

BOULDER COUNTY BAR ASSOCIATION NEWSLETTER APRIL 2014



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CALENDAR OF EVENTS

Tuesday, April 1

SOLO/SMALL FIRM

Formation and Taxation of the Corporation, P.C. and L.L.C. Basics
Presenters: Jennifer Lorenz and Dan Sweet

Noon @ Faegre Baker Daniels
\$25 CLE, \$15 New/Young Lawyer,
\$12 Lunch

Wednesday, April 2

NEW/YOUNG LAWYERS

Family Law 101

Presenters: Josh Anderson and Tucker Katz

Noon @ Dietze & Davis
\$25 CLE, \$15 New/Young Lawyer,
\$12 Lunch

Wednesday, April 2

Boulder Interdisciplinary Committee

The Drift Toward a Presumption of 50-50 Parenting Schedules – Myth or Reality?

Presenters: Peggy Goodbody, Lee Strickler, Jane Wells, & Robert Backerman

Noon @ Avalon
Register @ Boulderidc.org

Sunday, April 6

Boulder County Bar Foundatoin

Annual Meeting and Reception
5:30 PM at The Flagstaff House

Tuesday, April 8

EMPLOYMENT

I Un-friend You: How Colorado's New Social Media Law Impacts the Employer-Employee Relationship

Presenter: Katherine Pratt

Noon @ Caplan & Earnest

\$25 CLE, \$15 New/Young
Lawyer, \$12 Lunch

Wednesday, April 9

CRIMINAL

Time Computation for DOC Sentences

Presenter: Mary Carlson

Noon @ Justice Center

Jury Assembly Room

\$25 CLE, \$15 New/Young Lawyer,
Brown bag lunch

Wednesday, April 9

SOLO/SMALL FIRM HH

5:30 Happy Hour @ Conor O'Neills

Tuesday, April 15

ELDER

Fiduciary Compensation

Presenters: Judge Stewart and Judge Mulvahill

Noon @ Justice Center East

Training Room

\$25 CLE, \$15 New/Young Lawyer,
Brown bag lunch

Wednesday, April 16

FAMILY

Case Law Update

Presenter: Ron Litvak

Noon @ Justice Center East

Training Room

\$25 CLE, \$15 New/Young Lawyer, Brown
bag lunch

Thursday, April 17

PARALEGAL

It's All Relative – Financial Exploitation of the Elderly Within Family Systems

Presenter: Renee Ezer

Noon @ Dietze & Davis \$25 CLE, \$15

New/Young Lawyer, \$12 Lunch

Thursday, April 17

REAL ESTATE/NATURAL/ENVIRONMEN-
TAL RESOURCES

Boulder Ditch Project

Presenter: Elizabeth Black

Noon @ Caplan & Earnest

\$25 CLE, \$15 New/Young Lawyer,
\$12 Lunch

Thursday, April 17

BANKRUPTCY

Noon Roundtable @ Agave

Monday, April 21

Boulder County Legal Services

Pro-Bono Lunch

11:30 @ Boulder Marriott

Register @ BCLS

Thursday, April 24

NATURAL/ENVIRONMENTAL

The September 2013 Floods & Their

Impact on the Administration of

Water Rights in Division 1

Presenter: Dave Nettles or

Corey Deangelis

Noon @ Bryan Cave (1801 13th St.)

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

\$12 Lunch

Friday, April 25

IMMIGRATION

8:30 Breakfast Roundtable

@ Broadway Suites

Tuesday, April 30

TAX/NEW/YOUNG LAWYERS

Tax, Probate & Estate 101

Presenter: Kurt Hofgard

Noon @ Hutchison Black & Cook

(921 Walnut Street)

\$15 New/Young Lawyer,

free Lunch



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NOVEMBER 2014 JUDICIAL RETENTION ELECTIONS

In Colorado, judges are appointed to office by the governor for a provisional two year term. They stand for retention at the end of the provisional term. After the initial retention, County Court judges stand for retention every four years and District Court judges stand for retention every six years. Voters choose between two options: "Do retain" or "Do not retain."

