



BOULDER COUNTY BAR NEWSLETTER

APRIL 2012

CONFRONTATION – NOTICE AND DEMAND IN COLORADO

BY TIM JOHNSON

In recent years, the Confrontation Clause has undergone close examination in both the United States and Colorado Supreme Courts. In 2004, the United States Supreme Court's announcement of *Crawford v. Washington*¹ overturned the long standing confrontation rule established in *Ohio v. Roberts*.² Crawford established a bright-line rule regarding a defendant's right to confront the witnesses against him.

In *Crawford*, the Supreme Court held testimonial statements could not be offered as evidence unless the defendant had a right to confront and cross-examine the witness. The court did not initially identify what testimonial statements were with the exception of ex parte in-court testimony, affidavits, custodian examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements.³ The test enumerated to determine if a statement is testimonial is whether the statement was made under circumstances which would lead an objective witness to reasonably

believe that the statement would be used at a later trial.⁴ A number of cases following *Crawford* have identified other types of evidence that would be deemed testimonial including testimony at a preliminary hearing⁵, statements made to 911 operators⁶, and testimony from children who are found incompetent to testify⁷.

Prior to *Crawford*, the Colorado Supreme Court held in *People v. Mojica-Simental* the statutory provision allowing the results of a criminalistics laboratory report to be admissible without the lab technician who conducted the testing constitutional.⁸ The court found section 16-3-309(5) did not violate the Confrontation Clause provisions of either the United States or Colorado Constitutions. Section 16-3-309(5) provides "[a]ny report or copy thereof of the findings of the criminalistics laboratory shall be received in evidence in any court, preliminary hearing, or grand jury proceeding in the same manner and with the

same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person. Any party may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the witness and other party at least ten days before the date of such criminal trial."⁹ It is important to note there is a notice requirement that needs to be made ten days prior to trial. This notice must be made to both the laboratory technician as well as the opposing party.

In *Mojica-Simental*, the constitutional claim alleged the provision of the statute requiring the defendant to specifically issue a demand for the lab technician to appear was unconstitutional. The Supreme Court rejected that argument stating that while the right to confront one's accuser is a fundamental constitutional right, it is one that can be limited.¹⁰ After the announcement of

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CALENDAR OF EVENTS

Pre-registration is required for all BCBA CLE programs. Register by e-mailing lynne@boulder-bar.org, or pay online with a credit card at www.boulder-bar.org/calendar.

Tuesday, April 10

Family Law

What Boulder County Child Support Services Can Do for Your Client

Presenters: Rhonda Rawlinson and Pam Howell

**Noon brownbag in Boulder County Justice Center Courtroom N
1 CLE \$20, \$10 for new/young lawyers**

Wednesday, April 11

Solo/Small Firm Happy Hour

5:00 at The Rib House

13th and Walnut in Boulder

Thursday, April 12

In-House Counsel Section

Recurring Ethical Issues for

In-House Counsel

Presenter: Jack Tanner, Fairfield & Woods PC and CBA Ethics Committee

Noon at Hutchinson Black and Cook

1 ethics CLE \$20, \$10 new/young lawyers Lunch \$10

Tuesday, April 17

Business Law

Bankruptcy Basics for Small Business Creditors and Debtors

Presenters: Britney Beall-Eder and Chris Lane

Noon at Hutchinson Black and Cook

1 CLE \$20, \$10 new/young lawyers Lunch \$10

Wednesday, April 18

Longmont Lawyers Lunch

Noon at Terroir

Lunch and 1 CLE \$20

Thursday, April 19

Immigration Law

Open Forum/Roundtable Discussion on Current Topics in Immigration

Noon at Caplan and Earnest

1 CLE \$20, \$10 for new/young lawyers

Lunch \$10

Thursday, April 19

Paralegals and All Lawyers

Guardian ad Litem

Presenter: Peggy Goodbody

Noon at The Boulder Cork

1 CLE \$20, \$10 for new/young lawyers

Lunch at The Cork \$15

Thursday, April 19

Bankruptcy Roundtable Lunch

Noon at Agave Bistro 2845 28th Street

Friday, April 20

ADR with Family and Civil Litigation

Dialogue with the Judges on ADR in Family & Civil Matters

Presenters: Judges and Magistrates

Noon to 1:30 in the Boulder County

Justice Center, Jury Assembly Room

2 CLE's \$40, \$20 new/young lawyers

Lunch \$10

Saturday, April 21

Tree Planting in the

Four Mile Creek Burn Area

8:30 -afternoon Volunteers needed.

