



## BOULDER COUNTY BAR NEWSLETTER

# NOVEMBER 2012

### STATUTORY REGULATION OF CONSTRUCTION DEFECTS®

By KENNETH ROBINSON AND JOHN TWEEDY

From time to time a legislature becomes frustrated with the inefficiencies of a particular area of law and seeks to simplify and streamline the practice. Unfortunately, the legislature's reform can sometimes render the situation more complicated than it was before. Case in point, Colorado's Construction Defect Action Reform Act ("CDARA"). Beginning in 1999 with an amendment to the Colorado Consumer Protection Act,<sup>1</sup> the Colorado General Assembly has repeatedly addressed perceived needs to regulate the adjudication of construction defect lawsuits in Colorado. These statutes are primarily codified at §§13-20-801, *et seq.*, C.R.S. The legislative changes occurred in four phases and, although enacted at different times and covering different subjects, these statutes are now collectively referred to as "CDARA." This article offers a brief overview of these statutes and their intended impact on construction defect actions in Colorado.

**A. CDARA I.** The legislative process began with the Construction Defect Action Reform Act of 2001 ("CDARA

I"). CDARA I required claimants in construction defect cases to file lists of defects within 60 days of the commencement of a suit or arbitration, and it limited construction defect cases to defects which cause "actual damage," defined as property damage or personal injury, or which threaten future personal injury. CDARA I also amended the statute of limitations for indemnity and contribution claims against construction professionals.

**B. CDARA II.** In 2003, the legislature acted again, passing "CDARA II." This statute created a new "Notice of Claim" process which has significantly altered construction defect practice. *See* § 13-20-803.5. CDARA II requires that a construction defect claimant serve any accused construction professional with a Notice of Claim, identifying the alleged defects. The Notice (also commonly referred to as a "CDARA letter") must be served by certified mail or personal service at least 75 days before filing suit relating to residential property, or 90 days on a claim relating to a commercial prop-

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erty. For 30 days after service of the Notice, the property owner must permit reasonable access to the property to inspect the alleged defects. Then, the defendant has another 30 days (45 for commercial property) to provide a written report concerning the inspection, the scope of necessary repairs, an offer to remedy the alleged defects or settle the claim, and a proposed timetable for the repairs or settlement. The property owner then has 15 days to accept or reject the offer. If accepted, the settlement or repair is performed. If the offer is rejected, or if no offer is made, the owner may then commence a suit, or engage in mediation if required. Because the proce-

*(continued on page 11)*

### TABLE OF CONTENTS

REGULATION OF CONSTRUCTION DEFECTS 1    CALENDAR OF EVENTS 2  
PLAIN ENGLISH: THE BASICS 3    DISCOURSE, DECENCY AND PROFESSIONALISM 4  
PRESIDENT'S PAGE 5    PRO BONO PAGE 6    LAWYER ANNOUNCEMENTS 8  
CLASSIFIED ADS 13

## CALENDAR OF EVENTS

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

Thursday, November 1  
Natural Resources Law  
Colorado River  
Cooperative Agreement  
Presenter: Glenn Porzak  
Noon at Bryan Cave HRO  
1 CLE \$20, \$10 new/young lawyers  
Lunch \$11

Wednesday, November 7  
Boulder Interdisciplinary Committee  
Mindfulness and  
Conflict Management  
Presenter: Scott Peppet  
A Spice of Life Event  
11:30 to 1:15 lunch and speaker  
RSVP the Friday prior to the  
meeting. 720-232-4573

Thursday, November 8  
Intellectual Property  
Patent Docket/Portfolio Management Using  
USPTO Patent Application Information  
Retrieval System  
Presenter: Aaron Brodsky  
Noon at Hutchinson Black and Cook  
1 CLE \$20, \$10 new/young lawyers  
Lunch \$11

Friday, November 9  
Availability of Legal Services  
Noon brown bag lunch  
at BCLS in Louisville

Tuesday, November 13  
Employment and In-House Counsel  
Following the employee grievance from  
start to finish; plus tips to avoid it in the  
first place from the  
Corporate and Employee Perspective

