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SAVE THE DATE!
THE 30TH ANNUAL
REAL ESTATE
SYMPOSIUM
JULY 19-21, 2012
AT THE STEAMBOAT
SHERATON
DETAILS TO FOLLOW

FOR REAL ESTATE DEVELOPERS: MAJOR DEVELOPMENT IN ENFORCEMENT OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT

By Brian C. Cheney, Snell & Wilmer L.L.P.

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Consumer Financial Protection Bureau (“CFPB”) has now been charged with the enforcement of the Interstate Land Sales Full Disclosure Act (“ILSA”) as of July 21, 2011. Prior to that time, the Office of Interstate Land Sales Registration (“OILSR”), a sub-agency of the Department of Housing and Urban Development (“HUD”), was tasked with enforcement of ILSA. The CFPB, created to enhance consumer protection and to allow for more effective regulation of the financial and housing markets, is comprised of former HUD officials as well as officials from the Federal Trade Commission, the Treasury Department and the Federal Deposit Insurance Corporation. As such, although ILSA itself has not changed, the CFPB is expected to provide greater protection to consumers and will likely result in significant changes to ILSA in the future.

The CFPB published a notice in the Federal Register on May 31, 2011 (the “Notice”) identifying a list of the rules and orders it will enforce relative to ILSA. Of significant note, the notice made clear that the “Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act” (the “Exemption Guidelines”), previously promulgated by HUD and followed by numerous developers across the country in determining whether their projects are exempt from ILSA, will no longer be recognized or followed by the CFPB. A number of court cases have relied on the Exemption Guidelines in arriving at their decisions; others have given the guidelines no weight. Court decisions around the country have been inconsistent in their interpretation and application of ILSA generally and the exemptions under ILSA specifically. Although there is currently a project underway to discuss legislative revisions to ILSA, it is not likely that any such changes will be considered by Congress before 2013. To date, the CFPB has not issued any new regulations or guidelines concerning the enforcement of ILSA or the exemptions under ILSA. Therefore, until the CFPB exercises its rule-making authority, there will be a period of great uncertainty where developers and legal practitioners will be even more confused about the exemption issues under ILSA than they have been in recent years.

All residential developers may want to take a close look at their compliance with ILSA before engaging in any sales activities for residential lots or condominiums to ensure that the project has either been properly registered under ILSA or that the project is exempt from registration. As noted above, due to the change in the enforcement body of ILSA from the OILSR to the CFPB, there may be increased protection given to consumers. As a result of this increased amount of protection, all residential developers may want to ensure that their sales are compliant with ILSA in order to avoid claims for rescission or enforcement actions by the CFPB.

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AGRICULTURAL LAND CLASSIFICATION ANTI-ABUSE PROVISIONS TARGET “GENTLEMEN’S” FARM AND RANCH TAX BREAKS

By B. Joseph Krabacher, Sherman & Howard, L.L.C. Aspen Office

Rooted in a constitutionally protected legacy of providing very substantial tax benefits to “agricultural land”, the Colorado Legislature has recently targeted what it views as abusive practices by owners of ranch and farm land who take advantage of the favorable taxation regime applicable to agricultural lands. A state task force evaluated the perceived abuses, and the policies underlying the original intent of encouraging agricultural activities, and made recommended changes - ostensibly to make the tax laws more equitable.

The result was the adoption by the General Assembly of House Bill 11-1146, which becomes effective January 1, 2012. Although assessors typically revalue property every two years, and 2012 is not a regular revaluation year, assessors statewide will reclassify agricultural land after the law goes into effect.

