January 2022

Boulder COUNTY BAR ASSOCIATION

HOW THE BCBA CAN HELP

BCBA December In Photos Page 7

So many in our community have been affected by these devastating fires, and we are all struggling with understanding how so many suburban neighborhoods can be destroyed by a wildfire. In times like these, our thoughts naturally turn to how can we help. As an organization, we have a unique opportunity to help our fellow members immediately and the community at large in the following ways:

- The most immediate need right now is housing for those who are displaced. If you have space available and would like to be connected with a BCBA member in need, please send us your information including how many you can take and if you are open to pets. We will keep this list confidential and send names out as we receive them. If you are a member who has been displaced and could use a place to stay, please contact us. We can forward your information to one of our members who has availability. This can be a great resource knowing you will be staying with another BCBA member.
- A need many of our attorneys may have is a place to work. The BCBA is offering the coworking space to all who are displaced free of charge through the end of February with extensions available if necessary.
- In the coming weeks, members of the public will need legal help as they sort through insurance claims and other issues. Hopefully as many members as possible will be willing to provide free virtual legal help to those who may need some assistance. Please let us know if we can add you to this list. Consultations are virtual or by phone and typically last for about 30 minutes.

We know these are small steps and much more is needed. If you have any suggestions on other ways to be of assistance, please let us know. Our community is generous, and together we can help our members get through this unfathomable situation.

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CALENDAR OF EVENTS

Wednesday, January 5
Bagels with the Bar - Intellectual Property
8:30 - 10:00 AM @ BCBA Office (3269 28th St.)
Free for BCBA Members

Wednesday, January 12
Bagels with the Bar - Natural Resources
8:30 - 10:00 AM @ BCBA Office (3269 28th St.)
Free for BCBA Members

Thursday, January 13 - POSTPONED
Side Bar CLE: CBA Presidential Visit
Presented by CBA President Joi Kush
4:00 - 6:00 PM CLE @ BCBA Office (3269 28th St.)
$35 CLE & Happy Hour| $20 New/Young Lawyer | $10 No CLE

Wednesday, January 19
Bagels with the Bar - Paralegal
8:30 - 10:00 AM @ BCBA Office (3269 28th St.)
Free for BCBA Members

Wednesday, January 19
Natural Resources CLE: The Law of the Colorado River: Emerald Mile Edition
Presented by Gregor MacGregor
12:00 - 1:00 PM CLE @ BCBA Office (3269 28th St.)
$25 CLE | $15 New/Young Lawyer | $5 No CLE
Please click here to register

Thursday, January 20
CU Basketball - CU vs. USE
5:30 - 8:30 PM @ CU Events Center
$25 Tickets for BCBA Members
Please click here for tickets

Wednesday, January 26
Bagels with the Bar - Real Estate
8:30 - 10:00 AM @ BCBA Office (3269 28th St.)
Free for BCBA Members

Our office, yours, or video?

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PRESIDENT'S PAGE

BRETT LANDIS



An often cited (though rarely attributed) statistic tells us that about 80% of all New Year's Resolutions fail. Psychologists are quoted in think pieces every January to explain why resolutions fail and alternative ways to celebrate the new year, but the answer is quite simple. Change is hard. Keeping up momentum is hard. Day-to-day work is hard.

I have been thinking about change and how difficult it is (whether on a personal or global scale). In the immediate aftermath of a crisis or at the start of a new year, people act and make decisions and make promises about how they will improve their lives, but so often a sense of complacency takes over a few months afterwards. We have seen this with social justice movements, Covid safety protocols, and many other things.

As lawyers, we are just as susceptible to this pattern, if not particularly so. Given the amount of time and energy we give to solving other people's problems, it seems inevitable that our work lives dull and the hope that we would change the world with our career dims.

I have a theory that complacency is such a powerful force because the work required for actual change is quiet, consistent, and aggressively unglamorous. But maybe that is the antidote to complacency, as well.

