THE CDLA UPDATE

Highlighting Important Issues Facing Today's Defense Attorneys

COLORADO SUPREME COURT

Travelers Prop. Cas. Co. v. Stresscon Co. — *Supreme Court enforces 'no voluntary payment' clause in policy, excuses obligation to indemnify for voluntary payments.* (SC 04/25/16). Stresscon had voluntarily settled the claim against it in violation of the no-voluntary-payments clause of their insurance contract. Traveler's argued that Stresscon's actions had relieved it of any obligation to indemnify Stresscon for payments Stresscon had made without its consent. In a 4-3 decision, the Supreme Court reversed the judgment of the Court of Appeals, holding that the adoption of a notice-prejudice rule in Friedland did not overrule any existing "no-voluntary payments" jurisprudence in Colorado, and the Court declined to extend its notice-prejudice reasoning in Friedland to Stresscon's voluntary payments, made in the face of the no-voluntary payments clause of its insurance contract with Travelers. The Court remanded the case with directions that the jury verdict be vacated and that a verdict instead be directed in favor of Travelers.

City of Littleton v. Indus. Claim Appeals Office — *Supreme Court interprets firefighter statute as creating rebuttable presumption* (SC 05/02/16) In this case, the Supreme Court addressed the presumption created in the "firefighter statute," of the Workers' Compensation Act. The Court held that the presumption relieves the claimant firefighter of the burden to prove that his/her cancer "result[ed] from his or her employment as a firefighter" for purposes of establishing that his condition is a compensable "occupational disease" under the Workers' Compensation Act. However, the statute was found not to establish a conclusive, or irrefutable presumption. Instead, the firefighter statute shifts the burden of persuasion to the firefighter's employer to show, by a preponderance of the medical evidence that the firefighter's condition "did not occur on the job." The Supreme Court holds that an employer can meet its burden by establishing the absence of either general or specific causation. Specifically, an employer can show, by a preponderance of the medical evidence, either: (1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue; or (2) that the firefighter's employment did not cause the firefighter's particular cancer where, for example, the claimant firefighter was not exposed to the substance or substances that are known

QUICK LINKS

Indus. Claim Appeals Office v. Town of Castle Rock

City of Longmont v. Colo. Oil and Gas Ass'n

City of Fort Collins v. Colo. Oil and Gas Ass'n

Lopez v. Trujillo

People v. Douglas

Calvert v. Mayberry

Amerigas Propane and Indemnity Insurance Co. of North America v. Industrial Claim Appeals Office

Archuletta v. Industrial Claim Appeals Office

Boustred v. Align Corporation Limited

Verlo v. Martinez

Wasatch Equality v. Alta Ski Lifts

Deherrera v. Decker Truck Line

CECO Concrete v. Centennial State Carpenters

Tooele County v. United States

Miscellaneous

to cause the firefighter's condition or impairment, or where the medical evidence renders it more probable that the cause of the claimant's condition or impairment was not job-related.

