



BOULDER COUNTY BAR NEWSLETTER

DECEMBER 2011

FINANCING SOLAR POWER PROJECTS – HOW TO MAKE IT WORK

By MAUREEN E. ELDREDGE

Many businesses and property owners are looking for opportunities to go “green” and hedge against rising utility costs. At first look, however, they may be dissuaded by the cost of solar power production systems. A typical 10 kilowatt (kW) solar photovoltaic system, intended to last 25 to 30 years, costs between \$75,000 and \$90,000 to install. In the past, the expense of putting in these systems, and the resulting long wait for the owner’s return on the investment, has deterred property and business owners with limited capital to spare. However, a number of innovative solar installation companies and private investment groups have utilized federal and state incentives to shift the cost burden from the end user and make money in the process. It is a win-win for all: the property owner or business gets a solar electricity generation system with little up-front cost, the developer opens new markets and investors get a predictable return. The business attorney advising clients on either side of these transactions should be aware of the key issues related to the entity and financial structures to assist clients

wanting to take advantage of these opportunities.

There are a number of different ways to structure the transaction and financing. Commonly, a developer purchases, installs and operates a solar power production system on commercial or residential property owned by the power user. The developer then sells the electricity generated to the property owner, utility or business, usually through a long-term (20 year) power purchase agreement, or leases the equipment to the property owner under a long-term lease. The developer recoups its up-front costs through tax credits, treasury grants, renewable energy credits, sale of the electricity generated, and/or rental payments on the equipment.

Under Section 48 of the Internal Revenue Code and the American Recovery and Reinvestment Act of 2009, as the owner of “energy property” – the solar installation – the developer can currently obtain investment tax credits (“ITCs”) (a dollar for dollar credit against tax

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Wine tasting fundraiser for
Legal Aid Foundation of Colo

Thursday, February

5:30 PM

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owed) for 30% of the cost of the solar facility. Alternatively, provided that the facility has been placed into service, or a contract is in place and construction has started prior to December 31, 2011, the developer can obtain a treasury grant – a direct cash payment – equal to 30% of the cost of the solar power system, instead of the tax credit. The treasury grant

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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.

Thursday, December 1

Annual Ethics Update

Presenters: Susan Nevelow Mart,
Director of CU Wise Library and
Associate Prof.

Judge Edwin Felter, Senior
Administrative Law Judge

Elizabeth Krupa and Lisa Frankel,
Supreme Court Attorney
Regulation Counsel
CU Law School
Room 207 12:45-5 PM

Tuesday, December 6

Elder Law

Income Tax – Your Aging Client
and Deceased Client

Presenters: Dayna Roane
and Jane Paddison

Noon at Hutchinson Black and Cook
1 CLE \$20, \$10 for new/young lawyers
Lunch \$10

Tuesday, December 6

In-House Counsel Section
meeting and happy hour.
5:30 PM

Call the bar offices to RSVP

Wednesday, December 7

Criminal Law

Protection Orders and
Civil RO Hearings

Presenter: Judge John Stavely

Noon in the Jury Assembly Room
1 CLE \$20, \$10 for new/young lawyers

Thursday, December 8

Natural Resources Lawyers

Happy Hour

5 PM at Aji, 16th and Pearl

Tuesday, December 13

Employment Law

My Client Is Not a Citizen-
What Do I Do?

Presenter: Jon Sirkis

Noon at Caplan and Earnest
1 general and .3 ethics CLE \$20, \$10 for
new/young lawyers
Lunch \$10

Wednesday, December 14

Family Law Bench and Bar Exchange

Participants: Magistrate Brodsky,
Monica Haenselman, Judge

Berkenkotter, Judge Butler

Noon-1:30 PM Brownbag in the Jury

Assembly Room of the Boulder

County Justice Center

2 general, .5 ethics \$40

\$20 for new/young lawyers

Wednesday, December 14

Solo/Small Firm Happy Hour

5:00 at The Rib House,
13th and Walnut

Thursday, December 15

Bankruptcy Monthly Lunch
and Discussion

Noon at Agave Bistro
2845 28th Street

Special Notice

January 10, 2012 2 - 4 PM

Jury Assembly Room

Boulder Justice Center

District Attorney's, Criminal Defense
Attorneys, Probation Officers, Victim

Services Professionals, Sex

Offender Treatment Providers:

Peggy Heil and Suzanne Mackinnon
from the Department of Corrections

Sex Offender Treatment Program will

be presenting on the DOC Sex

Offender Treatment Program.