Call David Perlick, 303-449-6543

Thursday, April 26

Elder Law & Grandparents Rights

Presenter: Melody Fuller

Noon brownbag in Courtroom N

Boulder County Justice Center

1 CLE \$20, \$10 new/young lawyers

Monday, April 30

Taxation, Estate Planning

and Probate with Family

Asset Protection Planning for Future Generations: Using Trusts to Protect Assets From A Child's Creditors And

Divorcing Spouses

Presenter: Shelly Merritt

Noon at Hutchinson Black and Cook

1 CLE \$20, \$10 new/young lawyers

Lunch \$10

Thursday, May 3

All Lawyers

20th JD Boulder Drug Court

A Five-Year Update on Successes:

What's New and Different

Presenter: Judge Bailin

Noon in the Boulder County Justice

Center Jury Assembly Room

1 CLE \$20, \$10 new/young lawyers

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Plaza Hotel Conference Center
1850 Industrial Circle, Longmont
8:00 am - 1:00 pm

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CONFRONTATION CLAUSE *(continued from page 1)*

Crawford the following year, it was only a matter of time before the courts began addressing the issue of laboratory technician testimony again.

In 2007, the Colorado Supreme Court announced an opinion on the confrontation issue raised by section 16-3-309(5) in *Hinojos-Mendoza v. People*.¹¹ The court found the findings contained within the laboratory report to be testimonial under *Crawford*. The court next addressed the constitutional challenge that the statute imposed an illegal burden on the defense by establishing a “notice

and demand” requirement. It held that the procedure for ensuring the presence of the laboratory technician at trial did not deny the defendant the opportunity to cross examine the witness, but simply required the defendant to decide prior to trial whether it would cross examine the witness.¹² The Court compared the requirement imposed upon the defense to be no more onerous than the requirement to comply with the alibi defense requirements¹³ or the requirement to file a written jury demand and pay a jury fee. The court further held that the decision to exercise the right to cross-exam-

ine a witness, and therefore to provide the necessary “notice and demand”, is not right which requires the defendant personally to make a knowing, voluntary, and intentional waiver. Rather, the right to confrontation is one of the many rights that defense counsel can waive through strategic decision.¹⁵

The United States Supreme Court issued its own ruling on this issue in 2009 in *Melendez-Diaz v. Massachusetts*.¹⁶ In *Melendez-Diaz*, the defendant was charged with drug related offenses. At trial the prosecution was able to use the lab technician’s sworn affidavits to prove the results of the drug testing. In a 5-4 decision, the Supreme Court held that the testimony of the laboratory technician qualified as testimonial evidence requiring a defendant the right to confront the witness at trial.¹⁷ The court held, “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”¹⁸ The court later addressed concerns that the confrontation requirement will significantly affect the prosecution of cases requiring laboratory testing. It recognized that there are already numerous statutory limits and procedural rules in place requiring the defense to affirmatively act to ensure certain due process right. As an example, it noted that a defendant needs to notify the court of its intent to assert an alibi defense.¹⁹

The court specifically cited to the recent Colorado ruling in *Hinojos-Mendoza* and the procedure under section 16-3-309(5) requiring the defense to provide notice and demand the attendance of a witness

(continued on page 13)



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PRESIDENT'S PAGE

By ELLEN CADETTE



Happy spring –might be time to hang up the skis and get out and about and get involved! This page will hopefully provide you with a few ideas to do just that.

Now is the time of year when our bar association looks to recruit new leadership for the year ahead. Our fiscal year begins on July 1. This year, there are two (2) three-year Board positions opening up, plus the Secretary/Treasurer officer position. In addition, there will be opportunities to step up as a section co-chair in your field of choice. If you would like to apply for one of the Board positions, or become a co-chair of a section, please call Christine at the bar office, 303.440.4758.

