BOULDER COUNTY BAR ASSOCIATION NEWSLETTER NOVEMBER 2014



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NOVEMBER CALENDAR OF EVENTS

Wednesday, November 5
Boulder Interdisciplinary Committee
Update on Substance Abuse
Treatment Protocols: The Impact and
Treatment of the Whole Family,
Presenters: John Gilburt, PhD, CAC III
11:30 @ Millenium Harvest House
Register at Boulderidc.org

Wednesday, November 5
CIVIL LITIGATION
Busting the Myths of
Litigating in Boulder
Happy Hour Roundtable
4:30 at Holland and Hart
Free to attend. Drinks and
appetizers provided.

Thursday, November 6
BUSINESS
Emerging Enterprises Part 2: Helping
Entrepreneurs Make Good Choices
Presenters: Fern O'Brien,
Laurel Durham, and Matt Mckinney
Noon – 2 PM Bryan Cave
\$40 CLE 2 general credits and .8 ethics
\$25 New/Young Lawyers,
\$12 Lunch

Tuesday, November 11
SOLO/SMALL FIRM and CRIMINAL
Help! I was Arrested for DUI.
What Do I Do?
Presenter: Jay Tiftickjian
Noon @ Caplan and Earnest
\$25 CLE, \$15 New/Young Lawyers,
\$12 Lunch

Tuesday, November 11
PARALEGAL
Identity Theft - Investigation
and Prosecution
Presenter: TBD
Noon @ Dietze and Davis
\$12 Lunch

Wednesday, November 12 SOLO/SMALL FIRM Monthly Happy Hour 5:30 @ Conor O'Neills

Wednesday, November 12 WOMEN OF THE BCBA

Women of the Boulder County Bar Unite – A Happy Hour for Boulder Women Lawyers 5:30 @ The Bitter Bar – First drink and appetizers on the BCBA

Thursday, November 13
INTELLECTUAL PROPERTY
The US Patent and Trademark Office in
Denver: What It Means to Intellectual
Property Practitioners and Owners
in the Rocky Mountain States
Presenter: Russell Slifer
Noon @ Hutchison Black & Cook
\$25 CLE, \$15 New/Young Lawyers,
\$12 Lunch

Friday, November 14
NEW/YOUNG LAWYERS
Immigration 101
Presenters: Christina Fiflis and Igor Serbinin
Noon @ Justice Center Training Room East
\$15 CLE, Brown Bag Lunch

Friday, November 14
AVAILABILITY OF LEGAL SERVICES
Monthly Roundtable
Noon @ Boulder County Legal Services
Brown Bag Lunch

Tuesday, November 18
EMPLOYMENT
Ethical Implications of a
Multi-Jurisdictional Employment Practice
Presenter: Jim Coyle
Noon @ Bryan Cave
\$25 CLE, \$15 New/Young Lawyer,
\$12 Lunch
This program is accredited for
1 general and .8 ethics CLEs

Wednesday, November 19
FAMILY
SAFE Services: The Intricacies of
Protocol and Communication
Presenters: Judge Judy LaBuda,
Dr. Robin Menschenfreund,
and Jenny Shaw
Noon brown bag @ Justice Center
Training Room East
\$25 CLE, \$15 New/Young Lawyer

Wednesday, November 19
TAX, ESTATE PLANNING, AND PROBATE
The Good, The Bad, and the Ugly of the IRS
Presenter: William Van Dusen
Noon @ Hutchison Black and Cook
\$25 CLE, \$15 New/Young Lawyer,
\$12 Lunch

Thursday, November 20
REAL ESTATE
Reviving Development or Starting
Over in the Current Economy:
Financing and Other Trends and Requirements for Commericial Development
Presenter: Gabriel Arebalo and April Lutz
Noon @ Dickens in Longmont
\$25 CLE, \$15 Lunch
\$25 CLE new/young lawyers

Thursday, November 20 BANKRUPTCY Monthly Roundtable Noon @ Agave

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HISTORIC PUBLIC ROADS - WHAT ARE THEY? WHO OWNS THEM? WHO CAN USE THEM? A BRIEF SYNOPSIS OF A LAW KNOWN AS R.S.2477.