I have always appreciated the instruction anti-racism activists give to "do the work". Doing the work doesn't mean being "solving racism" or being the star spokesperson for a movement. It means taking on tasks that don't get a lot of attention, but need to get done; and it means showing up the next day to do the same thing again. If enough of us do the work together, the world does change, despite complacency.

In the public interest law field, I see the unglamorous side of this work every day. I see the client who yells at me, the one who never returns call, the one who can't seem to understand what I tell them, and it is incredibly draining. It's easy to accept that your work can't or won't make a difference, and that the problems our world faces are too big to be fixed by the work you and your colleagues do. But that is my complacency talking.

When I am faced with my own complacency, I try to remember to do the work. Every day. And again, the next day. Over time, when you add the work I do, the work my colleagues do, the work our community partners do, and the work our volunteers do (much of it also unglamorous), that work creates change in the world and in people's lives.

That is the inspiring side of New Year's Resolutions. Despite the difficulties, despite the complacency, despite the burnout, change is possible, especially if we do it together.

I wish you all the best of luck with your resolutions and a happy new year!

SETTLEMENT IN MEDIATION: IT ISN'T OVER UNTIL THE PAPERWORK IS DONE

ROB GUNNING

It was a hard-fought day, but your preparation for the mediation, and persistence throughout the day, paid off with a settlement favorable to your client. Or did it? Let's take a look at the current state of Colorado law on the subject. If you're not careful, that hard-won deal could prove unenforceable.

Colorado's Dispute Resolution Act ("CDRA") governs alternative dispute resolution proceedings in Colorado. The CDRA provides that, with certain exceptions, mediation communications **(i)** are confidential. C.R.S. § 13-22-307(2). **(ii)** The confidentiality accorded to mediation communications enables parties to be candid about the strengths and weaknesses or their cases, and encourages parties to put offers of compromise on the table with knowledge that their settlement positions will not be admissible in court. Importantly, written settlement agreements which are fully executed by the parties are excepted from confidentiality. C.R.S. § 13-22-308. **(iii)**

In *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008), the seminal case interpreting the CDRA, the Colorado Supreme Court held that parties could enter into a binding settlement agreement without a signed writing after mediation. *Id.*at 1104. In particular, the Court observed that the CDRA did not abrogate the common law of contracts. *Id.* Further, the statutory term "mediation communication" does not cover all communications made with an eye to resolving the dispute once parties have agreed to mediation. Rather, the term is "limited to those [communications] made in the presence or at the behest of the mediator." *Id.* at 1109. Applying these legal standards, the Colorado Supreme Court held (1) that a partial settlement agreement signed by all of the parties was excepted from the definition of mediation communication because it was a fully executed written agreement, (2) documents drafted by counsel at the instruction of the mediator were a protected mediation communication because they were not fully executed, and (3) that correspondence between counsel and a draft agreement were typical post-settlement negotiations that were not protected mediation communications. *Id.* at 1110-11.

Recently, however, the Colorado Court of Appeals distinguished *Yaekle*, holding that mediation communication confidentiality extends to evidence that discloses information concerning a mediation communication – such as an unsigned, post-mediation writing offered to prove the existence and terms of an oral agreement reached during a mediation proceeding. *Tuscany Custom Homes, LLC v. Westover*, 2020COA178, 490 P.3d 1039, *cert.denied, Platenak v. Westover*, 2021WL3278247 (July 26, 2021). Thus, while parties may enter into a binding settlement agreement absent a signed writing, proving the existence of such an agreement is a different matter. **(iv)**

Tuscany Custom Homes v. Westover

District Court Proceeding

In the underlying construction litigation, the parties conducted a three-party mediation in March 2019. Towards the end of the mediation, the mediator intended to produce a settlement Memorandum of Understanding (MOU) based on an oral agreement reached at the mediation. Unfortunately, the mediator encountered technical issues and returned to his office to instead send counsel an email, confirming his understanding of the agreement. The email outlined seven payment terms, and the mediator requested counsel for each party to confirm their assent by email. Two of the three parties' attorneys then confirmed that the MOU was consistent with their understanding of the oral agreement, with minor edits. The Westover

SETTLEMENT IN MEDIATION CONTINUED

Defendants' counsel did not respond, however. 2020COA178, ¶¶ 3-5.

