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LAW WEEK COLORADO

TOP LITIGATORS

These six Top Litigators continued to see success through 2020, despite the halt in physical court appearances and the slowdown in dockets. These lawyers excelled in trials, appeals, intellectual property disputes, public affairs, family law and commercial law.

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LAW WEEK COLORADO

AN AWARD-WINNING INDEPENDENT NEWSPAPER

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from the editor

This week's Top Litigators feature highlights the work of six attorneys in a range of practice areas who continued to stand out in 2020 — though only as a continuation of stellar legal work. Each one of the featured attorneys has been recognized with a variety of awards and by a range of publications. In fact, we've seen nominations, or already given awards, to several of them. The range of practice areas serves as a useful cross-section of the litigation work done in Colorado and for several signfiicant issues in our state. The coverage begins on page 10.

contact us

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(USPS 024757, ISSN 1942–7964), founded 2002, is published weekly. Periodicals are paid at Denver, Colo. Entire contents copyrighted.

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DEFINING SUSTAINABLE PRINTING

LEGAL LOWDOWN

Polis Appoints 4th District Judge

Laura Norris Findorff will fill a vacancy on the court April 1

STAFF REPORT
LAW WEEK COLORADO

Gov. **Jared Polis** appointed **Laura Norris Findorff** to the 4th Judicial District Court. The judgeship is created by the retirement of Judge **Robert Lowrey**, and the appointment is effective April 1.

Findorff is currently an El Paso County Court judge, a position she has held since 2013. Previously, Findorff was a magistrate in the 18th District; legal research attorney in the 18th District; of counsel at Haskins & Cyboron; senior editor at LexisNexis; law clerk at Gentry & Haskins; adjunct professor at Pikes Peak Community College; research attorney at Spence Moriarity & Schuster in Jackson, Wyoming; senior associate attorney at Cummins & White in Newport Beach, California; associate at Gilbert Kelly Crowley & Jennett in Orange, California; and a staff member at Deloitte & Touche in Irvine, California.

Findorff received a bachelor's degree from the University of San Diego in 1984 and a law degree from the University of San Diego in 1988.

ATTORNEY PROMOTIONS

Ireland Stapleton has named litigation attorney **James Silvestro** a shareholder and director at the firm.

Silvestro's practice focuses on land use, real estate, and business litigation matters. Silvestro represents clients in state and federal court through litigation, including trial and appeals.

Silvestro previously served as a law clerk to Chief Justice **Michael Bender** of the Colorado Supreme Court and practiced as an attorney for the U.S. Department of Energy before joining Ireland Stapleton in 2013. Silvestro received a law degree from the University of Colorado and his undergraduate degree from Colby College.

BakerHostetler announced March 4 that **Nathan Schacht** was elevated to partner earlier this year.

Schacht concentrates his practice on employment litigation, class and collection action litigation, labor relations and employment law counseling.

He received a law degree from the University of California Berkeley School of Law and a bachelor's degree from the University of Portland. Schacht was previously counsel at the firm and is a member of the labor and employment practice group.

BakerHostetler also announced March 4 that **Lisa Canarick** and **Taylor Perodeau Bechel** have been promoted to counsel for the firm's private wealth team.

Canarick is experienced in the areas of estate planning, wealth transfer, business succession and estate administration, with a focus on moderate, high and ultra-high net worth individuals. She received an LL.M. degree in estate planning from Miami School of Law and a J.D. degree from Touro College Jacob D. Fuchsberg Law Center. She is a member of the Rocky Mountain Estate Planning Council.

Bechel advises high-net-worth individuals and families on a range of tax and estate planning matters, including tax-efficient estate plans and trusts, charitable planning and tax-exempt organizations, estate administration and probate, cross-border estate planning and taxation and other sophisticated tax-saving strategies.

Bechel received an LL.M. in Taxation from Georgetown University Law

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CORPORATE COUNSEL INSIGHT

New Bill Would Stop Employers from Dodging Direct Negligence Claims

Plaintiff's lawyers say bill will hold corporations accountable while employer-side attorneys raise concerns about increased scope of discovery, litigation

JESSICA FOLKER
LAW WEEK COLORADO

Colorado lawmakers have introduced a bill that proponents say would hold corporations accountable for employee negigence and expose employer wrongdoing, while defense attorneys warn the bill could increase litigation costs and risks for some companies.

HB21-1188 would allow a plaintiff to bring direct negligence claims against an employer who has already admitted vicarious liability for its employee's negligence. If passed, the bill would undo the Colorado Supreme Court's 2017 holding in In re Ferrer v. Okbamicael, where the high court held that an employer's admission of vicarious liability bars a plaintiff's direct negligence claims against the employer.

Under the respondeat superior doctrine, an employer can be held vicariously liable for an employee's negligence as long as the misconduct occurs within the course and scope of the worker's employment. But the company could also be liable for its own direct negligence, such as negligent supervision, training and hiring or failure to properly maintain a company vehicle.

The Ferrer decision allowed employers to avoid direct negligence claims by admitting vicarious liability. When direct negligence claims are barred, plaintiff's attorneys can't take depositions or make other discovery requests regarding the employer's hiring and training practices, maintenance records or other conduct that might have led to the injury.

"[Ferrer] says once they admit vicarious liability, that's it. They're done. You can't do anything else with the company," said Michael Nimmo, former president of the Colorado Trial Lawyers Association, which is supporting HB21-1188. "So this bill really

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LEGAL EDUCATION

Remote Bar Was 'Positive Experience' Colorado Supreme Court Says

February remote bar offers little difficulty and July will be a repeat

AVERY MARTINEZ
LAW WEEK COLORADO

Colorado held its first-ever remotely administered bar exam in February, and for bar administrators, the exam worked well enough to be repeated in July. Whether remote options will remain beyond the pandemic, however, is unclear.

Colorado Supreme Court Attorney Regulation Counsel Jessica Yates said the remote exam was taken by 313 individuals across several states, and one possibly taking it in another country.

"It appears to have been very successful," Yates said. She added that approximately 13 people had some technical issues with passwords or software, but those were resolved quickly. There were no test-takers unable to complete the test due to technology issues.

Going into the remote exam, Yates said the bar administrators were confident in the software. The vendor, ExamSoft, an educational assistance tech company, worked with the National Conference of Bar Examiners to develop a remote bar exam in 2020. Several states used the ExamSoft for administering their bar exams last year.

"We're happy that we were right and that things did go right for the February exam," she said.

In a press release, the Colorado Supreme Court cited the continuing uncertainty of the COVID-19 pandemic for large events and Colorado's success with a remotely administered bar examination as reasons for the remote exam in July.

In November, the Colorado Supreme Court had decided to host the February bar remotely due to the rising number of COVID-19 cases. The previous bar exam, held in July 2020, drew complaints from examinees, attorneys and law school faculty when it was held in-person.

Colorado was not alone in administering a remote bar this February. In total, 33 out of 50 states offered remote exams for February's bar, according to the NCBE website. Only 16 jurisdictions held non-remote bar exams.

Louisiana did not offer a February bar exam of any type.

Although the February Colora-

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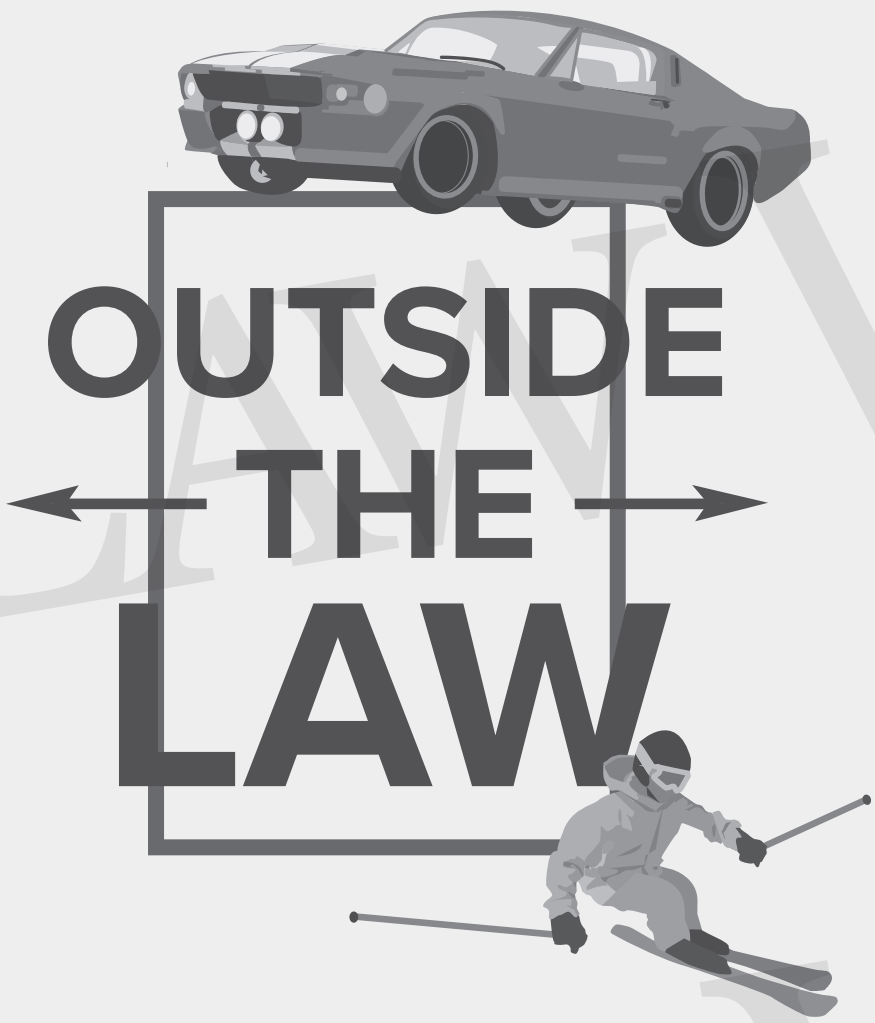

Despite popular belief, lawyers do have lives outside the office. Colorado's legal professionals can be found performing ballet on stage, building a 1,000-horsepower Mustang in a mechanic's garage, or even skiing across the Antarctic. Law Week is on the lookout for more unique stories happening, "Outside the Law."

Let us know of any attorneys with any interesting non-legal hobbies at **newsroom@lawweekcolorado.com**

IN THE LEGISLATURE

Bipartisan Bill Would Mandate an Update to Civics Education

The Senator Lois Court Civics Act of 2021 seeks to address a crisis in trust and understanding of American government

HANK LACEY
LAW WEEK COLORADO

As concerns rise nationwide over the state of American understanding of democracy and its governance, Colorado may soon join the growing number of states reemphasizing civics education in K-12 schools with the proposed Senator Lois Court Civics Act of 2021, approved by the state Senate last week.

SB21-067, a bipartisan bill sponsored by Montrose Republican Don Coram and Denver Democrat Chris Hansen, would require the state Department of Education to include in revised academic standards attention to the "history, culture, and social contributions" of ethnic, racial and religious minority groups. Coram and Hansen also propose to mandate that K–12 schools teach about the three branches of government and their interactions, assure "an understanding of how laws are enacted at the federal, state, and local government levels," and inform students about "the methods by which citizens shape and influence government and governmental actions."

"Schools and school districts must be encouraged to review and reinvigorate their civics education curricula," the bill says. "Civics education must include not only classroom instruction and discussion of the fundamentals of American democracy at the federal, state, and local government levels, but it must also include classroom activities through which students model democratic processes and engage in service learning and experiential project-based learning by participating civically in their communities."

Other directives to CDE include requiring new standards address the functions, history and significance of the Declaration of Independence and the U.S. and state constitutions and "how to engage with federal, state, and local governments and … public officials."

Coram said he thinks the measure is essential to correct growing and widespread adult civic illiteracy. "If you look around at what is happening around our state and in our nation, there seems to be a complete misunderstanding of the role of government," Coram said. "To change the course through the children is probably the fastest way to educate the general public."

