BOULDER COUNTY BAR ONLINE NEWSLETTER

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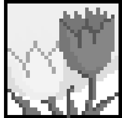

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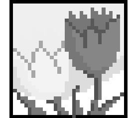

THE TESTAMENTARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE: DEFINING THE PARAMETERS

BY CONSTANCE TROMBLE EYSTER

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THE *LAWYERS HAVE A HEART*
5K RUN/WALK
SUNDAY, JUNE 7, 2003

WATCH FOR MORE DETAILS IN APRIL TO SEE HOW YOUR LAW FIRM CAN PARTICIPATE.

The Colorado Supreme Court has recently held that the attorney-client privilege survives the death of a client. *Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001). Colorado, like most jurisdictions, recognizes exceptions to this general rule. *Id.*[2] One exception is the "testamentary exception," which permits an attorney who drafted a deceased client's will to disclose attorney-client communications concerning the will and transactions leading to its execution in a suit among the testator's heirs, devisees, or other parties who claim by succession from the testator. *Id.* at 200. [3] This article discusses Colorado law applying the testamentary exception and discusses how other jurisdictions have defined the parameters of such exception.

The testamentary exception was recognized by the United States Supreme Court in *Glover v. Patten*, 165 U.S. 394, 407-408 (1897), where the Court reasoned that in a dispute between devisees the decedent would want confidential attorney-client communications disclosed to prove the decedent's donative intent. The Court stated that the testator's intent "could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related." *Id.* at 408. The Supreme Court reaffirmed this principle in *Swindler & Berlin v. United States*, 524 U.S. 399, 404-405 (1998), and stated that about half the states have codified the testamentary exception by providing that a personal representative of the decedent may waive the privilege when heirs or devisees claim through the deceased. *Swindler & Berlin*, 524 U.S. at 405 n.2.

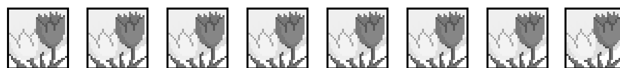
Colorado has not codified the testamentary exception; however, the exception was recognized in this State as early as 1905 in *Estate of Shapter*, 35 Colo. 578, 85 P. 688 (1905). In that case, a will was presented for probate and several heirs objected, alleging that the testator

(continued on page 3)

LONGMONT LAWYERS' LUNCH

April 3, 2003
The Raintree Hotel, Longmont
12 Noon
See page 6 for details.

MARCH 2003 *(Details for programs on page 6)*



SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
						1
2	3	4	5	6	7	8
9	10	11 Employment	12	13 Civil Litigation/ Family Law	14	15
16	17	18	19 ADR/Family Law	20 Young Lawyer Happy Hour	21	22
23	24	25	26 Tax, Estate	27		

LETTER FROM JUDGE ROXANNE BAILIN

Dear Members of the Bar Association:

First, I would like to thank you for giving me your "Beyond the Gavel" award in November. My efforts to connect Boulder's judicial system with the surrounding community derive from a deep love of my county and from a profound belief that communities are sustained and nurtured by the connections among their people and their systems. Receiving recognition for my efforts was both moving and motivating. Thank you very much.

Second, I would like to thank you for your support of the Boulder courts during this harrowing year of budget cuts. The staff at the Justice Center has been forced for months to endure the anxiety and fear associated with potential loss of jobs. They have been forced to lose part of their salaries and to work with short staff. It has not been a good time for any of us. Despite our problems, we have tried to serve you well. Your patience and understanding is deeply appreciated.

Last, I would like to report to you an exciting statistic. As you know, the Boulder District Court has used the trailing docket system for 20 years. We have been very successful in providing firm trial dates for lawyers and all but guaranteeing that every case will go to trial on its first trial setting. In 1998 we "bumped" 1.4% of our cases; in 1999, .047%; in 2000, .058%; and in 2001, .028%. The actual numbers of cases range from 15 in 1998 to 3 in 2001. I am happy to report to you that, in 2002, we were able to try every case on the first trial setting. We have made it to 100%! We hope that we will be able to serve you as well in the future.

On behalf of the judicial officers, I wish all of you a good year.