Involvement in BCBA leadership and/or active membership provides invaluable experience and an array of opportunities - to network, to give back to the community, and learn. Sometimes attending a bar function can provide one with a great chance to commiserate! I began as a co-chair of the bankruptcy section. Given that bankruptcy is a bit of a niche practice, I did not know many attorneys in different fields of practice until I became actively involved in BCBA leadership. My participation has enabled me to forge connections with people and to effectively network as well as establish new and valuable friendships.

In addition, active participation in the BCBA has afforded me opportunities to serve our community, such as volunteering for Food Wine Jazz Art which raised over \$10,000 for the Legal Aid Foundation this year, thanks to everyone who got involved!

Our sections have planned various community projects providing our membership with opportunities to get involved. The Business section provided gifts (necessities in socks) for the Bridge House, which serves the homeless. The Criminal Law section donated Christmas gifts to underprivileged kids. The Natural Resources section, in conjunction with our Young Lawyers, are going to be planting more trees this year on April 21st to re-forest the Fourmile

Fire burn area, which will help combat erosion problems. We need volunteers to plant 750 saplings in Sunshine Canyon. Please contact David Perlick at 303.449.6543. This is a project coordinated with Boulder County Parks and Open Space and is sponsored by the American Bar Association Section on Environment, Energy, & Resources' One Million Trees Project. Additional support is provided by the Colorado Bar Association Environmental Law Section and Young Lawyers Division, and other area lawyers and law firms. If you do not have the time to come out and help plant on April 21st, please consider making a donation on our website, click on the calendar and go to April 1.

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**2012 Mock Trial Volunteers
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Shawn Ettingoff	Renee Ezer
Peggy Goodbody	John Hoelle
Pam Howell	David Hughes
Conrad Lattes	Adam Lewis
Alex Logemann	Jennifer Lorenz
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Sherry Murgallis	Joe Niederhauser
David Orms	George Robertie
Brandy Rothman	Kimberly Roy
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Erica Slauson	Michelle Stoll
Todd Stoneman	Leanne Stover
Jennifer Walker	Alice Warren-Gregory
Bruce Wiener	Pat Wilkes
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Jennifer Zimmerman	Eric Hutchens
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	Judge Bruce Joss
	Mag. Lisa Hamilton Fieldman
	Judge Tom Mulvahill
	Judge Norma Sierra
	Judge Gwyn Whalen

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LAWYERS ANNOUNCEMENTS

Wednesday, April 11
EEOC Chair to Speak at CU Law School
Hosted by the Black Law Students Association
Presenter: Jacqueline A Berrien, Chair of the
U.S. Equal Employment
Opportunity Commission.
5:30 PM at the CU Law School
Wittemyer Courtroom
Reception will follow in the Boettcher Hall.
No RSVP required and Free CLE.

Wednesday April 11
Longmont Library Festival Week
6:30 - 8:30 PM
Denver Attorney and crime-fiction-author,
Manuel Ramos
will do a reading from one of his
books and have a book signing.
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PRESIDENT'S PAGE *(continued from page 5)*

Another great volunteer opportunity presented by the BCBA this year was the Boulder County high school mock trials. Thank you to all of the people who participated in that and helped to educate our future lawyers. Also, the Colorado Bar Association state mock trials were held in Boulder this year with 22 teams from across the state participating. Many of our judicial officers and bar association members stepped up to volunteer and help make this a success.

Our sections provide many learning opportunities at reasonable cost. CLE programs are actually an important part of the BCBA's financial stability, and this year, our co-chairs have done an outstanding job in putting on many great CLE's

which provide income to the BCBA. This year we expanded our sections. We added an In-House Counsel group, an Immigration Law section, Senior Lawyers group, and a group of Spanish-speaking lawyers that will hopefully meet for tapas again soon! Also, watch for the Mentor/Mentee program starting up in collaboration with the Colorado and Denver Bar Association. Mentor and Mentee applications are on the BCBA's website.

