BOULDER COUNTY BAR ASSOCIATION NEWSLETTER NOVEMBER 2015



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MARK YOUR CALENDARS FOR THE
BCBA ANNUAL JUDGES DINNER
WEDNESDAY, NOVEMBER 4, 2015
5:30 PM AT
TOUCHDOWN CLUB AT FOLSOM FIELD
$60 per person
(Free Parking will be provided)
RSVP
www.boulder-bar.org/calendar at November 4

CALENDAR OF EVENTS FOR NOVEMBER

Wednesday, November 4
CIVIL LITIGATION
The 2015 Changes to the Rules of Civil Procedures – Views from the 20th Judicial District Bench
Presenter: Judge Butler and Magistrate Gunning
Noon @ Justice Center Training Room East
$25 CLE, $15 New/Young Lawyer, brown bag lunch

Tuesday, November 10
EMPLOYMENT
Getting the Most from your Employment Law Mediation
Presenter: Steven Meyrich
Noon @ Caplan & Earnest
$25 CLE, $15 New/Young Lawyer, brown bag lunch

Thursday, November 12
INTELLECTUAL PROPERTY
PTO Insider Practice and Method Tips for the Patent Practioner
Presenter: A Representative from the USPTO
Noon @ Broadway Suites
$25 CLE, $15 New/Young Lawyer, brown bag lunch

Friday, November 13
AVAILABILITY OF LEGAL SERVICES
Monthly Roundtable
Noon @ Boulder County Legal Services

Tuesday, November 17
BUSINESS
Counseling Entrepreneurs: Helping Your Client Make Good Choices
Presenters: Charlotte Genevier, Laurel Durham, and David Cline
Noon – 1:30 @ Dickens Tavern, Longmont
$35 1.5 CLE, $20 New/Young Lawyer, $13 lunch

Tuesday, November 17
ELDER
Ethics Lightning Round: The Issues No One Wants to Touch
Presenters: Martha Ridgway and Susie Germany
Noon @ Caplan & Earnest
$25 CLE, $15 New/Young Lawyer, brown bag lunch (We have applied for one ethics credit for this event)

Wednesday, October 18
FAMILY
Maintenance Recapture and Tax Issues
Presenter: Preston Hofer
Noon @ Justice Center Training Room East
$25 CLE, $15 New/Young Lawyer, brown bag lunch

Wednesday, November 18
NATURAL RESOURCES/ENVIRONMENTAL LAW
The 2015 Clean Water Rule – Defining the Extent of Waters of the U.S.
Presenter: Eric Waeckerlin and Noah Greenberg
Noon @ Bryan Cave
$25 CLE, $15 New/Young Lawyer, brown bag lunch

Thursday, November 19
BANKRUPTCY
Monthly Roundtable
Noon @ Agave

Wednesday, November 4, 2015

Simon Mole, JD, Magistrate (Ret.); & Brad Yoder, JD, Magistrate (Ret.)
BIDC meetings will be held at the Millennium Harvest House
1345 28th Street, Boulder, CO 80302

11:30am - 1:15pm Networking: 11:30am to Noon
Lunch and Speaker: Noon - 1:15pm

LUNCH: $25.00 IDC MEMBERS • $30.00 NON-MEMBERs
You may pay at the door (cash or check), or online (click here).
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CLE Credit: TBA (unless specified above)



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MARITAL AGREEMENTS AND THE ELDERLY CLIENT

By Jessica H. Catlin and Brooke Brestel

Prenuptial or postnuptial agreements are marital contracts (collectively "marital agreements") which feature prominently in gossip columns and television celebrity news shows, usually pursuant to dissolution of marriage proceedings. However, these documents are not only used by the very wealthy or famous to protect assets from a divorcing spouse. Marital agreements are being used more and more by people of average means who are marrying for the second or third time and one or both parties want to keep their assets and incomes separate from the new spouse, for estate-planning purposes or in case of a marriage failure.

Some in the elderly population are also using marital agreements (both prenuptial and postnuptial) as contractual obligations for spouses, to ensure that children from prior marriages are protected while also putting in place guidelines for the benefit of the surviving spouse. This article will address the use of marital agreements as a protection for elderly spouses where children from first marriages may also be estate/trust bene
ficiaries.