Presenting Panel: Sarah Pritchard, Hugh  
Pixler, Dipak Patel, Mark Wiletsky  
Noon at Caplan and Earnest  
1 CLE \$20, \$10 new/young lawyers  
Lunch \$11

Wednesday, November 14  
Family Law  
Valuation of Professional  
Goodwill and Double Dipping  
Presenters: Robert Lanham  
and Eric Critchfield  
Noon brownbag in Courtroom N  
1 CLE \$20, \$10 new/young lawyers

Wednesday, November 14  
Solo/Small Firm Happy Hour  
5 PM at Connor O'Neill's in Boulder

Thursday, November 15  
Real Estate with Tax Estate Planning  
Creditors and Predators: Protecting Your  
Client's Interests in Real Estate  
Presenter: David Perlick  
Noon at Caplan and Earnest  
1 CLE \$20, \$10 new/young lawyers  
Lunch \$11

Thursday, November 15  
Bankruptcy Roundtable Lunch  
Noon at Agave Bistro in Boulder

Friday, November 16  
Immigration Monthly Roundtable  
Discussion of Current Issues and  
Workshopping Cases  
9 – 10 AM at the Broadway Suites Building  
3rd Floor Conference Room

Tuesday, November 27  
Elder Law  
Wills vs. Trusts: When to Use  
One and Not the Other  
Presenter: Kevin Millard  
Noon at Caplan and Earnest  
1 CLE \$20, \$10 for new/young lawyers  
Lunch \$11

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Tuesday, November 27  
Business Law  
Business Asset Protection  
Presenter: Barry Engle  
Noon at Hutchinson Black and Cook  
1 CLE \$20, \$10 new/young lawyers  
Lunch \$11

Wednesday, Nov. 28  
Criminal Section  
Making a Vivid Record: a presentation on  
how to make a clear and descriptive record  
for appeal.  
Presenters: Catherine Adkisson of the  
Attorney General's office and Lisa Weisz,  
Law office of Lisa Weisz.  
Noon in the "Garnett Conference Room",  
the 2nd floor of the Boulder Justice Center  
1 CLE \$20, \$10 new/young lawyers  
Lunch \$10

Thursday, November 29  
Natural Resources Law and Real Estate Law  
Anatomy of an Oil & Gas Lease  
Presenter: Peter Schaub  
Noon at Bryan Cave HRO  
1 CLE \$20, \$10 for new/young lawyers  
Lunch \$11

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# PLAIN ENGLISH: THE BASICS

BY MARK COHEN

Do you remember drafting your first Complaint? You found a sample from another case and copied the format. Your first paragraph probably looked something like this:

COMES NOW the Plaintiff herein, John Smith, by and through his undersigned counsel and the law firm of Kirk, Spock, and McCoy, P.C., and pursuant to the Colorado Rules of Civil Procedure, for his Complaint against the Defendant herein, Mary Jones, states and alleges as follows:

That is 46 words.

It is a fine example of “Legalese.”<sup>1</sup> Why do so many lawyers write like this? The reasons are many. Law schools traditionally taught that law is a rigorous intellectual discipline and requires a writing style to match. Some lawyers adopt a formal tone to sound authoritative. Others use bloated language to delay a meaningful response or action. A few intentionally write to confuse or mislead. Many lawyers mistakenly believe this style impresses clients, opposing counsel, and judges. And, let’s face it, Legalese serves lawyers well because it befuddles clients and makes them more dependent on us.

The plain English movement, sometimes called the plain language movement, seeks to promote the use of plain English over Legalese in business and law. Plain English is writing that is clear, concise, and readily understood by the target audience. The use of plain English lowers costs, improves productivity, increases credibility and reduces misunderstandings.<sup>2</sup>

The fundamental purpose of any document is to convey information. Common sense suggests writing that is clear, concise, and readily understood by its target audience is a worthy goal. Unfortunately, too many lawyers fill their documents with ambiguities, double negatives, jargon,

lengthy sentences, massive paragraphs, needless words, passive voice, poor sentence structure, redundancies, distracting footnotes, sexist language, undefined terms and worthless boilerplate.

