained by a Federal Ship, the slaves on board were taken to Hartford, Connecticut to determine their fate. They were claimed by the Spanish Government under the Pickney Treaty of 1795. The captain and crew of the US ship that had seized the Amistad claimed the 49 passengers as salvage under admiralty law. Jose Ruiz and Pedro Montez, claimed ownership of the Africans, while the Africans denied that they were "property" and demanded their freedom. The Africans couldn't speak English or Spanish and initially nobody could speak their language.

They were supported by abolitionists leader Lewis Tappan, who retained Roger Baldwin to represent the Amistad 49.

The trial revolved around whether the Amistad defendants had been born into slavery on a plantation in the West Indies or were free Africans unlawfully enslaved. If the Amistad defendants were born into slavery Spain or someone else would have the right to return of their property.. That is the core of the movie, the tension of using real property law to obtain freedom and return to Africa of the Amistad 49 rather than arguing the morality of slavery.

Although the abolitionists were leery of this tactic, it worked. The other theme was that the Amistad 49 could not communicate with the court or their lawyer. They had no clue what

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BCLS 2011 ANNUAL PRO BONO LUNCHEON AND AWARDS CEREMONY

Boulder County Legal Services (BCLS) celebrated the outstanding tradition of pro bono service in Boulder County at the Annual Pro Bono Luncheon, held April 18, 2011, at the Boulder Marriott. Some 130 attended as BCLS honored the many local attorneys, mediators, paralegals and other community members who volunteered 6,600 hours in 2010, to provide legal services for the poor of Boulder County.

Colorado Legal Services Executive Director, Jonathan D. Asher, followed his opening remarks with a tribute to the late Jane Gill Kellenberger, who founded BCLS thirty-six years ago. He remembered Jane as a woman ahead of her time — a mother, wife, friend and professional. “She multi-tasked before we knew what that was,” said Asher.

The Boulder County Bar Association honored Rachael K. Lattimer with the John Robert Marshall Award for her dedication to providing legal services to the poor. Bar president Richard Irvin presented the award, which is given annually in honor of the late John Robert Marshall, a local attorney who tirelessly advocated for the poor. Lattimer was recognized for her compassionate, long-standing commitment to serving the poor. She has accepted family law cases from BCLS for over a decade, specializing in monolingual Spanish speaking clients.

Lattimer has served on the Boulder County Bar Association Board of Directors, was director for the Boulder County Interdisciplinary Committee on Child Custody for several years, and currently serves on the Colorado State Judicial Performance Commission. She has taught trial advocacy at the University of Colorado School of Law and presented seminars for the Twentieth Judicial District. Her husband, Chris, and her children, Isabelle and Eli, were in attendance to hear colleagues praise Lattimer for her generosity, consistency, and strong advocacy in providing access to justice to the poor.

Among those attending the Pro Bono Luncheon were sixteen judges and magistrates of the 20th Judicial District. Chief Judge. Roxanne Bailin gave the keynote talk, emphasizing the ethical obligation of serving the poor and disadvantaged members of the community. Among the pro bono service awards judges and magistrates presented were:

Award for 50 – 75 Hours

Jeff Ballas
Howard Bernstein
Christina Ebner
Mary Louise Edwards
Ronald Jung
Rachael Lattimer
Benjamin Stetler
Leonard Tanis

Award for 75 – 100 Pro Bono Hours

Tucker Katz
Peter Shelley

Award for 100 – 150 Hours

Christopher Jeffers
Meg Quiat

Award for 200 – 300 Hours

Susan Bryant
Peggy Goodbody
Emma Pinter
Norton Steuben

Award for 700 – 800 Hours

Bruce Wiener

Awards for 100% Firm Participation

Cooper Tanis & Cohen
Ebner & Gent
Hutchinson Black & Cook
Jung & Associates PC
Rautenstrauss & Joss
Samson Pipis & Marsh
Stone & Rosen PC
Vincent Romeo & Rodriguez
Warren Carlson & Moore

The students of the CU Legal Aid and Defender Program, under the direction of Professors Norm Aaronson and Deborah Cantrell, and the CU Juvenile Law Clinic, under the direction of Professor Colene Robinson, were recognized for contributing a combined 1,986 pro bono hours on behalf of BCLS clients.

The “Coveted Special Awards”, presented annually to three attorneys selected for special recognition, were the “Astounding Pro Bono Dexterity Award” presented to Christina Ebner, the “Triple Crown Award” presented to Leonard Tanis; and the “I Gave at the Office Award”, presented to Bruce Wiener.

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Upper left: Judge Lael Montgomery honoring Bruce Wiener for 700-800 volunteer pro bono hours. Lower left: Judge Berkenkotter honors those representatives from the firms that have 100% participation for providing pro bono services. Above: Magistrate Brodsky honors Tucker Katz and Peter Shelley for volunteering 75 - 100 pro bono hours.

PRESIDENT'S PAGE *(continued from page 5)*

was happening to them. Slowly they figured it out, and eventually an interpreter was found.

The trial judge found that the defendants had been captured in West Africa and thus were not slaves. Since the seller of illegally obtained property has no legal title, the purchaser of that property gained no title. In the movie the government immediately appealed to the Supreme Court. In reality the case was first appealed to the Circuit Court, which affirmed the trial court's judgment. In front of the Supreme Court former president John Quincy Adams argued on behalf of the Amistad defendants. He made an impassioned plea against slavery. The trial counsel Roger Baldwin made the argument that this was a real property case, which won the day. Justice Joseph Story (played by real life of retired Justice Harry Blackmun) delivered the courts ruling finding that under real property law, the Amistad defendants were obtained illegally and thus "they cannot be considered merchandise but rather are free individuals with rights."