Judge Roxanne Bailin

lacked capacity to execute the will. Over the objection of the decedent's heirs, the trial court permitted the attorney who drafted the will to testify about the circumstances surrounding the will execution. The court stated that, undoubtedly, while the testator lives, the attorney drawing his will is not permitted, without his consent to testify to communications made to the attorney concerning the will or its contents. *Estate of Shapter*, 35 Colo. at 587, 85 P. at 691. After the testator's death, however, as a matter of public policy, the court saw "no reason why . . . the attorney should not be allowed to testify *as to directions given to him by the testator* so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator." *Id.* (emphasis added). [3]

The Colorado Supreme Court upheld this rule in *Denver National Bank v. McLagan*, 133 Colo. 487, 298 P.2d 386 (1956). The attorney who prepared the decedent's will in that case was permitted to testify about the circumstances surrounding execution of the will and statements made by the deceased at that time. *Denver Nat'l Bank*, 133 Colo. at 491, 298 P.2d at 388. Potentially broadening the application of the rule to more than just the "directions given" to the attorney, the court stated: "Numerous decisions . . . hold that an attorney who draws a will is a competent witness, after the death of the testator, to testify to *all matters leading up to the execution of the will including statements of the testator, his mental condition, and to facts relating to the issue of undue influence and other matters affecting the validity of the will.*" *Id.* (emphasis added). Thus, it appears from the holding in *Denver National Bank*, not only client communications, but the mental condition of the client and other circumstances of the will execution may be disclosed by the drafting attorney after the client's death in a suit between heirs or devisees.

In *Wesp v. Everson,* although the Colorado Supreme Court ultimately held that the testamentary exception did not apply in that case (because the attorney-client communication did not involve a will and the subject litigation was not a will contest), the court did state the general principle that the testamentary exception applies in suits between heirs, devisees, or other parties who claim by succession from the testator. *Wesp*, 33 P.3d at 200. Other courts have described such suits as disputes between parties claiming under the estate. *See Glover*, 165 U.S. at 406. Whether a party "claims under an estate" has been phrased in terms of whether a party is in "privity" or is a "stranger to" the estate. *Wills and the Attorney-Client Privilege*, 14 GA. L. REV. 325, 334 (1980); 2 MCCORMICK ON EVIDENCE § 94 (4th ed. 1992). Claims by creditors or other persons asserting an adverse contract or tort claim against an estate have been held to be claims by a stranger, and thus the testamentary exception has been held not to apply. *See* 2 Paul R. Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES 294-295 (2nd ed. 1999); 2 Edward J. Imwinkelried, THE NEW WIGMORE: A TREATISE ON EVIDENCE 955 (2002). Parties have also been held to be strangers to the estate where they are not heirs or devisees of the decedent and merely allege an interest in the estate based on a will contract claim, although courts have also held to the contrary. *See In re Smith's Estate*, 57 N.W.2d 727, 730 (Wis. 1953); 2 MCCORMICK ON EVIDENCE § 94 n.11 (4th ed. 1992).

Persons claiming a statutory share have been considered to be claiming under the estate. 2 Paul R. Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES 295 (2nd ed. 1999). Additionally, the current view is that the testamentary exception is available when someone is claiming an interest in the estate as a result of a purported inter vivos transaction. *See* 2 Edward J. Imwinkelried, THE NEW WIGMORE: A TREATISE ON EVIDENCE 955 (2002); Restatement (Third) of the Law Governing Lawyers § 81 (2000).

The Colorado Supreme Court has suggested that if the testamentary exception applies all matters leading to the execution of the will, including statements of the testator, his mental condition and the facts relating to

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the issue of undue influence and other matters affecting the validity of the will, are discoverable. *Denver Nat'l Bank*, 133 Colo. at 491, 298 P.2d at 388. Such a broad description of discoverable material may include copies of prior executed wills or even drafts of unexecuted wills in certain circumstances.