There is no formula for the perfect document. There is no perfect document. But there are accepted principles of good writing.<sup>3</sup> There are also many techniques certain to make any document unnecessarily long and confusing. No single article can identify all the principles of plain English, but this article attempts to summarize some of its most important tenets.

**1. Think Before Writing.** The most important principle is to think about what you want to say before you start writing. Pressed for time, too many lawyers just start typing or dictating, completely failing to think about what they want to say and how to say it in a sensible order. Often one sentence or paragraph does not logically flow from the prior one. This causes confusion and reduces trust. Equally important, by failing to really think about what they want to say lawyers may base conclusions on hidden assumptions or faulty logic.

**2. Omit unnecessary words.** As a rule, the quality of a document is inversely proportionate to its length. It took a long time to allow myself the

freedom to do this, but now when I draft a Complaint, the first paragraph looks like this:

**Plaintiff alleges:**

**That is 2 words rather than 46. Nothing more is needed.** The caption identifies the parties, their status as plaintiff or defendant, and the lawyer or firm filing the Complaint for the Plaintiff. The caption labels the document a “Complaint,” so a second reference to that fact is not necessary. Reference to the Colorado Rules of Civil Procedure is also unnecessary; we assume the Plaintiff relies on those if the Plaintiff files in a Colorado court.

**3. Prefer simple words to complex words.** Which is better, prior or before? Before is simpler – it is one word rather than two and consumes six spaces instead of eight. Avoid here-, there-, and where- words – words such as hereby, therein, and wherefore. And don’t even get me started on aforementioned or hereinafter.

**4. Look for bloated phrases that can be condensed.** For example, rather than write notwithstanding the fact that, use although.

*(continued on page 12)*

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## DISCOURSE, DECENCY AND PROFESSIONALISM: RAISING THE BAR

BY MARK LANGSTON

*Far from inhibiting declarations and defenses of positions, or, more importantly, the exchanges of ideas necessary to arrive at workable agreements, etiquette is what makes all this possible. When insult and invective is what is exchanged, nothing gets accomplished.* Judith Martin ("Miss Manners").

It's that time again..."Election Season". While we weather a virtual bombardment of political advertising, pandering and posturing by those who want to sway our vote, we are provided little of any substance, but rather are expected to exercise our franchise based upon the effectiveness, or lack thereof, of

negative, often personal, attacks on the candidates. Rather than address the issues, we are expected to question the intelligence, morality, faith, and even parentage of the "other side". Name-calling has become the norm. It is not enough to simply articulate a differing view. Vilification of the opposition is standard procedure.

Such abrasive methods and tactics are not limited to the political process. We have unfortunately come to tolerate, accept, and even promote the rapid disappearance of civility and common decency in almost every aspect of our lives. The

arts of communication, conversation and persuasion are being hijacked by the mindless convenience of insolence, impudence and disrespect. No one seems immune from this epidemic slide down the low road to rhetorical mediocrity. We are all regularly affronted not just by politicians, but by journalists, athletes, corporate executives, co-workers, soccer moms and grocery clerks who quickly submit to the temptation to make their point, or advance their position, by verbally attacking, debasing or ridiculing those who hold different views.

As lawyers, and players in an intrinsically adversarial process, we are vulnerable to not only being the targets of such petty personal assaults, but to responding in kind. We must diligently resist participating in the game that Washington, D.C., trial lawyer Richard Beckler calls "moral annihilation," in which you don't just disagree with your opponent, or skillfully demonstrate the fallibility of his position; you try to destroy him, and assert that his contrary position makes him an evil person.