By Kenneith D. Robinson and Meghan C. Hungate

Introduction

Access to land in Colorado, perhaps at one time land remote from development, has become an increasingly contentious issue. Contributing factors include increasing land values, increased emphasis on privacy and private property rights, changes in property ownership, and increasing use and development in these rural areas. A contemporary right of access over what may be an historic trail or road could arise from a relic of the 19th Century, a statute known as "R.S. 2477."

The Legal Framework

In 1866, Congress passed a statute, known as Revised Statute 2477 ("R.S. 2477"), as part of the 1866 Mining Law, which also addressed the use of existing roads and authorizing access through patents and claims. ¹ The entirety of R.S. 2477 is one sentence: "The right of way for the construction of highways over public lands, not reserved for public uses, is granted." ²

R.S. 2477 was unique in that "the establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal site; no formal act of public acceptance on the part of the states or localities in whom the right was vested." In fact, in 1938, an early Department of Interior regulation was published dealing with R.S. 2477 rights-of way, which provided:

This grant becomes effective upon the construction or establishing of highways, in accordance with the state laws, over public lands not reserved for public uses. No application should be filed under the act, as no action on the part of the Federal Government is necess ary. ⁴

In 1976, however, Congress abandoned its prior approach to public lands and instituted a preference for retention of the lands in federal ownership, with an increased emphasis on conservation and preservation.⁵ As a result, R.S. 2477, enacted to encourage development and settlement of the West, was repealed. However, the repealing act specifically provided that it would not have the effect of terminating any right-of-way previously permitted, i.e., before R.S. 2477 was repealed. Colorado has its own version of R.S. 2477, which states "All roads and highways which are, on May 4, 1921, by law open to public traffic shall be public highways within the meaning of this part 2."

As interpreted by Colorado courts, R.S. 2477 serves as "an express dedication of roads over public land where the roads were established by public use."

The "sum" of the Colorado courts' holdings on R.S. 2477 has been stated as follows:

[T]he statute is an express dedication of a right of way for roads over unappropriated government lands, acceptance of which by the public results from 'use by those for whom it was necessary or convenient.' It is not required that 'work' shall be done on such a road, or that public authorities shall take action in the premises. User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use

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HISTORIC PUBLIC ROADS

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be by only one, it still suffices.9

"[S]uch use must be established before the land in question is withdrawn from the public domain or included within a reserve." 10

Colorado has adopted a broad definition of what constitutes a "road or highway" under R.S. 2477, which may include "roads created by the passage of wagons, etc...." as well as a "footpath." Indeed, "the purpose of the act was to give every settler, however unable to build a road, lawful access to whatever land he chose to enter. If access is feasible without work with pick and shovel no such work is necessary, and it would be a mistake to hold that action by any governmental authority is required." 12

Proving an RS 2477 Claim Today

Access disputes among neighboring property owners often arise in the context of a locked gate, through which multiple property owners must travel to access their respective properties; or, access to a mining claim, which now may be surrounded by land owned by others and use of which causes dis-

agreements between them. Establishing both the existence and use of a road or trail prior to when the land it traverses was removed from the public domain (by reservation or patent, for example), is vital to a successful R.S. 2477 claim.

However, as one federal court has noted, in light of the federal government's public lands policies, which encouraged settlement and development of public land in the West, "parties rarely had an incentive to raise or resolve potential issues while [R.S. 2477] was in effect...." Since the enactment of the Federal Land Policy and Management Act in 1976, and the contemporary focus on conservation and preservation of public lands, "litigants are driven to the historical archives for documentation of matters no one had reason to document at the time," in order to litigate R.S. 2477 claims.15

In other words, in the late 1800s and early 1900s, settlers had no reason to document or to make official their use of a particular wagon road or trail to access their homestead. Now, in an

era when private property rights are asserted more vigorously, for example, a locked gate by one landowner may precipitate the need for another to prove that the locked gate is blocking access over a route that had been used before the land over which it crosses was owned privately. Witnesses who could have testified about this early use are likely deceased or at least quite elderly now. As a result, counsel may be referred to the United States Archives to uncover original homestead and mining patents, the land entry applications for such patents (written in the perfect cursive common at the time), original surveys and survey notes by the Bureau of Land Management, ditch company files and surveys, USGS surveys and maps, as well as to local museums and archives for local history about the development of a particular area. Such an adventure is rich with information of a bygone era, which may be as interesting as it is necessary to prove a right to public access over a particular road today.