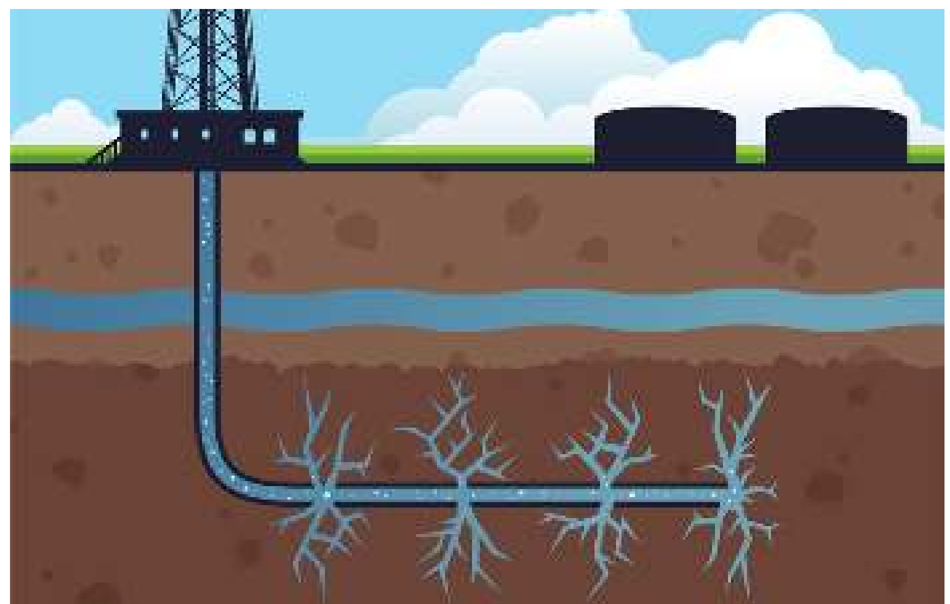
Indus. Claim Appeals Office v. Town of Castle Rock — *Supreme Court continues its interpretation of how the firefighter statute should be interpreted….* (SC 05/02/16) In a companion case to City of Littleton v. Industrial Claim Appeals Office, the Supreme Court held that the presumption created by the firefighter statute relieves the claimant firefighter of the burden to prove that his cancer "result[ed] from his or her employment as a firefighter" for purposes of establishing that his condition is a compensable "occupational disease" under the Workers' Compensation Act. However, the statute does not establish a conclusive, or irrebuttable presumption. Instead, the firefighter statute shifts the burden of persuasion to the firefighter's employer to show, by a preponderance of the medical evidence that the firefighter's condition "did not occur on the job." In this case, the Supreme Court held that an employer can seek to meet its burden to show a firefighter's cancer "did not occur on the job" by presenting particularized risk-factor evidence indicating that it is more probable that the claimant firefighter's cancer arose from some source other than the firefighter's employment. To meet its burden of proof, the employer is not required to prove a specific alternate cause of the firefighter's cancer. Rather, the employer need only establish, by a preponderance of the medical evidence that the firefighter's employment did not cause the firefighter's cancer because the firefighter's particular risk factors render it more probable that the firefighter's cancer arose from a source outside the workplace.

City of Longmont v. Colo. Oil and Gas Ass'n — *Supreme Court denies ability of home rule cities to get the fracking out of their town* (SC 05/02/16). Applying well-established preemption principles, the Supreme Court concludes that the City of Longmont's ban on fracking and the storage and disposal of fracking wastes within its city limits operationally conflicts with applicable state law. Accordingly, the court holds that Longmont's fracking ban is preempted by state law and, therefore, is invalid and unenforceable. The Court further held that the inalienable rights provision of the Colorado Constitution does not save the fracking ban from preemption by state law. The court thus affirms the district court's order enjoining Longmont from enforcing the fracking ban and remands this case for further proceedings consistent with this opinion.

City of Fort Collins v. Colo. Oil and Gas Ass'n — *Fracking statute pre-empts home rule efforts to impose moratorium* (SC 05/02/16). The Supreme Court concludes that Fort Collins's five-year moratorium on fracking and the storage of fracking waste within the city is a matter of mixed state and local concern and, therefore, is subject to preemption by state law. Applying well-established preemption principles, the court further concludes that Fort Collins's moratorium operationally conflicts with the effectuation of state law. Accordingly, the court holds that the moratorium is preempted by state law and is, therefore, invalid and unenforceable.

COLORADO COURT OF APPEALS

Lopez v. Trujillo – *Court of Appeals holds property owners do not own public sidewalks adjacent to house* (CA 04/07/15). Eight-year-old N.M. was walking on a sidewalk with another boy. As he passed defendant's home, two pit bulls rushed at the boys, allegedly unprovoked. The dogs jumped up and rattled a four-foot high chain-link fence. N.M. was allegedly so frightened that he darted from the sidewalk into the street and was struck by a service van, causing him serious injuries. Plaintiffs sued and settled with the driver and owner of the van, but lost their claim on summary judgment against the property owner.