Most of us who have practiced law for any length of time know that, despite the current cultural appetite for trash talking, mud-slinging, and "take no prisoners" attitudes, the ability to be truly effective at making your point still requires making an honest connection on a level that transcends the superficiality of mere contentiousness. Your audience, be it judge, jury or opposing counsel, will reward you for points fairly scored. As renowned Texas criminal lawyer Richard "Racehorse" Haynes has said: "Give me a 'Rambo' opponent, and I'll beat him in front of a jury. The American people don't like

*(continued on page 10)*

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## PRESIDENT'S PAGE

BY KEITH COLLINS



### Why Bother?

I don't know how the rest of the world feels, but for me, election season cannot end soon enough. It seems that every other commercial on television is a political advertisement. Then there are the radio ads, billboards, banners, yard signs and bumper stickers. The amount of money that is spent in political advertising is mind-boggling and somewhat depressing. It is disheartening to think about all that could be accomplished with that money.

I am writing in an attempt to clear the air of all the rhetoric and to remind us all of the reason we vote and the value of a democracy. I am writing this article for my own personal need as much as anything else. I find myself extremely frustrated with all of the negative ads and mudslinging that takes place right before elections. It seems that the closer the election gets the less the rules of civility apply and the candidates believe they are justified in saying whatever the situation calls for, regardless of the veracity of their statements. There are times I literally feel insulted as a voter.

As I think about of all the things that I would like to say to the candidates and all the things I dislike about elections,

my thoughts inevitably drift to the question "Why bother?" I mean really, why bother voting? No one is going to miss my vote. After feeling fed up with the entire process, I then begin to remind myself why I need to vote. I figured if I feel like this, then maybe some of you could use a pep talk as well.

Why vote? Because you can't win if you don't play. A vote is our voice. It is how we communicate what is important to us. It is how we tell our

government what we believe needs to be changed and what changes we disapprove of. A vote is our say in how our tax money is spent, and the voice that protects our civil liberties. The heart of every democracy is the voice of the people. The right to have our voices heard is a right that was born through bloodshed during the War of Independence and has been valiantly protected every century since.

*(continued on page 7)*



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## PRO BONO PAGE

### Pro Bono Referrals

Eighteen cases were referred during September. Thank you to the following attorneys:

Norm Aaronson – CULADP  
Susan Bryant  
Deborah Cantrell – CULADP  
Christina Ebner  
Keith Edwards  
Kim Gent  
Judson Hite  
Conrad Lattes  
Angela Little  
Craig Small  
Bruce Wiener

### Pro Se Program Volunteers

Mary Louise Edwards  
John Hoelle  
Tucker Katz  
Craig Small  
Leonard Tanis  
Karen Trojanowski

### BCAP Volunteers

There were no requests for pro bono assistance through the Boulder County AIDS Project in September.

### Pro Bono Corner

Interested in a Pro Bono case?  
Please call Erika at 303-449-2197.  
CLE credits available  
for pro bono service.

Longmont Law Clinic will take place on November 13 from 5:30 - 7:30 PM.  
The clinic is held at the Longmont Senior Center, 910 Longs Peak Ave. It began in August and was a huge success with 12 volunteer attorneys helping more than 80 clients.  
They are especially in need of attorneys who can help in tax, bankruptcy and worker's comp areas.

**Please call Susan Spaulding at 303.774.4384 to volunteer!**

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

November 5	Todd Stahly	303.797.2900
November 12	Anton Dworak	303.776.9900
November 19	Christie Coates	303.443.8524
November 26	Steve Meyrich	303.440.8238



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## PRESIDENT'S PAGE *(continued from page 5)*

Elections rarely offer the perfect solution. Voting does not guarantee you will get what you want, but choosing not to vote absolutely denies a person one of the fundamental tools to having a say in a democracy.

Why vote? To create change. The XV Amendment provides that ones' vote shall not be denied on account of race, color or previous condition of servitude. Whether you are voting to amend the constitution or to modify the rules at your local HOA, change is the result of those who spoke out, joined forces and expressed their opinions by voting. Thankfully, change no longer has to be accomplished through insurrection and bloodshed. Today is a time where each and every one of us has a voice that can be heard through institutions such as town meetings, senate hearings and voting booths.

