February 2017

Boulder County Bar Association Newsletter

MEDIATION: HOW TO AVOID BEING A PROBLEM LAWYER

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HON. JAMES C. KLEIN (RET.)

Many believe there is a science to effective mediation, and while many courses are taught on the subject, personally I believe that there is very little "science" to mediation at all. Rather, mediation is simply a practical common sense approach to facilitating a conversation between two (or more) parties involved in a dispute with the hope and goal of reaching common ground. Really, there is nothing more to it than that.

That being said, there are many things that you can do, as a practicing attorney to facilitate the "conversation." My hope in this article is to offer a few of these facilitating ideas to you for consideration. Much of what you will see here in print will seem obvious and common sense. That being said, you would be amazed how much of it is reality as seen through the eyes of your mediator, and your Judge.

As you go into mediation, and as you prepare for it with your client, it is critically important to remember a number of factors that are always true, but easily forgotten. First, as mediators, most, if not all of us, have been in your shoes. While we may not have an intricate working knowledge of your case, including your interactions with opposing counsel, we understand the process of litigation. We know how frustrating it can be.

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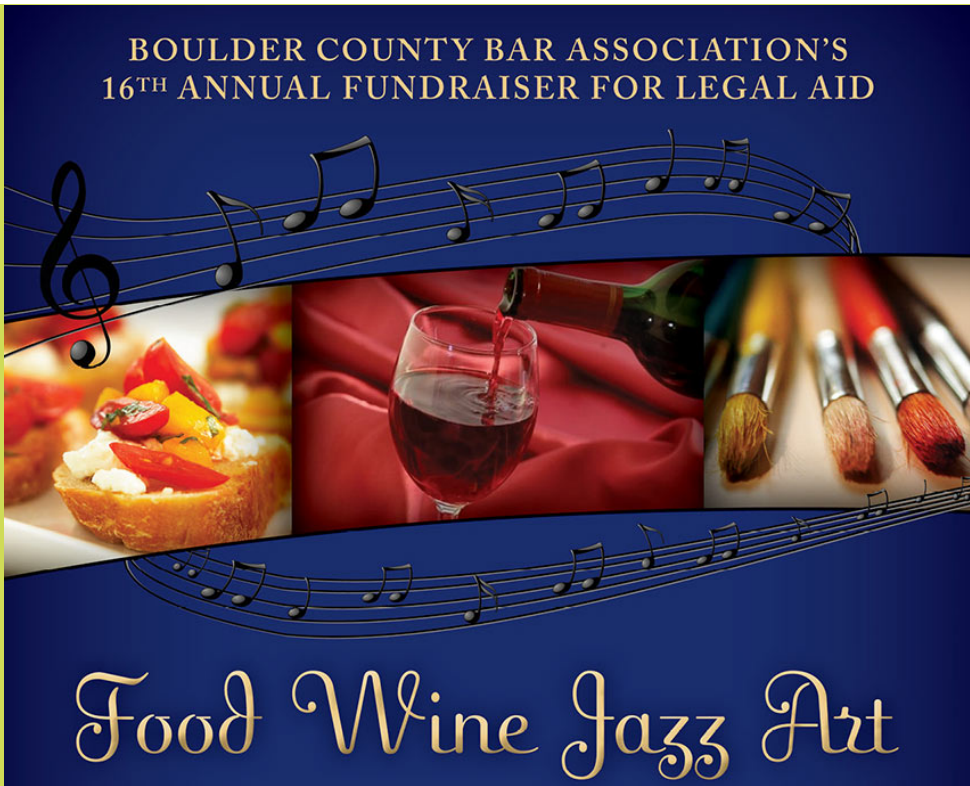

HOW TO AVOID BEING A PROBLEM LAWYER

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We know you are constantly saying to yourself "why can't the other side see it the way I do." The simple fact is that they don't, and neither do you see it their way. That is why you are in mediation in the first place. Second, remember, and this is critically important, this is not your case, it is your client's case. Don't personalize the case and the process. Always, always, always remember that you are an advisor, not a party. Doing what's best for your client does not include personal attacks on opposing counsel or their client. Stay objective. Moreover, that is something that you should be doing throughout the entire litigation process.

Third, we are trying to help both you and your client in the same way that we are trying to help opposing counsel and their client. As mediators, and I dare say as Judges, it is important for you to remember that we don't have a dog in this fight. We are messengers and advocates of good and bad news. You select a mediator for an honest evaluation of "both sides" of the case. If that is not your practice, it should be. Otherwise, you are doing a disservice to your client. If in selecting a mediator you are simply looking for an affirmation of your beliefs about your client's case, you are not assisting your client or the process. There are no "winners" or "losers" in Mediation. There is only resolution or not.

Preparation – Make the Mediation Meaningful

With a clear understanding of the above, there are a number of things that you can do in preparation for mediation that will greatly attribute to its success.

First and foremost, when asked to do so, and I always ask parties to do so, send a Confidential Settlement/Position Statement with supporting case law to your mediator in "meaningful" advance of the mediation. Why would you not? You would be amazed at how many attorneys do not send Confidential Settlement/Position Statements to me prior to a mediation, or who send it so late that is difficult for me as a mediator to prepare in a meaningful way, i.e., the evening before or morning of a mediation is too late. Moreover, sending a stack of exhibits with no meaningful explanation of what they mean or how they fit into your theory of the case is . . . meaningless. Yet, it happens all the time.

Sending a Confidential Settlement/Position Statement to your mediator is many times your first opportunity to analyze and address your client's case on paper. That process is going to occur at some point in the course of litigating the case. Why not now? Assume for a moment, just hypothetically, that you do not resolve the case at mediation. Presuming that you have presented your mediator, prior to the mediation, with a Confidential Settlement/Position Statement, at the very moment you leave mediation you have: (1) analyzed your case for the mediator; (2) you have his or her objective input about the strengths and weaknesses of your case; and, (3) you now have the opportunity to bolster those strengths and address those weaknesses as you proceed with the litigation process. Use this opportunity, and make the most of it!

In preparing your Confidential Settlement/Position Statement, be sure to address the arguments of the opposing party. Don't pretend they do not exist. Be as objective as you can. Sweeping them under the rug weakens your case as well as you and your client's credibility.

Prepare your client prior to the mediation. Be honest and practical with them about what your expectations are and what their expectations should be with respect to the process and especially with respect to reasonable and foreseeable outcomes at mediation. There is a fine line between being an

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advocate to your client and their case and creating false expectations, i.e., pie in the sky type expectations. Telling your client that his or her case is worth hundreds of thousands of dollars (or millions) when if fact it is worth tens of thousands (or hundreds of thousands, you get my point) of dollars creates barriers to a successful resolution of the case, and, in the event you proceed to trial, it creates other issues at the conclusion of trial too numerous to list here, although you can anticipate that most of them are grounded in hard feelings and distrust directed at you.

In the same vein, be comprehensive and accurate in your economic damages calculations. If insurance is involved, and it usually is, make sure the defense has "all" of the documents it needs well before mediation. Surprises at mediation not only slow the process, they make you appear to be unprepared, and most importantly make it appear that you are hiding something. That often leads to long and unnecessary discovery disputes subsequent to an unsuccessful mediation that is in large part unsuccessful because of your lack of preparation.