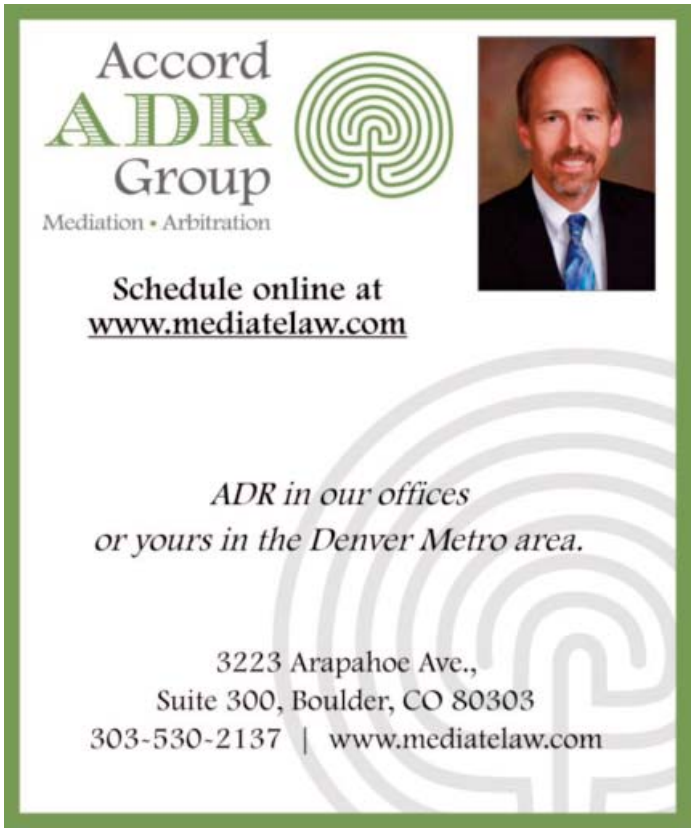
Enforceability: In 2014, the Colorado legislature updated the Colorado Uniform Premarital and Marital Agreements Act ("Marital Agreement Act"), which modified the requirements for enforcement of a marital agreement. § 14-2-309, C.R.S. The statute requires that the marital agreement must be voluntary and signed without duress, and that each party must have "access to independent legal representation," the definition and requirements of which will be discussed below. Further, if a party chooses to execute a marital agreement without benefit of legal counsel, the marital agreement must include a specific notice of waiver of rights under the statute, explaining in "plain language" the marital rights or obligations being modified or waived by the agreement. § 14-2-309(1)(c) and (3), C.RS.

Disclosure Requirements: The Marital Agreement Act defines "access" to independent legal representation as 1) reasonable time to a) decide whether to retain independent counsel, b) locate independent counsel, obtain legal advice, and consider the advice of counsel, and 2) the party seeking or using legal counsel has the financial ability to retain a lawyer or the other party agrees to pay the fees and expenses of independent legal representation. § 14-2-309, C.R.S. The Act also requires disclosure of "a reasonably accurate description and good-faith estimate of value of the property, liabilities and income of the other party." Id.[1]

Waiver of Rights for Elderly Clients: One of the rights or obligations which are often included in marital agreements are the waivers of family allowances and/or exempt property allowances under §§ 15-11-403 and -404, C.RS.; the waiver and/or priority of a spouse to act as a personal representative under §§ 15-12-203, C.RS.; the waiver of the right to an elective share of the decedent's spouse's estate under § 15-11-201 et seq., C.R.S.; and the right to an intestate share under § 15-11-102, C.R.S. The waivers of a surviving spouse are not enforceable under § 15-11-213, C.R.S. unless the marital agreement itself is enforceable under § 14-2-309, C.R.S.