Colorado Constitution Article X, Section 3 establishes the basis for preferential treatment of agricultural land and has been enabled by the adoption of C.R.S. §39-1-101 *et seq.* Simply stated, agricultural land is defined as land that was used for the previous two years (and is presently being used) as a “farm” or “ranch”, and must have been eligible for classification or actually classified as agricultural land for the prior 10 years. The land can be located either in incorporated or unincorporated areas. A farm must be used to produce agricultural products for profit that originate from the land’s productivity. A ranch must be used for grazing livestock which are used for food, breeding, draft or profit. There are other classifications beyond the scope of this article, including “forest land”, parcels subject to conservation easements, and farm or ranch land that has associated decreed water rights. Boarding horses or keeping horses does not qualify, although breeding horses does qualify. Many homeowners, however, rather than conducting the agricultural use themselves, will lease the land and thereby qualify.

Frequently referred to as the agricultural “exemption”, the status is not actually an exemption, but rather a classification category and taxable formula that results in a drastically reduced tax. Homeowners with property that has been classified for real property taxation purposes as “agricultural land” do not pay real property taxes based upon a market or cost approach to valuation, but rather on a complex formula based on the earning or productive capacity of the land, resulting in a substantially reduced tax that can at times be 5% or 10% of the tax that would be payable if the land were classified as residential. In Pitkin County, a former working ranch was subdivided and the lots were valued for property tax purposes at approximately \$26,000, but the lots actually sold for as much as \$1,000,000. The local assessor estimates that 116 Aspen area properties will be reclassified in 2012.

While traditional agricultural activities such as growing hay and grazing cattle qualify for agricultural land classification, abuses have been perceived to exist where the agricultural activities are more in the nature of a hobby incidental to the principal residential use of the property. This is particularly the case in the Western slope of Colorado near resort communities where market values of properties can be astronomical in relation to agricultural lands located far from the resorts. As a result, some counties have adopted a policy of requiring a developer to waive the right to claim an

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agricultural classification for new projects by recording a negative covenant against title to the property in order to gain county project approvals.

Under the new legislation, a county assessor may reclassify a house or similar improvements, together with two acres or less of the land on which the residential improvements are located, as “residential land”, unless the improvements are “integral to an agricultural operation” conducted on the land. As a result the actual real property tax would have two components, one based upon the portion of the land classified as agricultural and the other based upon the portion of the land classified as residential, thereby resulting in a substantial tax increase.

The phrase “integral to an agricultural operation” is defined by the new legislation to mean residential improvements where “an individual occupying the residential improvement either regularly conducts, supervises, or administers material aspects of the agricultural operation or is the spouse or parent, grandparent, sibling or child of the individual.” C.R.S. §39-1-102(1.6)(a)(I)(B) (2012).

As a result, the determination of the agricultural or residential classification will be fact and circumstance specific, and given the nuances of the existing statute and the existing case law, every attorney with an owner who receives a reclassification notice needs to evaluate the specifics of the circumstances and decide whether to protest the classification, pay the tax and seek an abatement, or potentially challenge the constitutionality of the statute.

WHITING OIL AND GAS CORPORATION V. ATLANTIC RICHFIELD COMPANY AND THE RULE AGAINST PERPETUITIES: COMMERCIAL REAL ESTATE DRAFTERS BEWARE

By Frederick B. Skillern, Montgomery Little & Soran P.C.

The case of *Whiting Oil and Gas Corporation v. Atlantic Richfield Company*, ___ P.3d ___, 2010 Colo. App. LEXIS 1223 (Colo. App. September 2, 2010) presents an interesting introduction to the Colorado version of the Uniform Statutory Rule Against Perpetuities, or USRAP. In this action concerning the exercise by Whiting of an option to purchase mineral rights, Atlantic Richfield claimed that the option was void under the rule against perpetuities, as it called for exercise of the option more than 21 years after the original contract. Whiting Oil invoked the reformation provisions of the uniform act, C.R.S. § 15-11-1106(2), which mandates that the court, in the event a property interest runs afoul of the common-law rule against perpetuities as it existed prior to USRAP’s adoption in 1991, reform a “disposition” to insert a savings clause that “preserves most closely the transferor’s manifested plan of distribution and that brings that plan within the limits of the rule against perpetuities applicable when the non-vested property interest or power of appointment was created.” The trial court granted this relief, inserting a savings clause terminating the option 21 years after the death of the principal officers of one of the parties.