Deciding an issue of first impression, the Court of Appeals considered whether a dog owner owes a duty to exercise reasonable care to an injured party when the injured party was not directly injured by the dogs or on the dog owner's property and the dogs remained confined and never left the landowner's property. The Court held there was no such duty. Public sidewalks adjacent to a landowner's property are not property of the landowner under the PLA.

People v. Douglas – *Court of Appeals holds videos are similar to animations and not subject to more rigorous foundational requirements* (CA 04/21/16). While driving his car, defendant looked down for a moment and struck a bicyclist with his vehicle, causing her injuries. Defendant asserted that the videos were simulations—which are scientific evidence offered as substantive proof and must meet more rigorous foundational requirements for admission than animations, which are demonstrative evidence. The Court of Appeals decided the videos were animations. The trial court did not abuse its discretion when it decided the videos were animations and admitted them into evidence as demonstrative exhibits.

Calvert v. Mayberry - (CA 04/21/16). The Court of Appeals decided that an attorney who enters into a contract with a client that violates Colo. RPC 1.8(a) cannot later enforce the contract against the client. The Colorado Supreme Court disbarred the attorney after a hearing board determined he had committed ethical violations, including some against the former client in this case. Specifically, the hearing board found that the attorney had loaned the former client over $100,000 and secured his interest in the loan funds by recording a false deed of trust in the chain of title on her house. The hearing board also found that the attorney had not complied with Colo. RPC 1.8(a) when he made the loans to the former client. The attorney then filed this case to recoup money he had loaned to the former client, claiming that he had an oral agreement with the client for repayment of the loans, and alternatively asserting that the trial court should impose an equitable lien on the former client's house. The trial court granted summary judgment for the former client and her daughter (to whom she had quitclaimed her interest in the house), finding that because the oral contract between the former client and the attorney violated Colo. RPC 1.8(a), the attorney was ethically prohibited from enforcing that agreement. On appeal, the Court agreed that the doctrine of issue preclusion barred the attorney from re-litigating factual issues that were litigated during the disciplinary proceeding and the oral contract between the attorney and the former client was void and unenforceable.

Amerigas Propane and Indemnity Insurance Co. of North America v. Industrial Claim Appeals Office – *Release bars claim of newly discovered injury in worker's compensation case* (CA 04/21/16). The worker was injured while working for Amerigas Propane and filed a claim for compensation. The worker and the employer (including the insurer) agreed to settle the claim. The settlement agreement clearly stated that the worker would forever waive his right to request compensation for unknown injuries. It also stipulated that the claim could only be reopened on grounds of fraud or mistake of fact. The worker later moved to reopen the settlement, alleging a mistake of fact in that he had a newly discovered injury that was unknown at the time of the settlement and it was related to the original injury. An ALJ reopened the claim but the Court of Appeals found this to be error. The language of the settlement agreement, specifically its statement that the worker waived his right to compensation for "unknown injuries" that arose "as a consequence of" or "result[ed]" from the original injury, clearly and unequivocally covered the newly discovered injury and therefore the case could not be reopened. The Panel's order was set aside with instructions to deny his motion to reopen the settlement.