We have an unusually large number of Boulder County judges standing for retention this November. They are County Court Judges Archuleta, Blum, Moore, and Sierra, and District Court Judges Bakke, Butler, MacDonald and LaBuda, and Chief Judge Berkenkotter. Judges Moore, Sierra, Bakke, Butler, MacDonald and LaBuda are completing their provisional terms.

There are Judicial Performance Commissions in each judicial district. Judicial Performance Commissions were created in 1988 by the legislature to provide fair and responsible information about judges seeking retention to enable voters to make informed decisions. The resulting performance evaluations also provide judges with information to help them improve their skills as judicial officers.

The Commission members are both attorneys and non-attorneys. The Commission members are appointed by the Chief Justice, the Governor, the President of the Senate and the Speaker of the House.

Helen R. Stone is the Chair of the Twentieth Judicial Performance Commission, which has ten members. The other members are Graham S. Billingsley, Patrick M. Haines, Jeffrey K. Ilseman, Michelle F. Murphy, Michael L. Radelet, Mike Rafik, Shannon W. Stevenson, Marc H. Vick, and Richard Warner, M.D.

Questionnaires are sent to attorneys and others who have had contact with the judge standing for retention, and the Commission reviews these survey results. Commission members personally observe the judges in the courtroom and review orders issued by the judges. Finally, the Commission interviews each judge personally. The Commission then completes a written profile for each judge, ending with a recommendation of "Retain," "Do Not Retain" or "No Opinion." These profiles and recommendations are included in the "blue book," the State Ballot Information Booklet published by the Colorado Legislative Council and provided to Colorado voters.

The Judicial Branch is very grateful for the time and effort the Commissioners give to the evaluation process. With so many judges standing for retention, their workload this year is especially heavy. If you cross paths with any of the Commissioners in the coming months, please thank them for their service.

Submitted by Judge DD Mallard, District Court Judge of the 20th Judicial District.



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DOCUMENT, DOCUMENT, DOCUMENT: PREPARING FOR GRIEVANCES AND ALLEGATIONS OF INEFFECTIVENESS.

BY ZAK MALKINSON

It is shocking for many people to be charged with crimes, especially for the first time. As criminal defense attorneys we try to counsel our clients through the strange experience of appearing in court and, possibly, standing in front of a judge saying "guilty." Many defendants are extremely anxious and in addition to researching the law, negotiating with the DA and investigating defenses, a major part of our job is to be a counselor to our nervous clients. It is important to recognize this vulnerability when considering how to protect ourselves professionally from complaints from disgruntled and disappointed clients. No matter how well we prepare for a case, no matter how thoroughly we prepare a client's expectations, criminal defense attorneys must also prepare their files in the event a complaint is filed.

There are a certain things even the most detailed attorney cannot avoid. There are clients who are unreasonable and cannot accept a verdict or a court's sentence. There are clients who have mental health problems who will grieve or complain no matter what happens. The vetting process at the office of attorney regulation seems to

take care of many of these frivolous complaints, but there still are two ways an attorney may have to defend or justify their representation: a grievance through attorney regulation and an ineffective assistance of counsel claim through a petition for post-conviction relief pursuant to Colorado Criminal Rule of Procedure 35(c). This article will give an overview of the most common complaints made to the Office of Attorney Regulation about criminal defense attorneys and offer suggestions on how to avoid those complaints.