Why vote? Because we can. There still remains an alarming population of the world that does not have the right to vote in a free legitimate democratic election. There are numerous places where the government controls the press and there is little or no opportunity for free speech. Places where criticizing ones' government could land one in jail or worse. Just two months ago, a trio of musicians were sentenced to two years imprisonment in Russia for what has been described as an "anti-Putin punk rant." Millions of individuals around the world envy our freedom and long for the rights we have and the right to have a say in their government. The right to vote is an extraordinary privilege that can easily be taken for granted and we must safeguard against that.

Lastly, every vote counts. It is difficult to believe that your vote will decide an election of any sort, and

indeed it probably will not. The power of voting is in the masses. It is the collective uniformity of our votes that reaches critical mass and causes change. If we all don the attitude that our vote is too inconsequential to matter then change would never happen. We would never be able to move forward as a nation and we would essentially surrender ourselves to the whims of others.

However, you never know when your vote may make the difference and change history. Here are a few fun facts I discovered where history was altered by just a few votes. In 1960, if just one person from each voting place had voted differently, Richard Nixon, not John F. Kennedy would have been elected president. In 1845 the U.S. Senate voted to invite Texas to become a state. The vote was 27-25 in favor. If one senator had voted differently, resulting in a tie, Texas would not have been asked to join the Union. Then twenty-two years later the decision not to remove President Andrew Johnson from office was decided by one vote in the U.S. Senate.

Change often happens out of desperation or inspiration. Some of you will surely be vote outing of desperation, tired of the way things are and

desperate for change. For the rest of you, I hope this article gives you a little motivation to get out there and be heard.

**2012 Bench Bar Retreat**  
Thursday, November 8  
CU Law School 1 - 5 PM  
Wittermyer Courtroom  
4 hours ~~of~~ Ethics CLE

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## BOULDER HOMELESS SHELTER NEEDS YOUR SUPPORT



The Boulder Shelter is encouraging the community to support its winter sheltering program – a program that provides safe shelter, warm beds, hot meals and supportive services to homeless men and women each year.

The Shelter is inviting individuals, companies, volunteer groups, and faith communities to adopt the Shelter for one winter night, between October 15 and April 30, by giving a tax-deductible gift of \$487.

This gift will provide a warm, clean bed and two hot, nutritious meals for 160 men and women in need. In addition, you will be recognized as the Shelter sponsor for a particular winter night of their choosing.

There are 212 nights in the winter sheltering season, and up to 160 homeless people will call the Shelter home each of those nights. By filling up the calendar, \$103,244 will be raised to help the Shelter provide much needed services for the homeless in our community!

To reserve your night, contact Caroline Goosman; [Caroline@BoulderShelter.org](mailto:Caroline@BoulderShelter.org), 303-468-4326, or [www.bouldershelter.org](http://www.bouldershelter.org) for additional information on the **Adopt a Night Program**.

**THANK YOU to the following for taking the lead and adopting nights at the Boulder Shelter for the Homeless.**

- Ruth Cornfeld Becker, LLC – 4/5/2012*
- Lyons Gaddis Kahn and Hall – 11/11/2011 and 11/12/2012;*
- Colson Quinn Attorneys at Law – 2/14/2011, 11/24/2011 and 2/14/2012;*
- Cooper, Tanis & Cohen, P.C. – 12/30/2011;*
- Goff & Goff, LLC – 12/1/2011 and 12/1/2012*
- Holland & Hart – 12/24/2011;*
- Steve Cook & Associates – 3/1/2012*
- e winner & associates – 4/10/2012;*
- McElroy, Meyer, Walker & Condon, P.C.- 2/20/2012;*
- Caplan & Earnest, LLC- 1/1/2012;*
- St. Clair & Greschler, P.C. – 1/27/2012*

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## LAWYER ANNOUNCEMENTS



Todd A. Stahly is pleased to announce the opening of Stahly LLC and will continue to focus on the practice of complex domestic relations cases.

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is pleased to announce that

**Kimberly E. Lord**

has joined the firm as Of Counsel specializing in real estate transactions and land use.

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is pleased to announce that

**Evan Branigan**

has joined the firm as an Associate Attorney.