For many elderly brides and grooms, the relevant waiver information surrounds and concerns the rights upon the death of the spouse. This can be especially true if the children from the decedent spouse have expectations of receipt of property upon the death of a parent. While some parties to a marital agreement will voluntarily change their wills to include a new spouse and ensure that the surviving spouse will be cared for during his/her life, a contractual obligation under the prenuptial agreement is another way to try and ensure that the surviving spouse has a contractual claim which can be enforced if necessary, should a new estate plan not get finalized before a spouse's death, the estate plan doesn't comport with the obligations set forth in the prenuptial agreement, or the children of the decedent fail and refuse to honor the decedent's wishes in an estate plan. *Labayog v. Labayog*, 927 P.2d 420, 435 (Haw. App. Ct. 1996)(prior divorce degree or marital agreement will be enforced against a decedent's estate to the detriment of surviving spouse); *Matter of Pavese,* 195 Misc.2d 1, 11, 752 N.Y.S.2d 198 (New York. Surrogate 2002)(The parties thus intended their agreements to survive death as independent contracts, and to be enforceable immediately. Under these circumstances, the abatement of the dissolution action and equitable distribution did not affect the enforceability of the

(continued on the next page)



MARITAL AGREEMENTS *(continued from page 3)*

agreements); *Plunkett v. Plunkett,* 629 S.E.2d 39, 41 (Va. 2006)(prenuptial agreement and mutual wills were enforceable in favor of surviving spouse and against children of decedent); *Blonstein v. Blonstein,* 831 S.W.2d 468 (Tex. Ct. App. 1992)(postnuptial agreement enforceable as against the personal representative and beneficiary claiming under the estate); c.f. In *re Estate of Jung,* 616 N.W.2d 118, 120 (Wis. App. Ct. 2000)(Marital agreement terms are superseded by annuity contractual obligations where wife waived rights to annuity but husband listed her as the co-owner of such policy and Court awarded her proceeds of the policy).

Marital Agreements and the Elderly Client: When an elderly client is considering getting married or remarried, and the issue of a marital agreement comes up, this should open a dialog between the prospective spouses or current spouses about needs and requirements for either surviving spouse. The financial needs for one surviving spouse may be very different than for the other, and so might the assets upon which each lives, so proper thought and care in drafting the marital agreement is extremely valuable for both the decedent and the surviving spouse. For example, if one party has medical issues or significant medical expenses, should the marital agreement set forth these expenses as a separate liability of the party who incurred them, or should these be considered a debt of the marriage? Should the parties contractually require the remainder of assets that passed to the surviving spouse after the first spouse's death then pass to the children of the first spouse after the surviving spouse's death?

Marital Agreements and Estate Planning Intersection: Additionally, thought and care about whether, or to what extent, children from a prior marriage receive an outright bequest from a parent at his/her death, which also may alleviate some of the interfamilial stress that can occur when a second or third spouse receives funds for his/her overlife and the children from a prior marriage receive nothing until the death of the surviving spouse. If there isn't enough money to make bequests at the death of the first spouse of the marriage, perhaps an explanation from the decedent about why the decedent created the marital agreement or estate plan that he/she did, can also relieve some of the inherent conflict and/or unhappiness.

Estate Planning: An additional consideration for any estate planner working with elderly clients and blended families is whether a family member - either the surviving spouse or a child or children from a prior marriage - can or should act in a fiduciary capacity for the other. There is significant antidotal evidence among estate planners that such an arrangement can lead to family disharmony, and in some cases, costly probate litigation. If there are the funds in the decedent spouse's estate to hire a professional fiduciary to make decisions about discretionary distributions from a decedent's trust, this may be a good option, especially with a blended-family situation.

Organizing the Elderly Client: When considering getting married or remarried, and given the new language of the statute requiring both parties to have ample time to decide whether to retain counsel, retain counsel, and consider the advice of counsel, it is standard practice of attorneys to try and get a prenuptial agreement executed at least one month prior to a wedding date.

What that means for the clients is that any discussion about the terms of a prenuptial agreement should be done several months before any anticipated wedding date. As importantly, the terms of any marital agreement should be discussed between the prospective spouses so that both parties know the general terms requested under such a document, and assets and/or incomes which would be affected by signing such a contract. The more the parties are aligned in the purposes and terms of a marital agreement, the more likely that the negotiations for the agreement will go smoothly. Just like any other contract, marital agreements won't be as successful if the expectations of the terms of the contract are not discussed long prior to any document being presented.

FOOTNOTE:
1. Even with full disclosure and each party receiving legal advice, a waiver of maintenance and attorney fees in a marital agreement are subject to review for unconscionability at the time of enforcement of a marital agreement. In re Marriage of Ikeler, 161 P.3d 663 (Colo. 2007)(en banc).