Office of Attorney Regulation

The Office of Attorney Regulation (OAR) is tasked with fielding complaints of unethical behavior made against Colorado attorneys. Six attorneys handle the over 4000 intake phone calls made each year. This intake process was established to protect the public and insure that client's understand a lawyer's approach. The majority of those calls are resolved without any action because the complaint is not credible or does not allege an actual violation of the Rules of Professional Conduct. Some other cases require minimal responses from the attorney involved. I spoke to the James Coyle,

Attorney Regulation Counsel at the OAR who explained, for example, some complaints are informally resolved simply by calling the attorney to make sure they contact their client. However, about 400 cases each year are begins an investigation to determine if the complaint is legitimate and if so, what to do about it. Those approximately 400 cases which do make it through are the cases which impact the public the most are marked for full investigation. For those cases, the attorney is contacted and needs to respond. Evidence is obtained and decision is made whether to go forward with discipline. Those cases are sent to an attorney regulation committee composed of six lawyers and three non-lawyers, chaired by Boulder's Steve Jacobson. Of those 400, about 250 are dismissed with the remainder submitted to the committee for discipline (unless the attorney stipulates to discipline). All are reviewed by Mr. Coyle.

Mr. Coyle says the most common nature of inquiry involves strategy decisions made by the attorney. The second most common complaint regards fees, but the next most common complaints are

continued on page 5

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GRIEVANCES AND ALLEGATIONS *(continued from page 4)*

neglect and communication. Mr. Coyle said a typical neglect complaint which can make it through the initial investigation has to do with failing to comply with filing deadlines, statutory or rule deadlines or a even self-imposed deadline. Meaning, don't tell your client investigation will be completed by St. Patrick's Day unless you are 100% sure it will be.

Colorado Rule of Professionalism Rule 1.4 requires lawyers communicate with clients promptly. We know that there are periods of time which pass during a case where nothing happens such as when we are awaiting investigation results, a ruling from the court, a future court date or information from the DA. During that time, it is critical to call back clients, even if it means a short conversation saying "nothing is happening until _ takes place."

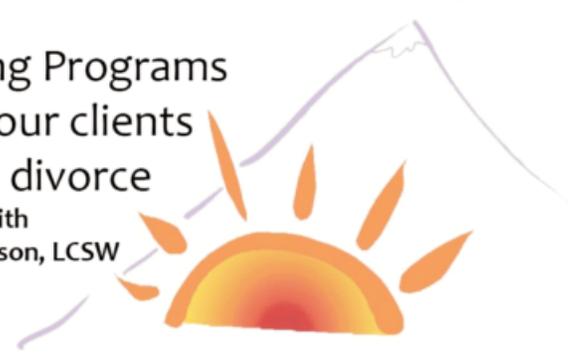
Megan Ring, the supervisor of the Boulder Public Defender's Office trains her attorneys to document everything: phone call, jail visit and voicemail. Ms. Ring explained it is very hard to recreate what you did on a certain case months after the case is closed. If the attorneys are in the habit of documenting the file, history won't have to be re-created. Ms. Ring makes sure the newer attorneys develop this habit so it becomes instinct. Anyone who has seen the County court docket and the number of people speaking with the DA and Public Defender will have sympathy for the number of quick conversations which are taking place, sometimes simultaneously. Ms. Ring advises her attorneys to keep a phone log so every call is documented, even if the file is not handy. This way, communication complaints made to OAR are quickly resolved. All criminal attorneys should adopt the practice of keeping a thoroughly logged file. Ineffective assistance of Counsel claims made pursuant to Crim. Pro Rule 35(c)

The Due Process Clause of the United States Constitution entitles defendants

to be represented by counsel. This right has been interpreted to mean competent counsel. A defendant may be entitled to relief in the trial court if they are able to establish an ineffective assistance of counsel (IAC) claim against their attorney. To prevail at such a claim, the defendant must establish 1) there was a mistake made by their attorney (the standard is conduct fell below that of reasonably competent assistance) Strickland v. Washington, 466 U.S. 668, 687 (1984) and 2) that the mistake was prejudicial or serious. In order to establish the requisite prejudice in an IAC claim, a defendant must demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694. To prevail on a 35(c) motion, the movant must demonstrate BOTH prongs of Strickland. Trial courts often resolve the first prong in favor of the attorney because the decisions made were strategic and picking apart the record amounts to little more than Monday morning quarterbacking. The second prong means if there was a mistake, that mistake had to MATTER.