THE GOAL: A CIVIL SOCIETY

Local lawyers with whom Law Week spoke said the bill addresses a growing crisis in the country: decaying political cohesion and confidence in government and the institutions that assure a society built on law. Chris Murray, a partner at Brownstein Hyatt Farber Schreck in Denver, said that, in his view, civics education has been neglected for decades. While SB 21-067's goals "used to be pretty basic" to public education, he argued, they have lately seemed to fade away. "We really are to the point where Schoolhouse Rock isn't something that everyone can get anymore," he said, adding that, although the bill is "aspirational," it's "like a drop of water to a man in the desert. It's still a drop of water."

> **"The most democratic country on earth is found to be, above all, the one where men in our day have most perfected the art of pursuing the object of their common desires in common and have applied this new science to the most objects."**
>
> — Alexis deTocqueville, Democracy in America

Murray said one feature of the bill that could be especially helpful to the next generation is its encouragement of open discussion in the classroom. American society "is dying from an inability to speak about controversial subjects charitably with each other and in an informed manner," he said, and kids need to hear more viewpoints, not less, with which they disagree or that make them uncomfortable. "If we're going to live in a pluralistic society, if we're going to work out our disagreements with a democratic process, we have to be able to talk to each other," Murray said. "More importantly, we have to be able to listen to each other."

In that sense, the bill advances a social goal that, to Davis Graham & Stubbs partner and former Department of Justice official Mark Champoux, is "absolutely critical." "In a democracy that's based on the rule of law, it's important that people understand how they can productively contribute to civil society and how they can participate in government," he said. "In a democratic society, there's a shared set of values that enable us to not just exist together but to be a successful town, state, country." Champoux argued that a commitment to pluralism, free expression and the "rule of law" cannot be kept without a focus on civics education. Nor can the refreshing of the mechanism of government needed to continually assure that constitutional promises are kept. "It's certainly true that not all of our institutions are perfect, but you have to understand what they are and why they're there before you can, in a helpful and productive way, work on fixing them or improving them" Champoux said.

John Walsh, a former U.S. attorney and longtime federal prosecutor who is now a partner at WilmerHale, pointed to the benefit to the government itself when Americans are well educated in matters of citizenship. He said that, absent widespread civic awareness, the American government is likely to experience difficulty in fulfilling its promise to be representative. "The controversies over civic education have been there from the very beginning of the American republic," he said. "You have to be willing to let young people know, 'hey, this is an ongoing conversation.' People disagree. That's something that's important for voters and for citizens to know. The most important message they can be given is that we have a system of government that, at its best, empowers citizens to be an active part of our government and really relies on citizens to be an active part of our government."

THE STATUS QUO IN COLORADO

As of 2018, according to an American Federation of Teachers study, most states did demand some civics teaching, though the overwhelming majority of those who do so require only one semester of instruction and nine states had no requirement at all. However, most states do not require adolescents to demonstrate their mastery of civics in order to advance out of middle school or to receive a high school diploma. As of 2018,

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What Can Lawyers Do?

Lawyers and judges have a variety of opportunities to participate in civics education of Colorado youth.

One of the most renowned programs is the Judicially Speaking program, which has inspired more than 100 of the state's judges and teachers to become involved in the quest to advance awareness of government, constitutional principles, and the function of the justice system.

Another, known as Citizen University, sponsors the Civic Saturday and Youth Collaboratory programs. The Constitution Day celebration in Colorado, the We the People Foundation's programs, and Law Day, a longtime staple of professional volunteerism in service of civic engagement, are other options.

IN THE LEGISLATURE

Lawmakers Take up Issue of Childhood Medical Bills

Plaintiffs attorneys asked Supreme Court to abandon common-law rule, but debate has moved to the Capitol for now

JESSICA FOLKER
LAW WEEK COLORADO

Plaintiffs' attorneys want Colorado to abandon a common-law rule they say is antiquated and prevents children from recovering the cost of medical bills they may later be asked to repay.

Their latest hope is SB21-61, a new bill that would abolish the common-law rule that only a parent or guardian can claim economic damages incurred by a child before the age of 18. The bill would allow a minor to bring their own claim to recover their pre-majority medical bills.

The Colorado Supreme Court was scheduled to hear arguments last week about whether to abandon the rule, but arguments in the case, Rudnicki v. Bianco, have been postponed while the bill is pending. The bill has been assigned to the Senate Judiciary Committee and is scheduled for its first hearing on March 25.

David Woodruff, a partner at Denver Trial Lawyers, is representing the plaintiffs in Rudnicki, and he says the case is a "perfect example" of the common-law rule's real-world effects.

Alexander Rudnicki, now a teenager, suffered a serious brain injury during birth and incurred about $400,000 in medical expenses as a newborn. By the time his parents started to suspect their son had suffered permanent damage, the statute of limitations for them to bring a lawsuit had expired. Under current law, parents have two years to bring a claim against a health care institution or professional, while minors can bring claims up to two years after they reach the age of majority.

Rudnicki was eventually awarded $4 million by a jury in a medical malpractice suit, but the judge later reduced the award by nearly $400,000 for his medical bills because, under common law, only his parents own those claims. However, subrogation laws give Medicaid the right to reimbursement for the amount it paid toward Rudnicki's medical bills, Woodruff said, leaving him on the hook to repay expenses that weren't covered by the judgment.

OLD LAW, TIMELY CLAIMS

According to Woodruff, the common law dates back to a time when children were considered "essentially the servants of their parents," and as "owners" of their children, parents bore sole responsibility for paying their children's medical bills. But children today are covered by private health insurance or Medicaid, Woodruff said, "so this old common-law concept that the parents pay medical expenses and therefore have the sole right to recover medical expenses is very antiquated."

Molly Greenblatt of Leventhal Puga Braley represented a client in a similar situation who brought the issue to the attention of Sen. Tammy Story, a Democrat representing Boulder, Denver, Gilpin and Jefferson counties and the prime sponsor of the bill. Greenblatt also co-authored an amicus brief in Rudnicki on behalf of the Colorado Trial Lawyers Association, which is supporting the bill.

"It's our belief as trial lawyers that represent this extremely vulnerable population that they are being treated fundamentally unfairly under this law," Greenblatt said. "I don't think that it was the purpose of this law way back when. But now, with the way that it is being utilized and the way that the subrogation rights and laws work, it is adversely affecting this very at-risk population."

Opponents of SB21-61, which include several health care, hospital and insurance groups, say the current law promotes parental responsibility and timely filing of claims in medical malpractice cases.

"The current common law, which has been in existence for decades … really promotes parents taking responsibility for their child's health care," said Dean McConnell, deputy general counsel for medical liability insurance provider COPIC.

Since minors have a longer statute of limitations, permitting them to bring pre-majority economic loss claims could delay the filing of claims by years or even decades, McConnell said, making them harder for plaintiffs to prove and harder for health care providers to defend against. "Witnesses die or move away or simply can't be found. Records sometimes are destroyed in the normal course of business after several years," he said.

And the sooner lawsuits are filed, the sooner injured children can receive award money. "If a child recovers for a tort claim, they have the benefit of having access to that money to promote their recovery, rather than going a very long period of time, having some care, and then trying to seek reimbursement for that [past] care," said Wheeler Trigg O'Donnell partner Theresa Wardon Benz, who filed an amicus brief in Rudnicki on behalf of Coloradans Protecting Patient Access, another group opposed to the new bill.

But in some cases, a parent might not realize right away that a child has been permanetly injured or that the injury had been caused by somebody's negligence, Greenblatt said, and the two-year statute of limitations gives parents in that situation little time to hire a lawyer and pursue complicated litigation.

WHO PAYS?

One question before the court in Rudnicki is whether the Colorado Department of Health Care Policy and Financing, which administers Medicaid programs in the state, has a valid lien against Rudnicki. The department sent Rudnicki letters establishing it paid nearly $55,000 for his care and maintains it has a valid lien against Rudnicki's judgment. But the Court of Appeals found Rudnicki is not personally responsible for the pre-majority medical expenses the department paid.

McConnell said that courts in Colorado and across the country have similarly concluded that minors are not responsible for their pre-majority medical bills, but that could change if minors become the owners of those claims. "The premise of the law in the first place is that a child cannot enter into contractual obligations, including for medical care," he said. "And that would change that and would potentially make them subject to contractual obligations for paying the bills."

In its amicus brief in Rudnicki, the CTLA says children already incur obli-

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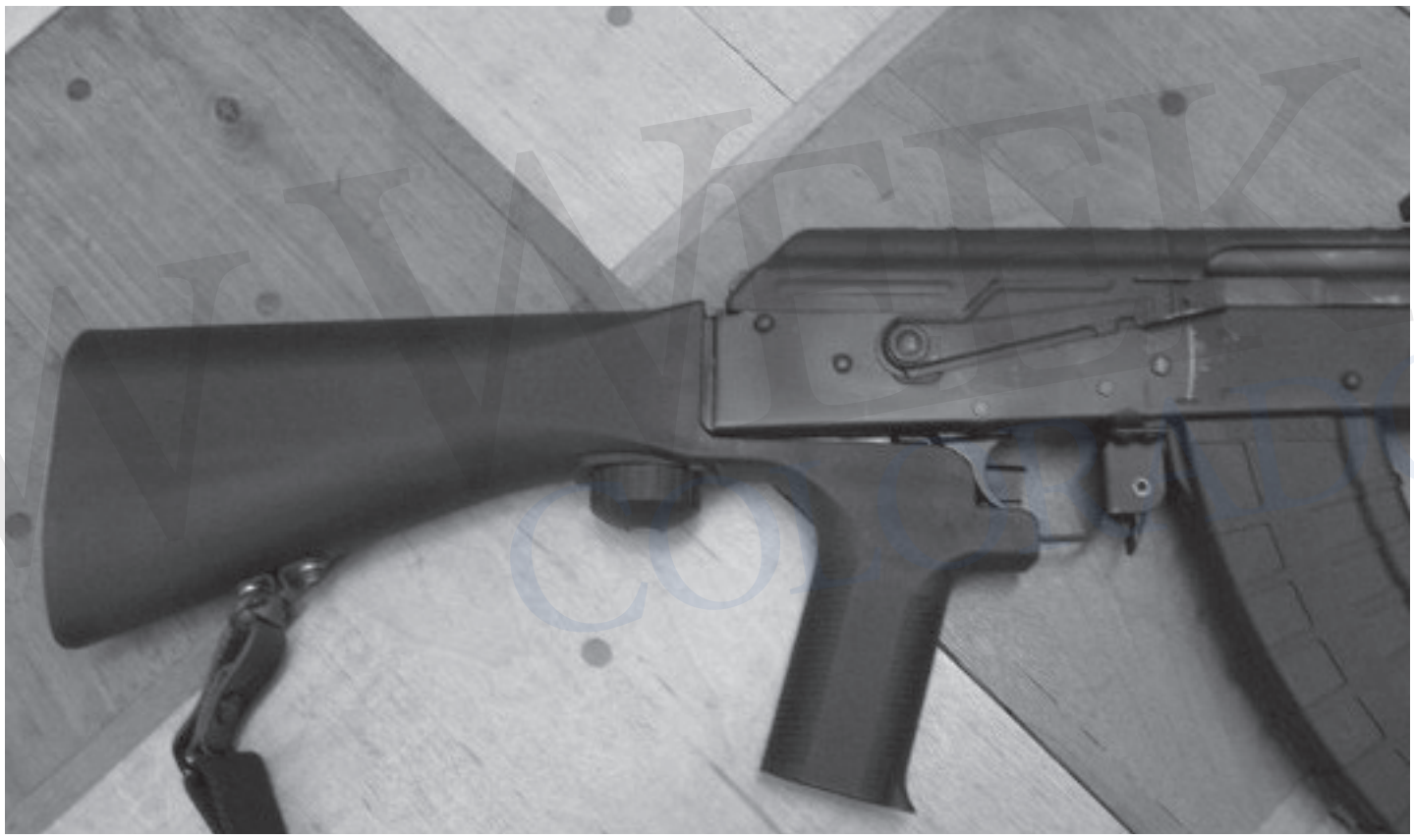
IN THE COURTS

10th Circuit Undoes En Banc Grant for Bump Stocks Case

After granting rehearing, 10th Circuit upholds panel decision

AVERY MARTINEZ
LAW WEEK COLORADO



The 10th Circuit Court of Appeals revoked a decision to grant en banc rehearing of a case challenging the legality of bump stocks, attachments for semiautomatic guns that enable them to mimic the rapid-fire ability of machineguns / **LAW WEEK FILE**

In a move described by litigants as "unusual," the 10th Circuit Court of Appeals revoked its decision to hear oral arguments en banc — after already hearing the arguments. Not only is the appellant's counsel concerned by the decision, five out of 11 judges expressed concern as well, including Chief Judge Timothy Tymkovich.