In *In re Estate of Voelker*, 396 N.E.2d 398 (Ind. Ct. App. 1979), the Indiana Court of Appeals found that, where a party who was not related to the decedent sought discovery of prior, unsigned wills, these documents were protected by the attorney-client privilege. The court relied on both the fact that the claimant was a stranger to the estate and the fact that "metamorphosis from mere pages of writing to the status of a will was never achieved" and therefore there was no implication that the client intended to waive an otherwise privileged communication. *Id.* at 399. This reasoning was also applied in *De Loach v. Myers*, 109 S.E.2d 777 (Ga. 1959). The Georgia Supreme Court held that the attorney-client privilege applied to a will prepared by an attorney that was never executed, read to or seen by the testator and that the privileged was not waived. *Id.* at 781. The Court reasoned that the reason for the testamentary exception, which is to disclose declarations and transactions that promote a proper fulfillment of a decedent's will, were not present in these circumstances. *Id.* (relying also, in part, on the fact that the claimant was a stranger to the estate).

Similarly, the Wisconsin Supreme Court found that, where claimants objected to a will on the theory that the decedent was bound by a will contract, an attorney was not required to produce or testify to the contents of prior wills and codicils executed by the decedent. *In re Smith's Estate,* 57 N.W.2d 727, 730 (Wis. 1953). The court reasoned that, because the claimants were not claiming as legatees or heirs of the decedent, they were strangers to the estate.The Court distinguished its earlier decision, *In re Landauer's Estate*, 52 N.W.2d 890 (Wis. 1952), where it held that prior wills in the possession of the drafting attorney were discoverable.

The difference between *Smith's Estate* and *Landauer's Estate*, reasoned the Wisconsin Supreme Court, is that in *Landauer's Estate*, the claimants argued that the decedent's last will was a product of undue influence. *In re Smith's Estate*, 57 N.W.2d at 730. Accordingly, it could not be assumed that the purported last will in fact reflected the testator's true intention. Rather the testator's interest "would best be served if the attorney . . . would be permitted to divulge all communications, including the contents of prior wills in his possession, which were relevant and material as to the question of the validity of such will." *Id.*

The United States Court of Appeals

(continued on page 10)

PRESIDENT'S PAGE

BY SETH BENEZRA

SEC RELEASES FINAL ATTORNEY CONDUCT RULE BUT EXTENDS COMMENT PERIOD ON "NOISY WITHDRAWAL"

Corporate lawyers are breathing a bit easier since the Securities and Exchange Commission on Wednesday released its final rule on attorney conduct under the Sarbanes-Oxley Act of 2002. In a statement issued on January 29, 2003, the SEC recognized "the thoughtful and constructive suggestions" from those who had commented on an early draft proposal on the issue of attorney conduct under the Sarbanes-Oxley Act of 2002. The SEC noted that the "final rule we adopt today has been significantly modified and changed in light of these comments and suggestions." To the further relief of many attorneys, the SEC announced that it is extending the comment period on a controversial proposal that would require attorneys representing a company to make "noisy withdrawals" when confronted with corporate wrongdoings.

The SEC's draft attorney conduct rule, which had been released for comment on November 21, 2002, sparked intense debate within the legal community, even amongst non-securities lawyers. One of the most contested provisions was the "noisy withdrawal" requirement. This provision was intended to be the final stage of an up-the-ladder reporting process that a lawyer was to follow if faced with material evidence of a securities violation. If a company failed to correct the violation, its lawyers would be required to disaffirm any SEC submissions they believed could be tainted. Outside lawyers would be required to resign from their clients' companies. Lawyers argued that this proposed process could endanger attorney-client privilege by requiring them to violate client confidences. Under the final rule, lawyers are still required to report evidence of material violations up the corporate ladder, but the requirement to withdraw and to report to the SEC has been tabled at least for now. Instead, the SEC extended the comment period on that issue by an additional sixty days.

The SEC also proposed an alternative to the "noisy withdrawal" requirement: allow the company rather than the lawyer to notify the SEC of the lawyer's withdrawal. The decision to extend the comment period was applauded by the ABA which had urged that action in the comment it filed with the SEC in December.

"We are pleased that they did what we asked them to do," said ABA President Alfred P. Carlton, Jr., "and we look forward to continuing the constructive dialog." Carlton, of Raleigh, North Carolina, says the ABA's task force on Sarbanes-Oxley implementation will meet early next week to discuss the rules and alternatives, including the SEC's proposal.