For example, in every trial there are probably times where you should have objected or should have asked a certain question, but that mistake in no way contributed to the outcome.

Once a defendant alleges IAC, attorney-client privilege is automatically waived. CRS 18-1-417(1) says whenever a defendant alleges ineffective assistance of counsel, the "defendant automatically waives any confidentiality, including attorney-client and work-product privileges, between counsel and defendant, and between the defendant...but only with respect to the information that is related to the defendant's claim of ineffective assistance." This does not mean if a 35(c) claim is filed against you, you need to hand over your entire file. It is important to figure out the scope a 35(c) petitioner's claim before simply handing over the whole file because the claim could turn out to be limited and narrow.



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GRIEVANCES AND ALLEGATIONS (continued from page 4)

The obvious solution to avoiding an IAC claim is to do everything right, research every case and ask every question, but that is impossible to do and the best trial lawyers will tell you they make mistakes in every trial. Trial work is an art, not a science so there is not a single, correct way to approach a case. Any aggressive litigant makes decisions throughout a trial they might regret after the verdict. But, that is not the point of a 35(c) petition. A quick memo to the file about WHY you made the decision you made, e.g. choosing not to call a certain witness will help you remember the strategy behind decisions made during a trial. As an example, if a client makes an unreasonable investigation demand, write a memo and put it in the file. Ms. Ring wants her attorneys to document why certain client demands were not made. She even suggests sending your client the memo explaining WHY you did not conduct that investigation.

It is important to remember the client decides whether to plead, testify or file an appeal (Constitutional rights), but the lawyer gets to decide which witnesses to call and which jurors to excuse for preemptory challenges. On issues of trial strategy, defense counsel is "captain of the ship." *People v. Bergerud*, 223 P.3d 686,693 (Colo. 2010). Of course, it is always the best practice to include your client in such decisions and get them on board with your trial strategy, but if there is a trial strategy you make against your client's wishes, write a memo to the file and explain why you proceeded as you did. Mr. Coyle said that a finding of ineffective assistance of counsel is a different standard than whether an attorney is incompetent or neglectful. The OAR will look at the totality of circumstances. In fact, Mr. Coyle explained, sometimes falling on one's sword is a mitigating factor in determining whether a client was incompetent.

As a rule of thumb, regular communication with your client will likely keep the OAR away. If a complaint makes it through the initial intake to the regulation committee, having a detailed and well-documented file will help you defend against strategy decisions made. Lastly, if you did make a mistake and a 35(c) petition is filed, you do not need to be afraid to admit such mistakes.

Zak Malkinson is a partner in the law firm of Malkinson Wheeler Law. He practices criminal defense and is the co-chair fo the BCBA Criminal Law Section.



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RIDICU - LAWS

Park 'lounging' law rankles local family (ORDINANCE)

By KARI C. BARLOW / Daily News

Published: Monday, March 3, 2014 at 17:47 PM

FORT WALTON BEACH —A local family says their afternoon at a local park was ruined after a homeless person complained to police that they were lying down. Under the city code, visitors to parks cannot “sleep or protractedly lounge” on seats, benches or other areas.

Michelle McCormick said she and her husband were at Fort Walton Landing Saturday with two young children. She said her husband was wrestling with them when a police officer approached.

“She walked up to us and said, ‘Sir, I’m going to have to tell you to get up.

There’s an ordinance against lying down in the park,’ ” McCormick said.

“My husband was just incredulous.” Police Sgt. Bill Royal said the officer was responding to a complaint from a park visitor. “We received a phone call, and it was a homeless person,” he said.

“He was complaining about individuals lying on blankets near the gazebo.”