Three days after mediation, Tuscany's counsel drafted and issued a draft settlement agreement to opposing counsel. The Westover Defendants' attorney responded that there were no suggested edits, and provided there were no redlines from other parties, indicated that his clients would sign. Thereafter, Tuscany and the Platenaks (third party defendants) executed the agreement. The Westover Defendants, however, refused to sign. 2020COA178, ¶ 6.

Tuscany filed a motion to enforce the settlement agreement with the Larimer County District Court. The motion, which was joined by the Platenaks, alleged that an oral agreement was reached at mediation, and attached the mediator's email and draft settlement agreement as evidence of the agreement's terms. In response, the Westover Defendants denied that there was an enforceable agreement, and filed a proposed agreement containing an additional paragraph, specifying the agreement was not intended to preclude the Westover Defendants from asserting future claims against non-parties. Tuscany and the Platenaks then deposed the mediator, who testified that the parties reached a settlement during mediation. **(v)** 2020COA178, ¶¶ 7-9.

The Larimer County District Court held a hearing on the motion. The Westover Defendants objected to the admissibility of the mediator's deposition testimony, the mediator's email chain, and the draft agreement. Provisionally admitting the evidence over objection, the Court took the matter under advisement pending review of *Yaekle*. Thereafter, the Court granted the motion to enforce the settlement, concluding that neither the email, draft agreement, nor deposition testimony were confidential mediation communications. The Court held that an enforceable oral contract had been formed at the mediation, as reflected in the mediator's email. 2020COA178, ¶¶10-12.

Court of Appeals Opinion

The Court of Appeals reversed the District Court's rulings as to admissibility, concluding that the mediator's email, draft agreement, deposition testimony, hearing testimony, and email correspondence were all inadmissible mediation communications. First, the Court held that the email the mediator sent to counsel the evening of the mediation was a confidential mediation communication. The statutory definition of the term "mediation communication" includes any "memoranda" or "notes" of a mediator. C.R.S. § 13-22-302(2.5).The email was prepared pursuant to a mediation services proceeding, and it was not fully executed by the parties. The Court therefore deemed that the email fell into the categories of notes and memoranda. 2020COA178, ¶¶ 26-29.

Second, the Court determined that the draft agreement circulated by counsel was also an inadmissible mediation communication because it was made at the mediator's behest. In particular, the mediator was one of the recipients of the draft agreement. Critically, however, the Court also held that the agreement was inadmissible even if it had not been made at the mediator's behest. Notably, the Court wrote that communications made "in the shadow of mediation" are not admissible to prove what happened during the mediation. Thus, while post-mediation communications could be admitted to prove the terms of a post-mediation agreement, they are not admissible to prove the terms of an agreement reached during the mediation proceeding. Due to litigants' inability to submit admissible evidence to prove an agreement was reached at mediation, in general, the only admissible evidence to prove the existence of such an agreement is a written agreement, signed by all ofthe parties. 2020COA178, ¶¶ 37-50.

Third, the Court concluded that the deposition transcript, hearing testimony, and email correspondence which followed the mediator's email

SETTLEMENT IN MEDIATION CONTINUED

were not sufficient to support the finding of an agreement when the mediator's email and the draft agreement were excised from such documents. Without the mediator's email or the draft agreement, there was no independent evidence of the agreement's terms. The Court therefore reversed the District Court's Order enforcing the settlement agreement. 2020COA178, ¶¶ 51-56.