"I believe the panel majority went looking for ambiguity where there was none," Tymkovich wrote in his dissent. "Then, having found ambiguity, it unnecessarily placed a thumb on the scale for the government by invoking Chevron deference."

The case in question is Aposhian v. Wellington, previously Aposhian v. Barr, involving bump stocks, a firearm attachment that allows semiautomatic firearms to shoot more than one shot with a single pull of the trigger, according to the Bureau of Alcohol, Tobacco and Firearms.

Bump stocks gained national interest following the 2017 mass shooting in Las Vegas where a gunman used a rifle fitted with such an attachment to kill 58 and injure more than 400 people. The oral arguments held in January, now nullified, hinged on whether Congress' ban on machineguns included guns fitted with bump stocks, and whether Chevron deference — which deals with the rulemaking power of federal agencies — could be invoked in the case even after the ATF waived the argument.

W. Clark Aposhian, who purchased his bump stock prior to the change of the Final Rule in 2018, challenged an ATF rule banning bump stocks in federal court. He argued that it conflicted with earlier established rule that said certain bump stocks weren't machineguns.

The en banc oral arguments in January discussed everything from the definition of "machinegun" to the use of Chevron deference. Chevron came from the case Chevron U.S.A. v. Natural Resources Defense Council and has become one of the most important principles of administrative law, according to the Legal Information Institute of Cornell Law School. In that case, the U.S. Supreme Court set a legal test as to when a court should defer to agency answers or interpretation of administrative actions — so long as Congress hasn't spoken directly to the issue or when judicial deference is appropriate where the agency's answer isn't unreasonable.

"Having now considered the parties' supplemental briefs and heard oral argument in this matter, a majority of the en banc panel has voted to vacate the September 4, 2020 order as improvidently granted," according to the order. As such, the order was vacated, and the May 2020 opinion was reinstated as the court's judgment.

Caleb Kruckenberg of the New Civil Liberties Alliance, representing Aposhian, said it was "unusual" for the court to grant en banc review and then dismiss the arguments as improvidently granted. In the cases in other courts, he said, it has generally been a unanimous decision of the court.

Tymkovich and judges Harris Hartz, Jerome Holmes, Allison Eid and Joel Carson, notably all of the appellate court's Republican appointees, wanted to proceed with the en banc rehearing, according to the order. Tymkovich, Hartz, Eid and Carson wrote separate dissents from the order.

"It is extremely remarkable that five of the 11 judges, not only thought it was provident to grant review, but they would have reversed the panel opinion," Kruckenberg said. He added he couldn't speculate about why the court decided to dismiss, but that it was not a cut and dry issue in the court's view.

In his own dissent, Tymkovich wrote that the issues initially leading the court to grant en banc rehearing "remain unresolved and it is important that they be addressed to give guidance to future panels and litigants."

He stated in the dissent that he wrote separately to identify why the panel majority wrongly decided the case in the first place and why the opinion of the court will have "deleterious effects" moving forward. Tymkovich pointed to the lower court's decision that Aposhian would not succeed on the merits, however, he noted that 10th Circuit panel had departed from the district court's reasoning. The panel also found the statute surrounding the machinegun definition as ambiguous.

"Having identified an 'ambiguity,' the panel applied Chevron deference to the ATF's interpretation … . Given this deference, Mr. Aposhian had no realistic path to success," he wrote. However, Tymkovich said he wondered how the panel found the ambiguity.

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> **"I believe the panel majority went looking for ambiguity where there was none. Then, having found ambiguity, it unnecessarily placed a thumb on the scale for the government by invoking Chevron deference."**
>
> — Chief Judge Timothy Tymkovich, 10th Circuit Court of Appeals

IN THE COURTS

10th Circuit Clears Path for Major Water Rule Rollback

The appellate court overruled the district court's decision to block the Navigable Waters Protection Rule

HANK LACEY
LAW WEEK COLORADO

Colorado is no longer protected from the Trump administration's effort to constrict the reach of the nation's principal water pollution law after the 10th U.S. Circuit Court of Appeals dissolved a preliminary injunction against a controversial EPA regulation. The March 2 decision leaves the the state's waterways susceptible to more risk of contamination than at any time in nearly 50 years.

U.S. District Judge William Martinez blocked the Navigable Waters Protection Rule within Colorado last June. He found the state had demonstrated not only a likelihood that the rule violates federal statutory law but that the attorney general's office had proven a likelihood that Colorado would suffer "irreparable harm" if the injunction were not issued.

"It has potential to do a lot of harm to waters around the country as long as it remains in effect," said Daniel Estrin, general counsel and advocacy director at Waterkeeper Alliance in New York. He said the risk involves the possibility that polluters will fill wetlands and discharge toxic and other dangerous substances to lakes, rivers, and streams at will. "If you can get a jurisdictional determination from the Army Corps of Engineers that says this isn't a federal stream, and therefore falls outside of federal jurisdiction, then there's really nothing that stops a developer in most states from coming in and filling those areas in and essentially destroying them," he said. The wetlands that are filled and the streams into which pollutants are routed, Estrin said, impact larger tributaries, "where we get our drinking water and our irrigation water."

Mark Squillace, a professor at the University of Colorado Law School, is less pessimistic. "Because I think the Biden administration is going to move relatively quickly to overturn the rule, to come up with some other rule, I don't know that, long-term, it's going to have a huge impact."

In Colorado, regulators in Gov. Jared Polis' administration will likely move to assure that waters formerly protected by the Clean Water Act, but which now are unprotected for the first time since at least 2008, are subject to pollution controls imposed by the Department of Public Health and Environment. A January 2021 DPHE white paper disclosed that agency staff has worked with stakeholders to develop a proposal for a strengthened state water pollution law.

It may not be possible for all states to provide increased regulatory protections for waterways. Squillace said some states forbid their environmental regulatory agencies from going beyond the reach of federal rules. In addition, some regions will be particularly susceptible to pollution damage to waterways because the Trump rule cuts them out of EPA's regulatory reach for the first time since the Clean Water Act took effect in 1972. "The Southwest is likely the most vulnerable part of the country because ephemeral streams are defined [as] outside the scope of federal jurisdiction," he said. "And such a large percentage of the miles of streams and waterways in the Southwest are ephemeral or are fed ephemerally."

NWPR was finalized by EPA in April 2020. Intended to replace a regulation put in place by President Barack Obama's administration in 2015, NWPR defines the statutory term "waters of the United States" in a manner that excludes nearly every ephemeral stream and many wetlands. "The definition has been disputed, basically going back decades," Estrin said.

EPA chose to rely on a restrictive interpretation of the phrase advocated by the late Justice Antonin Scalia in a 2006 plurality opinion of the Supreme Court. Scalia asserted that navigability is the touchstone of federal regulatory power over water pollution, although that understanding is not indisputable based on the Clean Water Act's text. The Obama-era EPA had defined "waters of the United States" more consistently with an explanation of the term advanced by Justice Anthony Kennedy in a concurring opinion in that case. The Kennedy view, which interpreted the shibboleth to include some waters that are not actually navigable, represented the judgment of the court in the dispute. "Kennedy's basically going along with the outcome that Scalia wanted, but said that as long as there's a significant nexus between navigable waters and the waters you're trying to regulate, then there's jurisdiction," Squillace said.

The Trump administration move was met with a blizzard of litigation, with at least four cases challenging it filed in federal courts around the country. The Colorado challenge is the only one that succeeded in securing an injunction against it from a federal trial court. Martinez determined that the Trump-era EPA created a risk that wetlands in the state would be destroyed because the pandemic had kept the General Assembly from convening to consider any amendments to the state's water pollution law needed to prevent that outcome. "At least some of that enforcement burden (i.e., filling in Disputed Waters) will now fall in Colorado's lap," Martinez wrote. "That share of the enforcement burden is not at all minimal or speculative. Colorado asserts, and [the federal government] do[es] not dispute, that about half of state waters protected by the Current Rule will be unprotected by the New Rule."

Judge Bobby Baldock rejected Martinez' conclusion that Colorado would be irreversibly damaged if the Trump rule took effect. "To merit preliminary injunctive relief, a movant must present a significant risk [that] it will experience harm that cannot be compensated after the fact by money damages," the New Mexico-based jurist wrote, noting that "speculative" or "theoretical" damage will not be enough to secure an injunction.

In an opinion joined by judges Carolyn McHugh and Allison Eid, Baldock then concluded that Attorney General Phil Weiser's argument that NWPR would force Colorado to undertake enforcement actions that it would not otherwise be compelled to do lacked foundation. Baldock found fault with the evidence Weiser submitted to support this claim — an affidavit of a state employee. "The declaration only provides that this obligation could begin as soon as the NWPR goes into effect and that Colorado will need to assume some of this [enforcement] burden in the future," the appointee of President Ronald Reagan found. "These vague assertions are insufficient to support a finding, which the district court did not explicitly make, that Colorado would likely suffer an increased enforcement bur-

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TOP LITIGATORS

CASIE COLLIGNON

BakerHostetler

Specialties:

Class Actions, Cybersecurity and Privacy

AVERY MARTINEZ
LAW WEEK COLORADO

With a practice focused on privacy class-action defense, Casie Collignon's career takes her to courts across the country, through daily challenges of chess-like proportions and debate in advocacy for her clients. She has had a growing practice throughout the pandemic with multiple wins in 2020 alone, but she still finds time to be a mother, mentor, wife and camper.

"I'm a lucky, lucky person," she said. "I very much enjoy my job, and even though I'm a defense lawyer, I very much feel that I'm helping my clients navigate risks — so that they can better provide client service to their consumers." she said.

She said she began her career in consumer class action defense, and it became a natural path to privacy-related class actions. "At its core, privacy issues are fundamentally a consumer issue." She said clients hire her because her practice is focused on privacy-related defense, which often comes up in a class action context.

"The fun thing about defending privacy class actions is the law is constantly evolving," Collignon said, adding later that the opportunity to constantly create new law "is what makes winning so fun."

For Collignon, 2020 was a year marked with interesting cases and wins. She was lead counsel through two successful appeals before the 9th Circuit for the client, [24]7.ai, a technology application company that provides chat services to companies ranging from Delta to Sears.

Her work with the company secured two complete case dismissals of multiple consolidated data breach class actions involving issues of first impression concerning the Stored Communications Act and complex issues involving the Airline Deregulation Act.

Although the case was a privacy class action matter, one of the first ways identified to win the case was that the company was the vendor of an airline, Delta. Even though the company was a vendor to non-airline companies also, the team was able to use the protections provided under the Airline Deregulation Act to get the claims dismissed.

Arguing that as a vendor of Delta, and as such the terms of the airline act protecting Delta from such actions, the claims against the airline were dismissed, she said. As a result, the claims against [24]7.ai were also thrown out, because Delta's preemption extended to [24]7.ai as a vendor.

As a result, a portion of the case involved arguing that any allegations against the company, and against Delta, should be dismissed, she said. That was nearly unheard of in the 9th Circuit, she said.

In the same year, Collignon obtained another complete dismissal, with prejudice, of a multi-million dollar nationwide putative class action against Envision Healthcare. Allegations arose from a phishing attack on the company's systems, and the resulting decision clarified the pleading standard for damages in the data breach-context in the 9th Circuit.

Collignon said doing class action work ensures no two cases are ever the same. A strategy used on one case doesn't fit neatly into another case, she said. "That's what keeps it new and interesting every day," she added.

She said her work is focused on getting the best result for her client, in most instances that's a win, but other times it's about trying to resolve a problem in creative ways. While 2020 had an amazing group of wins, she said there were an equal number of successes not known popularly that help her clients sleep better at night.

"At the end of the day, I'm here to win, I just am," she said with a laugh. "But I also provide client service, and sometimes the definition of win is not the same for everyone."

For Collignon, the client relationship really matters, she said. She added that the COVID pandemic had proven that those relationships matter more than ever before.