The call log indicates the officer made the family aware of the city ordinance that prohibits lying down in the park. McCormick said the officer was “pleasant enough” but firm about what the ordinance allows. “My husband sat up and by this time, he was fuming and we packed up to go,” she said. “... (The day) was so spoiled at that point, we didn’t want to stay.”

Police officials said the ordinance is intended to keep people from sleeping in the park and interfering with the use of local parks. “There’s a safety factor,” Royal said. “You may trip someone.”

City Manager Michael Beedie said he wasn’t sure when the ordinance was enacted but that it was designed to keep vagrants and others from sleeping in the park. Capt.

Tom Matz said the police department cannot discriminate against vagrants and must treat all park visitors equally. McCormick said the city should not use the ordinance to keep parents from relaxing with their children in a park on a sunny day.

“It’s taking a really big brush to a small problem,” she said. “It’s like they didn’t think about the ramifications.”

Contact Daily News Staff Writer Kari C. Barlow at 850-315-4438 or kbarlow@nwfweeklynews.com.

Follow her on Twitter @KariBnwfdn.

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Thank you Dave Harrison for submitting this article.

We would welcome any additions to this new section to the newsletter.

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BAR LEADERSHIP IS REWARDING AND FUN!

There are two openings on the Boulder County Bar Association Board of Directors beginning on July 1, 2014. There are nine members of the Board and each member serves a three-year term. The BCBA's Board of Directors is the managing and policy-making body. They meet once a month and attend a planning retreat in June. The general membership confirms the Board nominations at the annual meeting, which will take place on May 29.

The fundamental mission of the Boulder County Bar Association is to serve its members, help the public understand our legal system and promote the highest level of professionalism for the practicing bar. The board must continually reach out to new lawyers and non-members and seek the input of a broad range of lawyers to enhance legal services. We should always measure our efforts by the manner in which those efforts have affected our members and our profession. The BCBA must also serve the greater local community through concerted outreach efforts.

*Please send a letter of interest and consideration to
Christine@boulder-bar.org*

Mark your calendars for the Boulder County Bar Association ANNUAL MEETING AND RECEPTION Thursday, May 29th, 2014

**5:30 PM at the Boulder Dushanbe Teahouse
1770 13th Street**

**Cost is \$54 per person
RSVP at the bar's website www.boulder-bar.org/calendar
click on May 29**

PRESIDENT'S PAGE

By Judson Hite



I think I've determined – by comment – that writing about others is more interesting than the scold of more pro bono, mentoring, or public service. So let me try to bridge the genre.

Nearly all of the 20th Judicial District judges are standing for retention this year (more on that in another article by another author). As taking a "position" regarding a sitting judge up for retention may give the appearance of a political contribution in expectation of favor (see CRPC 7.6), I interviewed a new member of the loca bench who is not up for retention.

Meet Andrew Hartman:

Judge Hartman grew up in Detroit, at-

tended Michigan as an undergrad (great school), and law school at Georgetown. He played hockey in earlier days, shattering a wrist to end that past time, and oddly follows the Blackhawks instead of being a hometown Hockey Town fan. He's been practicing law for 25 years, first as a business lawyer and commercial litigator in private practice, and then in academia as the Director of Experiential Education at CU, teaching trademark and copyright law and coordinating the law school's intern/extern programs.

Judge Hartman was appointed six months ago, and explains that part of his motivation to join the bench was a belief that his background would add diversity to an institution typically bereft of commercial litigators. He explains too that becoming a judge at this point in his career appeared an appropriate change that allows him to continue to expand his legal training. It is refreshing to hear a judge admit he's still learning.