Again, and in the same vein, pick a solid fact based position and stick to it. Don't waffle around. Failing to do so makes you appear unprepared. Moreover, it lends itself to an appearance that misunderstand your client's case, and it can often lead to an inference of lacking credibility on your part. Finally, engage with opposing counsel prior to Mediation. Call opposing counsel well in advance and discuss any needs he, she, or you may have. In other words, do your best to avoid any surprises at mediation. Yes there will always be something new, but do your best to minimize the effect of new information on what should otherwise be a productive, and hopefully successful process.

Mediation

You and your client are at mediation. Here are a few do's and do not's that will assist you in the process. First and foremost, keep calm! Don't get angry if their evaluation is different than yours. First of all, this should not be news to you. Second, as discussed above, an opportunity has arisen. Make a note. If the mediation proves to be unsuccessful, address their evaluation when you get back to your office.

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You know something now that you did not know before. And, if you don't like the answer to the question you have asked opposing counsel through the Mediator, don't beat the Mediator up for asking it.

Be Present. Seriously. Some attorneys appear at mediation as if it were an inconvenience. If you REALLY don't want to be there, you have two choices. Choice One: Make the mediation as meaningful as you can. Why? Again, this is an opportunity to learn about your opponent's case and their evaluation of yours. It is an opportunity to save yourself a lot of time and your client a lot of money. Most importantly, it is an opportunity to save your client a lot of time, money, brain damage, and potential heartache. Choice Two – Don't be there. Personally, however, I believe failing to actively and meaningfully participate is a failure to advocate on your client's behalf.

Mediation Etiquette is something that is rarely discussed, but when considered can go a long way in assuring a successful mediation. First and foremost, let go! Allow the Mediator to do his or her job. Attempting to dictate the manner in which the Mediator conducts the process only serves as an impediment to the mediation's potential success.

Second, remember the Golden Rule: Treat opposing counsel and his or her client as you wish to be treated. Civility is an issue that is often discussed in backrooms and around lunch tables, but one not taught in law school. I have always wondered why? Does treating the other side poorly or reacting to the other side with similar bad behavior and disdain really further your client's interests? I can assure you that the one thing that upsets Judges in the courtroom is witnessing misbehaving attorneys or attorneys who show little or no respect for the other side. Take the high road, and stay on it. Even if the other side won't, believe me when I say you will be doing a great service to your client in the eyes of the Mediator, Judge, and Jury when you do. Remember, a calm head is much more effective than one in the throws of a tantrum.

Third, when and if you make a mistake, admit it and move on. No-one's keeping score. And, because the process is confidential, no-one will know or care. Again, take the high road and stay on it.

Fourth, as I mentioned in the course of discussing pre-mediation preparation, be realistic with your demands and expectations as well as those of your client. Very little can be accomplished when you advocate a position for your client that is simply unrealistic. It bogs down the process and has the potential of undermining what could otherwise be a good resolution of the case for your client.

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Fifth, if you believe it can be productive in breaking down some barriers, personal and otherwise, consider a meeting between your client and the defense in the presence of you and the Mediator, preferably early on in the mediation process. It is amazing to see the transformation in attitudes of parties when they realize that there is another "person" sitting at the table who is willing, or not, to listen to their perspective.

Finally, Mediators can-not and will not force pen to paper. True story. I had an attorney, not of the 20th Judicial District, and one who shall otherwise go un-named, criticize my handling of a mediation because he believed that I had: (1) not sufficiently "pushed" the other side to agree to terms of his liking; and, (2) had not included terms that he wanted into a hastily handwritten memorandum of understanding, necessitated by his need to leave themediation early due to other commitments, that he not only read, but that he and his client had both signed. I was dumbfounded. Simply put: Don't shoot the messenger! If you have not settled the case, that's ok. You are much further ahead than you were when you started. If you have settled, make sure you understand the terms of the settlement.

Successful Mediation?

In my opinion, they are all successful. Whenever you have the opportunity to sit at a table, in separate rooms or otherwise, and discuss the merits of your client's case with the other side, something is accomplished. Some barrier has been broken down. Some issue has been clarified. Some point of law has been defined. Have you met every expectation? Maybe you have, but probably you have not. Compromise is the norm.

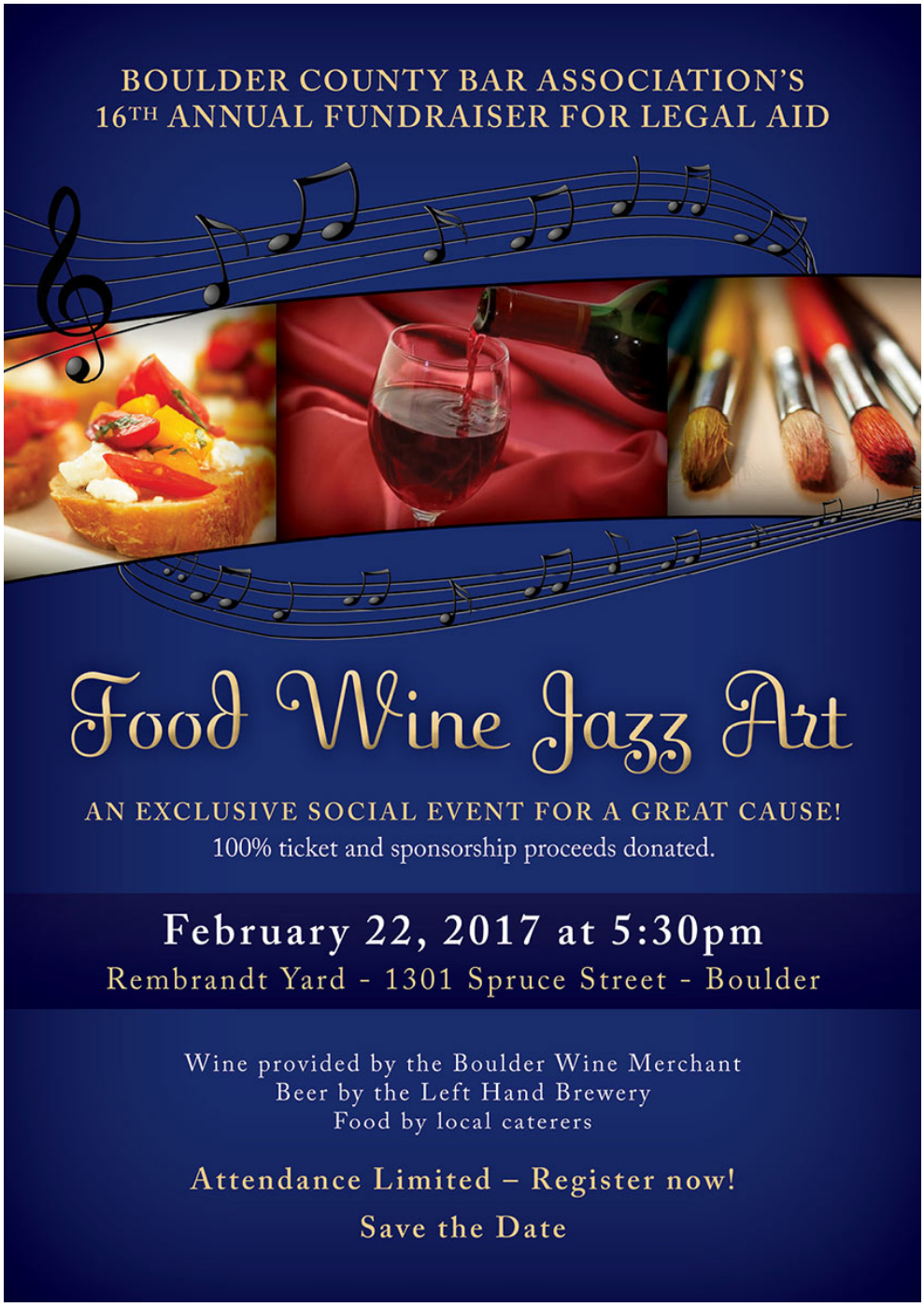
At JAMS, with the exception of domestic matters that often times require much more detail with respect to the myriad of issues involved, mediation ends successfully with a "term sheet," signed by the parties and counsel at Mediation, not a formal settlement agreement. In general civil and domestic matters, counsel have continuing and ongoing obligations to their clients, each other, and importantly to the Court. Your civil mediated settlement is not final until the Court says it is final.