The training will cover access to sex
offender treatment, the DOC system,

how offenders are tracked for

offense specific treatment, parole

considerations, as well as a

question and answer period.

Please feel free to invite other profes-
sionals that work with sex offenders.

No registration necessary.

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LIMITED LEGAL REPRESENTATION SCORES BIG IN THE COLORADO SUPREME COURT

By Ann Mygatt

On October 20th, 2011, the Colorado Supreme Court quietly approved a new amendment to the Colorado Rules of Civil Procedure, Rule 121, Section 1-1 Entry of Appearance and Withdrawal. Those of us on the Availability of Legal Services Committee were thrilled for the clients and lawyers who will benefit from this rule change. Entry of appearance and withdrawal for limited-scope representation of pro se litigants has been a dicey thing until now. This rule change addresses a fundamental aspect of the alternative, and relatively unchartered, practice of unbundled legal service for pro se patrons.

The amended Rule 121 allows attorneys to represent pro se clients in a court proceeding with certain conditions. This can be done without entering a general appearance in the case, instead filing a Notice of Limited Appearance at the beginning of the proceeding. Moreover, the rule change provides assurance for the attorney who makes a limited appearance for a pro se party, to terminate representation by merely filing a Notice of Completion of the Limited Appearance, without "...the necessity of leave of court...Service on an attorney who makes a limited appearance for a party shall be valid only in connection with the specific proceedings(s) for which the attorney appears".

This change in the rule carries wide-ranging implications for the practice of law, providing an opportunity for greater access to the justice system for those in the ever-expanding "justice gap" between legal services and high-end lawyers. The middle income client is too often overlooked. The new rule puts Colorado in sync with many other states that

have recognized and facilitated pro se participation, a trend that continues to expand across the country. It's a genuinely helpful rule change, designed to expand access to the courts that, until now, was limited. It also presents some real challenges in its application. For the clinics that do unbundled work, like the Boulder Law Shop, (a local clinic that offers unbundled services specifically for pro se parties), and for legal aid offices and pro bono programs, like Boulder County Legal Services, this new rule change allows for a more flexible and effective role in the attorney-client relationship.

Who Benefits?

Litigants in traffic, domestic relations and small claims court are often pro se. These individuals generally need more help regarding the specifics of their proceeding(s) than court facilitators and court clerks are authorized to provide, i.e. finding, filling out and filing the proper form(s). While ineligible for legal services, often they are in need of legal insight and judgments only a lawyer can provide. An attorney can offer guidance and strategies for obtaining positive results in court, as

(continued on page 6)

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(left to right) DA Stan Garnett, Keith Collins and Bill Meyer.



Chief Judge Roxanne Bailin, Tony Rodriguez and Tom Rodriguez



Left to right: Katharina Booth, Pamela Maas, Ryan Brackley, Mike Foote, John Kellner and Jon Banashek.



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PRESIDENT'S PAGE

By ELLEN CADETTE



*Home – is where I want to be
But I guess I'm already there.*
- David Byrne, Talking Heads.

Many people go home for the holidays or host those coming home for the holidays. But during this time of year, I wonder about the many people in this country who “can never go home again” - those who cannot travel to attend the funerals of their own parents for fear of not being able to come back, or those who face being sent “back” by deportation to a country which was never home (because they grew up here but their parents did not obtain legal status).

Whatever your views about immigration policy, law, and enforcement, this is the time of year that one might be able to empathize, deep down, with those who are separated from their families and loved ones because they (or their parents) came here to try to find a better life but have not attained documented status.

It is estimated there may be as many as 12 million undocumented people living in the United States. The situation poses a logistical quagmire for enforcement. However, popular sentiment seems to be anti-immigrant, particularly when the economy is faltering.

The “Secure Communities” program started in 2008, administered by Homeland Security’s Immigration and Customs Enforcement arm (ICE), to rid our nation of criminals who are here illegally. The program provides for state and local enforcement of national immigration laws, arguably mandating state and local governments to screen fingerprints of anyone arrested against not just the FBI database, but also ICE databases. If there is a match for an immigration violation, ICE is notified and issues a detainer for the person, often resulting in prolonged detention without access to a lawyer or other due process.

In practice, Secure Communities has been criticized due to its diversion of significant state and local resources, burdening those governments. So much so that Illinois withdrew its participation, as did the state of New York, Massachusetts, and numerous municipalities and counties, raising some interesting constitutional questions. In June of this year, Governor Hickenlooper vowed to examine

Colorado’s implementation of the program.