The 3rd Annual Senior Law Day will be held August 12, 2012 in Longmont for the Boulder County aging population, families and caretakers. Last year, over 400 people attended and many of our lawyers were sponsors as well as presenters. The Boulder County Bar Foundation

also supports this program. Not up your alley? Consider participating in Law Day on May 1st, which will be geared toward the younger population this year. Our Law Day committee is planning some great speaking engagements at local high schools and may be looking for people to help.

Another great upcoming event is the Medical/Legal Dinner on May 15th at the Boulder Country Club. This is your opportunity to become more informed by Colorado legislators who present to the Boulder County Medical Society and our BCBA on legislative changes potentially affecting the medical and legal communities.

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PRO BONO PAGE

Pro Bono Referrals

Twelve cases were referred during February. Thank you to the following attorneys:

Michele Clark
Mark Detsky
Graham Fuller
Judson Hite
Rogelio Peña
Craig Small
Stephen Wills

Pro Se Program Volunteers

M.L. Edwards
John Hoelle
Lauren Ivison
Tucker Katz
Michelle Stoll
Leonard Tanis
Karen Trojanowski

Thank you to the following mediators who accepted pro bono referrals in February:

Tom Bache-Wiig
James Christoph
Christine Fleetwood

BCAP Volunteers

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

Paul Bierbaum
Kurt Hofgard

Pro Bono Corner

Interested in a Pro Bono case?
Please call Erika at 303-449-2197.

CLE credits available for
pro bono service.

**Boulder County
Bar Association
Professionalism Committee
On-Call Schedule**

April 2	Mark Langston	303.440.9684
April 9	Todd Stahly	303.666.4468
April 16	Anton Dworak	303.776.9900
April 23	Christie Coates	303.443.8524
April 30	Steve Meyrich	303.440.8238

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CONFRONTATION CLAUSE *(continued from page 1)*

to be a reasonable limit of the confrontation right.²⁰

Following the rulings in *Hinojos-Mendoza and Melendez-Diaz* there was considerable discussion as to what obligation the prosecution may have in cases involving laboratory reports. Does the prosecution have an affirmative obligation to notify the defense of its intent not to call the witness so the defense had the opportunity to comply with the statute? The issue of notice to the defense was answered in *Cropper v. People*.²¹ The Colorado Supreme Court held that the prosecution, by providing the defense with a copy of the forensic lab report through discovery, had placed the defense on notice that, absent the specific request under section 16-3-309(5), the report could be introduced with-

out the witness being present.²²

After nearly a decade of decisions by the Colorado courts on the issue of confrontation under section 16-3-309(5), it is clear that while the right to confront a witness is a fundamental right enjoyed by a defendant, it is not an unlimited right. In order to exercise this right, counsel must make early decisions regarding its trial strategy and follow the specific statutory notice and demand requirements.

FOOTNOTES

1. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)
2. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)
3. *Crawford*, *supra* at 1364
4. *Id.*
5. *People v. Fry*, 92 P.3d 970 (Colo.2004)
6. *Davis v. Washington and Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)
7. *People v. Moreno*, 160 P.3d 242 (Colo.2007)
8. *People v. Mojica-Simental*, 73 P.3d 15 (Colo.2003)
9. C.R.S. 16-3-309(5) (1984)
10. *Mojica-Simental*, *supra*
11. *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo.2007)
12. *Id.* at 668.
13. Crim. P. 16(II)(d)
14. *Christie v. People*, 837 P.2d 1237 (Colo.1992)
15. *Hinojos-Mendoza*, *supra* at 669.
16. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)
17. *Id.*
18. *Id.* at 2540
19. Fed. Rules Crim. Proc. 16(b)(1)(C); Crim.P. 16(II)(d)
20. *Melendez-Diaz*, *supra* at 2540
21. *Cropper v. People*, 251 P.3d 434 (Colo.2011)
22. *Id.* at 437

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CELEBRATING BOULDER COUNTY'S DISTRICT ATTORNEYS

Boulder DA, Stan Garnett, hosted a recent lunch to celebrate an historic tribute done by Siliva Pettem, well-known Boulder historian, about the Boulder County District Attorneys' office past and present. Boulder has the longest judicial history of any other county in Colorado. The history and pictures of the past twenty-one DA's in Boulder County are hanging in their offices at the Boulder Justice Center. Go and see!