If you need something more than a "term sheet" with basic terms, come prepared with proposed language and negotiate that language at Mediation, not after the fact. Too many mediated and negotiated settlements get hung up subsequent to the mediation because one or both of the parties failed to consider the aspects of issues such as: Confidentiality; Taxation Issues; Medicare/Medicaid implications; Indemnity/Subrogation issues; and, as simple as it may seem, the timing for completion of settlement documents and payment. If these are matters of importance to your client, then you need to come prepared to negotiate them and include them in any agreement you and your client sign at the conclusion of mediation. If they are important to you and your client and you leave mediation with a signed term sheet or memorandum of understanding that does not include them, then it is likely that you will have an enforceable agreement without them to which your client will be bound. The consequences of that are not exactly pretty.

In a nutshell, at the conclusion of any "successful" mediation get a signed agreement delineating accurate terms. Don't leave Mediation without one!!

I hope that this has been helpful to you in your practice and in your pursuit of an effective and fair resolution of your clients' cases through mediation. As always, I am always happy to discuss these issues with you personally. If you would like to do so, please feel free to contact me at you convenience through JAMS at: (303) 534-1254.

FOOD WINE JAZZ ART



Please join us for our 16th Annual Food Wine Jazz Art! Last year's event sold out, so don't miss your chance. Tickets are $50 if purchased before February 17 with special $40 pricing for new lawyers. All tickets after February 17 will be $75. Sponsorships are still available. Please contact Christine or Laura at the bar for more information.

Click here to register and pay online for Food Wine Jazz Art

CALENDAR OF EVENTS

Wednesday, February 1
PARALEGAL
Business Valuations
Presenter: Patrick O'Kelly
Noon @ BCBA Conference Room
Free to attend, $12 Lunch
Register and pay online here

Tuesday, February 7
TRIAL PRACTICE SERIES - EVIDENCE
Presenter: Pat Furman
Noon @ BCBA Conference Room
$15 CLE, Free if you volunteer for mock trials
Email laura@boulder-bar.org to register

Wednesday, February 8
BUSINESS
Who Do You Represent?
Presenter: Dave DiGiacomo
Noon @ BCBA Conference Room
$25 CLE, $15 New/Young Lawyer
Register and pay online here

Wednesday, February 8
CRIMINAL
Meet the Municipal Judges
Presenters: Boulder County Municipal Judges
Noon @ Justice Center Training Room East
$25 CLE, $15 New/Young Lawyer
Register and pay online here

Thursday, February 9
INTELLECTUAL PROPERTY
Intellectual Property and Estate Planning
Presenter: James Juo
Noon @ Lathrop & Gage
$25 CLE, $15 New/Young Lawyer
Register and pay online here

Friday, February 10
AVAILABILITY OF LEGAL SERVICES
Monthly Roundtable
Noon @ BCLS

Tuesday, February 14
EMPLOYMENT
When Title II Issues Become Title I Issues under ADA
Presenter: Michael Roseberry
Noon @ BCBA Conference Room
$25 CLE, $15 New/Young Lawyer
Register and pay online here

Wednesday, February 15
FAMILY
Electronic Evidence
Presenter: John Haas
Noon @ Justice Center Training Room East
$25 CLE, $15 New/Young Lawyer
Register and pay online here

Thursday, February 16
IN-HOUSE COUNSEL
Ethics for In-House Counsel
Presenter: Jack Tanner
4:00 @ Zayo Group, 1805 29th Street
$25 CLE, $15 New/Young Lawyer
Register and pay online here

Wednesday, February 22
FOOD WINE JAZZ ART
5:30 @ Rembrandt Yard
Register and pay online here

Thursday, February 23
NATURAL RESOURCES/ENVIRONMENTAL LAW
Greening the Marijuana Industry
Presenter: Andrew Livingston
Noon @ BCBA Conference Room
$25 CLE, $15 New/Young Lawyer
Register and pay online here

Thursday, February 23
TAX, ESTATE PLANNING AND PROBATE
Ten Planning Tips and Traps for Out-of-State Property
Presenter: Jennifer Spitz
Noon @ Dickens Tavern, Longmont
Register and pay online here

Tuesday, February 28
ALTERNATIVE DISPUTE RESOLUTION
Roundtable Discussion and Brown Bag Lunch
Noon @ BCBA Conference Room
Email laura@boulder-bar.org to RSVP

BOULDER IDC – THURSDAY, FEBRUARY 16

Avoiding Burnout and Secondary Trauma in Family Law: And How COLAP Can Help
Presenter: Sara Myers, JD, LFMT, LAC
11:30 @ Dairy Arts Center, $27 IDC Members, $32 Non-Members, $35 Walk in
2 General CLE and 1 Ethics To RSVP, go to boulderidc.org

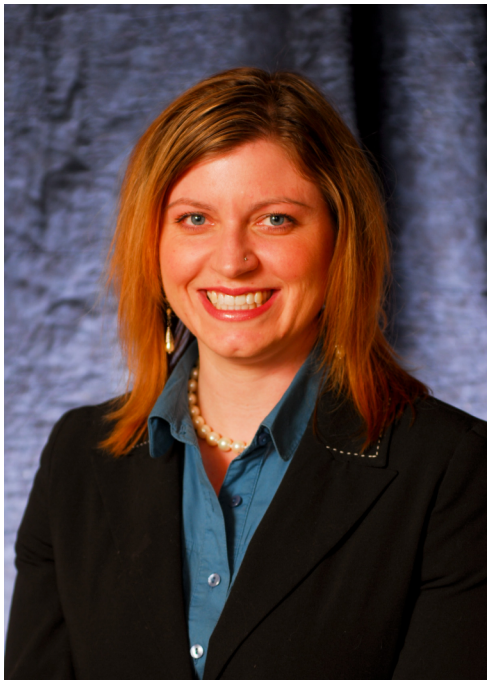
Reduced Fee Referral List - Your Help Needed!

The BCBA receives calls daily from people who do not qualify for Boulder County Legal Services but cannot afford an attorney. We maintain a list of attorneys who are willing to take cases on a reduced fee basis. Please let us know if we can add you to the list. All specialties are needed, and Spanish speakers are in high demand. This is a great vehicle for new attorneys to find clients, as well as any other attorneys who would like to help the community. The need is extremely high.

Contact laura@boulder-bar.org if you can help with this worthy service. Thank you for your consideration!

PRESIDENT'S PAGE

ABIGAIL SMITH



On January 21, 2017, I joined a massive march through the streets of Denver. It was joyful, cathartic and, above all, hopeful. As we marched, I spoke to the people around me about what had motivated them to join the Women's March. I heard many different answers, everything from climate change, to women's rights, to immigration, to LGBTQ rights. No matter the reason, everyone spoke of a similar feeling: fear of the unknown. Disquiet born from uncertainty. Of all the words that have been said, which are true? Of all the policy positions that have been discussed, which will be pursued? This dread, combined with a desire to take some sort of action, is what moved more than 100,000 people to take to the streets on that sunny Saturday.

