

Boulder County Bar Association Newsletter

HEAL THE DIVISIVENESS: A LAWYER'S DUTY

RONALD D. JUNG

**BCBF
Grants
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Divisiveness, the creation of disunity or dissention, is a pervasive recent trait of our American society. The cause of this trend is itself hotly debated and often creates the same level of division as the prevailing issues facing our country and society. It has spawned new terms such as "fake news" and "alternative facts." Divisiveness has encouraged debate techniques which are not helpful in seeking truth or resolving conflict. Deflection has become a pervasive tactic in every argument as though we are back on the playground justifying our own conduct by accusing someone else of something worse. Phrases like "I know you are, but what am I?" or "it takes one to know one" should be taglines for many of our politicians. The next time you watch one of our "leaders" answer a question with a deflection, remember the answer has no relevance to the question, no matter how it makes you feel.

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HEAL THE DIVISIVENESS CONTINUED

I have been a litigation and transaction attorney for 30 years. Over that time, I have witnessed changes in attorney behavior during all aspects of representation. The most pronounced is in litigation. When I began in the late 80's and early 90's, it was not unusual to see lawyers viciously attack witnesses, parties and each other during depositions or even in informal meetings. It seemed that clients wanted to watch the spectacle of their attack dog attorneys at work. Many articles were written on the topic. For example, see Ben Aisenberg, *Countering Deposition Abuse*, Colo. Law., 9-92, at 1889, 1890. It was not uncommon to stop depositions to seek court intervention or video tape the depositions just to be able to show an attorney's abusive conduct and seek sanctions. Depositions were often continued, driving up the cost for the clients as judges were rarely available by phone to resolve petty disputes. Bullying was rewarded, and the practice left clients wondering whether it was worth seeking dispute resolution at all. These techniques led to negative public perception of lawyers and only escalated the conflict.

Effective January 1, 1995, substantial changes were made to the Colorado Rules of Civil Procedure in an effort to correct obdurate behavior of attorneys and take away the rewards for being abusive. For a good summary of the changes see Richard P. Holme, *Colorado's New Rules of Civil Procedure, Part II: Rediscovering Discovery*, Colo. Law., DECEMBER 1994, at 2711. Following these changes, it seemed apparent that the general level of professionalism, in both litigation and transactions, advanced to a point where attorneys were actually working zealously to represent clients in a manner that was respectful of the parties, opposing counsel, the courts and the facts. There were differences of opinion on the law and disagreements about facts, but attorneys used appropriate avenues and means to resolve differences. Negotiation was no

longer a personal attack on the other side, but an effort to compromise; an agreement to disagree.

With the recent change in our country's demeanor, as played out on the 5:30 news every evening, I have noticed that attorneys and clients are beginning to slip back into the state where Machiavellian methods are not only accepted but encouraged by attorneys and clients. Rules are being misconstrued and subverted while trickery and chicanery are on the rise. This increases costs for the clients because attorneys are required to focus on anticipating what kinds of matters might be planned by the opposition and not disclosed or discussed to practice the "gotcha" style of law of the past. While we must always anticipate our opponent's arguments and actions, there is a difference between good strategy and hyper-analyzing every email communication for what is not being said.

The Preamble to the Rules of Professional Conduct states: "Lawyers play a vital role in the preservation of society." "A lawyer is guided by personal conscience and the approbation of professional peers." "A lawyer should demonstrate respect for the legal system and for those who serve it..." I was taught in law school that attorneys have a duty to set an example for the rest of society to instill and maintain public confidence in the judicial system; in its truth gathering and dispute resolution functions. Our court system is called a judicial system rather than a justice system for a reason. However, it is imperative that we strive to make it both. This is even more important when untruths, (otherwise known as lies), and convenient lapses of memory have become a daily national discourse. We are instrumental in seeking the truth in our profession. As required by Rule 1.3 of the Rules of Professional Conduct, our "positions must be reasoned and supported by law and fact." "We bear an immense burden to keep our judicial branch of

HEAL THE DIVISIVENESS CONTINUED

government respected and fully functional, especially when under attack. We must continue to value justice and truth above partisanship and continue to set an example of how to conduct ourselves honorably as people.