Many of the past district attorneys and public defenders came together to celebrate the history and to see Stan Johnson, who was DA in Boulder County from 1969 to 1973. The entertainment was superb. Lots of great stories and memories of events, cases and trials were shared and enjoyed.

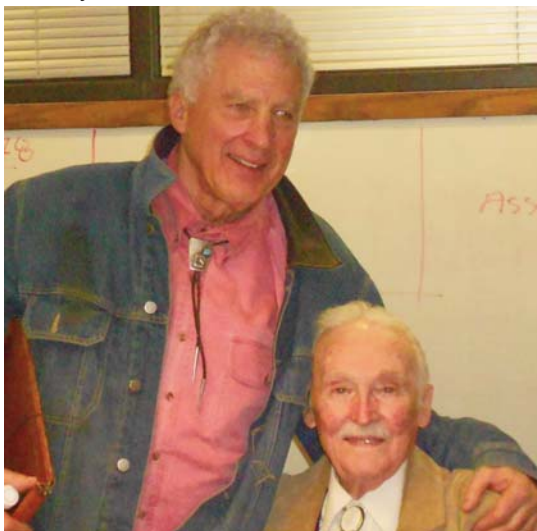
Those attending the lunch celebration were: John Purvis, Bill Gray, Chuck Sisk, Joe French, Retired Judge Tom Reed, Pete Hofstrom, Dick Dana, Bob Miller, Peggy Jessel, Sean Finn, Pam Maass, Silvia Pettem, Stan Garnett and guest of honor, Stan Johnson. Alex Hunter and Mary Lacy who followed Johnson were unable to attend the event. For more details about Boulder district attorney and judicial past, go to *The Colorado Lawyer*, November 2011 issue and read the article by Siliva Pettem.



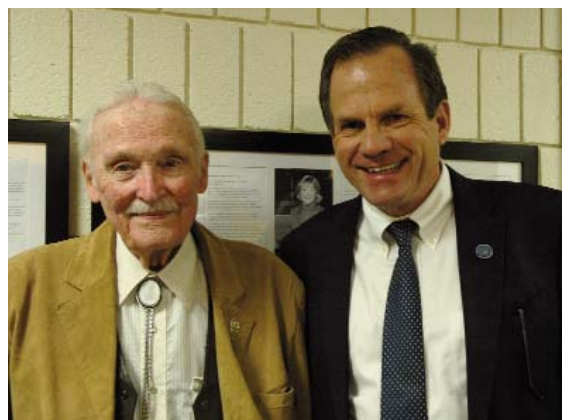
(Left) Stan Johnson, Siliva Pettem and Stan Garnett in front of the historic display in the DA's office.



(Left to right) Bill Gray, Joe French, and Stan Garnett.



(left) Bob Miller and Stan Johnson



Stan and Stan

PRESIDENT'S PAGE *(continued from page 8)*

I hope you will attend our Annual Dinner on June 7 at the Center Plate in Folsom Field. The reason I put this out there now is that the Board is seeking nominations from our membership for the Young Lawyer of the Year Award and the Award of Merit. Do you know someone worthy? Please call Lynne or Christine at the bar office 303.440.4758. We need your valuable input.

The Colorado Judicial Institute gives awards each year to a district judge, a county judge and a magistrate and they are looking for YOUR input. Nominations for the 2012 Judicial Excellence Awards opened last week and will close May 17. You can submit a nomination online at <http://www.coloradojudicialinstitute.org>. Nomination criteria may be found on the website. Please help CJI celebrate the judges and magis-

trates in our district by nominating a judge or magistrate. The only way CJI finds out about the great judges across our state is by hearing from people like you! The Judicial Excellence Awards will be presented on November 14th at the Denver Marriott City Center.

The BCBA relies on the input and ingenuity of members like you. If you have a great idea, or a desire to become more involved in the Association, please give us a call!



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- 2) Our office continues to receive many public calls from those in- and out-of- state seeking legal representation. We refer these people to the Find a Lawyer section on the bar's website.
- 3) When the public searches the CBA website for Boulder County lawyers, the list used is our Find a Lawyer index.