Jessica Catlin and Brooke Brestel are the co-chairs of the BCBA Elder Law Section. Jessica a member of the law firm of Stevens, Littman, Biddison, Tharp and Weinberg. She specializes in estate planning, probate administration, probate litigation, appellate advocacy and civil litigation. Brooke is an associate at the law firm of Vincent, Romeo and Rodriguez in Louisville. Her practice focuses on probate litigation, including protective proceedings, fiduciary representation, and contested trusts and estates.

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EMERGING TRENDS IN AUTO INSURANCE CLAIM NEGOTIATION AND LITIGATION

By: Jeffrey S. Rose, Driscoll Rose LLC

In 2008, the General Assembly enacted C.R.S. §§ 10-3-1115 and -1116, statutes that forbid and award damages for the unreasonable delay or denial of insurance benefits. Practitioners knew that it would take time for the new statutes to play out in the courts. However, new case law reveals unanticipated consequences that require practitioners on both sides of these cases to be far more proactive when handling claims for uninsured motorist ("UM") and underinsured motorist ("UIM") benefits. Practitioners who fail to adapt to these changes will lead their clients into the traps.

Pre-2008

Claims for UM or UIM benefits were relatively straight forward prior to the enactment of C.R.S. §§ 10-3-1115 and -1116. Practitioners had ample time to present a comprehensive claim for benefits and enter into negotiations. If the insurer failed to present a satisfactory, global settlement offer, the policyholder filed suit. Claims were subject to a three-plus year statute of limitations, C.R.S. § 13-80-107.5(a)(1)-(2), and, absent a somewhat obvious error by either party, litigation risk remained relatively evenly distributed between the parties throughout the case. These days are no longer.

New Case Law from the Colorado Court of Appeals

The recent decision in *Fisher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 57, stands for the proposition that, when insurance benefits are reasonably known to be owed, they must be paid, even on a piecemeal basis. Failing to timely pay benefits owed subjects the insurer to additional damages of twice the covered insurance benefit, attorneys' fees, and costs under C.R.S. § 10-3-1116. *Id.*

In *Fisher,* the Court of Appeals ruled that an insurance carrier's obligation to pay UIM benefits is triggered as soon as it becomes aware that a claimant's damages exceed the tortfeasor's policy limits, irrespective of whether the tortfeasor's liability has been determined, whether the tortfeasor has paid its policy limits, or whether a judgment was entered against the tortfeasor. Id. at ¶¶ 19-20. "[N]ot *all* of a claim [must] be established beyond reasonable dispute before a duty to pay some of the claim that is not reasonably in dispute arises." *Id.* at ¶ 27 (emphasis in original). Thus, insurers must begin making claim payments to their policyholder on undisputed claims right away, even in a piecemeal format, and even if other, disputed components of the claim remain pending. *Id.* at ¶¶ 35-36.

The ruling appears straight forward. In practice, the ruling results in dramatic shifts in litigation risk in both directions.

First, policyholders can shift most of the litigation risk onto the insurer by presenting a timely, comprehensive, and well-documented claim for damages. *Fisher* requires the insurer to pay undisputed portions of the claim without delay. If the insurer fails to do so, the insurer is liable for a significant award of statutory damages under C.R.S. § 10-3-1116.

Second, insurers can shift the litigation risk back to the policyholder by issuing payment on part of a claim; the greater the payment, the greater the risk shifted. Insurers contend that the Fisher holding is limited only to past medical expenses, and insurers tend to issue relatively prompt payment on undisputed medical expenses. This potentially guts a policyholder's damages for any subsequent lawsuit. Thus, policyholders who file suit are left to seek predominantly non-economic losses, a category of damages that many jurors are reluctant to award.