As I reflect on the experience, I consider what lessons can be learned from it, and how to carry forward the energy I felt that day. I have settled on two important takeaways: listen and act.

As to my first point, it strikes me that we often see clients, or potential clients, in a heightened emotional state. On the brink of something; excited, nervous, frustrated, angry, terrified or some combination of all of these things. Embroiled in a conflict, or embarking on a new start. Every situation that moves a client to a lawyer's office is suffused with the unknown. Will I get what I want? What I need? Will it be difficult? Can I afford it? Can I trust this person to act in my best interest? Will I have options? If so, will I understand them? Will I have the information I need to make good choices?

On top of this, for many clients, the legal system is an unknown quantity. The process is difficult to understand. The language is impossible to decipher. And at the end of the day, there's no way to be sure that your interests will prevail. Maybe you'll get what you want, or half of what you want. Or maybe you'll get none of what you want. And through it all, you have to entrust your future to a relative stranger, hoping that they understand what you need.

To add to the confusion, it can be easy to mistake the vehicle for achieving the result with the result itself. The client says, for example, "I want to file a lawsuit." All right, you say, what grounds do I have to file a lawsuit? And your whole strategy from that point forward is directed to the goal of filing a lawsuit. It might be that you follow this path and, in the end, the client receives what he or she needs. But I ask you to consider another way.

Every time a client comes to you, ask them to imagine everything turning out perfectly, and then ask them what that looks like. I am convinced that asking this question at the very beginning of a client relationship will ensure that you understand what the client is truly looking for, which will in turn help you find the right path. It will also help you appreciate and manage your client's expectations. After all, how can we advocate for our clients if we don't understand them?

So, lesson one from the Women's March is to listen. But I felt there was something else to learn, something I had trouble putting my finger on. It was

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only through continued reflection that the second lesson revealed itself. The Women's March was a success because a huge number of people showed up. It reminds me of a quote from Theodore Roosevelt: "Do what you can, with what you have, where you are." Enough people decided that even if they couldn't travel to Washington, D.C. for the Women's March, they had the time, energy and desire to join a sister march in their home state. And that act made a difference.

As attorneys, we are tasked with our own call to action. Recall the oath each of us swore when we were admitted to practice in Colorado:

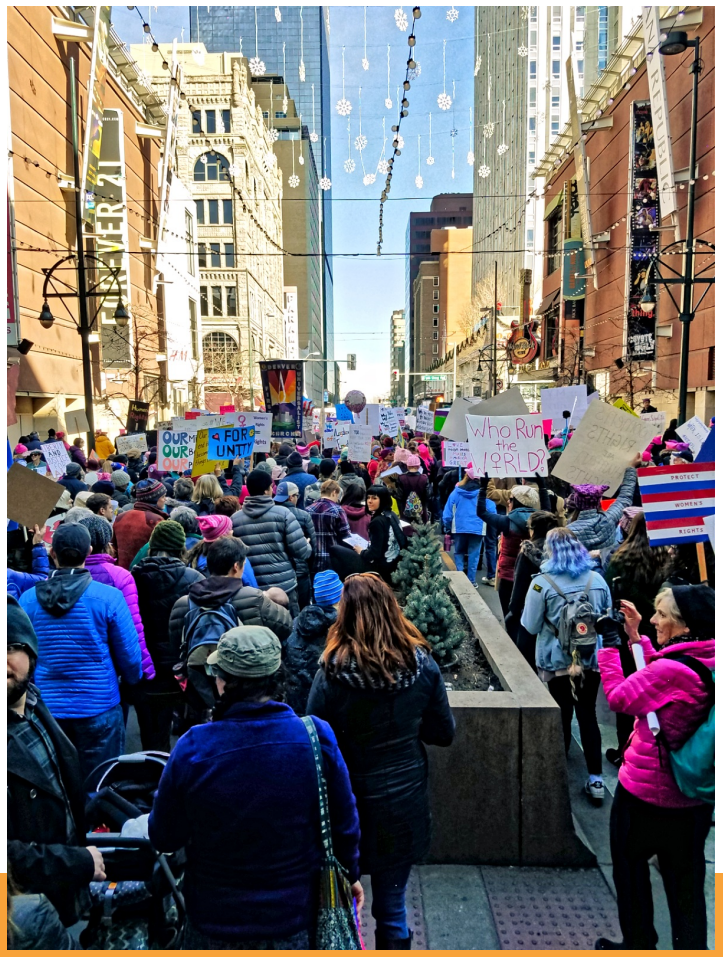
I DO SOLEMNLY SWEAR...

I will support the Constitution of the United States and the Constitution of the State of Colorado; I will maintain the respect due to Courts and judicial officers; I will employ only 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; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed; I will at all times faithfully and diligently adhere to the Colorado Rules of Professional Conduct.

Ask yourself: are you using your knowledge of the law for the betterment of society? Are you improving the legal system? Are you accepting the cause of the defenseless or oppressed? Are you doing what you can, with what you have, where you are? If not, now is a fantastic time to start.

On February 22nd, we hold our 16th annual fundraiser for the Legal Aid Foundation of Colorado, known as Food Wine Jazz Art. The Legal Aid Foundation's mission is to promote equal access to justice by raising funds to provide civil legal services for low-income people in the state of Colorado. All you have to do to support this important cause is to buy a ticket. That's it! If you're moved to do more, please consider inviting someone else to join you, whether that person is a fellow lawyer, a client, or a friend. And if neither of these options is inspiring enough for you, please consider becoming a sponsor.

Whether or not you can join us on February 22nd, I hope you will consider these lessons. After all, as Dr. Martin Luther King, Jr. urges us, "[t]he time is always right to do what's right."



FLEEING VIOLENCE AND THE UCCJEA: HOW TO USE THE UCCJEA TO KEEP FAMILIES SAFE DURING INTERSTATE CUSTODY LITIGATION

LILA SOL

The UCCJEA[1] was created and subsequently adopted[2] to simplify interstate custody[3] issues and handle discrepancies between other federal and uniform laws.[4] Although the UCCJEA does just that, it is certainly anything but simple.[5] The basic tenants of the act are clear: if the child has been in Colorado 182 days (or since birth), jurisdiction for initial custody determination (the first child custody order) is proper in Colorado because this is the child's "home state".[6] Typically, and correctly, if Colorado does not meet that requirement, a Colorado attorney will often advise the potential client that Colorado cannot take jurisdiction over the child, regardless of personal jurisdiction or agreement of the parties[7] and the case should be litigated in the other state (or survive the 182 day waiting period in Colorado).

However, there are factual circumstances which may exist in which jurisdiction in Colorado could be the appropriate jurisdiction to hear the custody matter, notwithstanding another state's "home state"[8] status. Specifically, families fleeing from domestic violence[9] may meet the criteria for "exceptions" regarding the home-state issue built into the statutory structure of the UCCJEA. This may be necessary because the fleeing-party simply cannot wait the 182 days due to litigation initiated in the other state (by the abuser) or other emergency concerns. This article will address the discreet issue that arises when a victim of domestic violence is seeking jurisdiction to have her[10] case heard by a Colorado court.[11]

ACQUIRING AND DECLINING JURISDICTION:
Colorado can take jurisdiction over a custody matter in three ways:
1) Colorado has home-state status (or did within the past 182 days);[12] or
2) Another state has home-state status, but declines to take jurisdiction, and Colorado is the most appropriate forum[13] (with satisfaction of additional criteria, infra); or
3) No state has home-state status[14] (with satisfaction of additional criteria, infra).