(continued on page 13)

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CALENDAR OF EVENTS

Pre-registration is required for all BCBA CLE programs. Please send a check to the Bar office at least 3 days in advance. You will be charged for your lunch if you make a reservation and do not call to cancel prior to the CLE meeting. BCBA CLE's cost $15 per credit hour for members and $18 for non-members unless otherwise noted. CLE credit is $10 per hour for members of the Young Lawyer Section practicing 3 years or less. Materials are $5 without CLE credit.

March 11, 2003
Employment Law Section
Fair Labor Standards Act
Speaker: Chris Leh
Caplan & Earnest, LLC
12 Noon
CLE $15, Boxed Lunch $10
Turkey, veggie or beef

March 13, 2003
Civil Litigation & Family Law Sections
Discovery, Hidden Assets and
Ramifications in Family Law Cases
Speaker: Bruce Fest
12 Noon Brown Bag Lunch
Boulder County Justice Center
Courtroom E, CLE $15

March 19, 2003
ADR & Family Law Sections
Attorney Ethics: Is Lying
Ever Acceptable?
Speaker: Professor Pat Furman
12 Noon Brown Bag Lunch
Boulder County Justice Center
Courtroom D
CLE $15

March 20, 2003
Young Lawyer Happy Hour
The Med, Walnut Street
5 PM

March 26, 2003
Tax, Estate Planning and Probate Section
Non-Profit Update
Speaker: Peter Guthrey
The Academy, 970 Aurora Street
12 Noon
CLE $15, Buffet Lunch $13

April 3, 2003
10:30 a.m. Board of Directors Meeting
The Raintree, Longmont
12 Noon Longmont Lawyers' Lunch
Speaker: Judge David Archuleta

Boulder County Bar Foundation
Annual Meeting and Dinner
6 PM, Boulder Country Club

April 9, 2003
Real Estate Law Section
Fundamentals of Title Insurance
Speaker: Diane Davies
12 Noon
Dolan's Restaurant
CLE $15, Lunch $13

April 10, 2003
ADR Section
Dialogue with the Judges
Location TBA
12 Noon
CLE $15

April 16, 2003
Bench/Bar Committee
Contempt Citation in Civil Cases
Speakers: Magistrates Lisa Hamilton
Fieldman and Norma Sierra
12 Noon Brown Bag Lunch
Boulder County Justice Center
Courtroom D CLE $15

IN MEMORY OF KEVIN BRUCE KLEIN

Kevin Klein passed away on Feb. 12, 2003. Kevin moved to Boulder 10 years ago after graduating from the University of Virginia Law School. He joined the Boulder County Bar Association in 1995 and was very active in the Young Lawyers Section of the Bar. He was the creator of the LACH (Legal Assistance Clinic for the Homeless) Program, which continues to operate each Wednesday night at the Boulder Homeless Shelter. Kevin cared deeply for the clients he served, most of whom were troubled youth or the medically indigent. He loved to teach, especially young people about the law, and taught legal ethics at the Denver Career College. He was in private practice for 6 years and a substantial portion of his practice was representing troubled youth as a defense attorney and guardian ad litem. In 2001 he became a prosecutor and assistant city attorney for the City of Thornton. Recently he worked for the City of Arvada. We are deeply appreciative of Kevin's contributions to the community and legal profession. He will be sorely missed.

The Kevin Klein Memorial Fund has been created to assist people who cannot afford mental health services. Contributions may be sent in care of William Benjamin, 5350 Manhattan Circle, Suite 105, Boulder, CO 80303.

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MARIE WALTON, P.C.
is moving to Manhattan,
but remaining in Boulder.

As of March 1, our office will be located at
5330 Manhattan Circle, Suite D
Boulder, CO 80301
Our phone, email and fax remain the same.

The focus of the practice will continue to be all aspects of family law, the representation of maltreated children, and GAL work of mentally ill adults.
Marie is also available to consult counsel on the representation of mentally ill clients and to serve as an expert witness on domestic and GAL issues.

