



## BOULDER COUNTY BAR NEWSLETTER

# DECEMBER 2013

### SECURITIES AND EXCHANGE COMMISSION INQUIRIES AND INVESTIGATIONS: AN OVERVIEW AND KEY CONSIDERATIONS FOR YOUR CLIENT

By JENNIFER BIRLEM

Imagine that you receive a call from a client that you have previously assisted in structuring a corporate transaction or entity, telling you that they have received a letter or a subpoena from the Securities Exchange Commission requesting the production of documents, or to take their testimony. Or perhaps you are in-house counsel to a corporation that has received this type of request. You might think that responding to such a request would be similar to helping a client navigate a lawsuit filed by a private litigant. While there are some similarities between the two, a regulatory investigation involves unique issues that require both practical and

strategic responses that differ in some significant ways from private litigation.

While both are “adversarial” actions, the most important distinction is that with an SEC inquiry you are not on a level playing field with your adversary in the way that you would be with a private litigant. The government regulator is, in essence, both your adversary and the fact-finder. The SEC is charged with oversight of the nation’s securities markets and they have a large enforcement staff – with several

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#### HAPPY HANUKKAH MERRY CHRISTMAS AND HAPPY NEW YEAR

The Young Lawyers Section is  
sponsoring  
A Precious Child Gift donations.

We have 30 children who have  
their Christmas lists ready.  
Please call our office or email  
[sarah@boulder-bar.org](mailto:sarah@boulder-bar.org) to  
choose a child to buy for this  
Christmas.

Gifts can be delivered to the  
BCBA Holiday Happy Hour  
after the Ethics Seminar  
on Thursday, December 5 at the  
Millennium Harvest House or to  
the bar offices.  
Deadline for presents is 12/13



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## CALENDAR OF EVENTS

Pre-registration is required for all BCBA CLE programs. Register by e-mailing [sarah@boulder-bar.org](mailto:sarah@boulder-bar.org), or pay online with a credit card at [www.boulder-bar.org/calendar](http://www.boulder-bar.org/calendar).

Wednesday, December 4

### BOULDER IDC

Parallel Parenting Versus Cooperative Parenting – How to Choose the Right Fit  
Presenters: Robert Cooper, J.D., M.A., and Suzanne Pinto, Ph.D.

11:30 a.m. @ Avalon

Cost: \$20 IDC Members, \$25 Non-Members

### ALL BAR HOLIDAY HAPPY HOUR

5 PM after the Ethics Update  
Hosted cocktails and appetizers  
You can bring your gifts for A Precious Child  
Young lawyers will be there to pick them up

Wednesday, December 11

### CRIMINAL

iPad Apps Which are Useful for Trial  
Presenter: Sean Finn  
Noon @ East Training Center  
\$20 CLE, \$10 new/young lawyers

Thursday, December 5

### ETHICS SEMINAR

Presenters: Reba Nance, Alec Rothrock, Charles Mortimer

1:00-4:45 pm @ the Millennium Hotel

\$100 for members; \$65 for new/young lawyers (members); \$125 for nonmembers

Wednesday, December 11

### SOLO/SMALL LAW FIRM

Initial Meeting – Brainstorming Ideas  
Noon @ Caplan & Earnest

Tuesday, December 17

### BUSINESS

The Economic Loss Rule:  
Is Business Tort Dead?  
Presenter: James Ghiselli  
Noon @ Hutchinson Black & Cook  
\$20 CLE, \$10 new/young lawyers  
\$11 Lunch



In lieu of sending gifts or greeting cards this year, Garlin Driscoll will make charitable donations to the United Way Foothills Flood Relief.



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## 2013 ANNUAL JUDGES DINNER



Left to right:  
Judges Tom Mulvahill,  
Andrew McDonald  
and  
DD Mallard

Left to right:  
Sydney Dolan,  
Eric Gold,  
Larry Hoyt and  
Pat Mayne



Left to right:  
Judges Dale Hale,  
Carol Glowinsky and  
Judy LaBuda

## SECURITIES AND EXCHANGE COMMISSION *(continued from page 1)*

regional offices around the country, including Denver – charged with investigating potential violations of the securities laws.

An SEC enforcement inquiry or investigation requires a prompt and focused response because such an inquiry can present significant issues for an issuer and its officers. Responding to investigations often involves a significant amount of time and resources. The SEC can seek remedies including monetary penalties, disgorgement, injunctions, administrative cease-and-desist orders, and orders barring individuals from serving as officers or directors of public companies. While investigations may be concluded without any enforcement action, the potential consequences are substantial and handling such inquiries consistent with the law and best practices is essential in order to limit damaging consequences for your client.