Evan is active in Colorado Bar Association Family Law Section and the Minoru Yasui Inn of Court  
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## PROFESSIONALISM AND CIVILITY *(continued from page 4)*

dirty players, they don't like crack-back blocking, and they don't like piling on. You've got to play between the lines to win, and I can beat a dirty player every time."

Locally, the Boulder County Bar Association's Professionalism Committee, a group of experienced lawyers and judges, fields complaints about unprofessional conduct on the part of members of the bar. The referrals come from opposing counsel, parties, judges and clients, and range from complaints about unreturned phone calls to claims of highly unprofessional or even unethical conduct. The committee has been very successful in not only reigning in lawyers who lose sight of what their role is in a case, but also in providing guidance to lawyers about how to effectively and successfully fulfill their obligations to the court and their clients

while maintaining the highest professional standards. I encourage you to take advantage of this resource if the need arises.

We are fortunate to work in an honorable profession where we can make a real difference, and we will all be more effective at what we do if we do it not only with superior skill, but with decency, civility and grace.

*Mark Langston is a Criminal Defense Lawyer and a member of the Boulder County Bar Association Professionalism Committee.*

*(This article contains material previously published by the author under the same title).*

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## REGULATION OF CONSTRUCTION DEFECTS *(continued from page 1)*

dural requirements and timetables of §803.5 are detailed and confusing, *there is no substitute for close and repeated reading of this statute as one navigates the Notice of Claim process.*

Under CDARA II, the Notice of Claim process tolls the two-year statute of limitations for construction defect actions, and the six-year statute of repose (both codified at §13-80-104, C.R.S.), and arguably, the three-year statute of limitations for claims of breach of contract or breach of warranty (§13-80-101) until 60 days after the process is completed. §13-20-805. Such tolling begins with the Notice of Claim itself. However, because the “process” may be lengthy and because there are various possible paths it may follow, it is often unclear how long this tolling period may extend and when it may be considered “completed.”

CDARA II also added a series of definitions to the regulatory scheme, at §13-20-802.5, though the statute does not define the term “construction defect” itself. Rather, the section defines who is a “construction professional” on whom a Notice of Claim may be served. The list includes architects, contractors, subcontractors, developers, builders, builder-vendors, engineers, or inspectors, who furnish design, supervision, inspection, construction, or observation of construction of any improvement to real property. §13-20-802.5(4). Interestingly, *this list does not include materials suppliers*

*or vendors, such as window or shingle manufacturers.* Claims against such suppliers and manufacturers are not governed by CDARA, but rather by the Uniform Commercial Code and other law. *See Ranta Construction, Inc. v. Anderson*, 190 P.3d 835 (Colo. App. 2008). Nevertheless, if a vendor also installs the supplied item, such installation work is governed by CDARA.

Perhaps for a related reason, requests for “ordinary warranty service” are also excluded from CDARA’s Notice of Claim process. § 13-20-807. However, claims for *breach* of warranty are subject to CDARA, and an improper warranty repair can itself be a construction defect, triggering CDARA, if the repair is “essential and integral to the function of the construction project.” *See Smith v. Executive Custom Homes, Inc.*, 230 P.3d 1186 (Colo. 2010).

Finally, CDARA II defines “actual damages” *as the lesser of* (i) the fair market value of the property without the defect, *or* (ii) the replacement cost of the property, *or* (iii) the cost of repairs plus relocation costs and, for residential property, loss of use and other fees or costs allowable by contract or law. §13-80-802.5(2). “Actual damages” may also include bodily injury as provided by law. §13-20-806 limits a claimant’s recovery to “actual damages,” meaning no punitive damages, unless the claimant prevails on a claim under the

Colorado Consumer Protection Act (“CCPA”).<sup>2</sup> Even then, if the defendant had made an offer during the Notice of Claim process that was more than 85% of the “actual damages” found at trial, then punitive damages are barred. If punitive damages and/or attorney’s fees are awarded, they are limited to \$250,000, and claims for bodily injury are not subject to punitive damages.