Archuletta v. Industrial Claim Appeals Office – *Statute cannot terminate worker's compensation benefits after they start* (CA 04/21/16). Claimant sustained a work-related injury in February 2014. His physician imposed temporary restrictions and released him to modified duty. On March 5, the attending physician released him to full duty work with no restrictions. On May 21, the attending physician determined claimant had reached maximum medical improvement (MMI) with no impairment restrictions. Employer filed a final admission of liability. Claimant continued to maintain that he could perform only light duty work because of his injury. He was laid off one week after reaching MMI because, according to him, he was "hurt on the job," could no longer perform his duties, and was on "light duty." He requested a division-sponsored independent medical examination (DIME) to challenge the MMI finding. The DIME physician concluded he was not at MMI. An administrative law judge (ALJ) then awarded claimant temporary total disability (TTD) benefits, finding that he was laid off because of his industrial injury. On review, the Industrial Claims Appeal Office (Panel) reversed, finding that under CRS § 8-42-105(3)(c), once a claimant has been released to full duty work TTD benefits must cease. On appeal, claimant argued that CRS § 8-42-105(3)(c) applies only to the termination of benefits and because he didn't have any benefits when the attending physician released him to work, his case should have been analyzed under CRS §§ 8-42-103 and -105(1),

which apply to the commencement of benefits and do not have a restriction based on release to full duty. The Court of Appeals agreed, holding that CRS § 8-42-105(3)(c) did not apply to claimant's case because the statute can only terminate benefits that have already commenced and therefore can only be applied prospectively.

Boustred v. Align Corporation Limited – *Court found to have jurisdiction over Taiwanese manufacturer* (CA 04/21/16). Align Corporation Limited (Align) is a Taiwanese company that manufactures and sells remote control helicopters and related parts. Align has no physical corporate presence in the United States, but it engages U.S. distributors to sell its products to retailers, which then sell them to consumers. One of Align's distributors was defendant Horizon Hobby, Inc. Boustred purchased a remote control helicopter and a main rotor holder, manufactured by Align, through Horizon. Boustred alleged the main rotor holder broke during testing and caused him to lose an eye. He filed strict liability and negligence claims against Align and Horizon in Larimer County. After service in Taiwan, Align asked the trial court to quash service and dismiss all claims against it for lack of personal jurisdiction. The trial court found that under Archangel Diamond Corp. v. Lukoil it could assert specific jurisdiction over Align, and denied the motion. This interlocutory appeal followed. Align petitioned the Court of Appeals to address the effect of the U.S. Supreme Court's plurality opinion in J. McIntyre Machinery, Ltd. v. Nicastro on Colorado's personal jurisdiction framework under Archangel. Colorado's long-arm statute is intended to confer the maximum jurisdiction allowable by the Due Process Clauses of the U.S. and Colorado constitutions. Specific jurisdiction exists when the alleged injuries resulting in litigation arise out of and are related to a defendant's activities that are significant and purposefully directed at residents of the forum state. If the requisite minimum contacts are established, a court must determine whether its exercise of personal jurisdiction over a defendant is reasonable and comports with notions of fair play and substantial justice. Align argued that merely placing a product into the stream of commerce, without more, is insufficient for a court to assert personal jurisdiction. The Court cited World-Wide Volkswagon v. Woodson, which held that a "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." Subsequent Supreme Court plurality decisions have differed on the scope of this theory. The Court concluded that the narrowest grounds articulated in the plurality opinions, those of Justice Breyer in J. McIntyre and Justice Brennan in Asahi Metal Industry Co. v. Superior Court, are controlling and together hold that World-Wide Volkswagon remains the prevailing decision articulating the stream of commerce theory. Applying that standard, the Court found that Boustred made a sufficient prima facie showing of Colorado's specific jurisdiction over Align and that asserting such jurisdiction is reasonable and does not offend traditional notions of fair play and substantial justice.