The additional criteria for a court to acquire jurisdiction under #2 and #3 are: (a) the child and parent[15] have a significant connection to Colorado (more than just physically present)[16] and (b) there is substantial evidence available in Colorado regarding the care of the child.[17]

A state can decline jurisdiction for two reasons: inconvenient forum[18] and unjustifiable conduct,[19] which circularly relate back to and are essentially similar to the criteria required for Colorado to take jurisdiction for "declined-home-state" (#2) and "no-home-state" (#3) matters.

For example: Washington is the home-state (#1) of a child, but Washington declines jurisdiction (when a custody case is filed) for reasons of inconvenient forum because the mother ("Mother") and the child are in Colorado as a result of Mother fleeing to escape abuse from the father ("Father"). Colorado can obtain jurisdictiction (and hear the custody case) when Mother and the child have a *significant connection* in Colorado and there is *substantial evidence* in Colorado regarding the child's care, protection, training, and personal relationships. [20]

TO FILE OR NOT TO FILE:
Another state can decline jurisdiction (in favor of Colorado) without an active Colorado case. However, there may be benefits to filing in Colorado[21] even before another state declines that jurisdiction, predominately to facilitate the communication between the two state courts[22] and to assert any argument and evidence in Colorado to assist the courts in deciding the issue during that

FLEEING VIOLENCE AND THE UCCJEA CONTINUED

communication. Remember, a Colorado attorney cannot practice law or assert position in the other state (unless licensed there). In the example above, Mother will need to file (whether pro se or through an attorney) an appropriate motion in Washington (pursuant to the laws of that state) to object to UCCJEA jurisdiction in favor of Colorado jurisdiction, in addition to the legal actions suggested herein in the State of Colorado.

Broadly, when filing the Colorado case[2]3 there are two initial options to assert (or both): 1) temporary emergency jurisdiction[24] (if needed); or 2) if non-emergency[25], simply acknowledge the simultaneous filings and request the proceeding be "stayed" pending the required communication between the court. In cases of domestic violence, filing for emergency orders using emergency jurisdiction will often (but not always) be appropriate.

A potential downside to starting a case in Colorado before Washington declines jurisdiction is the exposure to a double blow of attorney fees. These include the party's own Colorado attorney fees as well as legal fees assessed against that party for a failed attempt at asserting jurisdiction.[26] It is always necessary to determine case strategy with this consideration in mind. However, if emergency issues exist regarding child-custody determination as a result of domestic violence, it certainly may be beneficial to get a case started and may be worth the risk for someone fleeing violence.

IF YOU DO FILE - THE "HOW" (PROCEDURAL): Motions regarding jurisdiction are permissible at any time during a pending case in Colorado, pursuant to Rule 16.2(c)(4)(A) without permission / leave of the court. Therefore, if additional facts other than assertions in the initial petition[27] are necessary to clarify the jurisdictional position, consider filing a motion quickly or simultaneously alerting the court to the jurisdictional issue and requesting the court initiate or be on notice for potential communications with the other states' court.

Assertions for emergency jurisdiction and emergency orders can be made at this time. For example, motions for protective orders (also permissible without leave of court), motions to restrict parenting time, or forthwith request for temporary orders may be appropriate.[28] In the alternative, if the issue does not require emergency action, request the Colorado court to stay the case pending the communication with the other state's court.[29] Importantly, staying the case and communication with the other state are mandatory for the Colorado

court.[30] The Colorado court is limited in any action at this stage; thus, any non-emergency pleading/motion filed with the Colorado court is essentially preparing and assisting the Colorado court for its communication with the other state's court (rather than requesting immediate action from the court, unlike emergency jurisdictional assertions). This is the only way for a Colorado attorney to advocate for the party in Colorado at this stage, because a Colorado attorney (not licensed elsewhere), will not be able to appear telephonically (or otherwise) in the other state where the jurisdiction currently resides.[31]

IF YOU FILE - THE "WHAT" (SUBSTANTIVE):
The following set of legal assertions can be made to assist a victim of domestic violence in this situation. Again, it is imperative to understand that Colorado cannot take jurisdiction, even if the facts meet UCCJEA "exceptions" to home-state jurisdiction, unless or until the state with home-state status makes that determination and declines to exercise jurisdiction. Only then can the home-state court (with assistance of communication with the Colorado court) make findings that Colorado is the appropriate state to have jurisdiction.

(First Assertion) The Home-state Should Decline Jurisdiction: In any such pleading or presentation of evidence, the facts and admissions regarding the home-state jurisdictional elements in the other state should be conceded. It should be very clear to the Colorado court that the assertions are not that the home-state does not have jurisdiction, but rather Colorado is being asked to be on notice to communicate with the other state's court to determine if the other state will use its discretion to decline its jurisdiction (for either inconvenient forum or by unjustifiable conduct). Explicit admissions regarding "Simultaneous Proceeding[s]" pursuant to C.R.S. ¤14-13-206(2), should be made to indicate that after a review of documents and information provided by the parties pursuant to C.R.S. ¤14-13-209, the Colorado court is required to communicate with the other state's court and shall stay a proceeding (or take emergency jurisdiction if requested and appropriate) until that communication can occur.[32]

(Second Assertion) Colorado is the Appropriate Jurisdiction: Next, any pleading filed in Colorado at this stage should include the reasons that Colorado would be permitted to take jurisdiction if the other state's court declines it. Once declined, Colorado must be able to take jurisdiction under one of the three jurisdictional principles,[33] discussed supra. In this example, Colorado's only option is to meet the appropriate forum criteria, with significant connections and evidence existing in Colorado. This brings the analysis full circle and cleanly provides the proper basis for UCCJEA jurisdiction. Making the analysis clear in the jurisdictional pleadings filed in Colorado will help the two courts in communicating and making the final determination. Evidence and argument could occur in writing or in a hearing (or both) in the Colorado court. During the communication between the courts, the parties have a right to be heard and a record made of the proceedings.[34]

LIMITATIONS ON LITIGATING IN COLORADO :
If the Colorado case survives the analysis and takes jurisdiction, it may only be in regards to the child-custody determination and not the other issues of the case. Without properly effectuating personal service in Colorado on the out-of-state person, financial and property issues may need to be handled in the other court's case. Of note, it is not statutorily permissible to serve an out-of-state party in the state of Colorado pursuant to Rule 4, C.R.C.P. if he is in the state of Colorado for the exclusive reason of litigating

FLEEING VIOLENCE AND THE UCCJEA CONTINUED

the UCCJEA custody action.[35] If property division claims are significant, attorneys must discuss fully the best strategy to take in this scenario. If emergency safety issues are paramount, it may still be necessary to litigate the custody issue in Colorado and separately litigate the financial issues in another state. However, it may require a further discussion with the client to determine if there are other ways she can stay safe in the other state and litigate the entire case there (rather than deal with the complication of bifurcating the case).

If, however, the safety issue does warrant the custody case being litigated in Colorado, child support and maintenance may still be able to be litigated under UIFSA due to its substantially broad long arm provisions.[36] Specifically, there are provisions for victims of domestic violence that should be asserted so that family support can also be litigated in Colorado.[37] In other words, if the case is an allocation of parental responsibilities case (child-custody and support only), it may be able to be fully litigated in Colorado with the correct assertions regarding jurisdiction in UCCJEA and UIFSA. However, if the case is a dissolution of marriage action, litigation of property issues may have to remain in the other state.