**C. HPA.** The legislature next acted in 2007, passing the Homeowner’s Protection Act (“HPA”). HPA renders void, as against public policy, any contractual provisions that purport, in advance, to waive or limit a residential homeowner’s rights to seek redress for a construction defect under CDARA or CCPA, including any clause shortening the applicable statute of limitations or repose. §13-20-806(7). HPA does not apply to commercial contracts. Nor does the statute preclude parties from waiving or releasing claims as part of a settlement of a dispute or claim once it has begun.

**D. Construction Professional Liability Insurance Act.** Passed in 2010, House Bill 1394 addressed the scope of defendants’ insurance coverage under Commercial General Liability (“CGL”) policies for construction defects. §13-20-808. Passed in the wake of *General Security Indemnity Co. of Arizona v. Mountain States Mutual Casualty Co.*,

*(continued on page 13)*



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## PLAIN ENGLISH: THE BASICS *(continued from page 3)*

**5. Watch out for “of.”** One useful trick is to search for “of.” It often signifies wordiness. Rather than write, The Court previously advised the Defendant of the fact that there was no factual basis for such an instruction, try: The Court previously advised the Defendant that there was no factual basis for such an instruction.

**6. Watch out for “that” and “which.”** “That” and “which” are often unnecessary. For example, the last sentence in paragraph 5 could be written: The Court previously advised the Defendant there was no factual basis for such an instruction.

**7. Use short sentences and paragraphs.** Accepted readability formulas such as the Flesch Reading Ease Scale rely heavily on sentence and paragraph length. Try to keep your average sentence length to 20 or 25 words. A long sentence usually indicates you are trying to say too many things at once. The same applies to paragraphs; try to keep the average number of sentences in a paragraph to five or six.<sup>4</sup>

**8. Prefer active voice to passive voice.** In an active voice construction, the subject of the sentence does something. In a passive voice construction, something is done to the subject. The Court denied the Motion is active voice. The Motion was denied by the Court is passive voice. Active voice usually requires fewer words and better reflects the chronology of events. If you have trouble spotting examples of passive voice, look for be-verbs (is, are was or were) followed by a verb ending in -ed. For instance, The Motion was denied.

**9. Avoid multiple negatives.** For example, instead of No more than one officer may be in the courtroom as an advisory witness, write, Only one officer may be in the courtroom as an advisory witness.

**10. Use verbs, not nominalization.** A verb that has been converted to a noun

is called a “nominalization.” For instance, “Please state why you object,” becomes “Please make a statement as to why you are making an objection.”

**11. Avoid redundant legal phrases.** Phrase such as null and void or rest, residue, and remainder are unnecessary. Many of these traditional phrases are remnants from a time when legal documents needed to contain Latin, English, and French words to satisfy all parties to a transaction.

**12. Avoid gaps between subject, verb and object.** Most sentences should follow the normal English word order: subject, verb, and then object (if any). Consider this example from Richard Wydick’s Plain English for Lawyers:

The proposed statute gives to any person who suffers financial injury by reason of discrimination based on race, religion, sex, or physical handicap a cause of action for treble damages.

There is a 21-word gap between the verb (gives) and the object (cause of action). One remedy is to make two sentences. Another is to move the intervening words to the end of the sentence:

The proposed statute gives a cause of action for treble damages to any person who suffers financial injury because of discrimination based on race, religion, sex, or physical handicap.

**13. Use personal pronouns, especially in consumer documents.** In consumer documents, consider making the consumer “you” and the organization “we.” That makes the document easier to read than one that uses “customer” and “company.”

**14. Refer to people and companies by name.** For example, rather than using “Lessor” and “Lessee,” use “Smith” for the “Lessor” and “Jones” in place of “Lessee.”

**15. When necessary, make a list.** Sometimes the best way to present a set of conditions, or exceptions, or closely related ideas is with an introductory clause followed by a list.<sup>5</sup>

Legalese endures today for several reasons. Many cost-conscious clients are more concerned with results than the quality of legal drafting. It is a paradox that a lawyer may be able to charge more for a 40-page lease than for a 10-page lease, even though drafting the 10-page lease required more time.