TENTH CIRCUIT COURT OF APPEALS

Verlo v. Martinez – Jury nullification advocates permitted to distribute literature to prospective jurors on court plaza - Docket: 15-1319 (10th Cir. 04/08/16). In 2015, two men were distributing pamphlets on the plaza outside the Courthouse. The pamphlets contained information about "jury nullification." Both men were arrested and charged with jury tampering in violation of Colorado law. Plaintiffs, like the men who were arrested, wanted to distribute literature relating to and advocating for jury nullification to individuals approaching the Courthouse who might be prospective jurors. Fearing they too would be subject to arrest, Plaintiffs brought suit against the City and County of Denver and Robert White, Denver's police chief, to establish their First Amendment right to engage in this activity. On the same day they filed suit, Plaintiffs also moved for a preliminary injunction, seeking to restrain Defendants from taking action to prevent Plaintiffs from distributing jury nullification literature on the Plaza. This case was an interlocutory appeal challenging the district court's grant of the preliminary injunction, enjoining in part the enforcement of an administrative order issued by Defendant-Appellant Judge Michael Martinez, acting in his official capacity as Chief Judge of the Second Judicial District of Colorado. The Order prohibited all expressive

activities within an area immediately surrounding the Courthouse. Following an evidentiary hearing, the district court enjoined enforcement of a portion of the Order as against Plaintiffs. The Judicial District appealed. "[T]he government's power to control speech in a traditional public forum is circumscribed precisely because the public has, through the extent and nature of its use of these types of government property, acquired, in effect, a 'speech easement' that the government property owner must now honor." Based on the arguments made and evidence presented at the preliminary injunction hearing, the Tenth Circuit held the district court did not abuse its discretion in granting Plaintiffs' motion in part.

Wasatch Equality v. Alta Ski Lifts – *Snowboard ban by ski area does not constitute state action Docket: 14-4152* (10th Cir. 04/19/16). Wasatch Equality and four snowboarders sued to challenge a snowboard ban at Alta Ski Area in Utah. In its complaint, Wasatch alleged the ban unconstitutionally discriminated against snowboarders and denied them equal protection of the law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

In its complaint, Wasatch alleged the ban unconstitutionally discriminated against snowboarders and denied them equal protection of the law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Recognizing that private action won't sustain a civil rights complaint, Wasatch further alleged the ban constituted "state action" because Alta operated its ski resort on federal land via a permit issued by the United States Forest Service. The district court disagreed, and dismissed this case for failure to identify a state action. Because the Tenth Circuit agreed Wasatch hadn't plausibly established that the snowboard ban constituted state action, the Court affirmed.

Deherrera v. Decker Truck Line – *10th Circuit resolves wage dispute over transportation of New Belgium shipment - Docket: 15-1220* (10th Cir. 04/21/16). Decker Truck Lines, Inc. was a for-hire motor carrier, regulated by the U.S. Department of Transportation and the Secretary of Transportation, with its principal office in Fort Dodge, Iowa. Decker signed a transportation contract with New Belgium Brewing Company (New Belgium) to make two classes of shipments: (1) outbound shipments of beer from New Belgium's brewery to its warehouse (known as the "Rez"), and (2) backhaul shipments of empty kegs, pallets, hops, and other materials from the Rez to the brewery. These two facilities are located approximately five miles apart in Fort Collins, Colorado. Decker employed Plaintiffs (all of whom are commercial truck drivers) to transport both categories of shipments. This case involved a dispute over the scope of the Motor Carrier Act exemption from the overtime pay requirements of the Fair Labor Standards Act and the Colorado Minimum Wage Order. Joe Deherrera and several other complainants, who were commercial truck drivers for Decker, claimed Decker failed to pay them proper overtime wages. Decker contended Plaintiffs were exempt employees under both the FLSA and the Wage Order. The district court granted summary judgment to Decker, and after review, the Tenth Circuit affirmed: "By driving an intrastate leg of shipments in interstate commerce, Plaintiffs became subject to the authority of the Secretary of Transportation and were thus exempt from the overtime pay requirements of the FLSA and the Wage Order."