Phone 303.447.1760
Fax: 303.440.9767
Email: mwaltonpc@aol.com
Marie Walton, Esq. Robbin Moore, paralegal

The CBA's Family Law Section produced a booklet, "When Violence Affects Your Work," which discusses the secondary trauma that may affect attorneys and their staff when a violent episode involves a client or someone in their office. The FLS distributed copies to the members of the section at meetings and through the relay boxes. However, there are a number of people who have not gotten their copies. If your name is listed below, a copy is available for you at the Boulder County Bar Association office without charge. If your name is not listed below, you may purchase the booklet for $2.50 payable to the CBA.

ROBIN AMADEI, PETER ANDERSON, JAMES COOKE, HOMER CLARK, JANET RUTH CORLEY, CATHERINE EDWARDS, MICHAEL ENWALL, MARY LOUISE EDWARDS, KATHLEEN ANN FRANCO, EVAN FREIRICH, LOIS JEAN TABBERSON GRAY, GREGG GREENSTEIN, BARBARA HIGHT, BRUCE JOSS, RICHARD KALAR, BARBARA LAVENDAR, ANDREW LITTMAN, C. JAN LORD, STACY ANN MARGOLIN, STEVEN MEYRICH, KEVIN MCDOWELL, TODD MCMILLEN, MARDI MOORE, STEVEN CHARLES MORELAND, JOAN NORMAN, RICHARD POLEY, CHRISTIAN JOHN RATAJA, PATRICIA RILEY, TERRE RUSHTON, SALLY SCHNEIDER, TIM SPONG, DOMINICK SAIA, JAMES WILLIAM SAFFELL, SUSAN SPAULDING, GEORGIANA SCOTT, CINDY VIGESAA, LEROY WARKENTINE, MARILYN WILDE, SARA WILLHITE.

Please come by the bar office and get your booklet by April 1. The Family Law Section did not have the budget to mail this helpful booklet to all its members.

LAWYERS ANNOUNCEMENTS

MARSH FISCHMANN & BREYFOGLE LLP
Attorneys at Law
welcomes
ROBERT G. CROUCH
to the firm as a Partner in our Boulder office.

Bob's practice will continue primarily in the area of obtaining patent and trademark protection for his clients and counseling related thereto.

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TRADE SECRETS AND THE INEVITABLE DISCLOSURE DOCTRINE

BY MARK WILETSKY AND SUZANNE KEITH

Many employers today invest substantial time and money developing client lists, marketing strategies, software or other materials -- so-called "trade secrets" -- to give them a competitive edge in the marketplace. Losing an employee to a competitor often raises concerns about the potential misappropriation and disclosure of these trade secrets to the new employer, especially if the employee played a key role in developing them.

In certain limited circumstances, an employer may believe that an employee could perform his or her new job only by using its trade secrets. Thus, even without direct evidence of misappropriation of trade secrets, employers at times seek to prevent a former employee from working for a competitor and improperly disclosing trade secrets by invoking the "inevitable disclosure doctrine."

The inevitable disclosure doctrine presumes that a former employee who has had access to an employer's trade secrets will "inevitably" use or disclose that information in the course of the employee's new employment. In the seminal case of *PepsiCo Inc. v. Redmond*,[1] the Seventh Circuit Court of Appeals affirmed an injunction restricting a PepsiCo manager's acceptance of a comparable position at Quaker Oats because he had knowledge of PepsiCo's strategic marketing plans and beverage pricing. The manager had signed an agreement not to disclose confidential information, but he had not signed a formal non-compete agreement. In enjoining the manager, the court held that "a plaintiff may prove a claim of trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets." [2]

PepsiCo established three elements of inevitable disclosure. First, the employee must possess "extensive and intimate knowledge" of the employer's trade secrets.[3] Second, the employee's positions must be so similar that he would have to rely on trade secrets to adequately perform his new position. Finally, lack of candor by the employee or new employer may be proof of their willingness to exploit the secrets for their benefit.