Counsel should carefully evaluate who should be made a party to any lawsuit, including any party with an interest in the land over which the route crosses. However, the U.S. District Court for the District of Colorado has limited parties' abilities to pursue any R.S. 2477 claim against the federal government (for access over land now owned by the United States Forest Service, for example), based on issues of standing under the Federal Quiet Title Act.16 Although Colorado courts have routinely litigated R.S. 2477 claims between private parties, the local county may also be a necessary party to such claims.17

Conclusion

Although R.S. 2477 was repealed long ago, certain arguments about access to what are properly characterized as historic routes may still arise for years to come. Certainly, disputes between neighbors regarding access to their respective private properties will con-

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HISTORIC PUBLIC ROADS

(continued from page 4)

tinue to arise. Evaluating whether there may be a claim that such access is over a public road may provide your client with a remedy not otherwise available; and, proving it can be as much a history project as a complicated legal claim, and one that takes both the parties and their counsel on a rich historic journey.

FOOTNOTES

- 1. The 1866 Mining Law followed the 1862 Homestead Act (12 Stat. 392; 1877 Desert Land Act, ch. 107, 19 Stat. 377, as amended, 43 U.S.C. §§ 321-323), which were both intended to encourage settlement of open lands, expand the nation's economy, and legitimize the access required for these activities.
- 2. Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866) (formerly codified at 43 U.S.C. § 932) (repealed by 43 U.S.C. § 1769).
- 3. Southern Utah Wilderness Alliance v. BLM, 425 F.3d 735, 741 (10th Cir. 2005). 4. U.S. Dept. of Interior, Report to Congress on R.S. 2477, June 1993, at p. 20; Camp Bird Colorado, Inc. v. Bd. of County Commssr's of Ouray County, 215 P.3d 1277, 1284 (Colo. App. 2009) (no federal or state statutory procedures or require-

ments for accepting a grant under R.S. 2477).

- 5. See Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005).
- 6. Lee v. Masner, 45 P.3d 794, 795 (Colo. App. 2001); Southern Utah Wilderness Alliance v. BLM, 425 F.3d at 741.
- 7. C.R.S. § 43-1-202.
- 8. Lee v. Masner, 45 P.3d at 795.
- 9. Camp Bird Colorado, Inc. v. Bd. of County Commssr's of Ouray County, 215 P.3d at 1285; Leach v. Manhart, 102 Colo. 129, 133, 77 P.2d 652, 653 (1938).
- 10. Barker v. Bd. of County Comm'rs, 49 F.Supp.2d 1203, 1214 (D. Colo. 1999); see Korf v. Itten, 64 Colo. 3, 169 P. 148 (1917). 11. Heath v. Parker, 30 P.3d 746, 750 (Colo. App. 2000) (citing Simon v. Pettit, 687 P.2d 1299 (Colo. 1984) and Central Pacific Ry. V. Alameda County, 284 U.S. 463 (1932)). 12. Nicolas v. Grassle, 83 Colo. 536, 538, 267 P. 196, 197 (Colo. 1928) (analyzing R.S. 2477 and finding that the road in question in that case was in the evidence and pleadings and "was in use before the defendants' entry" into the land and was therefore a public road); see also Rozman v. Allen, 100 Colo. 503, 68 P.2d 440 (1937) (public road claimed based on use to drive cattle back and forth to the mountain ranges).

- 13. Southern Utah Wilderness Alliance v. BLM, 425 F.3d at 741.
- 14. 90 Stat. 2743, 2789, § 7 (codified at 43 U.S.C. §§ 1701-1782 (1976)).
- 15. Id. at 742.
- 16. See Fairhurst Family Assoc., LLC v. U.S. Forest Service, 172 F.Supp.2d 1328 (D. Colo. 2001).
- 17. *Bittle v. CAM-Colorado, LLC,* 318 P.3d 65 (Colo. App. 2012).