"In life and in law, there's a premium on trust," Collignon said. "Solid client relationships have become more solid because we're relying on each other to get through challenging times, both legally and in life."

In addition to her regular practice, Collignon also takes on pro bono cases. Currently, she is representing a Coloradan who is both a disabled veteran and minority in an appeal for separation benefits against the Department of Veterans Affairs. She also previously helped lead a team working with the American Civil Liberties Union to secure a $375,000 settlement for two victims of wrongful arrest in a drug sting.

She's also a co-founder of the Denver Urban Debate League, a nonprofit seeking to provide equal opportunity to underserve students in Denver Metro schools a chance to learn through competitive debates, and currently is a member of the board of directors.

She also serves as her firm's Denver office hiring partner, where she runs the summer associate program and the firm's Paul D. White Scholarship Diverse 1L program, where she works with scholarship recipients to ensure they have opportunities to gain connections across the Denver legal network.

Of her pro bono work, Collignon said that she made a commitment to herself when starting her practice that she would do pro bono work throughout her career. That service dedication to her clients also applies to helping people.

"That's what you become a lawyer for," she said. •

—Avery Martinez, AMartinez@CircuitMedia.com

DUNCAN GRIFFITHS

Griffiths Law

Specialty:

Corporate Litigation, Complex Family

TONY FLESOR
LAW WEEK COLORADO

Duncan Griffiths has developed a specialty in commercial litigation, but some of his big wins blend his firm's well known focus area of family law with his experience in handling business disputes.

In 2019, Griffiths won in a case before the Colorado Court of Appeals that dealt with the question of whether his client had exercised a "spurious lien" against her ex-spouse's business assets. And in 2020, he went to the appellate court again with a case that blended business issues and marital issues.

In re Marriage of Behnke dealt with the question of whether a woman was entitled to interest on her share of her ex-husband's pension account after he had withheld it from her for nearly two decades. Griffiths said he took the case after several other attorneys had turned away the client thinking she didn't have recourse and simply had bad luck in the situation, Griffiths suspected. "Most lawyers weren't bullish on it," he said. "When I got the case, I thought, 'you're owed money, there has to be a way to figure this out.'"

Griffiths sought to apply a statute that allows for 8% interest on withheld money to help his client get her share of the money through the divorce. He said he had seen the statute commonly applied in his former practice area of construction defect law but not in family disputes. Griffiths said he lost the case before a magistrate and then took it to a district judge, who overturned the magistrate but gave Griffith's client the principal amount of the pension fund, finding that because the ex-husband hadn't wrongfully withheld the money, he didn't need to pay interest.

Griffiths appealed the case to the Colorado Court of Appeals, arguing that the intent didn't matter — if a party fails to give someone money they are owed, the recipient is entitled to interest. The appellate court agreed with an unpublished opinion in October and awarded the interest, taking the client's award from the roughly $55,000 she would have been owed as her share of the pension to over $250,000 with interest, Griffiths said.

Also last year, in the final days of in-person trials before the pandemic, Griffiths went to a bench trial for a case involving an ownership dispute involving a home health company. While his case did not involve family law issues, it

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TOP LITIGATORS

CHRIS MURRAY

Brownstein Hyatt Farber Schreck

Specialty:

Government Relations

JESS BROVSKY-EAKER
LAW WEEK COLORADO

Chris Murray's law practice is inherently public-facing due to the nature of pursuing cases against governments and government officials, but his political litigation includes an effort to increase public understanding of the legal matters he's addressing.

Murray graduated from Harvard Law School in 2005 before moving to Denver to clerk for then-10th Circuit Court of Appeals Judge Timothy Tymkovich, who is now the court's chief judge. He took a job at then-Hogan & Hartson, now Hogan Lovells, and practiced mostly commercial litigation at the firm between 2007 and 2012. Murray temporarily left the firm in 2012 to serve as deputy general counsel for Mitt Romney during his presidential campaign. When he returned to Hogan, Murray said he was still practicing a lot of commercial litigation, but because of his experience in the political arena, he was starting to get calls about constitutional law and other political matters.

As Murray worked more in the political law space, he looked to reach partnership while expanding that area of his practice. He began at Brownstein Hyatt Farber Schreck five years ago and is now a shareholder at the firm.

At Brownstein, Murray has taken on a number of high-profile cases including one in 2019 on behalf of three Republican state senators who challenged the constitutionality of Democrats' automated, high-speed bill reading in Senate committee hearings. The case, which dissected a constitutional issue regarding a requirement to physically read aloud bills under consideration, is currently being considered by the Colorado Supreme Court. Murray said the automated reading software the Senate president and secretary approved used multiple computers to read the "incredibly long bill" aloud at around 250 words per minute and completed the reading within about four hours. "It sounded like a lot of clicks — kind of like an insect alien invasion," he said.

Republican challenger in the primary election was nine votes," Murray said.

He worked with Arizona attorneys to look into the issue, which ended up being that some poll workers instructed voters to cast ballots in the incorrect precinct, according to Murray. "When the court ordered that entire group to be counted, our candidate ended up gaining votes. And he's a member of Congress now."

Murray also worked in 2018 on a case out of the District of Columbia that dealt with the state-level regulation of student loan services, which are now largely issued by and owned by the federal government. Murray received a win in Student Loan Servicing Alliance v. District of Columbia addressing a regulatory law that

"People want to understand this stuff, because who doesn't want to understand big public issues that affect the rules that we live by. Most people naturally get interested in that."

Notably, that case addressed the Constitution's intent for bill readings. Since its drafting more than 100 years ago, the Colorado Constitution wouldn't have considered a need to specify what reading a bill means in practice without the use of assistive software. Murray said he got a temporary restraining order and a first-of-its-kind injunction against the secretary of the Senate to require bills "be read aloud at a pace that a human being can understand."

A ruling in the case may prevent the use of assistive reading software in future instances where one party might want to speed through a bill reading to get to a vote.

Murray also represents political clients in recounts and other election issues. In 2016, he represented then-Arizona State Senator Andy Biggs in the recount for the Republican primaries in the 5th Congressional District. "The final vote count separating him and his

went into effect in the District in 2017, which required all student loan servicers operating in the District be licensed and regulated by a student loan ombudsman operating within the Department of Insurance, Securities and Banking.

Murray said his approach in trial is to read judges and juries to see what elements of his argument are most interesting to them to help them better understand historical or nuanced backgrounds to his points. He said being a repeat player in disputes sometimes allows him to dive into more arcane pieces of the Constitution to say, "here's what I think they say," and that judges, and occasionally juries "credit for being able to figure that stuff out." Murray said, "people want to understand this stuff, because who doesn't want to understand big public issues that affect the rules that we live by. Most people naturally get interested in that." •

– Jess Brovsky-Eaker, jess@circuitmedia.com

JOEL NECKERS

Wheeler Trigg O'Donnell

Specialties:

Class Actions, Commercial Litigation

JESSICA FOLKER
LAW WEEK COLORADO

In a year when virtual courtroom fumbles have gone viral, Joel Neckers quickly mastered the art of the remote trial. The Wheeler Trigg O'Donnell partner won one of the country's first fully remote trials in May, an achievement he said has been "one of the biggest victories of [his] career so far."

His client in the case was United Power, a Brighton-based rural electric cooperative that wanted to exit its contract with Tri-State Generation and Transmission to gain access to cheaper power on the market, more flexibility and more options for greener and cleaner energy, according to Neckers. United Power offered $235 million as an "exit fee," but Tri-State demanded $1.25 billion to leave the agreement, and United Power filed a complaint with the Colorado Public Utilities Commission.

Neckers, who served as co-lead counsel for United Power, was set to try the case in March 2020, but COVID-19 had other plans. The trial was moved to May, giving Neckers a little over a month to adapt his team's approach for a new virtual format. According to colleagues, Neckers experimented with the videoconferencing software and extra tablets, headphones and other equipment to prepare for the "inevitable hiccups" that happen with virtual meetings.

> **"I think that's part of what being outside counsel is, it's part of being what a good trial lawyer is — peering around the corners and understanding what's coming down the pipe."**

"The overarching lesson … is that you can be equally as effective in a video trial as you can in person," Neckers said. "It's just a matter of changing your mindset and being willing to be flexible and adapt."

The three-day trial included testimony from 11 live witnesses and the presentation of thousands of pages of documents, and a big part of preparing for virtual trial involved experimenting with different ways of presenting the witnesses and evidence. Neckers became so adept at using the technology that opposing counsel asked him to display their own exhibits during witness examinations, "which I was happy to do to help make the trial run efficiently and smoothly," he said.

United Power prevailed, making it possible for the cooperative to leave Tri-State. In addition to being one of the country's first remote trials, the trial was one of the first involving a cooperative seeking to exit a generation and transmission association, according to a WTO news release, and "[g]oing forward, electric cooperatives, courts, and regulators across the nation will look to Colorado for guidance as these disputes escalate."

Neckers also helped an alternative energy company prevail in a case involving former employees who had embezzled more than $750,000 from the client.

The client won on summary judgment following a remote preliminary injunction hearing.

"It's an important case for the client simply because they have a lot of employees all over the place," Neckers said. "And when someone steals money from them — and that's exactly what happened — you need to make sure people are held to account for that, so it doesn't happen again."

In addition to his virtual courtroom wins, Neckers said anticipating COVID-related legal issues and quickly bringing clients up to speed on them has been one of his proudest accomplishments of the past year. "I think that's part of what being outside counsel is — it's part of being what a good trial lawyer is — is peering around the corners and understanding what's coming down the pipe," he said.

Neckers grew up in Michigan, where his father was a commercial litigator. One of his earliest childhood memories is being asked what he wanted to do when he grew up and saying, "I want to be an 'oiler' like my dad." "I grew up with him as an example and a cousin and an uncle who were lawyers," he said, adding he never really thought he would do anything else.

He earned a law degree from the University of Michigan Law School in 2004, clerked for a federal judge in Michigan and then worked for a big firm in Chicago for three years before joining WTO in 2008. The move to Denver was largely motivated by personal interest and family ties, Neckers said, and the city "offers a good platform to have both a local and national practice."

Neckers has a broad practice that includes commercial litigation, class actions, medical malpractice and professional liability defense. Colleagues praise his relentless work ethic and

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JACKIE ROEDER

Davis Graham & Stubbs

Specialties:

Investigations, White Collar Defense

HANK LACEY
LAW WEEK COLORADO

Jackie Roeder of Davis Graham & Stubbs does not lose sight of her purpose, no matter how many "balls" are in the air.

A veteran commercial, criminal defense and torts litigator, the Princeton University and University of Michigan Law School alumna runs a fine-tuned machine to serve her grateful clients. "It requires a constant juggle and resetting and recalibrating of crises and priorities on a daily basis to ensure that I'm delivering the best service I can to my clients when they need it and not sitting on anything," she said. "It requires a lot of organization, and it requires the ability to delegate to great people and to multitask and to stay on top of it and reassess what that list looks like in the morning, again in the middle of the day, and again before you go to bed."

Roeder, who also worked for O'Melveny & Myers in New York before moving to the Mile High City, has had a "fruitful year" despite the pandemic. She was instrumental in securing a dismissal of a complaint in a shareholder derivative suit brought in Colorado's federal district court, convinced the SEC not to bring an enforcement action against a client and persuaded the Department of Justice to refrain from False Claims Act charges against a DGS client after a multi-year investigation and presentation.

The white collar criminal defense cases are Roeder's favorites. In approaching them, she aims to both maintain the integrity of an investigation and to understand the psychology behind the problem she's asked to solve. "You don't need to be enterprise disruptive, but you [also] have to keep everybody informed so that you don't end up with the gossip mill or a front-page story on your hands," she said.

In all of her client work, though, she said she remains cognizant of the fact that the law is a service business. Roeder reminds herself, as she does associates and peers, that the practice is "a marathon, not a sprint." For her, a life in the law is one "constant learning and evolution." I'm constantly improving my skills and improving my ability to be the best lawyer and partner for clients that I can be," she said. "So much of it, honestly, is about attitude and perspective and a willingness to recognize what you do and don't know, to ask questions, to seek out mentors, and to say what you want."

To get to where she is at DGS, Roeder said she skipped the "academic pursuits" of a clerkship after law school and instead sought to begin her practice as soon as possible.