CECO Concrete v. Centennial State Carpenters – *Tenth Circuit reverses arbitration decision on pension plan liability - Docket: 15-1021* (10th Cir. 05/03/16). At issue in this case was whether a construction company that stopped contributing to its employees' pension plan had to pay withdrawal liability under the Multiemployer Pension Plan Amendment Act. Ceco Concrete Construction, LLC was a party to a collective bargaining agreement that required it to contribute to the Centennial State Carpenters Pension Trust, a multiemployer pension plan. After Ceco stopped contributing, the Trust assessed MPPAA withdrawal liability. Ceco disputed the withdrawal liability and initiated arbitration. The arbitrator sided with Ceco, concluding withdrawal liability was improper. Ceco then sued in federal district court to affirm the arbitrator's decision. The Trust and its Board of Trustees [Plan] counterclaimed, asking the district court to vacate the arbitrator's award. The district court granted summary judgment in Ceco's favor, granted Ceco's request for costs, and denied Ceco's request for attorney fees. The Plan appealed the grant of summary judgment; Ceco appealed the denial of attorney fees. After review, the Tenth Circuit concluded the district court erred in its grant of summary judgment by limiting liability to the entities under common control at the time Ceco ceased its obligation to contribute. The award of costs was vacated, and the matter remanded for further proceedings.

Tooele County v. United States – *Tenth Circuit determines district court did not have authority to enjoin state court action - Docket: 15-4062* (10th Cir. 05/03/16). This appeal concerned two suits: one in state and one in federal court, and statutory limitations on the power of the federal court to enjoin the state court case. In the federal case, the Utah Attorney General and the Board of Tooele County Commissioners sued the federal government under the Quiet Title Act, attempting to quiet title in favor of Utah for hundreds of rights of way in Tooele County, Utah. Five environmental groups opposed this suit, and the federal district court permitted the groups to intervene. The Utah officials asked the federal court to enjoin the Wilderness Alliance and Mr. Abdo from prosecuting the state-court case. The federal district court granted the request and entered a temporary restraining order enjoining the Wilderness Alliance and Mr. Abdo for an indefinite period of time. On appeal, after concluding it had jurisdiction to hear this appeal, the Tenth Circuit then concluded that the federal district court did not have authority to enjoin the Utah state court. "The All Writs Act grants a district court expansive authority to issue 'all writs necessary.' But the Anti-Injunction Act generally prohibits federal courts from enjoining state-court suits." An exception exists when an injunction is "in aid of" the federal court's exercise of its jurisdiction. This exception applies when: (1) the federal and state court exercise in rem or quasi in rem jurisdiction over the same res; and (2) the federal court is the first to take possession of the res. These circumstances are absent because the state-court action was neither in rem nor quasi in rem. Thus, the district court's order violated the Anti-Injunction Act.

MISCELLANEOUS

The Colorado Supreme Court adopted Rule Changes 2016(04), 2016(05), and 2016(06), approving changes to the Colorado Rules of Professional Conduct and the Colorado Appellate Rules.

Rule Change 2016(04), adopted and effective April 6, 2016, enacts substantial changes to the Colorado Rules of Professional Conduct. Many of the changes were to the Comments to the Rules, and language was added to many comments about lawyers contracting outside their own firms to provide legal assistance to the client. Additionally, a new model pro bono policy was added to the Comment to Rule 6.1. The changes are extensive; a redline and clean version is available here.

Rule Change 2016(05) amended Rules 35, 40, 41, 41.1, and 42 of the Colorado Appellate Rules, adopted and effective April 7, 2016. The changes to the affected rules were extensive, and the Comments to those rules generally explain the changes. Rule 41.1 was deleted and incorporated into Rule 41. A redline and clean version of the rule change is available here.

Rule Change 2016(06), adopted and effective April 7, 2016, amended the Preamble to the Rules Governing the Practice of Law, Chapters 18 to 20 of the Colorado Rules of Civil Procedure. The Preamble addresses the Colorado Supreme Court's exclusive jurisdiction and its ability to appoint directors of certain legal programs to assist the court. The Preamble also sets forth the court's objectives in regulating the practice of law. A clean version of the newly adopted Preamble is available here.