Cost: The annual cost for you to be listed in one specialty area is \$50, which also includes your specialty area listing in the front section of the 2012-2013 Annual Membership Directory. Each additional specialty area listing is \$25, and you may be listed in up to 8 areas of the law. To see the list of specialty areas go to www.boulder-bar.org/find/index.html

Please select from the following options:

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Name _____

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CLASSIFIED ADS

OMNI FINANCIAL, A TAX RESOLUTION FIRM IN BROOMFIELD, is currently hiring licensed non-traditional attorneys to represent individuals and businesses with IRS and state tax liabilities. Base salary+commission+bonuses and a 40 hour workweek. Please email KarlaT@Omni-financial.com for more information.

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We will have a small furnished office in Boulder available in July for a personal injury attorney willing to handle our overflow of smaller cases and some contract hourly work. This would not be an associate or salary position, but does have potential to grow into a more permanent relationship. Call or email Randy or Jerry at 303-447-1144 lawyers@sloatlaw.com.

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BOULDER OFFICE SPACE: ONE OR TWO OFFICES AVAILABLE FOR SUBLEASE IN THE WATER STREET PLAZA

complex with shared kitchen/break room, conference room and copy/work room. Options include use of copier, scanner, fax and office supplies. High speed LAN and Internet available. Please contact Scott Robinson at 303.339.3800 or srobinson@lrw-law.com for additional information.

OFFICE FOR LEASE - INCLUDES REFERRALS FROM RETIRING ATTORNEY.

14 ft. windows w/ views, balcony, trees, free parking lot & covered parking, tennis court, conference room, reception area, lg. kitchen/storage area, lateral file cabinets, phone system, DSL, furniture, fax/scanner/copier, secretarial space & second office available. Share 1,800 sq.ft. suite with two attorneys, \$893/mo. 2919 Valmont, Suite 209, Boulder, 303-541-9229.

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BANKRUPTCY ATTORNEY RELOCATES TO BOULDER.

After 25 years of bankruptcy practice in Colorado Springs, I have relocated my practice to Boulder. I do chapter 7 and 13 Bankruptcies. Debtors only -- no creditor work. I look forward to meeting other attorneys in this area. My information www.attorneytriggs.com; 75 Manhattan Drive, Suite 106.

S. BOULDER OFFICE SUITE WITH SIX PRACTITIONERS.

Large office plus secretarial station available.

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One large office with secretary station and outside decks available at Canyon Professional Building

across from Justice Center. Full services including receptionist, law library, conference room, fax, phones, parking, storage, and other amenities. Gross rent \$750/month. 303.444.1700.



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HELP PLANT TREES FOR EARTH DAY CELEBRATION



Photo by Melissa Richards
info@kelvin-images.com

In honor of Earth Day 2012, lawyers will plant trees on April 21 in the hundreds of acres burned by the Fourmile Canyon Fire in Boulder County. Last year, lawyers planted over 3,000 trees on burned private property. This year, we plan to plant on burned Boulder County Open Space. We ask individuals to please donate \$100 and law firms to donate \$500 to help us buy the trees. A \$100 donation will purchase approximately 100 trees and water-reserving mulch, a discounted price for this public service project!

Donations are tax deductible (Boulder County Bar Foundation) and need to be made by April 1, 2012 so that the trees can be ordered in time for the planting. Questions?

Contact Joe Dischinger - jdischinger@fwlaw.com (Fairfield & Woods), Maki Iatridis - adi@bhgrlaw.com (Berg Hill Greenleaf & Ruscitti) , David Perlick - david@perlicklegalcounsel.com (Perlick Legal Counsel), Ann Rhodes - amr@bhgrlaw.com (Berg Hill Greenleaf & Ruscitti)

If you would like to volunteer to plant some trees on April 21, please contact David Perlick.

To make your tax deductible donation online with a credit card, go to www.boulder-bar.org, click on the calendar and go to April 1.

Checks may be written to Boulder County Bar Foundation and mailed to 1942 Broadway, Suite 205, Boulder, CO 80302.



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Return Service Requested