REMINDERS AND CAUTIONS:
Clearly, the actions described in this article should only be taken given the appropriate factual circumstances.[38] As stated herein, there are significant risks for exposure to attorney fees, the inconvenience and cost to bifurcate, and inadvertently practicing law without a license in another state. Additionally, if a court takes subject matter jurisdiction improperly, any court order would be null and void, the case would be open for appeal, and/or leave a family with no court orders in an unsafe or at the very least, contentious, matter. However, when an issue such as fleeing from domestic violence arises and presents significant risk to physical safety (and even life and death in some cases), having the tools as an attorney available to advise a potential client quickly and correctly[39] is vital.

-By Lila Sol (lsol@colegalserv.org). Lila is a staff attorney at Colorado Legal Services who litigates exclusively in the area of domestic relations for victims of domestic violence, including divorce, APR, and protection orders for low-income clients. [40]

Endnotes are listed on pages 22 and 23.

VOLUNTEER NOW FOR MOCK TRIALS

This year the Mock Trials will be held at the Boulder County Justice Center on February 9, 10 and 11. Please volunteer to be a scoring or presiding judge. This is a great program, and it cannot happen without all of you generous volunteers. We still have the following needs:

- **February 9 at 4:30 pm - 4 scoring judges**
- **February 10 at 4:30 pm - 1 presiding judge**
- **February 11 at 8:00 am - 3 scoring judges, 3 presiding**
- **February 11 at 10:30 am - 3 presiding judges**

Email laura@boulder-bar.org to sign up

PROFESSIONALISM ON CALL

February 6	Mark Langston	303.440.9684
February 13	Meghan Pound	303.440.8238
February 20	Tom Rodriguez	303.604.6030
February 27	Karl Kumli	303.447.1375

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 Free Legal Clinics at the Sacred Heart of Jesus church (2312 14th Street) from 5:30 - 7:30 pm. Volunteers are always needed. Please contact Christine at christine@boulder-bar.org if you can help.

March 16, 2017 **June 15, 2017**

PRO BONO CORNER

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

PRO BONO REFERRALS

Five cases were referred during the month of December. Thank you to the following attorneys:

Evan Branigan

Shirin Chahal

Chris Jeffers

Louisa Young

PRO SE VOLUNTEERS

Evan Branigan

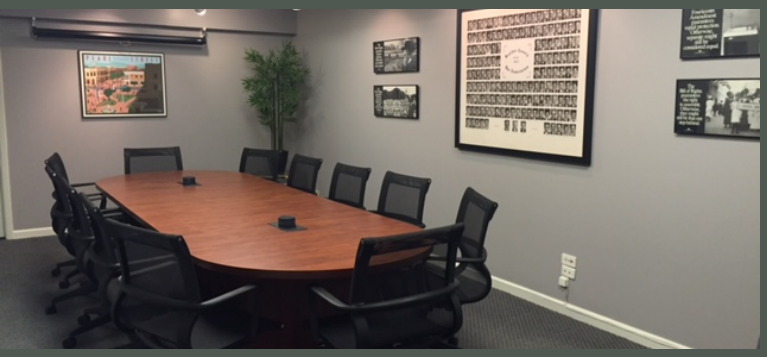
Kathleen Franco

Michael Morphew

Joan Norman

BCAP VOLUNTEERS

There were no requests for referrals for the Boulder County AIDS Project in December.



THE BCBA CONFERENCE ROOM

AVAILABLE TO BOOK

Please contact Laura at the bar offices to reserve your space. Rates are $25 per hour. 303-440-4758

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We've moved - January 30, 2017

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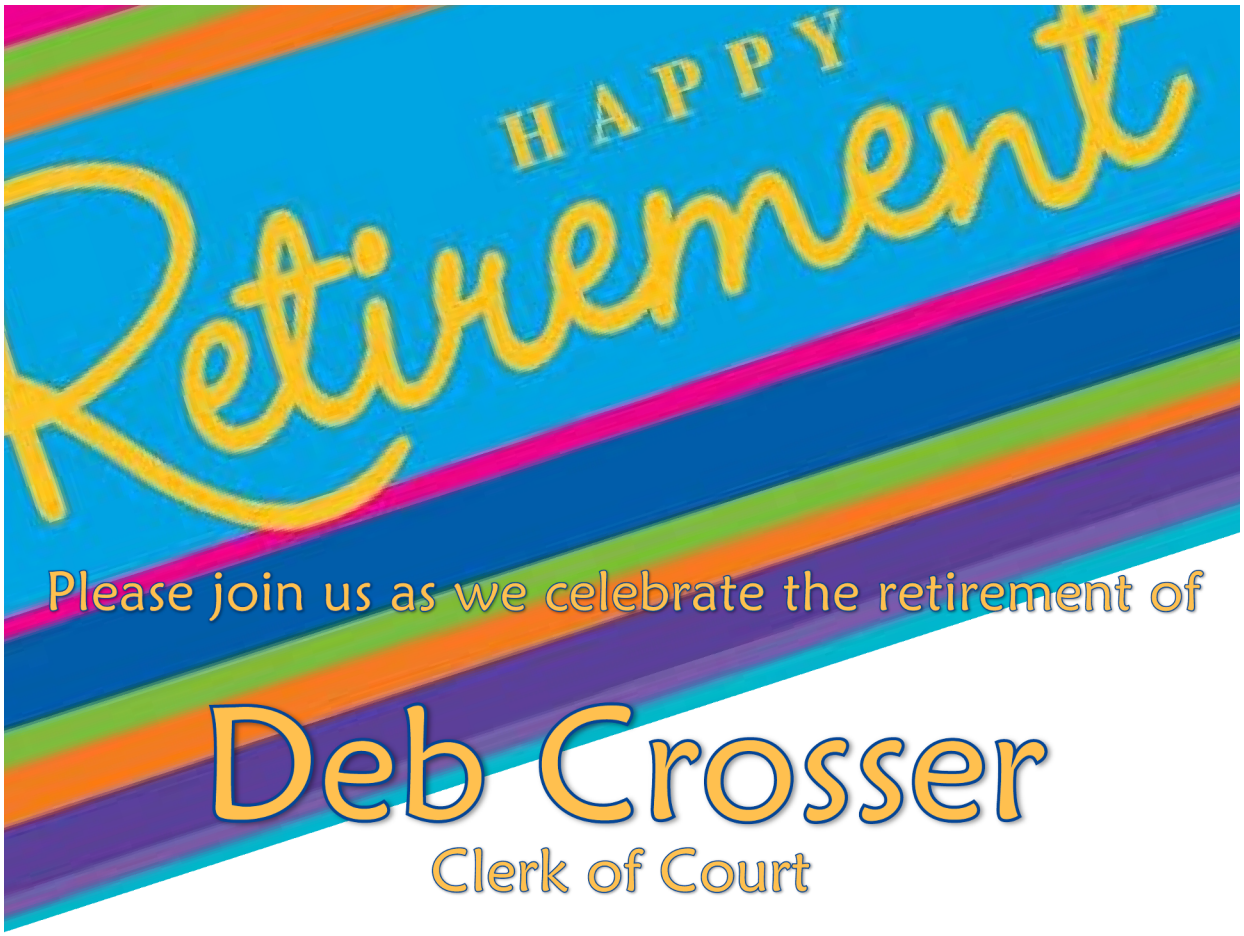
Lafayette, CO 80026
303-442-0165

www.oshlaw.com

Russell K. Osgood
Scott R. Osgood

COURT ANNOUNCEMENTS



Friday, February 24, 2017

4:00 – 5:00 p.m.