Kenneth Roboinson is the partner in the law firm of Robinson & Tweedy, PC. Meghan Hungate is the co-chair of the BCBA Civil Litigation and is an associate with the law firm of Robinson and Tweedy, P.C.



LAWYERS ANNOUNCEMENTS

The 20th Judicial District is pleased to announce that

Michelle Crozier Haynes and Donna Powell

have been hired as Self-Represented Litigant Coordinators (SRLC)

The "Sherlocks" will provide information to self-represented litigants regarding state statutes, rules, policies, and procedures; engage in community outreach initiatives to strengthen resources for self-represented litigants; and develop written, online and visual resources to assist self-represented litigants. They cannot provide legal advice.

Information regarding Self-Help Centers can be found by calling (303) 441-4741, by email to BoulderCourtSelfHelp@judicial.state.co.us or on the court website at: http://www.courts.state.co.us/Self_Help/

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ATTORNEYS AT LAW

Is Pleased to Welcome

Lauren E. Groth

Formerly a judicial clerk for the Hon. Richard Paez U.S. Ninth Circuit Court of Appeals and formerly an associate with Steptoe & Johnson in Washington, D.C.

As an associate with the firm.

Lauren's practice will focus on civil litigation.

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Boulder County Bar Foundation Board of Trustees has approved the 2014 grants to the following organizations and programs in Boulder County.

Boulder County Legal Services
Boulder High School Mock Trial
Children First of the Rockies
FOCUS REENTRY Program
Immigrant Legal Center
Safe Shelter of St. Vrain Valley
Voices for Children/CASA
YWCA

Special thanks to our Boulder County Bar Foundation Fellows for their annual contributions that allow us to fund these worthy programs. Boulder County Aids Project Local Legends Gala on November 9 at 5 PM will honor

Paul Bierbaum, BCAP'S Pro Bono
Legal Team Coordinator since 1991,
Hillary Hall,
Boulder County Clerk and Recorder
Gay Marriage Advocate
Ann Puleo, BCAP Volunteer
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The Gala will take place
At the Hotel Boulderado and
Licnese No 1
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VOX POPULI



BRUCE W. WARREN "BIFF"

Name and Area of Practice:

- 1. Bruce W. Warren "Biff" My practice is a general civil practice, including primarily Wills & Estates, Real Estate, Business Law, and Family Law.
- 2. Where you went to school and law school:

I went to undergrad at the University of Nebraska (Political Science) and also went to Law School at Nebraska.

3. In your view, what are the advantages of being a member of the Boulder County Bar Association? In an age when everything is becoming electronic, we don't run into other lawyers at the courthouse as often as we used to, nor do we meet in person as

much. The Boulder County Bar Association helps me stay connected with other attorneys, through the Newsletter, CLE programs and other Bar events. The Bar's mentor program is of great value to young lawyers – I was fortunate to have then Bar President Chris Brauchli as a mentor many years ago.

4. When you are not practicing law what are your outside interests.

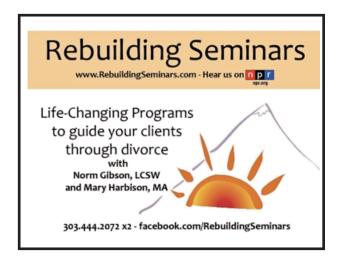
When I'm not practicing law, I cover local sports for the Left Hand Valley Courier, a Niwot newspaper. I'm also an assistant baseball coach at Niwot High School, and play in two bands, the Niwot Community Semi-Marching Free Grange Band (no musicians were harmed in the making of this music) and a classic rock band, On Fire.

5. Please tell us something most people don't know about you. *

My dad, a CU Law alum and retired district judge in Nebraska, gave me the nickname "Biff" (after a Nebraska football coach, Biff Jones) when I was born. I never heard "Bruce" until I went to college.

I'm credited (erroneously) with inventing Berry Peppers, a frozen soft drink sold at the swimming pool in my hometown of Creighton, Nebraska, which celebrates Berry Pepper Days every summer. I did help with the taste tests, and trademarked the name when I managed the pool.