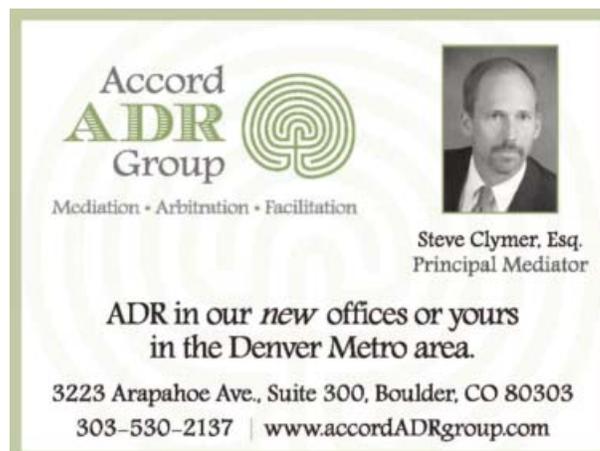
He enthusiastically describes his time on the job as "great." He enjoys his colleagues and their professionalism; is impressed by the quality of lawyering he witnesses; and has had an interesting milieu of cases on his civil docket. He enjoys the Court's trailing docket which has also allowed him to preside over criminal, domestic, juvenile, mental health, and parental right cases.

Asked what has surprised him about the job, Judge Hartman observes that the sincerity with which jurors approach their duties was unexpected. The excuses he anticipated hearing from those seeking to avoid jury duty have not appeared, and those who have served report they very much enjoyed fulfilling their responsibilities. That is surprising.

A shortfall he identified is the need for "low bono" assistance for the many individuals who do not qualify for court-appointed or pro bono representation and appear pro se for want of an affordable attorney. Often those situations are in domestic and FED cases. His observation is not that counsel would necessarily change the outcome (hmm), but that without legal assistance for these individuals, the process can become bogged down and dysfunctional. Segue back on the soap box: we all need to consider the availability of legal services to those priced out of our normal rates. Under Christine Hylbert's direction and coordination, the Boulder Bar has cultivated a panel of counsel who are willing to provide legal services on a reduced or sliding scale. You should get on that list.

Identifying tips for those who may ap-

(continued on page 11)



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PRESIDENT'S PAGE *(continued from page 10)*

pear in his Court, Judge Hartman offers that the typical format of presenting motions in limine (an agreed necessity) through formal motion/response/reply is often an unwieldy process for relatively mundane evidentiary matters. Explaining how to short-circuit that process and yet placate a lawyer's fear that any argument left out might be the winning argument, he suggests a stipulated listing of limine issues be placed before the court, or that the parties request a trial management conference or brief hearing, rather than engaging in a paper deluge.

My parting shot was to ask the good

Judge to identify one characteristic about himself that might not be known to others. After a little consternation, he admitted being a semi-retired voluntary firefighter/EMT for the former Cherryvale, now Rocky Mountain Fire Department. That skill set afforded him the opportunity to once attend to a stricken airplane passenger - after no doctor or nurse or anyone staying at a Holiday Inn Express was found on board. Luckily the guy lived.

Admitting that fact a little pedestrian, Judge Hartman mentioned that he played water polo while at Michigan. That sounded cool. He explained it was a club sport coming up on its 100 year anniversary, and pointed me to 1992

NYT article on google (search: Michigan Flounders). Read it. He broke teeth and almost drowned. Very interesting.

Thank you for your time Judge! Next month: Bruce Langer (hopefully).

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PRO BONO PAGE

Pro Bono Referrals

Fourteen cases were referred during the month of February. Thank you to the following attorneys:

Howard Bernstein
Jonathan Boonin
Eve Canfield
John Clune
Judson Hite
John Seebohm
Craig Small
Bruce Wiener

Thank you to the following attorneys who accepted a mediation case in February:

Lauren Ivison
Beverly Nelson
Joan Norman

BCAP Volunteers

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

Pro Se Program Volunteers

Evan Branigan
M.L. Edwards
John Hoelle
Lauren Ivison
Chris Jeffers
Tucker Katz
Craig Small
Leonard Tanis

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April 28	Lee Strickler	303.443.6690



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