Although ICE and proponents of the Secure Communities program maintain that the program effectively achieves its goal of deporting dangerous criminals here illegally, critics say in reality, it is a vehicle for racial profiling which produces unfair results, since a large percentage of those caught up in the program have not been convicted of a crime or are low-level offenders. In addition, our immigration court system has become severely overburdened. Instead of spending the time and resources on the detention and deportation of the many gardeners and dishwashers as a result of routine traffic stops, shouldn’t the government’s top priority be to apprehend and deport those who commit serious crimes, and/or who pose national security risks?

This past year, according to ICE, almost 400,000 people have been deported. But of those deported,

(continued on page 8)

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LIMITED LEGAL REPRESENTATION (continued from page 3)

well as advice on other options available, such as mediation and settlement.

Often, lawyers in a traditional practice are reluctant to help a client on just one part of the case – and their hesitation was well founded: once in, you were often in for the duration. However, with this rule change, a lawyer may count on being able to withdraw from a case when needed, and the client doesn't need to pay any additional costs for going through trial.

How Will the Rule Impact the Current Judicial System?

The new rule enables lawyers to offer clients a limited court appearance; it creates an obligation to provide notice to the Court and the other party, and provides an expedited procedure for withdrawal. This should ultimately benefit the system by streamlining court processes for pro se cases, and bring about better results for litigants.

Subject to certain notice provisions, the new rule should encourage lawyers to make appearances in court and participate for a specific purpose, such as arguing a motion,

or qualifying an expert. Subsequently, the same lawyer will file a Notice of Completion at the end of the hearing. This can streamline the hearing and shorten the time it takes to get evidence admitted and offer the Court the benefit of another interpretation of the law.

What Challenges?

Here are just a few of the questions raised:

- How far can the attorney go in helping? Sit at counsel table? Closing argument? Send notes to client? Act as co-counsel?
- Is there a limit on how many times you can intervene in one case? In one proceeding?
- Will there be subsequent rules from the Supreme Court defining what the lawyer and the client can do?
- Would each judge use discretion in determining what is acceptable in their Court?
- Will it be confusing for other attorneys to know who they can talk to?

How Will the Rule Change Effect What a Lawyer Can Offer the Client?

We can offer more diverse services to the clientele with greater flexibility.

Attorneys can enter an appearance in order to argue a motion during a hearing and then immediately withdraw. The attorneys can represent a client during mediation or a status conference without the fear of an obligation to take on a case in its entirety. The new rule will enhance what is already one of the most positive aspects of unbundled legal services: the dynamic partnership between attorney and client. One of the reasons that incidents of malpractice and grievances are lower in unbundled relationships is because the nature of the working relationships requires lawyer and client to work together closely to achieve their goals. Communication goes way up. The client appreciates what it takes to present a case in court, and regardless of the outcome can feel they got a fair shake from the system.

Ann B Mygatt, has practiced law in Boulder County for many years. She is currently the director of The Boulder Law Shop and a member of the Availability of Legal Services Committee.



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

almost half of them (approximately 44%) did not have criminal records. Of those deported who had criminal records, a fraction were Level 1 (aggravated or repeat felonies) offenders; the majority were low-level offenders (i.e. traffic violations, misdemeanors).

In June of this year, John Morton, the Director of ICE, issued a memorandum suggesting that the Obama administration would scale back deportations of illegal immigrants who are young students, military service members, elderly people, or close family of American citizens, among others, to allow immigration officials to focus on expediting the deportation of those who present real threats. ICE's new policy requires nationwide training for enforcement agents and prosecuting

lawyers. The goal is to prioritize the deportation of dangerous criminals as opposed to low-level offenders and non-criminals.

According to Igor Serbinin, our Immigration Law Section co-chair, there appears to be at present "a positive trend in the immigration system in Colorado, allowing for more prosecutorial discretion in cases in which a person has no criminal activity, and has been here as a part of the community for some time. In other words, a traffic stop should not create a removal consequence."

Appreciate being home for the holidays, and coming or going as you please. If you haven't rented the movie *The Visitor*, check it out during holiday down-time – it's about a

professor who had all but stopped living after his wife died, until he encounters a couple of undocumented people who really turn his life around.

Thank you for your continued support of the bar association, our events and programs. We hope you all have a wonderful holiday season and Happy New Year!