Colorado appellate courts have yet to issue a published decision addressing inevitable disclosure doctrine. Other jurisdictions have either rejected the doctrine because it runs counter to the policy of encouraging employee mobility or placed severe restrictions on its use.[4]

For example, the Arkansas Supreme Court recently refused to grant an injunction in a case relying on the inevitable disclosure doctrine because the former employee was not bound by a post-employment confidentiality agreement.[5] The court noted that the employer "had in place no protection against post-employment revelation of confidential information by [former employees]."[6]

Several recent decisions from New York illustrate courts' reluctance to rely on the inevitable disclosure doctrine. In *PSC, Inc. v. Reiss*,[7] even though the employee had signed a confidentiality agreement, the court refused to apply the inevitable disclosure doctrine because he had not signed a formal non-compete agreement. The court held that "to grant the relief sought would in effect convert the confidentiality agreement into such a covenant [not to compete]."[8] The court also reasoned that it "need not order Reiss to do that which he is required by law to do by dint of his employment contract "[9] Because the employer would have a remedy if the former employee breached the confidentiality agreement, the court refused to grant an affirmative injunction based on the inevitable disclosure doctrine before the employee had actually disclosed confidential information.

The *PSC* decision was based on the reasoning in *EarthWeb v. Schlack*.[10] In that case the court refused to look to a confidentiality agreement to enjoin a former employee from working for a competitor. The court noted that confidentiality agreements are disfavored because they result in unequal bargaining power between the employer and employee. Thus the court considered only the provisions of the non-compete agreement, and not the confidentiality agreement, in refusing to grant an injunction based on the inevitable disclosure doctrine. The court emphasized that the "inevitable disclosure doctrine treads an exceedingly narrow path through judicially disfavored territory . . . Its application is fraught with

(continued on page 12)

for the District of Columbia has also held that, where the claimants allege that the decedent's last will was the product of undue influence, that prior wills held by the drafting attorney must be disclosed even though the decedent himself destroyed all executed originals of prior wills. *Doherty v. Fairall*, 413 F.2d 381, 382 (D.C. Cir. 1969). The court stated that "we recognize that in some circumstances valid reasons exist for keeping a revoked 'will' private but these considerations must yield to the needs of a situation such as exists here. . . . Subsequent destruction of the executed draft evidences an intent to render the will invalid, but the purposes for which the copy is now sought does not depend on its present legal efficacy." *Id.* at 382-83.

Courts have also found that prior wills are discoverable when the decedent requests that the drafting attorney sign the will as a witness to its execution, on the theory that, by making such a request, the decedent waived the attorney-client privilege. *In re Landauer's Estate*, 52 N.W.2d at 892. There is some support for this form of waiver in Colorado. The trial court in *Denver National Bank* ruled that since, the drafting attorney signed the will as a witness to the due execution, at the request of the decedent, there was a waiver of otherwise privileged attorney-client communications. *Denver Nat'l Bank*, 133 Colo. at 491, 298 P.2d at 388. The Colorado Supreme Court upheld the trial court's ruling, although without expressly rely upon or rejecting the trial court's reasoning. *See id.*

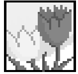
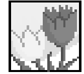
Even if the testamentary exception to the attorney-client privilege does not apply to prior wills or drafts of wills, an attorney may still need to disclose this information if the decedent revealed the contents of these documents to the person claiming under the estate. The Supreme Court of New Hampshire has held that, "if it is found that [the claimant] was present with the testator and in a position to learn the contents of this will or of the communications between him and the attorney relating thereto, these documents, to that extent only, would not be privileged and the Trial Court could order their production." *Scott v. Grinnell*, 161 A.2d 179, 184 (N.H. 1960).

If uncertain as to whether disclosure of information about a decedent's estate planning would violate the attorney-client privilege, it may be advisable for an attorney to wait to disclose this information until ordered by a court to do so. In Iowa, the Board of Professional Ethics and Conduct has issued several advisory opinions stating that documentation of a client's written and verbal communications about a decedent's will should be disclosed only if the court issues an order to that effect. Iowa Eth. Op. 88-11 (1988); Iowa Eth. Op. 91-25 (1991). Ethics opinions issued by the Philadelphia Bar Association's Professional Guidance Committee also provide that an attorney is prohibited from disclosing the contents of an earlier will to the heirs of the decedent in the absence of express authorization by the client or a court order. Phila. Bar Op. 91-4 (1991).