Most SEC investigations begin as informal inquiries, begun by a member of the SEC Staff as the result of a news report, trading trends, a tip, or referral by another law enforcement agency. Informal investigations do not require the authorization of the Commission members; as a result,

the Staff does not possess subpoena power to compel the production of documents or testimony. Despite this fact, it is highly advisable to cooperate fully with an informal inquiry. Where strong advocacy and objections to document requests might win the day in a private litigation, they will win you no points with the SEC Staff and your client will likely find themselves the subject of a formal investigation approved by the Commission. It is in your client's best interest to keep the inquiry an informal one because your client retains more control over the scope and timing of an informal inquiry. The Staff is also typically more willing to close such inquiries without enforcement action. Finally, informal inquiries may not carry the same disclosure requirements for your client as formal investigations. Cooperation with informal inquiries typically involves more than just responding to the Staff's specific requests. It requires keeping the Staff informed of steps the company is taking to respond to the inquiry, and in some cases your client may want to consider hiring an independent accountant or commissioning an internal investigation in order to assuage the Staff's concerns.

As mentioned above, the SEC Staff

may also choose to seek a formal order of investigation from the Commission. This is a fairly routine administrative matter and involves only showing a good-faith basis to believe an investigation is warranted. The issuance of a formal order of investigation results in the SEC Staff being granted subpoena power. The Staff can then subpoena third parties, such as accountants, former employees, or entities that have done business with the target of the formal investigation. Once a formal order is instituted, your client will have substantially less influence in negotiating with the Staff the scope and timing of the inquiry. Moreover, a formal investigation can only be closed by senior enforcement staff, so it becomes more difficult to resolve with the staff than an informal inquiry.

At the conclusion of an informal inquiry or formal investigation, the Commission is empowered to bring a civil enforcement action in federal court or before an Administrative Law Judge, seeking injunctive action, monetary penalties or disgorgement, or requiring undertakings. Before making this recommendation, however, the staff will typically provide the proposed respondent/defendant with a notice of its preliminary determination – called a "Wells notice" – to which the recipient has the opportunity to make a written or video-taped "Wells submission" to the staff, presenting his or her view of the facts and any arguments against the filing of an enforcement action. It should be noted that, for a variety of reasons, the SEC settles far more cases than it litigates – both before and after the Wells process. Therefore, while interactions with the Staff are intended to convince them not to

*(continued on page 8)*

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## PRESIDENT'S PAGE

By JUDSON HITE



professional and personal relationships - understanding and advancing a colleague's or client's quest, or lending a neighbor a truck, masked as tasks, all have their own reward.

Our occupation is enjoying some good fortune too. After several years of arguable over saturation, the market is turning, although the upcoming ranks are thinning. Those still in it have a good chance to win it. Law schools and institutional firms may be shrinking a bit, but solo ranks are swelling. Many of us, especially in local time and place, are recognizing freedom and financial stability without 2200 or even 1600 hours per year. That's a trend worthy of giving thanks.

The silly season. The Holidaze. A time of celebration and reflection. Giving thanks. All of it about to go off.

As Thanksgiving sneaks up on me, I realize there is much for which to be thankful: family, and the faith of love; a rewarding livelihood; representative democracy; healthcare reform; the hope of being born in this time and place ... pushing envelopes. As well, I enjoy the good fortune of complicated

It's also the season to give. There are many not as fortunate, either by circumstance or choice, for which the benefit of shared largess - of voluntary wealth redistribution - is crucial. And there are many ways to give. These are some local over-the-top, beyond bell-ringing opportunities: tipping pints to prevent child abuse (really?); stuffing sandwiches for "Brown Thursday" workers; skiing to defeat ALS; and bouncing for brains -

on a trampoline to support neurological research. Last year, on a single day in December, Boulder County residents gave \$1.6 million to charities. There is plenty to give.

Likewise, the spirit of the holidays infuses good intention into much of our daily interactions. An aura of goodwill oozes into salutations. My mutual exchange of bon appétit and holiday cheer with the gentlemen collecting carts is mutually genuine. Although statistically, crime is higher in the Christmas season, if you can steel yourself from the stress of commercialism and the possibility of too much family time, a sense of peacefulness can overcome typical self absorption and flippantness.