Attorneys are duty bound to lead by example. We must endeavor to dissuade clients from merely using the legal system as a sword and employing improper means in their disputes. If we encourage or adopt society's bad behaviors, we are complicit in perpetuating the divisive temperament we find

ourselves in and in harming the judicial system. "It is the spirit and not the form of law that keeps justice alive." ~ Earl Warren, Supreme Court Justice.

Ron Jung is a Director for the Boulder County Bar Association. He is a previous co-chair of the Real Estate Section.

Ron can be reached at Jung & Associates, P.C. 1942 Broadway Suite 314, Boulder, CO 80302 or at legalrealty.com.

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CALENDAR OF EVENTS

Friday, December 1

ALL BAR CLE PRESENTATION

Ethics & Professionalism in Divisive Times

Presenters: Judge Butler, Judge Brodsky, Magistrate Gunning, Ron Jung, & Jeff Rose

3:00 PM @ Justice Center Jury Assembly Room

\$40 CLE, \$25 New/Young Lawyer

[Register and pay online here](#)

Tuesday, December 5

SOLO/SMALL FIRM

Increase Your Firm's Efficiency

Presenter: Olivia Bartholomew

Noon @ Dickens Tavern, Longmont

\$15 lunch

[Register and pay online here](#)

Wednesday, December 6

CIVIL

Internal Investigations & Conflict Resolution for Arts Organizations

Presenter: Caroline R. Kert

Noon @ Justice Center Training Room East

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Thursday, December 7

REAL ESTATE

Arbitration of Real Estate Related Disputes

Presenter: Kylie Crandall

Noon @ BCBA Conference Room

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Tuesday, December 12

BUSINESS

The NVCA Models Forms

Presenter: Bill Roberts

Noon @ BCBA Conference Room

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Wednesday, December 13

WOMEN'S BAR HAPPY HOUR

5:00 PM @ License No 1

Thursday, December 14

FREE LEGAL CLINIC

5:30-7:30 PM @ Sacred Heart of Jesus Church

Friday, December 15

AVAILABILITY OF LEGAL SERVICES

Monthly Roundtable

2 pm @ BCLS

Tuesday, December 19

ELDER

Presentation: Mediation in Probate and Elder Law

Presenter: Judge Kim Goldberger

Noon @ BCBA Conference Room

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Thursday, December 21

BANKRUPTCY

Monthly Lunch and Roundtable

Noon @ Kathmandu



PRESIDENT'S PAGE

RENEE EZER

As I continue to explore lawyer well-being from different angles, it is apparent that mentoring can play a valuable role. I don't just mean this for the new lawyer. I think a mentorship relationship can have great value for lawyers 10 and 20 years into their careers. And it can have great value for the mentor, as well as the mentee.

I met my mentor years ago, in a professional development meeting that had not gone well. I later asked him to lunch to talk about what had gone wrong and to try to repair the damage. At the end of the meeting, the damage was repaired and a lifelong relationship had begun.

It has been invaluable to me to have someone I could turn to with practical and professional questions. How do you set up a file to prepare for litigation from the day a client hires you? What are your best strategies for case management? How do you manage your time efficiently? The answers to these questions were helpful in the beginning.

The more-helpful stuff came later. As I became a more experienced attorney, my cases became more sophisticated. Some of them presented ethical issues with which I had never dealt before. I was grateful to have had someone I trusted, who knew me well, with whom to discuss my concerns and possible options to resolve them. He introduced me to experienced practitioners and leaders in the bar, and regularly encouraged my professional growth. We celebrated wins, debriefed losses, and shared hundreds of stories with one another.

One day my mentor called me and told me that



he'd been contacted by a young attorney who needed some guidance. He told me that he wanted me to mentor her. He did not give me the opportunity to decline. Though I didn't believe that I had enough experience or wisdom to make a positive difference to a new attorney, he believed that I did. And that was the end of that conversation. Since then, I've mentored over a dozen young lawyers, and developed as many friendships with the folks I've mentored. Mentorship has been an integral part of my practice for 30 years.