* Editors note: Biff sent two special stories about himself and I was supposed to pick one but I thought both were very worthy of publishing. Thank you Biff!





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PRESIDENT'S PAGE

By Star Waring



WHY IT IS IMPORTANT FOR EXPERIENCED LAWYERS TO MENTOR NEW LAWYERS

The term "mentor" is derived from Greek mythology and is based upon the story of Mentor who was placed in charge of Telemachus, the son of Odysseus, when Odysseus left for the Trojan War. The goddess Athena later disguised herself as Mentor and in that capacity imparted practical advice to the young Telemachus. Now, we use the word "mentor" to describe someone who shares knowledge and wisdom with a less experienced colleague.

Like many of you, I have had the opportunity during my career to work with inexperienced new lawyers who were hired right out of law school after passing the bar. They showed up for work eager to begin practicing law and put their new legal skills to the test. Most of them possessed strong analytical skills that were sharpened during three years of law school and many of them could write well enough. But they often seemed to flounder when it came to understanding the finer points and the practical side of legal practice. I definitely include myself in that category as a newly minted attorney in 1979.

One of my early faux pas was to overlook the proper entity for which an insurance claim was filed. Based on typical large firm procedure, I was handed the litigation file on the morning of a county court hearing involving an insurance subrogation claim for an auto accident and told to handle the hearing. The automobile in question was actually owned by the John Jones Corporation and the insurance policy was issued to the Corporation but Mr. Jones testified under my direct examination that he personally owned the automobile involved in the accident and that he was entitled to recover damages. After the judge dismissed the claim, he asked me to meet him in his chambers where he kindly and patiently explained that it is necessary to pay attention to the entity. I was of course mortified and forever after, I have been very careful to remember the "who owns the car" rule. This incident demonstrates that there is so much that we simply do not learn in law school and so much that a good mentor can help us learn before we make a mistake.

Fortunately for me, I did have great mentoring in my field of practice, water law. Early on in my career, I was able to work with attorneys in my firm who were willing to spend the time necessary to explain exactly what they wanted me to research and why the issues were important. And they generally tolerated any follow up questions I had when the assignment was not clear or when my research went in a different direction than

anticipated. These mentors let me take baby steps by second-chairing a case before I was allowed to handle the entire trial on my own. Eventually, they turned over entire clients to me. After a few years of mentoring, I was ready to bring in and represent new clients on my own.

Back in the 1800's, people became lawyers by "reading the law." They worked under the guidance of experienced lawyers while studying designated legal treatises. Abraham Lincoln began his legal career in that manner. Law schools were rare in the United States until the late nineteenth century so working with an experienced mentor was the best way to learn the finer points of legal practice. Surprisingly, a few jurisdictions, including California, Maine, Washington, Vermont and Virginia, still allow an applicant who has not attended law school to take the bar exam after reading the law under the supervision of a judge or attorney for a prescribed period of time.

I believe proper mentoring for attorneys is just as important today as it was over a century ago and in some ways it is even more important now. One of the trends resulting from the 2008 recession was the oversatura-

(continued on page 8)



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PRESIDENT'S PAGE

(continued from page 8)

tion of the legal market and the dearth of jobs for lawyers. A direct result of the dismal job market was that many lawyers had no choice but to hang their own shingles right of out of law school and jump into the quagmire of practicing law without being able to work with a built-in mentor. The risk of committing malpractice is significant for inexperienced lawyers in general, especially because the practice of law has become much more complicated with each passing year.

Fortunately for inexperienced attorneys in Colorado who do not work in a law firm with an experienced colleague, there are now many opportunities for lawyers to be mentored by experienced attorneys. Both the Colorado and the Boulder County Bar Associations have stepped up to the challenge by establishing mentoring programs for newly admitted attorneys and in some cases for attorneys who are switching into a new field of practice. In Boulder County, the Bar Association has for many years paired many new lawyers with more experienced lawyers who practice in similar areas of practice. BCBA's executive director, Christine Hylbert, keeps a list of new lawyers who are seeking a mentor and she actively searches for qualified mentors who would be a good fit. One important qualification is that the mentors must take the commitment seriously. Christine encourages the mentors to meet with their protégés at least once a month over coffee or lunch and if possible take them to Bar Association events or other gatherings where they can meet other lawyers. The main thing is to share as much practical advice as you can with your mentee and be available to answer any questions they may have about working in your area of practice. Having been a mentor myself, I can tell you it is a very satisfying experience.