In sum, although Colorado recognizes the testamentary exception, there has not been significant case law in Colorado defining its parameters. Attorneys should be aware that, if a will contest occurs between parties claiming under a decedent's estate, the attorney who drafted the decedent's last will and in some circumstances the attorney who drafted prior wills for the decedent may be required to disclose communications about the will and transactions leading to its execution.

(continued on page 12)

PRO BONO PAGE

Thank you to the following attorneys who accepted 36 referrals from BCLS during January.

Tessa Alexander
Glenn DeAtley
Jeff Ballas
Steve Barnett
V. Craig Belair
Bill Benjamin
Bruce Danford
Tony Dworak
Christina Ebner
Kim Gent
Dan Kapsak
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Jack Robinson
John Steinkamp
Wendy Stevens
Richard Vincent
Bruce Warren
Bill Zurinskas
Norm Aaronson's **CULADP** students

Thank you to **Patty Mazal Investigations** for pro bono investigation.

Boulder County Legal Services pro se family clinic volunteers:

Mike Miner
Anne Mygatt
Bev Nelson
Georgiana Scott
Tim Spong

Boulder County AIDS Project:

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

Christina Ebner
Ruth Irvin
Steven Taffet

Pro Bono Corner: Volunteer attorneys accepted 542 client referrals from Boulder County Legal Services during 2002! Congratulations and thank you to the many attorneys who support pro bono.

Mark Your Calendars:

Annual Pro Bono Luncheon

April 23, 2003

Details to Follow

BCBA Professionalism Committee On-Call Schedule

March 3	Anton Dworak	776.9900
March 10	Christie Coates	443.8524
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ATTORNEY-CLIENT PRIVILEGE

(continued from page 10)

Furthermore, an attorney may be more likely to be required to disclose communications about will executions if the attorney signed the will as a witness. Finally, express authorization from a court or a court order may be preferable before an attorney discloses any information regarding a client's will or the circumstances leading to its execution.

Constance Tromble Eyster is an associate at Hutchinson Black and Cook, LLC, where she specializes in estate planning and probate law. She received an A.B. from Dartmouth College and her J.D. from the University of Colorado at Boulder. She is co-chair of the Tax, Estate Planning, and Probate Section of the Boulder County Bar Association and is active in several committees of the Trust and Estate Section of the CBA.

1. For a detailed discussion on the waiver of the attorney client privilege as a result of communications with third parties, see D. Edward Brown, Annette C. Wilson, Attorney-Client Privilege and Duty of Confidentiality: Distinction and Application, 31 COLO. LAW. No. 1, p. 97 (2002).
2. This article does not discuss whether an attorney, who is permitted to testify regarding a decedent's will, would be a competent witness under C.R.S. § 13-90-102, which is commonly known as the Dead Man's Statute. However, it is noteworthy that the Dead Man's Statute was repealed and reenacted in 2002 and now currently states that a party or person in interest with a party shall be permitted to testify regarding an oral statement made by the decedent if (a) the statement was made under oath, (b) the statement is corroborated by material evidence of a trustworthy nature, or (c) the opposing party introduces evidence of related communications. Accordingly the statute would only apply to the testimony of an attorney if the attorney is either a party or a person in interest with a party, which is defined as a person with an interest in the outcome of the civil action or an interest that, standing alone, renders the person's testimony untrustworthy. See H. Tucker, M. Darling, & J. Hill, *The New Colorado Dead Man's Statute*, 31 COLO. LAW. No. 7, p. 119 (2002) (discussing the new statute).
4. Although directions regarding a will fall within the testamentary exception to the attorney-client privilege, merely writing a deed does not. However, neither does the mere drafting of a deed constitute a communication that is protected by the attorney-client privilege. *Caldwell v. Davis,* 10 Colo. 481, 492, 15 P. 696, 701 (1887).