For me, mentoring gave me career guidance. It gave me contacts, knowledge and opportunity. It gave me confidence in my practice and in my ability to pay it forward to lawyers with less experience than I had. The BCBA and the CBA both have excellent mentoring programs for anyone who might want to realize the benefit of such a relationship. Don't be shy – despite all of the technological advances in our profession, personal, supportive relationships will never be obsolete.

Renee Ezer is a shareholder at Dietze and Davis, P.C. She can be reached at 303-447-1375 or ezer@dietzedavis.com.

DRAFTING MISTAKES IN LLC AGREEMENTS

JACK A. DONENFELD

When forming limited liability companies for clients or helping clients enter existing LLCs, lawyers are often asked to review LLC operating agreements prepared by others. Many of these agreements are excellent, and we can learn a lot from them. But many of them, unfortunately, are full of mistakes and fail to provide a competent organizational framework for the LLC.

The following list of errors in drafting LLC operating agreements covers only multi-member LLCs taxable as partnerships. Agreements for multi-member LLCs taxable as S corporations and for single-member LLCs raise other issues.

Failing to Provide a Planning Memo as a Basis for the Operating Agreement. Before providing drafts of operating agreements to their clients, lawyers should provide planning memos to them in plain English with summaries of the agreements' key contents. This helps ensure that the documents address the clients' facts and circumstances and helps clients understand the agreements before signing them. The planning memo should include key recommendations about management, tax and other matters and explanations for the recommendations.

Failing to Tailor the Operating Agreement to the Deal. Lawyers should develop and use their own form documents to help identify and provide guidance about relevant issues. This is obvious when the lawyer is providing the first draft of the agreement, but it is also important to compare drafts prepared by others with the lawyer's standard forms to ensure that everything is covered. This increases efficiency.

Watch out for other lawyers' operating agreements that are just copies of form documents with names and addresses inserted for the parties.

These agreements often do not address the unique issues that a deal involves, like dissociation events, buy-sells, fiduciary duties and voting rights.

Failing to Use the Right Form. An operating agreement for a venture capital deal is different than one for a real estate deal or an operating business. Most of the operating agreements that I receive from other lawyers are copies of the *wrong* forms.

Trying to Keep the Agreement Short. LLCs require resolving complex legal, operational and tax issues. This inevitably means that they need to be 30 pages or more. Lawyers should resist the temptation to provide a short document in order to avoid needing to spend time explaining complicated provisions to their clients.

Failing to Address Key Issues. The most neglected issues seem to relate to (i) pre-formation representations and warranties, (ii) tax allocations and distributions, (iii) fiduciary rights/ duties, (iv) functional responsibilities and time commitments for active members, (v) procedures for member and manager suspensions and expulsions, and (vi) dispute resolution. Failure to address these and other important issues can result in conflicts among the members.

Failing to Override State Law Default Provisions. All LLC acts have mandatory provisions, which cannot be changed by member agreement. They also have default provisions, which may be changed by agreement. The lawyer's job is to change the default provisions that are not in the best interests of his or her client. Otherwise, the default provisions will automatically govern the deal and, more often than not, cause unexpected and sometimes disastrous results for the members.

DRAFTING MISTAKES CONTINUED

Including Needless Tax Boilerplate. Most of the operating agreements I review from others include provisions relating to complex Federal income tax matters like (i) minimum gain and qualified income offsets, (ii) safe harbors under Internal Revenue Code Section 704(b) for allocations of profits and losses disproportionate to contributions and other special allocations; and (iii) rules under IRC Section 704(c)(1)(A) concerning appreciated property contributions. The problem here is that, from a tax viewpoint, most LLCs make allocations and distributions to the members proportionate to member contributions and do not involve contributing property as capital. So these fancy tax provisions are unnecessary.