The movie deviates from reality in the details but not the result. (For example, Adams argued not for 5 minutes but for 8 ½ hours.) As I pointed out in my first movie, "The Man Who Shot Liberty Valance," when you have the facts and the legend, print the legend. But here the legend and facts coincide at its core. The courts used the law to obtain a result that was opposed by the executive branch. President Martin Van Buren wanted the Africans to be returned to Spain to appease the South and avoid further strike that could (and would) lead to civil war, as Senator John Calhoun pointed out. The movie is stirring and makes you proud to be a lawyer.

The final prong of this column was an article I read in the New York Times Magazine in April 2, 2011 written by Adam Goodheart, "The Shrug that

made History," It was also about slavery and the Civil War but also that "Earth shaking events are sometimes set in motion by small decisions." On May 23, 1861 3 slaves escaped into Union lines. General Franklin Butler had to improvise on how to handle the slaves, who had been working on Confederate fortification. He was bound by Lincoln's vow that the North would not interfere with slavery. A Confederate officer appeared and demanded their return based on federal law, the Fugitive Slave Act. Thinking on his feet and also using real property law, Butler shrugged and declared that the slaves were contraband that he was confiscating and refused to return them. Word got out and soon a flood of slaves came to Union lines and using Butler's improvised precedent, the Union declared them contraband. The Union then made them former slaves. The emancipation was thus an accomplished act 18 months before Lincoln issued the Emancipation Proclamation in the fall of 1862. Secretary of State William Seward, talking about the Proclamation, said "We have let a puff of wind over an accomplished fact." John Hay, Lincoln's advisor said, "Out of this incident seems to have grown one of the most sudden and important revolutions in popular thought which took place during the whole war."

The Amistad and Butler's shrug are part of a steady stream of small individual decisions that have earthshaking consequences. Rosa Parks refused to give up her seat. James Meredith just wanted to go to college. The Browns wanted their kids to go to public school in Little Rock. A fruit vendor refused to pay a bribe in Tunisia and lit a fire across the Middle East. My favorite: an East German border guard is confused in November 1989 by conflicting orders and is unable to contact party officials in Berlin. There are several thousand East Germans at the Berlin Wall demanding that the gate be opened. A

misleading announcement had been broadcast saying that there was now free transit at the Berlin Wall into West Berlin. The unknown guard shrugged and opened the gate. The wall never closed again and soon the East German Government fell. (See "Goodbye Lenin")

All of these earthshaking changes occurred as John Quincy Adams said "due to mysterious mix of circumstances with the whole world watching." The world was already primed for the change; it just needed a spark. If Rosa Parks had refused to give up her seat in 1954 we wouldn't know her name. But the time was right.

There are myriad small individual acts that have immense consequences. As lawyers we can use the law and the courts to help channel the consequences of these small actions in a positive way. This is what we do every time we take a case. Butler and the Amistad lawyer used the tool of real property law to effect change in meaningful way. As lawyers we're here to use the law to effect change. Change happens. Who knows when and where it will happen next? "People Get Ready there's a Change A Comin'."

(An aside:, One of the female Amistad Africans, Sarah, came back to the United States and graduated from Oberlin as one of the first black students at a college.)

PRO BONO PAGE

Pro Bono Referrals

Twenty-five cases were referred during March. Thank you to the following attorneys:

Howard Bernstein
Christopher Bosch
James Brantz
Susan Bryant
Richard Carlson
Mary Louise Edwards
Peter Jarldane
Susan Lindley
Gary Merenstein
Richard Nehls
Tanya Shimer
Craig Small
Leonard Tanis
Matthew Tindle
Stephen Wills

Pro Se Program Volunteers

M.L. Edwards
Chris Jeffers
Michael Morphew
Tanya Shimer
Craig Small
Helen Stone
Leonard Tanis
Matthew Tindle

Mediators

The following mediators accepted a pro bono case in March:
Steven Meyrich

BCAP Volunteers

Thank you to the following attorneys who accepted pro bono referrals for the Boulder County AIDS Project in March.

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Richard Irvin
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May 16	Steve Meyrich	303.440.8238
May 23	Helen Stone	303.442.0802
May 30	Curt Rautenstrauss	303.666.8576

MULTIPLE DUI OFFENDERS *(continued from page 4)*

The DITC provides early screening, assessment and court intervention to avoid a missed opportunity for change. Frequent court reviews and supervision give the DITC team a chance to respond quickly to participants' behavior, whether positive or negative. People who demonstrate progress in treatment receive rewards, such as recreation center passes, movie tickets, and reduced fines and costs. Those who don't are subject to immediate sanctions which can include jail time, community service, electronic monitoring and day reporting.

Judge Archuleta explained that it is human nature to want to impress people who are pulling for you. With the DITC, those people include the treatment team, comprised of the probation officer, the treatment provider, the DITC coordinator, and judge. According to DITC therapist George Bishop, since the probation officer, therapist and Judge have conferred, participants "can't BS any of us, we're too unit-

ed." For many participants, their addiction has destroyed relationships with family. The treatment team provides a source of support for people who have sometimes lost their familial social support. As Judge Archuleta reports, once participants have regained their own family's trust, it is hard to go back.

For more information, the court has posted on the 20th Judicial District Home Page under Business Resources, the DITC Policies and Procedures, the Handbook, DITC Contract and a Guide to DITC for Lawyers.

Kristan Wheeler is the co-chair of the BCBA Criminal Law Section. She and Zachary Malkinson are partners in the law firm of Malkinson & Wheeler Law, LLP. Their practice focuses on criminal defense.

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