Which brings me to the point of this month's harpy-ness: the charity, the good deeds, the goodwill toward man, the fine sense of self, all that going off at T-minus 35 days to the New Year ... why doesn't it go off all year? Shouldn't we espouse these traits every day? Someone dear to me rises in defense of an attack on the

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## LAWYER ANNOUNCEMENTS



**Vincent, Romeo & Rodriguez, LLC  
Is pleased to announce that  
Brooke W. Brestel  
has joined the firm as an associate.  
Her practice will focus on elder  
and probate litigation matters.**

<b>Metro Denver</b>	<b>Boulder</b>
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<b>Englewood 80111</b>	<b>Louisville 80027</b>
<b>(303) 770-0673</b>	<b>(303) 604-6030</b>

**We will say Good Bye and Good Luck to  
Sarah Flinn, BCBA executive assistant  
as she is leaving to go back home to Utah.**

**Thank you Sarah, you have been an amazing asset to the bar!  
We wish you well in your new endeavors for 2014 and beyond.**

**And we will welcome  
Laura Zang as the new BCBA Executive Assistant.  
Laura will begin at the bar association as of December 16**

## WHY IT PAYS TO ACCEPT CREDIT CARDS

Credit card acceptance is a practice management tool often overlooked as a means to increase revenue and cash flow. Clients often prefer the convenience of paying with a credit or debit card. Opening a merchant account to accept payment is a simple process giving you more control of your receivables.

### CASH FLOW 101

Accepting credit cards allows law firms to benefit from immediate cash flow. It helps eliminate “check is in the mail” and other common delay tactics. With most merchant accounts, credit card deposits are available within 24-48 hours. Clients depend on you for assistance with legal matters, not a credit line. It makes fiscal sense to let Visa and MasterCard banks manage credit lines, handle collections and late payments.

### CREDIT WORTHINESS OF YOUR CLIENTS

Most law firms do not have an ‘underwriting’ process when accepting new clients. Generally, there is no credit check or credit review. As a result, you may have zero insight into your client’s true ability to pay. Every time an invoice goes unpaid or payment is late, your firm is essentially extending

credit to clients and putting your receivables at risk. Unfortunately, a legal bill is one of the easiest expenses not to pay. Historically, law firms do not report to credit agencies or enforce late fees. It is also tricky to sue a client for unpaid fees. The simple fact is banks do underwriting, attorneys don’t. Take advantage of the card bank’s underwriting department. If a Visa or MasterCard bank does not take the financial risk on an individual, why would you?

### MERCHANT ACCOUNT BASICS

If you consider credit card acceptance, ensure the processor you choose understands the specific needs of a law firm. It is unlikely you have a check-out aisle or cash register in your firm, so look for solutions that enable you to accept payment in a professional manner. There are many custom options available which include secure web-based programs, online invoicing and smart phone applications. On average, total fees for a merchant account will range from 2 to 3% of your transactions.

### SEPARATING EARNED AND UNEARNED FEES

One key feature to consider when opening a merchant account is the

ability to separate earned and unearned fees. To stay in compliance with the American Bar Association and most state guidelines, your merchant account should prevent comingling of funds by correctly depositing any unearned fees or advanced payments directly to your trust account. Most importantly, a compliant merchant account must protect the trust account from any third party withdrawals, including processing fees.

### USE YOUR WEBSITE

Consider expanding the use of your website and add a “Pay Invoice” link. This gives clients a convenient way to pay through the click of a button. Encourage clients to pay online. This drives more traffic to your website and increases visibility of your firm.

### THE BOTTOM LINE

A merchant account can be the key to resolving payment and cash flow issues. It provides payment flexibility as well as convenience. In addition, offering credit cards as a payment option has been proven to attract clients and win new business.

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## SECURITIES AND EXCHANGE COMMISSION *(continued from page 4)*

bring an enforcement action, those interactions can also have an impact on the terms of any settlement that might be reached. For that reason, as described above with respect to informal investigations, cooperation with the Staff is critical to the best outcome for your client.

Practically speaking, the following are the key steps that should be taken when faced with an informal inquiry or formal investigation:

- Retain experienced counsel as soon as possible. SEC investigations present unique issues that require experience beyond that presented by private litigation.
- Counsel should contact the SEC Staff promptly to advise that counsel has been retained. Counsel should seek to ascertain the focus of the staff's investigation – your client could be receiving a request for information or a subpoena because they are the target of the investigation or because they are a third party

that the Staff might think possesses useful information. If a formal order has been issued, counsel should request a copy.

- Counsel and client should work closely together to preserve and gather all relevant information. Employees should be advised only to communicate with the SEC Staff through counsel. Counsel and client should consider the need for an internal investigation or whether individual officers or employees should be provided with separate counsel.
- Client and counsel should consider disclosure obligations and whether any third parties should be notified.