Using Legalese. When tax provisions are needed in operating agreements, their complicated and technical language is difficult to understand. Lawyers can solve this problem by either (a) providing a plain English summary of the provisions in the operating agreement and putting the technical language in an exhibit (advising clients not to worry about fully understanding the exhibit), or (b) referencing the LLC's intent to comply with the IRC provisions and empowering the LLC's manager(s) and/or accountant(s) to make tax decisions that are appropriate. Then *non-tax* terms can and should be expressed in plain English. Plain English helps make the agreement accurate, complete and binding and helps the members understand their rights and obligations, so that they can easily comply with the agreement.

Including "Clutter." Most of the key LLC issues should be addressed in the body of the operating agreement, but special arrangements like buy-sell terms and contributions of non-cash property or

services are best provided in separate exhibits. Avoiding clutter in the body of the operating agreement can help focus clients on the basics.

Failing to Ensure that Operating Agreements are Well-Organized. Operating agreements should be organized logically, which normally means that they will contain sections that address: (i) basic issues like the effective date of the agreement, the name of the LLC, its purpose and its principal place of business; (ii) financial terms; (iii) member dissociations; (iv) sales and other transfers and issuances of membership interests; (v) voting and management issues; (vi) fiduciary duties; (vii) dissolution, (viii) dispute resolution and (ix) boilerplate matters.

Summary. A poorly drafted operating agreement can cause disputes that are difficult and sometimes impossible to resolve without costly litigation. And the litigation that starts with a fight among the members often spills over into legal malpractice claims against the lawyers who were involved in writing and/or revising the operating agreement. The time and energy needed to avoid the mistakes described above and to write operating agreements that serve our clients' needs are modest compared to these potential problems.

Jack Donenfeld is a Co-Chair for the Business Section of the Boulder County Bar Association, President, Donenfeld Law, a Legal Professional Association, and Co-Founder and General Counsel, Boomtown Accelerator

BOULDER COUNTY BAR FOUNDATION

Boulder County Bar Foundation Grants \$21,600 Supporting Local Organizations.

This year the Boulder County Bar Foundation granted \$21,600 to non-profit, legally-related organizations. The continued financial commitments from our Fellows through annual dues and voluntary contributions allowed the Foundation to support these worthwhile projects that make a significant difference to many in Boulder County. The following programs received grants in November 2017:


- Boulder County Legal Services
- Bridge to Justice
- Boulder, Fairview and Niwot High School Mock Trials Teams
- Children First of the Rockies
- Immigrant Legal Center of Boulder County
- J-SUP: Law Center for the Unhoused
- League of Women Voters of Boulder County
- Safe Shelter of St. Vrain Valley
- YWCA Co-parenting for Life Program

Here are some words from our grant recipients:

*"For the past twelve years the Bar Foundation has provided assistance to our non-profit legal center, and no one knew back then just how important it would be to have a community-based legal center specializing in immigration law. The ongoing support of the Bar Foundation has enabled us to leverage additional grant funding, expanding our services to immigrants who might otherwise have turned to "notarios." Our thanks go out to all the local attorneys who trust the wisdom of the Foundation and who make the good work of the Boulder Bar Foundation possible."*Laurel Herndon, on behalf of the staff of the Immigrant Legal Center of Boulder County.

*"Funding from the Boulder County Bar Foundation supports our ability to keep our fees affordable to meet the legal needs of the low and moderate income clients in Boulder County. There is a significant unmet need for affordable legal representation, especially in cases of high conflict divorce and post decree issues Bridge to Justice is very proud to have served over 1,000 clients since our beginning 2013 with the support from the Boulder County Bar Foundation. Thank you very much."*Bruce Wiener, Executive Director and the staff of Bridge to Justice.

The Boulder County Bar Foundation would like to thank our Fellows for their continued financial support. These valuable programs are the beneficiaries of your generous contributions. If you would like further information regarding the Boulder County Bar Foundation or are interested in becoming a Fellow, please contact Christine Hylbert, the Foundation's Executive Director, at christine@boulder-bar.org.