Aftermath of *Tuscany Custom Homes*

Tuscany Custom Homes has significant ramifications for mediators, attorneys, and litigants. In light of *Tuscany Custom Homes*, both mediators and parties should ensure that a Memorandum of Understanding (MOU) is signed **(vi)** by all parties at the conclusion of a successful mediation session. *Tuscany Custom Homes* teaches that an email from the mediator documenting the settlement terms is insufficient to later prove the existence of the agreement, even if all counsel email their assent to the terms. While the signature of the parties is required, it is also prudent for counsel to sign the MOU as to form. The MOU should include all material terms that were agreed to in the mediation, both as to payment and other key provisions, such as confidentiality and non-disparagement provisions. If appropriate, the MOU should include language that the MOU is intended to serve as the final and enforceable agreement if the parties are unable to agree on the terms of a final settlement agreement and release within a certain timeframe.

Further, in light of the Court's conclusion that mediation communications include those made in "the shadow of mediation," if the case does not settle at mediation and the mediator is involved in successful post-mediation negotiations, either (1) the mediator should promptly prepare an MOU or (2) counsel should promptly draft the formal settlement agreement and documents. Attorneys will want to keep in mind that in drafting the formal settlement documents, involving the mediator could cause the communications to fall within the shadow of mediation, and thus within the ambit of a mediation communication under C.R.S. § 13-22-302(2.5).

In short, it is incumbent on mediators and attorneys to ensure that all parties sign an MOU at the conclusion of a successful mediation, with the MOU including all material terms agreed to during the mediation. In the absence of the required paperwork, a hard-earned settlement may be lost in the shadows of mediation.

i A "mediation communication" means: "any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding or dispute resolution program proceeding, including, but not limited to, any memoranda, notes, records, or work product of a mediator, mediation organization, or party." C.R.S. § 13-22-302(2.5).

ii The statutory exceptions are if all parties to the proceeding and the mediator consent in writing; if the mediation communication reveals the intent to commit a felony, inflict bodily harm, or threaten the safety of a child under the age of 18 years; or the mediation communication is required by statute to be made public; or disclosure of the mediation communication is necessary and relevant to an action alleging willful or wanton misconduct of the mediator or mediation organization. C.R.S. § 13-22-307(2). Additionally, a written agreement to enter into a mediation service proceeding or dispute resolution proceeding is not considered a "mediation communication." C.R.S. § 13-22-302(2.5).

iii C.R.S. § 13-22-308 provides that "[i]f the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court."

iv It should be noted that neither the author nor the Accord ADR Group had any role in the underlying mediation, and that all information for this article has been obtained from publicly available sources. This article follows a CLE co-sponsored by the ADR and Civil Litigation Sections of the BCBA on April 1, 2021: "Great – You Got Your Case Settled in Mediation – or Did You?", presented by Rob Gunning (Accord ADR Group), Doug McQuiston (Accord ADR Group) and Doug Stevens (Caplan & Earnest).

v Presumably, the parties and the mediator consented in writing to the mediator's deposition. Otherwise, the mediator was not permitted to testify regarding the mediation communications. C.R.S. § 13-22-307(2)(a).

vi Given that the vast majority of mediations are now being conducted remotely, electronic signatures, including through DocuSign, should be sufficient for execution purposes.

Rob Gunning is the Section Chair of the BCBA Alternative Dispute Resolution section. He is a Panel Mediator for Accord ADR Group.

BCBA DECEMBER PHOTOS



BCBA 2021 Holiday Party



BCBA 2021 Holiday Party



December 1 Bagels with the Bar



Civil Litigation Section CLE & Happy Hour

WELCOME NEW BCBA MEMBERS

Rachel L Hammond

Brian J Holst

Joseph B Jonikas

Johanna E Blumenthal

Alison M Lipman

Alec Menzies

Aidan Leonard

Matthew M Stamski

Martha J Hartney

Alicia Marsh

Timoth Shannon

Lindsey A Ratcliff

Gabriel Cutter

Megan Tholen

PROFESSIONALISM ON CALL

January 3	Karl Kumli	303.447.1375
January 10	Trip DeMuth	303.447.7775
January 17	Peggy Goodbody	303.440.5736
January 24	Tim O'Neill	303.776.9900
January 31	Steve Clymer	303.530.2137

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 Boulder County Free Legal Clinics have been replaced with our Virtual Legal Clinic until further notice.