By the time Roeder joined Davis Graham & Stubbs as a senior associate, she said her desire to work directly with clients was well established and the firm's partners welcomed her determination. "I was met with resounding enthusiasm and people who said 'great, go do this trial, you're going to first-chair it' and 'go take all these depositions, tell me what the strategy is for this case' and 'let me introduce you to these clients.' Roeder said that a former DGS partner, Miko Brown, has been one of her key mentors. "She took me under her wing and showed me the ropes."

Mentorship is, for Roeder, an essential component in any lawyer's success. "It really is an apprenticeship for a long time until you feel like you've got your feet under you," she said. "I was fortunate enough to [work for] people who gave me those opportunities and trusted me with them. I think you have to do it in order to be able to do it."

Career highlights include successful quests to secure commitments from the government not to prosecute clients, dismissals of criminal cases, and defense verdicts for her clients in civil cases. Roeder fondly remembered one trial that occurred shortly after she joined DGS. The high-dollar case, on which she worked with two other lawyers, was a hard-fought win for her client. "The day that we got the jury verdict, it was one of those emotional highs that you can't quite replicate," she said. "It cemented for me the fact that I like what I do." Roeder explained that the feeling of having helped a client validates her efforts to manage a large, diverse and busy practice. "As stressful as preparing for a trial is, and [despite] all of the ups and downs, it's so worth it," she said.

As for the less exciting moments of her career, Roeder said "there are periods of the job where you really feel like it's a slog." That, though, does not surprise her. "That's true in any profession," she said. "Sometimes you don't have a trial, you don't win a summary judgment motion. It's the ebb and flow of it." •

— Hank Lacey, HLacey@circuitmedia.com

"You don't need to be enterprise disruptive, but you also have to keep everybody informed so that you don't end up with the gossip mill or a front-page story on your hands."

MINDY SOOTER

WilmerHale

Specialty:

Patent Law

TONY FLESOR
LAW WEEK COLORADO

With her track record in high-stakes intellectual property litigation, WilmerHale partner Mindy Sooter has earned the trust of major tech companies as well as from the leadership within her firm.

In the past year, Sooter was named partner-in-charge of the national firm's Denver office and she saw wins and forward progress for large and small clients.

In a story not uncommon for patent lawyers, Sooter went into the law as a second career. The first career was in engineering, working as a consultant and then as director of software engineering for a startup in Boulder. She said the work that led her to Boulder also led her to graduate school and then law school. During interdisciplinary coursework in her master's in engineering at the University of Colorado – Boulder, she took a policy class with Phil Weiser who became a mentor of hers.

"That's when I realized law was pretty fun and pretty intellectually stimulating as well. [I thought] this is actually really cool, and my law classes were a lot more fun than my engineering classes," Sooter said. "One thing led to another, and I became a lawyer."

"That's where I feel like my skill set is, where I can take some deeply complicated, involved, technology and figure out what really matters and present that to the jury in a way they can easily understand."

She still describes herself as a "technical geek" and uses her engineering background in the courtroom. "In the courtroom, the most important skills are being able to communicate with the jury and being able to identify the points that are important to juries while also deeply understanding the technology that you're talking about," she said. "So that's where I feel like my skill set is, where I can take some deeply complicated, involved, technology and figure out what really matters and present that to the jury in a way they can easily understand."

She said her technical background gives her a head start in working with technical experts and engineers. "It also allows me to detect flaws in the other side's arguments or identify when a witness on the other side is being evasive and how I can make sure that the cross examination can nail it down what is really accurate."

While courtroom closures slowed some areas of litigation last year, her intellectual property work continued, and Sooter said WilmerHale remained busy. Sooter had cases involving large clients and small ones. Key work involved assisting longtime client Comcast in defending a patent infringement case brought by a company challenging patents for a variety of technologies that involve the interconnection of devices ranging from voice-activated remote controls, set-top boxes, internet gateways and video cameras. Sooter said WilmerHale has been working on "whittling down" that case for about a year and a half and has already won dismissal of induced infringement, willful infringement, vicarious liability and joint infringement claims. That case is set to go to trial later this year.

When working on cases like Comcast's, the team first reads the patents, researches the technology and talks with engineers. She said the work involves "figuring out a way to ask questions where we can identify the differences between the technology and the patents and also dig around and see whether these patented ideas were truly new. All of that does require marrying up strategy of how you think that your client should prevail with deep understanding of how the products work and what the patents are meant to cover."

In addition to the large-scale litigation, Sooter said some of the more rewarding work is for the smaller clients that might not be "accustomed" to litigation and who are "really almost upset and somewhat distracted when litigation does come their way," she said. "With those clients, we really feel like we get to know about them and their people, and we've become very passionate about defending or prosecuting their claims, depending on which side they're on."

Last year, Sooter represented Live Power and one of its investors, Yes Energy, in a trade secret case. The

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BILL CHARTS

Happenings in the House

The House of Representatives is considering more than 200 bills so far. In the latest round of bills introduced last week, one would establish an Immigration Legal Defense Fund, one would prevent discrimination on COVID-19 vaccination statuses and another establishes a new registrar that would create a publicly available summary report of women who received abortions in the state.

HOUSE BILL 1214

Record Sealing and Collateral Consequences Reduction

Sponsor: Sen. Pete Lee (D) and Reps. Mike Weissman (D) and James Coleman (D)

Status: Assigned to the House Judiciary Committee

Summary: Under current law, adults and juveniles can file motions for relief from collateral consequences. The bill would allow motions to be filed related to convictions retroactively. The bill would allow the state public defender and the office of alternate defense counsel to seek and accept gifts, grants and donations for the purposes of representing defendants in record sealing proceedings and then requires the public defender or defense counsel to transmit the money to a special fund with the treasury. The bill would also create an automatic sealing process for arrest records when no criminal charges are filed.

HOUSE BILL 1211

Regulation of Restrictive Housing in Jails

Sponsors: Sen. Pete Lee (D) and Rep. Judy Amabile (D)

Status: Assigned to the House Judiciary Committee

Summary: Beginning July 1, 2022, the bill would prohibit a local jail with a bed capacity of over 400 beds from involuntarily placing an individual in restrictive housing if the individual has been diagnosed with, self reported or exhibits indicators of a serious mental health disorder; the individual has a significant auditory or visual impairment that cannot otherwise be accommodated; and if the individual is pregnant, under 18 years old or has a disability.

HOUSE BILL 1209

Parole Eligibility for Youthful Offenders

Sponsors: Sen. Pete Lee (D) and Reps. Serena Gonzales-Gutierrez (D) and Lindsey Daugherty (D)

Status: Assigned to the House Judiciary Committee

Summary: The bill would make a qualified felony offender who committed an offense while they were between 18 and 24 years old eligible for parole after the offender serves 50% of the sentence and after the offender has served at least 15 calendar years in prison.

HOUSE BILL 1194

Immigration Legal Defense Fund

Sponsor: Sen. Dominick Moreno (D) and Reps. Kerry Tipper (D) and Naquetta Ricks (D)

Status: Assigned to the House Judiciary Committee

Summary: The bill would create the Immigration Legal Defense Fund and lists permissible uses of grant money awarded from the fund. Organizations that receive a grant from the fund would be required to report certain information about persons served and services provided by the organization.

HOUSE BILL 1191

Prohibit Discrimination COVID-19 Vaccine Status

Sponsor: Reps. Kim Ransom (R) and Tonya Van Beber (R)

Status: Assigned to the House Health and Insurance Committee

Summary: The bill would prohibit an employer, including a licensed health facility, from taking adverse action against an employee or an applicant for employment based on the employee's or applicant's COVID-19 immunization status. Additionally, the bill specifies that the COVID-19 vaccine is not mandatory, that the state cannot require any individual to obtain a COVID-19 vaccine, and that government agencies and private businesses, including health insurers, cannot discriminate against clients, patrons or customers based on their COVID-19 vaccination status.

HOUSE BILL 1183

Induced Termination of Pregnancy State Registrar

Sponsors: Rep. Stephanie Luck (R)

Status: Assigned to the House Health and Insurance Committee

Summary: The bill would require health-care providers that perform induced terminations of pregnancies to report specified information concerning the women who obtain the procedure to the state registrar of vital statistics in the department of public health and environment. The reported information must not include information that could identify the women who obtained induced terminations of pregnancies. The bill would require the state registrar to annually create a summary report of the information reported by health-care providers and to make the report available to the public. The bill would place limitations on how and to whom the state registrar may release the information reported. The bill would also put in place penalties for falsified information.

HOUSE BILL 1182

Missing Child Emergency Electronic Location Information

Sponsors: Sponsors: Sen. John Cooke (R) and Rep. Mike Lynch (R)

Status: Assigned to the House Judiciary Committee

Summary: The bill would require a supervising representative of a law enforcement agency to order a designated security employee of a wireless telecommunications provider to provide the law enforcement agency, without requiring the agency to obtain a court order, location information concerning the telecommunications device of a missing child if certain qualifying circumstances exist.

HOUSE BILL 1179

Canadian Domestic Violence Protection Orders

Sponsors: Sen. Bob Gardner (R) and Reps. Monica Duran (D) and Janice Rich (R)

Status: Assigned to the House Judiciary Committee

Summary: The bill would enact the Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act as recommended by the National Conference of Commissioners on Uniform State Laws. The bill would allow a peace officer to enforce a Canadian domestic violence protection order, and would allow a court to enter an order enforcing or refusing to enforce a Canadian domestic violence protection order. The bill would also provide immunity for a person who enforces a Canadian domestic violence protection order.

HOUSE BILL 1176

Election Integrity and Voter Accuracy

Sponsors: Rep. Richard Holtorf (R)

Status: Assigned to the House Committee of State, Civic, Military & Veterans Affairs

Summary: The bill would create the Colorado Bipartisan Election Commission in the Department of State, a five-member panel who would make recommendations to the Secretary of State and the General Assembly concerning the manner in which a comprehensive audit of the state's election processes is to be conducted. The bill specifies requirements relating to the qualifications of persons appointed to the commission and the operation of the commission.

STATE BILL COLORADO

COURT OPINIONS

COMPILED BY
JESS BROVSKY-EAKER
LAW WEEK COLORADO

Editor's Note: Law Week Colorado edits court opinion summaries for style and, when necessary, length.

COLORADO SUPREME COURT

MARCH 8, 2021

People v. Peluso

In March 2019, several parole officers approached a home they believed to be the residence of Susan Damico. Damico was a parolee whose parole agreement allowed officers to search "her person, residence and/or vehicle" without a warrant as a condition of parole. Damico informed her parole officer that she would be moving from the apartment she lived in at that time and she updated C-WISE, a call center and database used to monitor and communicate with parolees, to indicate that her new residence was Aaron Peluso's home.

When officers arrived at the home, they encountered Damico, who gave them a house key to conduct the search and told the officers that Peluso was inside in bed. Damico did not say at any point during her interactions with the officers that the home they were searching was not her legal residence. The officers who first entered the home found Peluso in bed and informed him of the purpose of their visit. After Peluso got dressed and out of bed, officers searched the room and found methamphetamine, THC and drug paraphernalia. Officers arrested Peluso and then searched his wallet, which contained additional methamphetamine. Peluso was charged with possession of a controlled substance and possession of drug paraphernalia. He filed a motion to suppress both the evidence recovered from his home and the statements he made after his arrest, arguing the warrantless search of his home violated his Fourth Amendment rights. At the suppression hearing, the parole officer explained that he believed Damico was a co-habitant of Peluso's home and that officers therefore had authority to search the home pursuant to Damico's parole agreement.

The trial court issued an oral ruling granting the motion to suppress, concluding Damico did not actually live at Peluso's home at the time of the search and that the parole officer could have done more to verify her address, rather than accepting her update in C-WISE as dispositive. The court further found that there was insufficient evidence to determine whether Peluso might have objected to the search once the officers entered his home. The People moved for reconsideration, arguing that the court incorrectly analyzed Damico's actual, not apparent, authority to consent to the search.

In this interlocutory appeal, the Colorado Supreme Court reviewed the trial court's order suppressing evidence of drugs discovered during a warrantless search of Peluso's residence. Because the officers acted on a reasonable belief that Peluso's girlfriend had authority to consent to the search, the Supreme Court concluded the trial court erred in suppressing the evidence. The court reversed the trial court's suppression order and remanded for further proceedings.