Further Complications: A Possible One-Year Statute of Limitations

It is well settled that claims for benefits must be brought within no less than three years of the date of a motor vehicle collision. C.R.S. § 13-80-107.5(a)(1)-(2). Statutory claims for damages arising out of an insurer's unreasonable delay or denial of UM or UIM benefits claims would appear to be derivative and thus subject to this three-plus year statute of limitations. However, some judges apply a second, one-year statute of limitations to statutory damage claims under C.R.S. § 10-3-1116. *See, e.g., Phipps v. Travelers Prop. Cas. Co.,* No. 14-cv-01642-PAB-KLM, Ord. p. 6-7 (D. Colo. Aug. 27, 2015) (ruling that claims for statutory damage claims are subject to the one-year limitations period for claims for penalties, C.R.S. § 13-80-103(d)).

This harsh interpretation creates a paradox for the policyholder. Under Fisher, insurers need to begin making payments on undisputed benefits without delay, and the insurer needs to continue making payments on undisputed benefits until the policy limits are exhausted. This process could take years. However, if the *Phipps* ruling governs, policyholders have but one year to file suit for statutory damages under C.R.S. § 10-3-1116.

Avoiding the Traps

Under Fisher, practitioners on both sides need to remain on the lookout for dramatic shifts in litigation risk. Counsel for policyholders need to be proactive in documenting all damages – not just medical expenses – in writing and early on in the case, all without creating the need for counsel to be called as a witness. In turn, insurers need to process and promptly pay claims for undisputed benefits, including non-economic losses, in order to avoid harsh statutory penalties. Failure of either party to do so will result in that party carrying the brunt of litigation risk throughout the proceeding.

Further, when a carrier begins making piecemeal payments on one part of a claim, but not another, counsel must realize that statute of limitations on any claim for statutory damages may be running. If policyholders fail to perfect their claim within one year or otherwise file suit, they may forfeit their statutory claim under C.R.S. § 10-3-1116 and lose significant leverage throughout the remainder of the claim. Likewise, if an insurance carrier is too obvious in jockeying its insured into a statute of limitations trap, jurors may become much more likely to enter a significant award against the insurer.

Jeff Rose is a co-chair of the BCBA Civil Litigation. He is a partner in the law firm of Driscoll Rose LLC in Boulder. He focuses on plaintiff's personal injury, environmental torts and property damage, business matters, and insurance disputes, including insurance coverage and insurance bad faith.

PRESIDENTS PAGE

Greetings Boulder County Bar Association members!



As we enjoy the gorgeous splendor of another beautiful fall in Colorado, we march ever forward into November and cap this wonderful month with a dedicated day to reflect on our lives and give thanks to all that we are thankful for.

On October 3rd, 1863 Abraham Lincoln proclaimed the last Thursday of November as a day to remind us of the "blessings of fruitful fields and healthful skies" that we so often take for granted. Even in the midst of the Civil War and, despite hardships and sorrow that touched the lives of millions of Americans, an 1863 America, North and South, was able to find the good within themselves, their family, their community and their nation, with all its differences, and give thanks to all that is good.

Fast forward to November, 2015 and that sweet sentiment has not changed. Sure, there may be the garish trappings of a Hallmark holiday and I think I have a couple of solar powered bobbing turkeys somewhere around the house (one is missing its head after Aaron snapped its poor little neck) but it is impossible not to think upon this holiday with fondness and solemn thanks to the good things in life that we are thankful for: friends, family, health, prosperity, community and happiness.

I am thankful for many things, but I would like to take this moment to thank all of you…the Boulder County Bar Association members. Without our members the Boulder County Bar Association would not be as strong and successful as it stands today. Most importantly our membership sets the tone throughout the community that as attorneys we will treat each other and our clients with professionalism and respect. As a group we have demonstrated that the legal ends do not justify the means and the pursuit of justice does not need to leave a wake of destruction behind it.

Whoa! That got a little dark. I am glad I took out the parts about "littered bodies" and "blood of innocents." On to something more cheery!

I am thankful for the Boulder County Bar Association. Our bar is strong. Our CLE programs are well attended, affordable and relevant. Our happy hours have not only been a lot of fun, but have also introduced me to many brilliant attorneys and pleasant locales that I would have not gotten to know otherwise. We have some great events coming up and I hope to see you all at the upcoming Judges' Dinner. Even if you do not litigate in Boulder in front of the Judges they are all wonderful people and worth meeting.

All of this would not be possible without our wonderful Director, Christine Hylbert and Laura Ruth. It seems like I thank them in every President's Page, but that is only because whenever I sit down to write this Page out I am reminded of all their hard work, effort and dedication as they keep this organization running like a well-oiled machine.