Most importantly, as noted above, cooperation with the Staff is of paramount importance. It is critical that those who are involved in an SEC inquiry or investigation respond fully and promptly to all requests, and confer with the Staff early and often regarding the scope of their

inquiry and what relevant information your client can provide. This is a more “informal” process than litigation. For example, your client can at any time request a meeting with or to make a presentation to the Staff, can confer with the Staff regarding actions taken internally to mitigate the Staff's concern (such as internal investigations or an independent accountant review). This kind of cooperative advocacy and dialogue with the Staff can go a long way toward achieving the most beneficial outcome for your client.

*Jennifer Birlem is an attorney at Shoemaker Ghiselli + Schwartz, and specializes in SEC investigations.*



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## **PRESIDENTS PAGE** *(continued from page 5)*

artificial sweetness of Valentine's Day by observing that it'd be "splenda" if the sweetness were more evenly spread through the year, but very much enjoys the spike on a single day in February. I suppose the spread of good cheer through the month of December is equally sanguine, but believe the other 87.5% of our lives could use the boost.

Happy holidays, every day.

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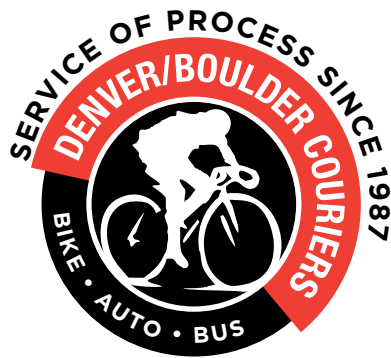
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## PRO BONO PAGE

### Pro Bono Referrals

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

Don Alspaugh  
Scott Brenner  
Todd Brownell  
Karen Burns  
Richard Carlson  
M.L. Edwards  
Peter Jarldane  
Chris Jeffers  
Scott Osgood  
Jeffrey Skovron

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

### James Christoph Pro Se Program Volunteers

Josh Anderson  
Joyce Bergmann  
Evan Branigan  
Mary Louise Edwards  
John Hoelle  
Chris Jeffers  
Michael Morphew  
Craig Small  
Leonard Tanis

### BCAP Volunteers

The following attorneys accepted pro bono referrals for the Boulder County AIDS Project in October:

Paul Bierbaum  
Christina Ebner  
Brandon Fields  
Barre Sakol  
Pro Bono Corner

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

### Boulder County Bar Association Professionalism Committee On-Call Schedule

December 2	Mark Langston	303.440.9684
December 9	Meghan Pound	303.443.8010
December 16	Karl Kumli	303.447.1375
December 30	Trip DeMuth	303.447.7775

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## CLASSIFIED ADS

**Legal Assistant seeking part-time employment in Bldr. County. Start date ASAP.** Three years recent legal experience. Available Mon-Fri, 9:00 a.m. – 2:00 p.m. Professional, organized, excellent communication skills. **Contact Lucy: 303-808-9700**

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**Downtown Boulder office for rent** (sublease) as of December 2013 Nice office, at a prime location (on the pearl Street mall, between Broadway and 11th). **Contact** [ebblank@communityenergyinc.com](mailto:ebblank@communityenergyinc.com)

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Point them to my website at [ColoradoStudentLoanAttorney.com](http://ColoradoStudentLoanAttorney.com). These clients also get a free 15-minute phone consultation. Call me if you have questions about student loan payment issues. **DOUG TRIGGS, 303-499-1336**



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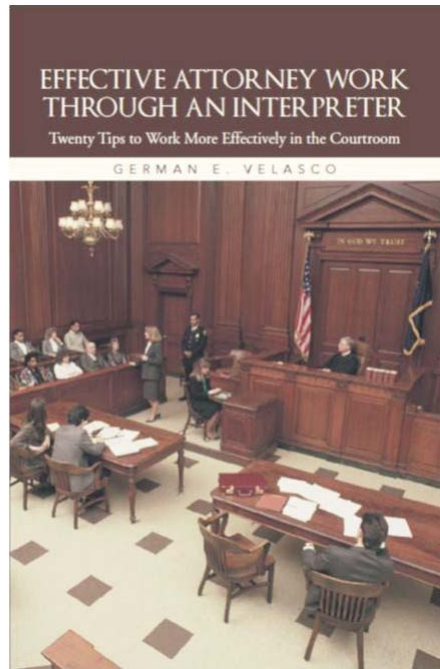
The approach and idea of this book are fabulous.

This is vital information for all attorneys working with interpreters, and is a need that has not yet been filled in our state.

Emy Lopez, Head of the Office of Language Access,  
Colorado Judicial Department

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