THANKS TO OUR VOLUNTEERS

The BCBA Virtual Legal Clinic remains ongoing and has served over 30 people to date. Thank you to the attorneys who serve as volunteers:

Dan Droege	Amy Stengel	Beth Kelley
Jennifer Huston	Laura Herndon	Dipak Patel
Sherri Murgallis	Maki Iatridis	Lindsey Killion
Craig Small	K.C. Cunilio	Karen Burns
Scott Hamerslough	Fern O'Brien	Susan Spaulding
Starla Doyal	George Farmer	Chris Lane
Jeff Skovron	TJ Willard	Connie Eyester
Lila Sol	David Harrison	Beth Montague
Georgiana Scott	Ann England	Kurt Hofgard

PRO BONO REFERRALS

Four cases were referred in the month of November. Thank you to the following attorneys:

Ellen Ross
Howard Bernstein
Bruce Wiener
Kelton Shockey (with mentorship from Heather Kurland)

PRO SE VOLUNTEERS

There were Pro Se Clinics held in the month of November, thanks to the help of the following attorneys:

Kathleen Franco

Chris Jeffers

Patricia Riley

PRO BONO CORNER

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

CLASSIFIED ADS

Office Share Opportunity. The law firm of Vincent, Romeo & Rodriguez is downsizing from our current space in Tebo Plaza in Louisville. We're looking to share space with another Louisville law firm. We would need a copier/scanner to share, conference room to meet clients and conduct Will signings 1-2 days per week, and a small office where we could put a desk and couple of file cabinets. Handicap parking and access essential. We don't need phones answered or additional staff at this time. Contact Richard Vincent or Rick Romeo at 303-604-6030 or email to info@elderlawcolorado.com

Office Space Available. Nice office on main floor of historic building in Boulder near downtown. Would fit a single lawyer, but may be space for staff if wanted. Off street parking, copier/scanner/fax, in a building with several other lawyers. Contact Dave Harrison –*dave@millerandharrison.com*, 303-449-2830.

Litigation Attorney Needed. Part-time, contract-based. Litigation experience a must. Small, growing practice based in Boulder focuses on construction defect and outdoor recreation litigation, in addition to insurance coverage. For consideration, please submit a resume and legal writing sample to *jennifer@arnettlawyers.com*.

Associate Attorney Needed. Full-time Associate Attorney for established Boulder domestic relations practice sought to perform research, draft pleadings, conduct discovery, contact clients, and generally perform all aspects of client representation. Seeking an individual with excellent legal research and writing skills as well as someone who is independent, diligent, and flexible. Only long-term candidates with 1 to 5 years experience in Domestic Relations, or judicial clerkship. Beginning salary between $60,000 and $80,000 depending on experience. Excellent benefit package, casual, collegial work environment with interesting cases and advancement potential. Please e-mail resume, cover letter, and references to Bonnie Ray at bray@mmwclaw.com.

Office Space For Lease. Incredible Flatirons Views, located at 2575 Pearl Street, Suite 230, Boulder. Furnished office space with 2 executive offices, glassed-in conference room, kitchen/work room, and reception area. 850 Square Feet. Monthly rent: $3,250. Call Todd at (303) 859-3840.

Boulder COUNTY BAR ASSOCIATION

We are updating group participation in BCBA Law Section Groups, and will use your choices to add or remove groups to your BCBA membership profile. Section membership is free, so please join as many sections as you like. We regularly send targeted e-blasts about CLE programs and other news to specific groups, and this will assist us in keeping you up-to-date on group activities.

Please click here to update your BCBA Group Preferences

Boulder COUNTY BAR ASSOCIATION

THE BCBA NEWSLETTER IS A MONTHLY ELECTRONIC PUBLICATION BY THE BOULDER COUNTY BAR ASSOCIATION. ARTICLES BY GUEST LAWYERS MAY NOT BE REPRODUCED WITHOUT PERMISSION FROM THE BOULDER COUNTY BAR ASSOCIATION OR THE AUTHORS.

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