Thank you all for your continued patronage and support and I wish you and your families the best during this holiday season.

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LAWYERS ANNOUNCEMENTS

ALEXANDER GARLIN
HAS ALSO MOVED!

Upon my recent retirement, I send heartfelt thanks to the innumerable folks whose friendship, kindness, support, and encouragement made these past 38 years so deeply satisfying.

David Driscoll, my law partner of 24 years, I wish you, Jeff Rose, and our first-rate staff the very best in your new Boulder offices as Driscoll Rose, LLC

Having already passed to the other side, I enthusiastically send word:
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Berg Hill Greenleaf Ruscitti LLP

is pleased to announce that

J. Mark Smith

has joined the firm as Special Counsel



Mr. Smith will continue handling and co-counseling in matters of transactions and litigation involving copyright, patents, trademarks, computer software, the internet and privacy.

Mark is available in either our Denver or Boulder office. His profile is available at
www.BHGRLAW.com

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Christian Griffin joins firm



Christian Griffin has joined Caplan and Earnest's growing litigation practice as an associate. He specializes in litigation related to education and health care law. He previously served as a deputy state public defender, during which time he represented hundreds of clients charged with felonies and misdemeanors and received the ACLU of Colorado's 2014 Civil Rights in Action Award.

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PRO BONO PAGE

Pro Bono Referrals
Nineteen cases were referred during the month of September. Thank you to the following attorneys:

Norm Aaronson CULADP
Donald Alspaugh
Deborah Cantrell CULADP
Connie Eyster
Brett Landis
Kimberly Lord
Gary Merenstein
Scott Osgood
Rick Samson
John Seebohm
Tanya Shimer
Christopher Tomchuck
Bruce Wiener

Thank you to the following mediators who accepted a referral in September:
Seth Benezra

Pro Se Program Volunteers

Josh Anderson
M.L. Edwards
Shawn Ettingoff
Toni Gray
Tucker Katz
Brett Landis
Michael Morphew
Todd Stahly

BCAP Volunteers

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

John Gstalder

Pro Bono Corner

Interested in a Pro Bono case?

Please call Erika at 303-449-2197. CLE credits available for pro bono service.

PROFESSIONALISM ON-CALL LIST

November 2	**Meghan Pound**	**303.443.8010**
November 10	**Tom Rodriguez**	**303.604.6030**
November 16	**Karl Kumli**	**303.447.1375**
November 23	**Trip DeMuth**	**303.447.7775**
November 30	**Peggy Goodbody**	**303.440.5736**

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 cotrary 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.

CLASSIFIED ADS

Established attorney looking for attorney with some experience in estates, trusts, wills and transactional matters. Looking for attorney who is interested in building their practice in assisting existing attorney servicing clients in this area. Address replies to: Occupant, P.O. Box 187, Boulder, CO 80306.

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Sunny, comfortable, lovely office space in historic mansion three blocks from Pearl Street Mall (NW corner of Mapleton & Broadway). The office is on the main level custom woodwork and stained glass, separate entrance with porch, and a peek-a-boo view of the Flatirons. The space can be easily divided into two or more work areas. Includes one parking space. Reception/answering of telephones is negotiable, and use of the high-volume copier/scanner/fax is available at a per-page rate. Available November 1st. 303-449-2830

Office for Rent in Downtown Longmont
Centrally located office available on the **NE corner of 5th and Coffman St.** space is approximately 12' x 15' with a shared reception area, large windows, outdoor access, and off street parking. Perfect for a Satellite Office!
Available November 1st $475/month
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Downtown Boulder Office Space – Beautiful Historic Mansion - NW Corner of Broadway and Mapleton. Garden level suite of 2 private spaces: includes private entrance and private bath. Bright, welcoming, and quiet---perfect for a therapist or other professional, or a small business or organization. Comfortably warm in winter, cool in summer. Parking available. 5 minute walk to Pearl Street Available November 30th. $1,200 mo. incls all utilities except phone and internet. 303-449-2830

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Gross rent $800.00/month 303-444-1700

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Contact Jill 303-443-6690; waters@slblaw.com



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