The Colorado Bar Association formed the Colorado Attorney Mentoring Program (a/k/a "CAMP") in 2011. This is a more formal mentoring approach which requires a 12 month curriculum to be developed by the mentor and mentee. The curriculum includes subject areas such as "Litigation and Transaction Experiences," "Law Office Management and In-Office Procedures," "Working with Clients, and "Colorado Rules of Professional Conduct, Professionalism and Civility." CAMP provides mentor training and materials to mentors who must be Colorado attorneys or judges who either are actively practicing or retired and in good standing. For more information, contact the Colorado Bar Association.

As experienced lawyers, I believe we have a moral duty to help young lawyers who are beginning their careers, just as we were helped when we started our ca-

reers. This can happen either through the formal mentoring programs established by the bar associations or more informally on an ad hoc basis. I often get emails from young lawyers who just want to talk about what I do or have questions about how to handle a particular issue. I always try to take the time to meet with them for coffee or speak with them on the phone to answer questions. I strongly encourage each of you to consider being a mentor if you are not already doing so.

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	All fees in estate shall be subject to the approval of the Court which may in its discretion set the fees at less		15. Consultation and Advice on simple matter not requiring research, not less than 5.00
	than 4% when less than average work is involved. Jointly held property shall be excluded from consideration in Estates, and shall—be charged for separately.		* If a lawyer is handling a large volume of abstract examinations for an individual client, a bank or lending instituton, appropriate reduction may be made.

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COAL CREEK REGIONAL TRAIL RESTORATION

Boulder County Bar Volunteers Help Restore Coal Creek Regional Trail

On October 11, 2014, 60 volunteers, including approximately 20 volunteers from the Boulder and Colorado Bar Associations, conducted a flood restoration project along the Coal Creek Trail in Lafayette, Colorado. The flood of September 2013 caused severe damage to the stream and trail systems across northeastern Colorado. The popular Coal Creek Regional Trail, in Lafayette, was severely damaged, as flood waters washed away the trail and much of the stream-side vegetation. Wildlands Restoration Volunteers (WRV), an environmental non-profit that has partnered with the Colorado Bar Association on other restoration projects, organized a volunteer event to clear debris shortly after the flood. However, the City of Lafayette is rebuilding the trail this year and asked WRV to return and help restore stream-side habitat near the trail.

The Boulder County Bar Natural Resources and Environment co-chairs, Ann Rhodes and Gabriella Stockmayer, organized local attorneys to help with the WRV restoration efforts. The result of everyone's efforts on a beautiful October day (see photo below) included 250 native shrubs and trees

planted, over 14,000 square feet of stream bank seeded and mulched (see more photos below), piles of invasive species removed, and more than 200 feet of protective fencing erected to protect the area. Everyone got a bit muddy and had a great time, enjoying a lunch catered by Noodles & Co.

If you would like to be involved in future environmental public service projects, please contact Ann (amr@bhgrlaw.com) or Gabriella, gstockmayer@dietzedavis.com If you just can't wait for the next Boulder County Bar volunteer project, check out the numerous projects at www.wlrv.org.

Ann Rhodes is the co-chair of the BCBA Evnironmental, Natural Resources Section with Gabriella Stockmayer. She is an associate at the law firm of Berg Hill Greenleaf and Ruscutti, PC

BEFORE



AFTER



PRO BONO PAGE

Pro Bono Referrals

Nine cases were referred during the month of September. Thank you to the following attorneys:

Norm Aaronson- CULADP Christina Ebner M.L. Edwards Matt James Thomas Moore

Pro Se Program Volunteers

Evan Branigan
Mary Louise Edwards
Lenore Fox
John Hoelle
Lauren Ivison
Tucker Katz
Craig Small
Chris Tomchuck

BCAP Volunteers

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

Paul Bierbaum Laurel Herndon

Pro Bono Corner

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November 10 Todd Stahly 303.797.2900

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