DISCLOSURE DOCTRINE

(continued from page 9)

hazards," and thus "the doctrine should be applied in only the rarest of cases."[11]

Most recently, in *Marietta v. Fairhurst,*[12] the court held that a mere presumption that an employee might use trade secrets gained during previous employment is not enough to support injunctive relief, stating, "we find plaintiff's claims to be self-serving, entirely conjectural and insufficient to support the theory that [the employee] had used or threatened to use a 'trade secret.' Absent any wrongdoing which would constitute a breach under the confidentiality agreement, mere knowledge of the intricacies of a business is simply not enough."[13]

Thus the future of the inevitable disclosure doctrine is unclear. As a result, before seeking to enjoin a former employee from working for a new employer based on the inevitable disclosure doctrine, a business should consider (1) whether it has any "trade secrets" as that term is defined under Colorado law, (2) how difficult it may be to prove an "actual or threatened"[14] misuse of those trade secrets and (3) whether the costs of litigation are justified based on the severity of the risk posed by the former employee's work for the competitor.

Mark Wiletsky is co-chair of the BCBA Employment Law Section and an associate with Caplan and Earnest, LLC. Suzanne Keith is a law clerk with the firm.

1. 54 F.3d 1262 (7th Cir. 1995).
2. Id. at 1269.
3. Id.
4. See *An Overview of Individual States' Application of Inevitable Disclosure: Concrete Doctrine or Equitable Tool?,* 55 SMU L. REV. 621 (2002), for a survey of states' treatment of the inevitable disclosure doctrine.
5. *ConAgra Poultry Co. v. Tyson Foods, Inc.,* 30 S.W.3d 725 (Ark. 2000).
6. *Id.* at 730.
7. 111 F. Supp. 2d 252 (W.D.N.Y. 2000).
8. *Id.* at 257.
9. *Id* at 255.
10. 71 F. Supp. 2d 299 (S.D.N.Y. 1999).
11. *Id.* at 310.
12. 2002 WL 31898398 (N.Y.A.D. 3 Dept. Jan. 2, 2003).
13. *Id.* at 4.
14. Colo. Rev. Stat. § 7-74-103 (2002).

ATTORNEY CONDUCT RULE *(continued from page 5)*

"We'll be commenting," he said. The SEC also provided more guidance on the type of events that would require a lawyer to start the up-the-ladder reporting process. The trigger initially proposed, "evidence of a material violation," had drawn sharp criticism for its vagueness and the potential for subjectivity.

The SEC clarified that it intended the trigger to be based on an objective standard. The rule will require attorneys to report wrongdoing when they have "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." The final rule also addressed concerns about how the regulations would mesh with existing state ethics rules and about the scope of the proposed rules. It also revised its definitions of which lawyers were to be covered by the rule. The earlier draft had made no distinctions between the obligations of foreign and U.S. attorneys.

The SEC stated that any conflict between the SEC's rules and state rules will be decided according to SEC regulations, but that these regulations "will not preempt ethical rules in jurisdictions that establish more rigorous obligations [than] it imposed by this part." The final rule also goes easier on foreign lawyers by creating a new term, "non-appearing foreign attorney." Basically, if non-appearing foreign attorneys do not practice in the United States, counsel or give advice on U.S. laws or act in ways that could constitute appearing or practicing before the SEC, they will be excluded from the final rule.

As a whole, the SEC's final rules are an improvement over the original proposals because they appear to tighten definitions, says Robert Pietrzak, a partner in the New York office of Sidley, Austin, Brown & Wood and a frequent lecturer on securities issues. "I think the Commission has taken to heart some of the very serious concerns the commentators have noted and has tried to adjust to them. The legal profession may want things even clearer but it's not realistic to expect the Commission to adopt every suggestion, however meritorious."

(Source: ABA News)

2003 MEMBERSHIP DIRECTORY UPDATE FORM

The BCBA will be updating the Annual Membership Directory. If you would like to be listed in a specialty area, please complete the form below and return it via fax to (303) 402-6958 or via mail to the Bar office at 1942 Broadway, #205, Boulder, 80302. Anticipated publication is May/June 2003.

In order for you to be listed in the Directory we must have your information by April 14, 2003.
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