COLORADO COURT OF APPEALS

MARCH 11, 2021

People v. Grosko

A division of the Colorado Court of Appeals decided two matters of first impression with respect to Colorado's 2020 pimping statute.

The division concluded "pimping" is defined by the statute as a continuing offense. The division also concluded the unit of prosecution for pimping is defined as per person or an individual who is supported by funds derived from another's prostitution, and persons may be prosecuted based on the number of prostitutes that they receive money or other things of value from.

In this case, Robert Grosko appealed his conviction of pimping, attempted pimping, solicitation and pandering. The division concluded the district court did not abuse its discretion in allowing expert witness testimony in this case. The division affirmed.

People v. Carter

Wayne Carter appealed his convictions of felony driving under the influence and failure to present proof of insurance.

A division of the Colorado Court of Appeals concluded the district court erred by treating the requirement of three prior convictions for felony DUI as a sentence enhancer rather than an element of the offense and constructively amending the failure to present proof of insurance charge by instructing the jury on operating a motor vehicle without insurance. Linnebur v. People required the division to reverse Carter's conviction for felony DUI and issued instructions for remand.

The division also held that a constructive amendment to a criminal charge is not structural error, rejecting a line of Court of Appeals cases holding that such an amendment is "per se reversible."

People v. Nevelik

A division of the Colorado Court of Appeals held that the State of Colorado lacks jurisdiction over a defendant accused of money laundering in an internet scam when there is no record evidence that he had any contact with the victims in Colorado, either physically or electronically. Because nothing in the record shows or suggests that the defendant knew of any connection with the State of Colorado, the district court lacked jurisdiction over him and the division vacated its judgment.

Estate of Colby

In this probate proceeding, the decedent's will provided that her primary residence, if not claimed by a family member, is to be sold and the

THIS WEEK IN HISTORY

The Case Law Behind DNA Tests

Two 1990s Colorado cases collide in attempts to remove the Frye Test from the books

JESS BROVSKY-EAKER
LAW WEEK COLORADO

The Colorado Supreme Court in 1993 weighed in for the first time in the state about the admissibility of certain DNA evidence. Just two years later, the Colorado Court of Appeals would cite the case again in an opinion questioning the same issue: Is DNA typing an acceptable and scientifically backed process to identify suspects, and can that evidence be admitted in a trial?

In Fishback v. People, Jeffrey Fishback was convicted of first-degree sexual assault, second-degree burglary and mandatory sentence violent crime. The evidence connecting Fishback to the crimes included the victim's identification, fingerprint evidence and expert testimony that a DNA profile from seminal fluid from a rape kit matched his blood sample, according to the 1993 court opinion.

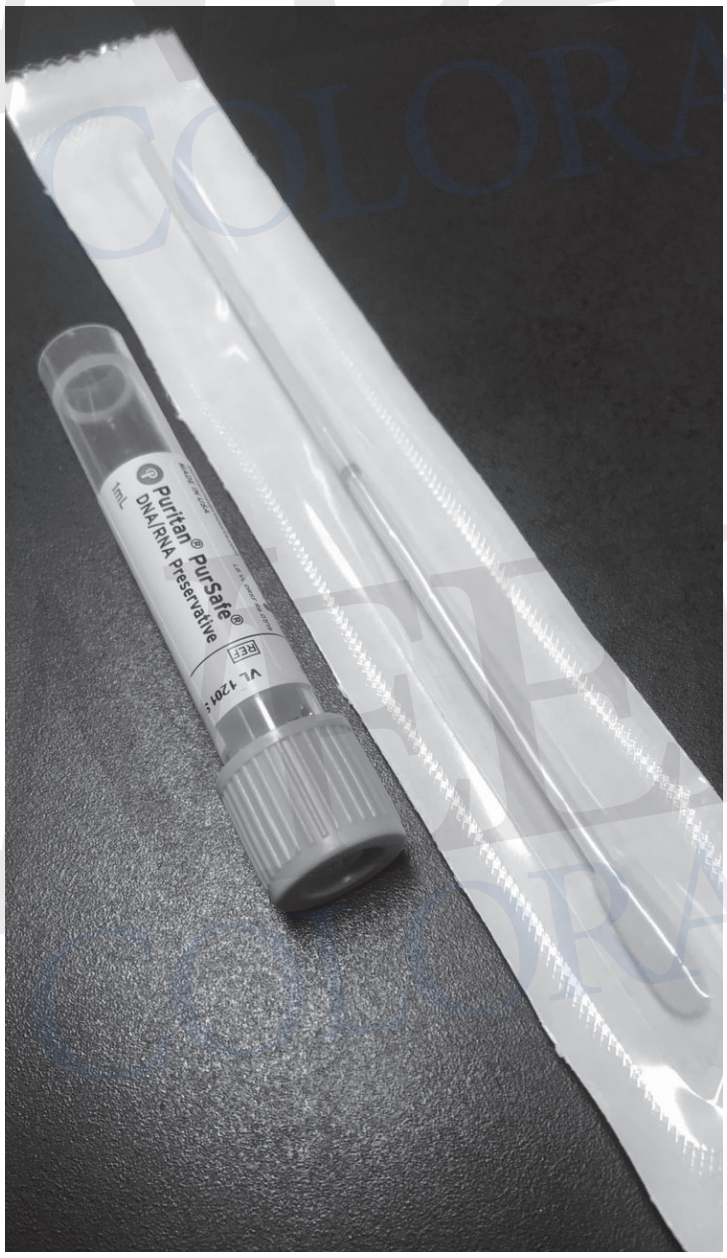
Fishback moved to suppress the evidence at trial but the trial court ruled the DNA evidence was admissible under the Frye test established in 1923. Set forth as an admissibility standard in Frye v. U.S., the test stipulates a court must determine if a scientific community in the field in which the evidence belongs agrees that the method in which the evidence was gathered is generally accepted.

The Court of Appeals affirmed Fishback's convictions, holding DNA typing evidence is generally accepted within the relevant scientific communities and is admissible under the standard set forth in Frye according to the opinion. The Supreme Court affirmed on the same grounds.

The Colorado Court of Appeals ruled just two years later in Lindsey v. People that the DNA evidence used to convict Gregory Lindsey of first-degree sexual assault, second-degree burglary and four habitual criminal counts was admissible under the Frye test. While that case approached the issues with Frye more directly, stating the "scientific disagreement concerning the validity of the statistical techniques employed" was such that the DNA should have been excluded, the court disagreed.

The Lindsey ruling was hotly debated after the U.S. Supreme Court in 1993 ruled in Daubert v. Merrell Dow Pharmaceuticals, Inc. that the Frye test was superseded by the Federal Rule of Evidence 702.

Cases throughout the 1990s in the U.S. Supreme Court explored alternative admissibility standards for DNA evidence, eventually settling around 1999 on a new Daubert Standard. Daubert stipulates trial judges may consider the methodology and extends considerations to include nonscientific evidence. Evidence's relevance, reliability, illustrative purposes and backing with expert testimony are all included in the new gatekeeping role of judges established by Daubert.



By 2017, roughly 80% of states would switch over to Daubert including Colorado in 2001 following a decision in People v. Shreck according to data gathered by the Expert Institute. / **LAW WEEK COLORADO**

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LINDSEY V. PEOPLE

END NOTES

COLORADO COURT OF APPEALS

Brooks v. Archuleta

In 2010, Jason Brooks pleaded guilty to securities crimes and received a 32-year prison sentence. In 2014, he filed a habeas corpus petition and failed. Since then, Brooks filed three unsuccessful motions seeking authorization to file another petition. In 2017, he sought relief in federal district court, but the district court construed the filing as a second or successive petition. In 2020, Brooks filed two motions, arguing that he did not sell "securities" as the term is used in the Colorado Securities Act, that Colorado lacked jurisdiction to prosecute him and that enforcing the Colorado Securities Act violates due process. The district court construed the motion as an unauthorized second or successive petition and concluded that it lacked jurisdiction to consider the merits of the claims. Brooks sought appeal of the district court's rulings, and the 10th Circuit denied the request and dismissed the matter.

Richeson v. United States

David Richeson filed a pro se complaint in the district court asserting claims under the Federal Tort Claims Act. After he was ordered to file an amended complaint, a magistrate judge determined that he failed to comply with pleading requirements and ordered him to file a second amended complaint. Richeson didn't do so despite an extension of the time to file, and the magistrate recommended dismissal of Richeson's amended complaint. Richeson didn't file any objections to the report and recommendation, but the district court docket indicates that on Nov. 23, a copy of the magistrate judge's report that was mailed to Richeson was returned as undeliverable. The district court adopted the magistrate judge's report and recommendation and dismissed Richeson's amended complaint without prejudice. The district court also certified that any appeal from this dismissal would not be taken in good faith. Richeson appealed to the 10th Circuit Court of Appeals but the court affirmed.

United States v. Lopez-Ramirez

The government filed a motion to enforce the appeal waiver in Jenifer Lopez-Ramirez's agreement pleading guilty to two counts of bank robbery, and two counts of possession of a firearm during and in relation to a crime of violence. She was sentenced to a total of 19 years. Lopez-Ramirez sought to challenge the district court's acceptance of her plea agreement and her sentence. The 10th Circuit Court of Appeals concluded the Hahn conditions were satisfied in this case and granted the government's motion and dismissed the appeal. The 10th Circuit noted the dismissal was without prejudice to Lopez-Ramirez's right to pursue post-conviction relief on the grounds permitted in her plea agreement. The court also granted Gregory Stevens's motion to withdraw as counsel.

DICTA

ENTERTAINING THE EXTRANEOUS

CITIZEN UNREST

A bill that would set mandates for civics education in Colorado is represntative of a national push, and national concern, about the level of understanding of government. A 2017 study found that 30% of U.S. millennials consider living under a democratically-elected government to be important. Another from 2016 concluded that between 1995–2011, the proportion of Americans born in the 1970s that believed democracy to be a "bad" form of government rose from 16% to 20%.

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MEDIEVAL JUSTICE

Plaintiffs' attorneys are urging Colorado to abandon a "medieval" common-law rule that says only parents may recover a child's pre-majority medical bills. In an amicus brief, the Colorado Trial Lawyers Association said the rule is based on the "antiquated and offensive" idea that a male head of household exercises "domestic rule" over dependents, including his wife, children, servants and slaves. "Early Colorado cases reflect the view of children as 'servants' of the male head of household, without independent rights and under the dominion of the parental 'master,'" states the brief.

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BUMP STOCK SPLIT

The 10th Circuit Court of Appeals, after hearing oral arguments in a case involving firearm bump stocks, walked back their grant of en banc to the dismay of multiple judges of the court. Elsewhere in the county, bump stocks are headed to hire courts as well. An appeal was filed in the 5th Circuit in a separate bump stock case asking to reverse a trial court's decision in the first bump stock case to reach trial.

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UPCOMING EVENTS

MAR 16

WHAT:
The CDLA and Colorado LGBT Bar Association are holding a presentation on the hurdles to professional advancement for the LGBTQ+ attorneys.

WHEN:
noon – 1 p.m.

WHERE:
Register at codla.org

MAR 16

WHAT:
IAALS will host a discussion on programs in other countries that open up the legal and justice system for everyone to access services.

WHEN:
11 a.m. – noon

WHERE:
Register at iaals.du.edu

MAR 19

WHAT:
The CTLA will hold a seminar on trial storytelling tactics.

WHEN:
all day

WHERE:
Register online at ctlanet.org

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LOWDOWN
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Center and a J.D. from the University of Colorado Law School. She is a member of the Rocky Mountain Estate Planning Council and the Colorado Planning Giving Roundtable.

Regulatory attorney **John "Sean" Jennings** has been named a shareholder and director at Ireland Stapleton. Jennings' practice focuses on representing businesses in matters involving regulatory law, government relations and commercial transactions. He works with clients in diverse industry sectors such as food and beverage, cannabis, hemp/CBD, transportation, energy and gaming.

Jennings is an active member of the Downtown Denver Partnership and the Colorado Restaurant Association's Government Affairs Committee. He also sits on the Board of the WorldDenver, a nonprofit that engages global citizens and organizations in Colorado through education and cross-cultural interactions. Jennings earned his law degree from Villanova University School of Law and his undergraduate degree from Michigan State University.