Boulder County Justice Center

1777 6th St. Boulder, CO 80302

Jury Assembly Room

CLASSIFIED ADS

TSCERTIFIED SIGNING AGENT/MOBILE NOTARY AND CONTRACT PARALEGAL SERVICES. Litigation specialist, Civil Litigation. ADC/CJA. Roz Lynn Dorf, M.A. 303.494.6935

DOWNTOWN BOULDER PROFESSIONAL ATTORNEY OFFICES FOR LEASE. 1 – 3 offices available on February 1, within historic office building. Includes use of conference rooms, reception and kitchen. From $1000 to $1500 per office or group rate. Includes full service gross. Contact Nicole or Alanna at 720-943-1095.

BRIDGE TO JUSTICE, A 501(C)(3) NONPROFIT LEGAL SERVICES PROVIDER BASED IN BOULDER SEEKS A PART-TIME PARALEGAL. Background in family law preferred. Please send cover letter, resume and a list of 2-3 professional references to Executive Director, Bruce Wiener, at bruce@boulderbridgetojustice.org.

FIDUCIARY SERVICES. Experienced Colorado EP, EA attorney (former probate paralegal) offering fiduciary services focusing on trust and estate administration as a PR or Trustee. Carol Johnson, 303-474-4235, carol-530@comcast.net.

KLEIN FRANK, P.C. HAS AN OFFICE FOR RENT IN CLASS A SPACE. 2505 Walnut Street, Suite 100. Free parking provided. Internet, all utilities, fax, reception area, conference room, and kitchen included. $1,000 per month. Space for one staff member can be negotiated. Contact Beth Klein 303-448-8884.

LOUISVILLE OFFICE. Lease one or two private, sound-protected offices, available February 15th. $900 rent includes internet, phone, bilingual reception, conference room, and future space for staff. Contact Katharine kspeer@accimm.com.

Rockies Season Ticket Share: Buy one, two or three 1/9th interests in two terrific Colorado Rockies Season Tickets (two seats for 9, 18, or 27 games). These are perfect for a real baseball fan:

- Great seats (Sec. 136, row 33 on the aisle, looking into home plate)
- Seat viewer: **http://colorado.rockies.mlb.com/col/ballpark/seat_viewer.jsp**
- Aisle is away from the action, so people using the aisle don't obstruct view
- Look directly in on home plate for a left-handed batter
- Unobstructed view into the Rockies dugout
- Just under the overhang, so you are never wet or sunburned
- Season ticket price is better than per-game price
- Participate in a draft, so you have a good chance of getting the games you want
- Participate every year

Contact Karl Kumli at 303-440-0075.

HAPPY HOUR FOR BOHO

Charity Benefit for the Homeless
Tuesday, 02.07.2017, 4-6 P.M.
Centro Mexican Kitchen 950 Pearl Street
info@boulderboho.org or 720-431-4374

FLEEING VIOLENCE AND THE UCCJEA ENDNOTES

[1] Uniform Child-custody Jurisdiction and Enforcement Act, C.R.S. ¤¤14-13-101, et seq. UCCJEA has been adopted in every state/territory except Massachusetts and Puerto Rico. Uniform Law Commission. http://www.uniformlaws.org/Act.aspx?title=Child Custody Jurisdiction and Enforcement Act.
[2] In Colorado, the UCCJEA was adopted as a replacement for the UCCJA July 1, 2000.
[3] ÒCustodyÓ or Òchild-custodyÓ is used in this article for brevity and to avoid at least some of the numerous acronyms in this area of law. Further, most states and this uniform law (UCCJEA) still retain the use of the term Òcustody.Ó The use of ÒcustodyÓ here shall include ColoradoÕs C.R.S. ¤¤14-10-124(1.5)(a) and (b) designations of parenting time and decision making. The distinction between the two is not necessary for the very discreet and limited scope of this article.
[4] Uniform Child Custody Jurisdiction Act (UCCJA), previous version of UCCJEA; Uniform Interstate Family Support Act (UIFSA), C.R.S. ¤¤14-5-101, et seq., and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. ¤1738A (1980).
[5] This article is not intended to explain the complexities of the UCCJEA. For a comprehensive review of the UCCJEA in Colorado, see the Honorable Angela R. ArkinÕs (Ret.) chapter 39 (Interstate Family Law Jurisdiction) in The PractitionerÕs Guide to Colorado Domestic Relations Law, Second Ed. (Linda J. Creagan ed., CLE in Colo., Inc., Supp. 2016). In fact, given that this is a litigation Òhow toÓ article, feedback and comments regarding the article are more than welcome - to expand, solidify issues, and serve victims of domestic violence. Collaboration is key (and encouraged), both in Colorado and with attorneys in other states.
[6] Ò ÔHome stateÕ means the state in which a child lived with a parent or a person acting as a parent for at least one hundred eighty-two consecutive days immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birthÉÓ C.R.S. ¤14-13-102(7)(a). Or, if the child is relocated outside of the Òhome-stateÓ jurisdiction, the remaining parent (or person acting as parent) has up to 182 days after the child leaves that state to assert an extended jurisdictional home-state assertion, which is also proper.
[7] ÒPhysical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.Ó C.R.S. ¤14-13-201(3).
[8] ÒHome stateÓ is a legal term in the statute as defined in C.R.S. ¤14-13-102(7)(a). For readability and to distinguish it as the legal term and term of art, it will be referred to as home-state in this article.
[9] A common example is when a mother leaves a state due to serious domestic violence. She relocates to Colorado due to family ties and a support structure. After some time living in Colorado (but less than the requisite 182 days), Father/husband/perpetrator files a case in the state she fled from. It is not only unsafe for Mother to travel back to the other state given the factual circumstances of the abuse, but it is often a heavier cost burden on Mother (typically the lower wage earner with no family support yet ordered), and disruptive to the childÕs wellbeing and stability in the new state of Colorado.
[10] Statistics have shown that domestic violence victims can be men and/or any person of any gender or sex to any domestic relationship (LGBTQ partners, spouses, or non-married parents, etc.). However, women still remain statistically disproportionately victims of domestic violence and disproportionately affected by the results of domestic violence (i.e., financially and physically). Bureau of Justice Statistics, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4536; National Coalition Against Domestic Violence, http://ncadv.org/learn-more/statistics. Therefore, this article will use ÒsheÓ as the pronoun referencing the fleeing victim (survivor) of domestic violence and ÒheÓ as the pronoun referencing the perpetrator of domestic violence.
[11] This article focuses on only initial child-custody determinations before substantive litigation has began in either state. This article does not address continuant exclusive jurisdictions, modifications, etc.
[12] See supra, note 6; C.R.S. ¤14-13-201(1)(a).
[13] C.R.S. ¤14-13-201(1)(b)
[14] Id.
[15] Or person acting as parent: Òa person, other than the parent who (a) has physical custody of the child or has had physical custody for a period of one hundred eighty-two consecutive days, including any temporary absence, within one year immediately before the commencement of the child-custody proceeding; and (b) has been awarded legal custody or allocated parental responsibilities with respect to a child by a court or claims a right to legal custody or parental responsibilities under the law of this state.Ó C.R.S. ¤14-13-102(13).
[16] C.R.S. ¤14-13-201(1)(b)(I)
[17] C.R.S. ¤14-13-201(1)(b)(II)