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2018 Boulder County Bar Association



JUSTICE FOR ALL BALL

Saturday, February 24 at 7 pm
The Studio
3550 Frontier Avenue, Boulder

About JFAB

16 years ago, the Boulder County Bar Association started a fundraiser called Food Wine Jazz Art to benefit Colorado Legal Services. While this event was a great success, recent cuts to the federal budget made us realize we needed to rebrand our event to draw a larger crowd and raise even more money for legal services.

The Boulder County Justice For All Ball will still be geared toward the legal community, but this year we are expanding further to include partners, clients, and friends. We are holding the event on a Saturday evening to accommodate those who find a weeknight event hard to attend. We are also hoping to bring in members who have never attended a bar event. Our new space, The Studio, is an industrial chic venue with ample parking that should bring a fun new feel to our fundraiser.

We will have music and dancing led by the Diamond Orchestra. Their fun, sophisticated and soulful ensemble keeps guests of all ages and tastes entertained at the top venues in Colorado and beyond. There will also be a silent auction with some fabulous opportunities.

Hors d'oeuvres will be available along with delicious desserts from Bridge House Catering.

This year also brings new sponsorship opportunities if you are unable to attend but still want to contribute to a worthy cause. We are asking for Young Lawyer and Paralegal sponsorships to allow those that might not have the funds in their budget to purchase a ticket. We are also seeking silent auction donation items. Traditional sponsorships are still available. Please contact Laura@boulder-bar.org for more information.

PROFESSIONALISM ON CALL

December 4	Lee Strickler	303.443.6690
December 11	Mark Langston	303.440.9684
December 18	Meghan Pound	303.443.8010
December 25	Tom Rodriguez	303.604.6030

The Professionalism Committee assists lawyers, clients, and other members of the community with questions or complaints about behavior by lawyers that fails to meet generally accepted standards of professionalism and courtesy, or that is contrary to the BCBA Principles of Professionalism.

The Professionalism Committee does not address allegations of criminal or ethical violations by lawyers, as regulated by the Colorado Rules of Professional Conduct, and any such violations should be addressed to the Office of Attorney Regulation Counsel.

BOULDER COUNTY FREE LEGAL CLINIC

The dates have been set for the 2017 & 2018 Free Legal Clinics at the Sacred Heart of Jesus Church (2312 14th Street) and the Longmont Senior Center (910 Longs Peak Ave) from 5:30 - 7:30 pm. Volunteers are always needed. Please contact Laura at laura@boulder-bar.org if you can help in Boulder, or susan.spaulding@longmontcolorado.gov if you can help in Longmont.

Boulder: December 14, March 22, June 21

Longmont: February 27, May 22

PRO BONO REFERRALS

Ten cases were referred during the month of October. Thank you to the following attorneys:

Susan Bryant

Christina Ebner

Jeff Foltz

Glen Gordon

Brad Hall

Michael Miner

Roseann Murray

PRO SE VOLUNTEERS

Josh Anderson

Kathleen Franco

Ainagul Holland

Tucker Katz

Alice Robbins

BCAP VOLUNTEERS

There were no requests for a referral for the Boulder County AIDS Project in October.

PRO BONO CORNER

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

COURT ANNOUNCEMENTS

NOTICE:

Due to scheduling Boulder County Courts will not be scheduling FED and Name Change hearings at the Boulder and Longmont locations on the dates listed below:

Boulder: December 22, 2017, and January 5, 2018, January 12, 2018

Longmont: December 22, 2017, January 5, 2018, and January 12, 2018

LAWYER ANNOUNCEMENTS

PackardDierking
ATTORNEYS AT LAW

is pleased to announce that

Kathryn D. Keiser

has joined the firm as Special Counsel.

**Kate's practice will emphasize
tax and estate planning and real estate.
She will continue to serve Longmont, Boulder
and the surrounding areas.**

The firm's practice will continue to emphasize
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KARA N. GODBEHERE

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PART TIME LEGAL ASSISTANT NEEDED. 6-8 hours per week. \$16/hr. Contact Kirstin Jahn 303-545-5128.

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