JUDICIAL ANNOUNCEMENTS

The 2nd Judicial District Nominating Commission has nominated three candidates for a district court judgeship created by the retirement of Judge **Morris Hoffman**, effective May 1.

Nominees **David Karpel** of Englewood, and **Marie Moses** and **Demetria Trujillo**, both of Denver, were selected by the commission via videoconference on March 5. The governor has 15 days from March 8 to appoint one of the nominees as 2nd Judicial District Court judge.

The 10th Judicial District Nominating Commission will meet via videoconference on April 27, to interview and select nominees for appointment to the office of county judge for Pueblo County, filling a vacancy created by the retirement of Judge **David Lobato** occurring on July 1.

The nominating commission will also meet April 28, to interview and select nominees for a judge vacancy that will be created by the retirement of Judge **Kim Karn,** occurring July 1.

Applications are available from the office of the ex officio chair of the nominating commission, Justice **Melissa Hart**, 2 E. 14th Ave. in Denver, and the office of the court executive, **Laura Snyder**, 501 N. Elizabeth Street in Pueblo. Applications also are available on the court's home page at http://www.courts.state.co.us/Careers/Judge.cfm

Applications must be submitted by 4 p.m. on April 7. Any person wishing to suggest a candidate to fill the vacancy may do so by 4 p.m. on March 31.

BOARD APPOINTMENTS

Brownstein Hyatt Farber Schreck announced that **Carrie Johnson**, a shareholder in its Denver office, has been named co-chair of the firm's Women's Leadership Initiative. Johnson will serve as co-chair alongside **Ali Metzl**, shareholder and chair of diversity, inclusion and equity.

As a member of the firm's litigation department, Johnson focuses on litigation related to complex contract, corporate governance, fiduciary duty, fraud and securities issues. In addition to her complex commercial litigation work, she has a robust appellate practice, often appearing before state and federal appellate courts. She also most recently served as co-chair of the firm's Summer Associate Committee and currently serves as the hiring and review partner for the Litigation Department.

The WLI was co-founded in 2014 by Metzl and **Nicole Ament**, chair of Brownstein's Real Estate Department, to foster greater connectivity among the women of the firm, provide additional professional development tools and training for women, and advocate for greater opportunities for women in partnership and leadership positions. •

CORPORATE ACCOUNTABILITY
CONTINUED FROM PAGE 4...

is about corporate responsibility."

"All of this bad conduct that's out there, potentially, is being hidden from the public, and it's being hidden from the plaintiff," said Nimmo, a partner at Denver Trial Lawyers. "We can't right the wrong from the right people. We can only bring it against the employee and the company for the employee's conduct rather than the employer's conduct."

Defense and employer-side attorneys say the Ferrer ruling has helped to streamline litigation by eliminating time, costs and complexity associated with discovery.

"…(W)here an employer has conceded it is subject to respondeat superior liability for its employee's negligence, direct negligence claims against the employer that are nonetheless still tethered to the employee's negligence become redundant and wasteful," Justice Monica Márquez wrote in her majority opinion in Ferrer.

"That expansion of discovery puts pressure on the employer to settle the case," said Evans Fears & Schuttert partner Lee Mickus, who filed an amicus brief in Ferrer on behalf of the Colorado Defense Lawyers Association.

"All that becomes very expensive, and it becomes very disruptive," he said. "And a lot of small businesses … don't have the resources to be in a position to manage litigation full time while they're also trying to run a business full time."

In addition to increased litigation costs and time, direct negligence claims can also open employers up to reputational risks as potentially embarrassing or damaging information could become public during discovery or trial, said Sterling LeBoeuf, a partner at Davis Graham & Stubbs. "It's one thing to say this one employee messed up on this one occasion. And it's another thing to have your whole organization opened up for examination," he said. LeBoeuf added employers could also be hit with higher insurance premiums over time if they face additional liability claims.

According to the attorneys, respondeat superior issues most often arise in the transportation and trucking industry; the Ferrer case involved a cab company whose driver hit a pedestrian. But other industries could fall within the scope of HB21-1188. "In theory it would apply to any situation involving a corporation where an employee is involved or an agent is involved," said Nimmo, including the medical industry in malpractice cases or a property management company in a premises liability case.

Mickus said vicarious liability can apply in "just about any [industry] with exposure to the road," which includes restaurants, manufacturing, retail and wholesale businesses that have delivery drivers or move their product. But it can also arise in other situations where an employee is interacting with the public, the attorneys said, such as in the retail and hospitality industries.

HB21-1188 was introduced March 4 and has been assigned to the House Judiciary Committee. It has not yet been scheduled for a hearing. The bill's prime sponsors are Rep. Chris Kennedy (D-Jefferson County) and Sen. Julie Gonzales (D-Denver).

A similar bill was introduced last year but was put on the back burner due to the pandemic. Nimmo said he and other proponents have been working on the bill "for quite some time" to "make it as palatable as possible," and they have been listening to objections and concerns in order to craft a bill that will get bipartisan support.

According to Nimmo, the bill won't change the amount a plaintiff is awarded, but it will demand more accountability and transparency from employers. "It doesn't change the damages," he said.

"It's just about holding corporations liable for their own negligent conduct. And if you don't do that, then what incentive do they have to not be negligent?" Nimmo said. "Because they never have to pay for it. They never have to stand trial for it. It's never discovered. It's just in the background, always going on, and nobody knows about it."

The bill doesn't allow plaintiffs to recover compensatory or punitive damages more than once for the same injury. But LeBoeuf said direct negligence claims could allow a plaintiff to discover and present evidence of systemic problems in hiring, training or supervising, giving the plaintiff leverage for a bigger settlement or more ammunition if the case proceeds to trial.

"These are the types of arguments that really inflame juries, when they hear about a systemic issue at an employer or at a company," he said. "And they're the kinds of arguments and evidence that tend to make juries want to award punitive damages." •

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BAR EXAM
CONTINUED FROM PAGE 5...

do bar exam went well, other states have experienced issues with remote testing.

Bloomberg Law reported last month that six Democratic senators wrote to the CEO of ExamSoft inquiring about changes the company would make in response to reports that students, specifically students of color or with disabilities, faced "alarming" issues in using the software for the exam, were locked out of tests and were accused of cheating. In response, CEO Sebastian Vos wrote that the company had not found any such issues.

The American Bar Association reported in December that in California's remote October exam, over 3,000 examinees had their videos flagged for review, and "dozens" reported getting violation notices from the office of admissions.

In total, over 8,000 examinees took the California bar exam in October, according to the ABA. Attorneys representing the test-takers and documents reviewed by the ABA Journal revealed that violation notices included references to examinee eyes being intermittently out of view of the webcams; non-functioning audio and test-takers not being present behind their computers during the exam.

The ABA Journal reported that, in the end, only 47 of all test-takers were implicated.

One California bar examinee told the ABA Journal that his laptop crashed on the first essay question, and he received a violation notice for using an electronic device during the test.

He said he was using the phone to contact the California Bar and ExamSoft for help, and his laptop experienced technical problems again soon after.

For the future of options for remote bar exams in Colorado, Yates said Colorado, being a Uniform Bar Exam state, would follow the guidance of the NCBE, which has not provided any indications of future exams beyond July.

Typically, Colorado's July administration of the bar has over 700 applicants, according to the Supreme Court's release. Currently, 13 other jurisdictions have announced they will hold a remote bar exam in July. Colorado's July exam will be held July 27-28. •

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CIVICS EDUCATION
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16 states ask students to pass a civics competency exam.

Although Republican legislators have in the past urged the establishment of a civics test mandate for Colorado — a 2016 bill to require Colorado teenagers to earn a passing score on such an exam as a condition of high school graduation died in the Senate that year — Colorado has not done so.

School districts in the Centennial State can mandate passage of a civics competency exam, said Floyd Cobb, executive director of CDE's Teaching and Learning Unit, but, at least in Colorado, "we typically don't have competency exams from a state level."

Colorado does currently require all high school graduates to have completed one high school government course, Cobb said. "Civics is actually the only course that is required for high school graduation."

Despite the requirement for graduation, the implementation of active learning opportunities in Front Range public schools, which would be in line with the bill's mandate, appears to be, at best, inconsistent. James Stephenson, a Denver Public Schools high school teacher, said that he and colleagues at Thomas Jefferson High School "like to have the kids collaborate and work together," especially by acting out civic roles, he said. "Kids really enjoy that."

While DPS requires Advanced Placement students to undertake a civics project, there is no district-wide expectation for active learning in the social studies classroom. Stephenson said the methods for teaching civics and government are wholly based on an individual teacher's and a school's preference.

In the more affluent Boulder Valley School District, the situation looks similar. Only limited opportunities for students to engage in active learning, such as debating issues, are made available. Kyle Addington, the district's director of curriculum and standards, highlighted BVSD's work to launch a "Democracy Day" activity for students. "That is a more applicable implementation of civic engagement, where students participate in debate and take up actual issues facing local government and have those discussions," he said, noting that the district primarily focuses on the state content standards, as opposed to recommended teaching methods, as its "north star."

The content standards do not address how students should be taught. "When it comes to teaching methods specifically, that's a level below what the state standards do," Cobb said. "The state standards really focus on broad understandings and not specific delivery methods. Those are reserved for local school boards and schools themselves." Instead, social studies standards aim to build student knowledge and skills relating to civics, as well as economics, geography and history. The current set, adopted in 2018, are being first used in the state's classrooms this year. They must be revised this year as a result of earlier General Assembly action and, while the Coram-Hansen bill would put pressure on CDE to ask more of teachers and students as the agency undertakes the revision, Cobb does not believe that the mandate in SB21-067 would complicate the process. "I haven't seen anything that would indicate that that's the case," he said.

Sen. Rachel Zenzinger, D-Arvada, on the other hand, is concerned that the bill seeks to solve a problem that does not exist and needlessly adds to CDE's workload. "I am a social studies teacher," she said. "I can tell you unequivocally that the standards they are proposing already exist. They are already there." "I think the standards are already in the exact place they need to be, which is in the purview of the state Board of Education," she continued. "While I commend the sponsors for raising this issue, I just don't believe we should be putting the standards in our state statutes." Zenzinger said.

Zenzinger conceded that the public is likely confused about how the government works and about the merits of the American constitutional design. Nevertheless, she said, "I don't think you can then draw the conclusion that it's because these things are not being taught in school, because they are." She opined that the more likely explanation of the state of civics knowledge is a human tendency to forget. "I learned algebra in school, but I probably couldn't do the quadratic formula anymore," she said. "I don't remember how." She continued that the state legislature should not expect to "make sure that everybody knows, one thousand percent, these standards for all eternity."

FEDERAL RESPONSE

Congress, too, is showing signs of taking up the question of how best to encourage and improve civics and history education. The leading proposal, sponsored by Sen. Chris Coons, D-Del., and John Cornyn, R-Tex., would have Washington invest $1 billion per year in the project.

The bipartisan team's Educating for Democracy Act would "would create a variety of grants to states, nonprofits, institutions of higher education, and civics education researchers to support and expand access to civics and history education in schools across the country," according to a press release from Coons' office.

Another bill filed in the House of Representatives by Democrat Alcee Hastings of Florida takes a similar tack, proposing to provide grant funding to increase access to civics education. •

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MEDICAL BILLS
CONTINUED FROM PAGE 7...

gations to pay medical bills under the current law, and even when a parent is identified as a guarantor, providers are "not necessarily precluded from seeking payment" from a child's tort recovery. "Injured minors like the plaintiff in this case commonly face contractual and statutory reimbursement claims by private insurers and governmental payors alike," states the brief.

Both supporters and opponents of the bill say there are broader ramifications for health care costs and access. Benz said changing the law could drive up the cost of malpractice insurance, which gets passed on to patients. Obstetricians already face high premiums, which could impede access to obstetrical care, particularly in rural Colorado, she added.

Benz said that the current system is "working well for Colorado," and children aren't being deprived of their rights. "There isn't some large problem that needs fixing," she said. "And the solution being proposed by the legislature creates a lot of problems and could ultimately put children on the hook for medical expenses and reduce access to quality medical care in Colorado."