[18] C.R.S. ¤14-13-207. Considerations the court must make in accordance with the inconvenient forum matter include specifically domestic violence; issues addressing the finances of the parties; agreements of the parties; nature and location of evidence, etc. C.R.S. ¤14-13-207(2)(a).
[19] C.R.S. ¤14-13-208. The assertion of unjustifiable conduct is used in circumstances where the parent who is seeking jurisdiction in a non-home-state and has arrived in the non-home-state by means of unjustified conduct, i.e., abducting the children from the other parent. An example in this context to correctly assert unjustifiable conduct would be if an abuser abducted the children to Colorado and he asked Colorado to take jurisdiction despite home-state jurisdiction elsewhere. Therefore, in a set of facts where the mother and child have fled to Colorado to escape abuse, this would not be the appropriate assertion. And, caution should be used because the court could apply this section against her, unfortunately, if the allegations of domestic violence are not presented to the Colorado court. However, exceptions are made for domestic violence in order to prevent misapplication of this section to victims fleeing abuse rather than abducting children, and such exception is referenced in the comments. See also In re B.C.B., 2015 COA 42, at pp. 12-14; see also ¤14-13-208 comment. Therefore, factual evidence regarding domestic violence will be critical to Colorado obtaining jurisdiction in this type of situation. If a court declines jurisdiction due to this section, there is significant exposure to the non-prevailing party for the award of attorney fees, costs, and expenses.

FLEEING VIOLENCE AND THE UCCJEA ENDNOTES

[20] See supra notes 13, 17.
[21] C.R.S. ¤14-13-209 requires a party to furnish specific information in all cases involving child custody determinations. In Colorado, this information is specifically stated as line items on the JDF 1101 (Petition for Dissolution) and JDF 1412 (Petition for APR). However, if non-judicial forms are used, ensure that all information is asserted as required by this section of the UCCJEA because the assertions are jurisdictional. It may also be advisable to submit an affidavit asserting the facts of cases that give rise to the simultaneous proceedings to clarify.
[22] For practical reasons, there are clear advantages to filing in Colorado initially so that there is a clear case, venue, court, and assigned judge to permit the other stateÕs court to communicate as required by the statute. Also, if the other state does decline jurisdiction, there is an immediate way to move forward in the case without any gaps. Without a pending matter in the Colorado courts, it will be difficult for your client to direct the court for purposes of communication and could even make the home-state court less likely to consider alternate Colorado jurisdiction.
[23] Personal service of the Colorado matter may be made anywhere (does not need minimum contact analysis or service within the state) because personal jurisdiction is irrelevant and the UCCJEA provides statutory procedure to provide notice to a party outside of the state. C.R.S. ¤¤14-13-201(3) and 14-13-108.
[24] Emergency Circumstances: If asserting temporary emergency jurisdiction, start with factual assertions that support the standard of Òchild is present in this stateÓ and Òit is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subject to or threatened with mistreatment or abuse.Ó C.R.S. ¤14-13-204(1). This provision provides that a victim of domestic violence may make assertions for temporary emergency jurisdiction even if the violence is not alleged as to the child specifically. Then, acknowledge the commencement of the action in the other state with home-state status, request limited orders regarding child custody, and request that court specify a time period in which such order will expire. C.R.S. ¤14-13-204(3), C.R.S. A request may also be made that temporary orders will become final or permanent orders if no further orders are made, when Colorado acquires jurisdiction on a ÒpermanentÓ bases. Id. If the Colorado court will permit it, request the emergency order until the other state court has communicated and made final determination regarding jurisdiction. Be careful of leaving time gaps in orders when domestic violence is an issue. The Colorado court will be required to communicate with the other stateÕs court if it elects to make temporary orders under this section. Conversely, once the other state court is on alert that a case has been filed in Colorado, it is also required to communicate with Colorado. C.R.S. ¤14-13-204(4).
[25] Non-emergency Circumstances: If emergency orders are not necessary, file a petition with the appropriate factual circumstances wherein Colorado could take jurisdiction if the other state declines, and request the court to ÒstayÓ the case and communicate with the other state court. Under the UCCJEA, the Colorado court is mandated to stay the action and contact the other court before dismissing a case. C.R.S. ¤14-13-206(2).
[26] Attorney fees to be paid by the non-prevailing party are mandated in the UCCJEA in certain circumstances and the burden lies with the non-prevailing party to show that an award of attorney fees is inappropriate. See C.R.S. ¤¤14-13-112(3), 14-13-208(3) and 14-13-312. This places any party seeking jurisdiction in Colorado when Colorado does not have home-state status at significant financial risk, and thus should be emphasized to any party seeking to assert these positions. Of note regarding attorneys fees is that ¤14-13-207 (inconvenient forum) removed the attorney fee provision from the previous version of the UCCJEA (UCCJA).
[27] Embedding jurisdictional arguments directly in the petition to prevent outright dismissal on the basis of the non-home-state status is an effective option. Unbundled services/limited scope representation provided by a Colorado attorney simply for the purpose of asserting this complex jurisdictional argument in a petition and entering for jurisdictional purposes only could potentially be an invaluable service to a party/victim of domestic violence who does not have the funds for full representation and does not have the legal knowledge to jump this initial hurdle. This method has been used effectively to acquire Colorado jurisdiction when no other state currently had home-state jurisdiction (before receiving legal assistance/advice, the mother was summarily turned away by the court clerk when she attempted to file her APR petition).
[28] Requests for temporary orders is not a motion permissible through Rule 16.2(c)(4)(A), C.R.C.P., without permission of the court. In Colorado, many districts have specifically prescribed processes for requesting temporary orders hearings and you should read the Case Management Order carefully for that districtÕs process.
[29] An attorney or the party pro se must assert a timely jurisdictional objection in the other state, in accords with that states laws and procedures.
[30] C.R.S. ¤14-13-206(2); only after the states communicate and determine that Colorado is not an appropriate forum can the Colorado court dismiss the case.
[31] Attorneys must take care not to practice law where they are not licensed in another state. Requests to be present telephonically to observe/hear the matter are permitted, but participation in any way is not permitted.
[32] If the other state does not decline jurisdiction, the Colorado court shall dismiss the action.
[33] See supra, notes 12-14.
[34] C.R.S. ¤¤14-13-110, 14-13-111, and 14-13-112.
[35] C.R.S. ¤14-13-109, ÒAppearance and Limited Immunity.Ó
[36] UIFSA; C.R.S. ¤14-5-201(a)(5).
[37] UIFSA and the details of such statute are outside of the scope of this article, but care must be taken to review UIFSA to differentiate the jurisdictional requirements from that of UCCJEA discussed herein.
[38] However rare it may seem, with domestic violence rates continuing to be high and one in three domestic relations matters becoming interstate during the childÕs minority (see note 5 at p. 39-10), issues such as this may be more common place than expected. Notwithstanding, unless an attorney litigates exclusively family law cases for victims of domestic violence (i.e., Family and ChildrenÕs unit of Colorado Legal Services), applications of these methods may be rare. But, given the Boulder legal community has always been generous with pro bono, low bono, and volunteer work with Colorado Legal Services, these situations may indeed arise.
[39] Attorneys risk disciplinary action if they advise their clients incorrectly regarding child custody orders. See People v. Aron, 962 P.2d 261 (Colo. 1998). See Arkin, note 5.
[40] Special thanks to Melina Leodas for volunteering her proofreading assistance and Judge Elizabeth Brodsky for her ever sage consultation.

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