Upcoming CLEs

All CLEs are free to members, including adult beverages and appetizers (unless you are attending a webinar, we don't deliver, ha!). Please take advantage of the committees' dedicated efforts to present quality and timely CLEs for their respective substantive law areas of practice.

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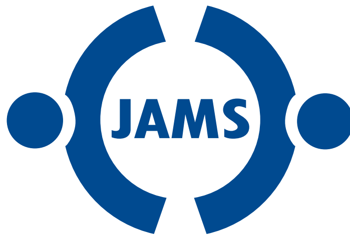

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CDLA 2015-2016 BOARD

KRISTIN A. CARUSO, ESQ., MSCC
President
Ritsema & Lyon, PC
999 18th Street, Suite 3100
Denver, CO 80202
Phone: 303-297-7290
Kristin.Caruso@Ritsema-Lyon.com

JOHN R. CHASE, ESQ.
Vice President
Montomery Amatuzio Dusbabek
Chase, LLP
4100 East Mississippi Avenue
16th Floor
Denver, Colorado 80246
Phone: (303) 592-6600
JChase@madc-law.com

GREGG RICH, ESQ.
Treasurer &
2016 Conference Chair
Markusson Green & Jarvis
1660 Lincoln Street, Suite 2950
Denver, Colorado 80265
Phone: (303) 572-4200
rich@mgjlaw.com

THOMAS S. RICE, ESQ.
Secretary
Senter Goldfarb & Rice, LLC
3900 East Mexico, Suite 700
Denver, CO 80210
Phone: (303) 320-0509 phone
trice@sgrllc.com

ROBERT JONES, ESQ.
Immediate Past President
Paul Edwards & Associates
1975 Research Parkway, Suite 235
Colorado Springs, Colorado 80920
Phone: (719) 228-3800
rob.jones.g06i@statefarm.com

KATELYN WERNER, ESQ.
New Lawyer Director
Frank Patterson & Associates
5613 DTC Parkway, Suite 400
Greenwood Village, Colorado 80111
Phone: 303-741-4539
kwerner@frankpattersonlaw.com

KATHERINE OTTO, ESQ.
Communications Director
McElroy, Deutsch, Mulvaney &
Carpenter
5600 South Quebec Street, Suite C100
Greenwood Village, Colorado 80111
Phone: 303-293-8800
kotto@mdmc-lawco.com

DEAN A. MCCONNELL, ESQ.
At-Large Director
COPIC
Senior Legal Counsel
7351 E. Lowry Blvd., Suite 400
Denver, Colorado 80230
Phone: 720-858-6034
dmcconnell@copic.com

KAREN H. WHEELER, ESQ
DRI State Rep
Levy, Wheeler, Waters P.C.
6400 S. Fiddlers Green Circle # 900
Greenwood Village, CO 80111
Phone: 303-796-2900
kwheeler@lwwlaw.com

KEVIN RIPPLINGER, ESQ.
Diversity / Outreach
Frank Patterson & Associates, P.C.
5613 DTC Parkway, Suite 400
Greenwood Village, CO 80111
Phone: 303-741-4539
kripplinger@frankpattersonlaw.com

DAVID MAYHAN, ESQ.
At-Large Director
Wells, Anderson & Race, LLC
1700 Broadway, Suite 1020
Denver, CO 80290
Phone: 303-813-6531
dmayhan@warllc.com

ANN SMITH, ESQ.
Southern Chapter
Vaughan & DeMuro CS Office
111 S Tejon St, Suite 545
Colorado Springs, CO 80903
Phone: 303-691-3737
asmith@vaughandemuro.com

CASEY QUILLEN, ESQ.
Legislative
Ruebel & Quillen, LLC
8501 Turnpike Drive # 106
Westminster, CO 80031
Phone: 888-989-1777
casey@rq-law.com

CDLA OFFICES
643 Dexter St
Denver, CO 80220
Phone: 303-263-6466
bo@codla.org
glenna@codla.org