Greenblatt said that if the law stays as it is, "this is adversely going to financially impact everyone." "If you don't have the funds to take care of these extremely disabled children, somebody is going to have to step up and help, and that puts a strain on our systems like Medicaid," she said.

"[SB21-61] makes good sense for the children of Colorado," said Woodruff, who said he currently has around 30 cases that would be affected by the bill.

"It will benefit Medicaid. It will benefit all kids in Colorado and ... the parents of the kids," he said. "Who it will not benefit, of course, is insurance companies like COPIC who may end up having to pay the medical expenses that otherwise would have expired after two years." •

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BUMP STOCKS
CONTINUED FROM PAGE 8...

The chief judge continued to write that the manner the panel addressed the issues wasn't only "wrong" but created an "unfortunate amount of uncertainty for future litigants."

He wrote the ruling further confused the 10th Circuit's guidance about whether Chevron can be waived and whether the rule of lenity can be used to resolve ambiguities when Chevron could apply to statutes with criminal penalties.

Tymkovich wrote that he believed that Aposhian showed a likelihood of success on the merits, and that the section of ATF regulations on machineguns "unambiguously excludes bump stocks." He also wrote in his dissent that he found Chevron inapplicable for many reasons, one being that the government revoked its use, and "that is a decision we should respect."

Tymkovich also wrote that while bump stocks increase the rate of "lethal fire" from a gun, Congress didn't define machineguns based on the rate of fire. Instead, it defined machinegun based on mechanical operation. "The language of that statute and that statute alone is what we must apply."

"The en banc majority has done the circuit no favors today," he wrote. "By dismissing the en banc order, the majority perpetuates confusion on difficult issues in the circuit." He concluded his dissent by hoping that the issues he rose would be clarified "sooner rather than later."

The other judges similarly wrote that Chevron was improperly applied. Eid opened her dissent by stating simply, "Chevron has no place in this case." Carson said in his dissent that there was an apparent intracircuit conflict over whether the application of Chevron deference must be requested by the government first and that the U.S. Supreme Court and the 10th Circuit have often declined to apply Chevron when the government fails to invoke or rely on the doctrine.

Kruckenberg said he plans to file for certiorari with the U.S. Supreme Court. •

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MINDY SOOTER
CONTINUED FROM PAGE 15...

companies were accused of trade secret misappropriation in an industry that she said previously only had one player. When Sooter's clients entered that industry and began competing, they were met with a lawsuit from that key competitor. The WilmerHale attorneys successfully won dismissal of the claims, and "now the company is able to go back and focus on what they're really needed to do, what they really are meant to do, which is build competition in an industry that didn't previously have it," she said.

Sooter stressed that "it takes a village" to be successful for a client and that working with teams to litigate cases has been the most rewarding part of her career, particularly noting the coordination involved behind trying cases in California and Texas during the pandemic. "I'm just really proud of the group that we've built here in Denver, and elsewhere as well. for help."

In addition to her cases, Sooter has also been busy managing the Denver office of WilmerHale as partner-in-charge. She said WilmerHale has stayed busy through the tumultuous 2020 and expects to see significant growth in 2021. •

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WATERS OF THE U.S.
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den before a decision on the merits." He also concluded that the state employee's affidavit did not "tie any alleged reduction in federal enforcement — and thus any potential increase in Colorado's enforcement burden — to the jurisdictional changes under the NWPR."

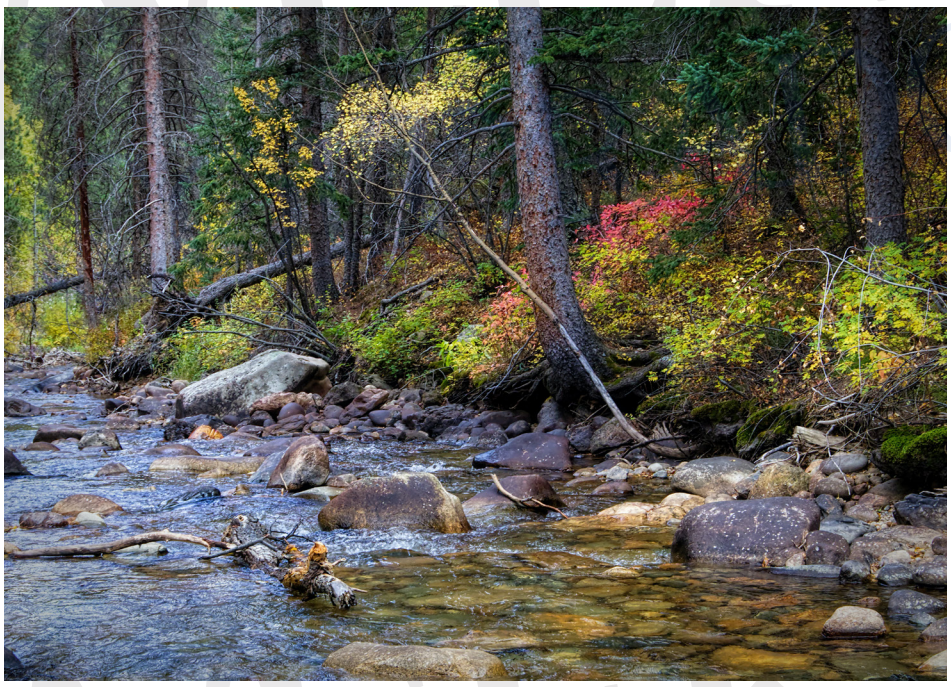
The 10th Circuit's decision does not end Colorado's litigation against the NWPR. Weiser can continue to argue a violation of the Administrative Procedure Act, Clean Water Act, and National Environmental Policy Act. Weiser told Courthouse News that he is "disappointed with the court's ruling." The attorney general declined to comment about whether his office will ask the en banc 10th Circuit to revisit the injunction question or seek review of Baldock's opinion by the Supreme Court. Instead, Weiser said only that his office will examine the 10th Circuit's ruling "in the coming days and determine how best to protect Colorado's water" and that he hopes President Joe Biden's administration "will take a more sensible approach to this critical issue."

Estrin said he does not think that a court will remand NWPR to EPA even if the agency asks it to do that. "They will likely need to either repeal that rule or have a court vacate it." On the other hand, he predicted newly-confirmed EPA administrator Michael Regan is likely to make replacement of NWPR a high priority. "They understand that it is the most dramatic rollback of authority in the history of the Clean Water Act," Estrin said.

Even if Regan does move quickly to eliminate NWPR and restore a broader jurisdictional reach of EPA under the Clean Water Act, the nation may be able to avoid the policy ping-pong ball of restrictive definitions of "waters of the United States," only if Congress addresses the problem.

"I object to the whole notion that you should be looking at [the waters of the United States phrase] in terms of navigable waters," Squillace said. "The legislative history could not be more clear on this point."

Squillace said that, in the case of the Clean Water Act, judges can look to the "gold standard" of a record of Congress' intention when it enacted the law. "It was what we call a conference report, so it was the final report from Congress after both houses have agreed to the final text," he said. "We consider that to be the best of the best of legislative history." In that report, according to Squillace, Congress "said they intended the broadest possible constitutional interpretation of that phrase."



The 10th Circuit Court of Appeals overturned a ruling that shielded Colorado from changes to an EPA law that now open up non-navigable waters to possible pollution. / **CLAUD RICHMOND, UNSPLASH**

Estrin remarked that the urgency of a legislative response may be more pronounced given the increasingly hostile attitude of some federal judges to the Clean Water Act. "In earlier decisions going back to the '70s and '80s, courts seemed much more attuned to what Congress intended, that it was meant to be this all-encompassing federal [law] that regulated every discharge," he said. "We've seen this much more nit-picking review of a lot of the provisions. It almost seems that they're looking for ways to find that the act doesn't apply rather than to accomplish what Congress clearly intended." •

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JOEL NECKERS
CONTINUED FROM PAGE 13...

"superhuman" efforts, and one WTO partner said, "We often joke that he may not

actually be human, but in fact a cyborg terminator sent from the future." His nomination form noted that in addition to working the long hours typical of high-powered litigators, Neckers once visited dozens of "musty basements" around the country searching for evidence in a case involving alleged defects in washing machines.

Somehow, he still finds time to serve the community. Since 2009, Neckers has volunteered with the Colorado Coalition for the Homeless. He was recently elected chairman of the board and will oversee CCH in that role for a three-year term, and he has previously served as vice chair, provided pro bono legal counsel and planned fundraisers for the organization. •

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DUNCAN GRIFFITHS
CONTINUED FROM PAGE 11...

did have the heated emotional issues of a divorce. The issue arose after his client's longtime business partner transferred the ownership interests in the company to his wife in their divorce.

"He didn't go into business with [his partner's] wife, she didn't know home health. Can they even legally do this?" Griffiths said. "To my client's detriment, he tried to make it work." However, the situation became untenable after the new business partner started to come to work in the office and went as far as changing locks and dismissing an office manager so she could run the business.

Griffiths said to his client's chagrin, his former business partner was legally able to transfer his interest in the company to his ex-wife, but the case focused in on the question of whether he could legally transfer a director position as well. The court found that in order to become a shareholder, you must be elected by a majority of other shareholders — and with just two business partners, both would have to agree. Griffiths said it wasn't a significant case in terms of its impact but was a major case for his client.

"I enjoy substantive areas that I practice in," Griffiths said. "That's the fun thing about being lawyer – learning the underlying substance for other professions.

In this case home health care." He started his career in construction defects litigation, but he and his brother eventually joined their mother's law firm. He has since focused his practice on commercial litigation and said he specializes in cases that involve issues with forensic accounting.

As a litigator, he seeks to apply his own business and finance understanding but also to spend his time doing homework on the businesses and the issues involved in the cases he takes on so he can work with expert witnesses in a trial to build his case or dissect his opponents'.

And in the cases he takes on, he said he's moved by representing an underdog. "I like the cases where there's an uphill battle," he said. "I'm not afraid to lose a case if I feel like it's righteous enough or is worth the chance. The judge isn't always going to agree with my client's position, but I take the cases that move me." •

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COURT OPINIONS
CONTINUED FROM PAGE 18...

proceeds evenly distributed to her two daughters. One of the decedent's daughters contended she made a valid claim for the residence under the terms of the will. The district court disagreed because the demand did not comply with section 15-12-804 of the 2020 Colorado Revised Statutes.

A division of the Colorado Court of Appeals concluded the district court erred because section 15-12-804 applies only to a creditor's claim against an estate and does not apply to a devisee's demand for a devise under a will. The division reversed the district court's order approving the final settlement of the decedent's estate and remanded for further proceedings.

Jerud Butler v. Board of County Commissioners for San Miguel County

A division of the Colorado Court of Appeals considered whether the Lawful Activities Statute — which prohibits an employer from "terminat[ing] the employment of any employee" due to the employee's lawful off-duty conduct — applies to an employee's demotion to another position with the same employer.

The division concluded it does not. The division also considered whether the Freedom of Legislative and Judicial Access Act — which prohibits an employer from taking any action against an employee for testifying before a committee of the General Assembly or a court or for speaking to a member of the General Assembly at the committee's, court's or member's request — applies to an employee's voluntary testimony as a witness in a court proceeding without a court order, subpoena or other formal request by a judicial officer.

The division concluded the statute may apply when a party or a party's attorney calls an employee to testify as a witness in a court proceeding and a judge, magistrate or other judicial officer allows the testimony.

The division affirmed the trial court's dismissal of Butler's Lawful Activities Statute claim, reversed the trial court's entry of summary judgment on the Access Act claim and remanded for further proceedings.

People in the Interest of My.K.M.

V.K.L. and T.A.M. appealed the juvenile court's judgment terminating their parent-child legal relationships with My.K.M. and Ma.K.M. V.K.L.'s appeal presented an issue of first impression in Colorado: whether enrollment in a tribe, or merely tribal membership absent enrollment, determines whether a child is an Indian child under the Indian Child Welfare Act of 1978.

A division of the Colorado Court of Appeals held that a child's membership in a tribe, even absent eligibility for enrollment, is sufficient for a child to be an Indian child under the ICWA. •

LAW WEEK COLORADO

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* These features are developed using survey results. Surveys can be found at LawWeekColorado.com.