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PRO BONO PAGE

Pro Bono Referrals

Twelve cases were referred during October. Thank you to the following attorneys:

Norm Aaronson - CULADP
Amanda Bertrand
Susan Bryant
Jordan Dorrestein
Christina Ebner
Mary Louise Edwards
Bruce Fest
Chris Jeffers
Charles Martien
Jennifer Terry
Alice Walker

Thank you to the following mediators who accepted referrals in October:

Lauren Ivison

Pro Se Program Volunteers

Sheila Carrigan
Mary Louise Edwards
Lauren Ivison
Tucker Katz
Elizabeth Meyer
Helen Stone
Leonard Tanis

Thank you to the following attorneys who accepted a mentorship in October:

Michael Miner

BCAP Volunteers

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

Paul Bierbaum
Keith Collins

Pro Bono Corner

Interested in a Pro Bono case? Please call Erika at 303-449-2197. CLE credits available for pro bono service.

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On-Call Schedule**

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Dec. 12	Steve Meyrich	303.440.8238
Dec. 19	Helen Stone	303.442.0802
Dec. 26	Curt Rautenstrauss	303.666.8576

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FINANCING SOLAR POWER PROJECTS *(continued from page 1)*

program currently expires at the end of 2011, but it may be renewed for 2012. Under the federal tax credit or treasury grant program, the solar facility needs to stay in place, and cannot be sold, for five (5) years. If it is transferred or removed within 5 years, a portion of the tax credit or treasury grant must be repaid.

Additionally, the developer can offset its costs and generate revenue through renewable energy credits ("RECs") offered through Xcel Energy's Solar Rewards Program. For third-party owned systems, the RECs are paid monthly to the developer at a fixed per kWh rate based on the amount of energy produced by the system. The amount of the REC varies depending on the size of the system. Xcel's program is structured so that the per kWh value of the RECs will decline over the next several years and eventually be phased out completely. Xcel's program requires that the solar power system remain installed for 20 years.

The third source of revenue for a developer is the payments for the electricity from the end user or, if the system has been leased to the property owner, rental payments for the equipment. In power purchase arrangements, the customer pays for

the energy it uses directly to the developer through a power purchase agreement. Depending on the size and efficiency of the solar facility, the developer can charge less than the per kWh rate charged by the utility company and still make a profit. If the revenue generated by the federal and state incentives is sufficient, as an added incentive to the property owner the developer may price the electricity at a significant discount.

Utilizing federal and state incentive programs can open up new markets for solar installation companies, but does require substantial up-front cash. Some companies obtain financing through traditional sources, such as banks and financial institutions, which make short-term equipment loans to fund purchase and installation costs. The business attorney can assist with more complex structures, involving third-party investment vehicles using limited liability companies or partnerships to attract passive investors looking for a predictable return.

For example, a developer can form an LLC or similar partnership and seek investors for capital, using those funds to put the energy property into service, either selling the

generated electricity to the property owner or leasing the equipment. To achieve investment goals, income allocations and cash distributions must be set up carefully in the operating or partnership agreement and the investors must remain with the company for at least five (5) years. In addition, efforts to obtain investment for such LLCs or partnerships must comply with state and federal regulations concerning private offerings of securities.

Alternatively, the developer may install and operate the facility, but sell the facility to the investor entity (usually an LLC or special purpose entity), which leases the facility back to the developer under a long-term (20-years) net lease for fixed rent payments. A sale-leaseback transaction can help the developer convert its equity in the solar property into cash, regaining use of the capital that otherwise would be tied up in the asset and potentially receiving more cash than would be available through traditional financing. Also, the developer doesn't have the responsibility of managing the investment entity, which is controlled by the investors. The sale and leaseback transaction must occur within three (3) months of the date the energy property is placed into service. The business attorney must make sure all requirements are met under this structure, including the requirement that the lease be a "true" lease and that the operative documents ensure the investor entity can claim the various tax credits or grants.

There are a number of other possible investment and development vehicles that may be tailored to fit the needs of the particular developer, energy user or investor. This article touches on major issues, but cannot thoroughly describe all of the impor-



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POWER PROJECTS

(continued from page 12)

tant tax and ownership considerations for any development or investment vehicles. Business attorneys representing clients involved in such transactions must consider the risks and business and tax advantages and disadvantages of each type of structure, and ensure that the transaction complies with the various regulations and requirements for energy property. If done properly, these types of investment and development transactions can open up new opportunities for renewable energy projects and benefit developers, property owners and investors.

Maureen E Eldridge is a member of the firm of Hutchinson, Black and Cook, LLC. She is co-chair of the BCBA business section.

CLASSIFIED ADS

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