If you would like to learn more practical skills to improve your ability to translate Legalese into plain English, there are several good books available filled with helpful examples. They are *Legal Writing in Plain English* by Bryan A. Garner and *Plain English for Lawyers* (5th ed.) by Richard C. Wydick. In addition, the U.S. Securities and Exchange Commission created a *Plain English Handbook* that is available free at <http://www.sec.gov/pdf/handbook.pdf>

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### FOOTNOTES

1. Like “hard-core pornography,” you may not be able to define “Legalese” precisely, but you know it when you see it. See, *Jacobellis v. Ohio*, 378 U.S. 184 (1964), concurrence of Justice Stewart.

2. For a comprehensive list of the many studies conducted on the benefits of plain English, see Kimble, *Writing for Dollars, Writing to Please*, Carolina Academic Press (2012) at Part 5.

3. Contrary to what you learned in high school, it is fine to begin a sentence with “But” or “And.”

4. Microsoft Word’s grammar check function offers the ability analyze the readability of any document. It tells you the number of words in the document, the number of characters, the number of paragraphs, and the number of sentences. It provides the average sentences per paragraph, the average words per sentence, and the average number of character per word. It also provides the percentage of sentences that employ passive voice and tells you how the document scores on the Flesch Reading Ease Scale and the Flesch-Kincaid Grade Level Scale. There are also similar open source programs such as Abiword.

5. Reed Dickerson, *The Fundamentals of Legal Drafting* 115-24 (2nd ed. Little, Brown 1986)

205 P.3d 529 (Colo. App. 2009), a case that adopted a narrow definition of the term “accident” in CGL policies, thus restricting the scope of coverage, H.B. 1394 creates a presumption that a construction professional’s work that results in property damage, including damage to the work itself, is an “accident” unless the damage was intended or expected by the insured. The statute also directs courts to interpret insurance policies according to the “reasonable expectations” of insureds, and places the burden of proof on insurers to prove the applicability of any exclusion or limitation on coverage. Lastly, HB 1394 provides that an insurer’s duty to defend a construction defect claim is triggered by a CDARA Notice of Claim, requiring the insurer to investigate the claim and cooperate with the Notice of Claim process. Previously, insurers typically would not provide a defense until a lawsuit had been filed.

HB 1394 has been held not to apply retroactively to claims on insurance policies no longer in force at the time of its enactment. However, in *Greystone Construction, Inc. v. National Fire & Marine Insurance Co.*, 661 F.3d

1272 (10th Cir. 2011), the Tenth Circuit Court of Appeals disagreed with *General Security*, holding that *foreseeability*, not *fortuity*, is the defining characteristic of “accident” in a CGL policy, and that property damage caused by faulty work was “accidental” if the damage was not expected or intended by the person performing the work. *Greystone*, if followed by the Colorado Supreme Court, will bring judicial decisions closer to H.B. 1394’s definition of accident, regardless of when the relevant insurance policy was in force.

The above discussion reflects that construction defect litigation is inherently complex and recent statutory revisions have increased, rather than resolved, these complexities. The best defense to these complexities, for both property owners and construction professionals alike, is to have written contracts that are appropriately tailored to the work being performed. Experienced construction counsel at the stage of contract formation is the best way to mitigate unnecessary losses and costs after a defect claim arises. Still, if a construction defect issue does arise, we recommend that you read the statute thoroughly and follow the general

guidelines and procedures discussed in this article.

For a more in depth analysis of Colorado construction defect litigation, please see the full version of this paper, titled *Colorado Construction Defect Litigation: More Than You Might Want To Know – But Should!*, on Robinson Tweedy, P.C.’s blog: <http://www.rt-law.com/category/construction-law-fundamentals/>.

### FOOTNOTES

1. § 6-1-113, C.R.S., limiting a builder’s exposure to treble damages to proven “bad faith” conduct.
2. Commentators question whether punitive damages can still be recovered post-CDARA. See, e.g., Sullen, Sandgrund and Tuft, *Residential Construction Law in Colorado*, p. 126 (3rd Ed. 2011).

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