On appeal, Atlantic Richfield argues first that the statute does not apply to a commercial transaction, as the provision is found in the probate code and the contract for an option is not akin to a “plan of distribution” by a “transferor.” The court rejects this argument. Indeed, the statutory rule is designed to apply only to “donative” transfers made after passage of the statute in 1991. For these transfers, its provisions generally “limit the application of the rule against perpetuities to donative

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transfers of property, thereby freeing commercial transactions from the rule's arcane vesting requirements." *Meadow Homes Dev. Corp. v. Bowens*, 211 P.3d 743, 748 (Colo. App. 2009) (quoting Krendl, 2A COLO. METHODS OF PRACTICE § 72.27, at 187 (5th ed. 2007)). However, section 1106(2) by its terms applies to "all transactions" which were subject to the common law rule as it existed prior to 1991, the effective date of the statute. The reformation provision in section 1106(2) does not exclude from its application "nondonative transfers" or any other kind of transfer, such as the purchase option in this case, and the court ruled that the trial court did not err when it reformed the option pursuant to the Act. The court notes that some states, in their adoption of the uniform act, created a broader "exclusion" for application of the act to nondonative transfers, such that no part of the statutory scheme would apply to an arms-length commercial transaction. Colorado did not take this path, and reformation applies to commercial transfers, such as options and leases, created prior to 1991 and that extend more than 21 years into the future.

Atlantic Richfield also contended that the trial court's application of the reformation provision to the option was unconstitutionally retrospective because it took away Atlantic Richfield's vested rights in the mineral rights – by allowing Whiting to exercise its option! In general, retroactive statutes that affect property rights are constitutional if their intent is procedural and remedial, rather than affecting a vested property right. Here, the court holds that the legislative intent was strictly remedial, and that its application did not take away or impair any vested interests of Atlantic Richfield. In the words of the court, Atlantic Richfield "had no vested interest in its contractual agreement not being enforced." It follows that the trial court properly invoked the statutory remedy of reformation – a very helpful case of first impression in this difficult area of the law.

On August 1, 2011, the Colorado Supreme Court accepted this case for review. According to the petitions filed, the issues to be considered by the court include:

- Whether the Statutory Rule against Perpetuities Act's reformation provision, Section 15-11-1106(2), C.R.S. (2009), authorizes a court to reform a nondonative, commercial option created prior to the effective date of the Act in order to bring it into compliance with the common law rule against perpetuities.
- Whether the reformation provision is unconstitutionally retrospective, where such reformation deprives a party of its vested interest in real property.

**LEGAL MALPRACTICE AND THE RULE AGAINST PERPETUITIES –
DON'T FORGET *TEMPLE HOYNE BUELL FOUNDATION V. HOLLAND & HART***

By Daniel A. Sweetser, The Sweetser Law Firm PC

In 1992 the Colorado Court of Appeals rendered its decision in the case of *Temple Hoyne Buell Foundation v. Holland & Hart*, 851 P.2d 192 (Colo. App. 1992). That decision concerned an option to purchase mineral interests at some time in the future when those interests might be distributed to a shareholder of a corporation that actually owned the mineral interests. The trial court determined, as a matter of law before trial, that the option provision which was contained in a broader contract violated the Rule against Perpetuities. The jury awarded the plaintiffs \$5.5 million

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due to the attorney's malpractice in drafting the option provision. The Court of Appeals reversed and remanded holding that: (1) the option provision, as a matter of law, *did not* violate the Rule against Perpetuities; but (2) there was still a triable issue regarding whether the attorney, nevertheless, had committed malpractice by not adequately advising the client concerning the potential for litigation over the provision and for not considering other or additional provisions to take the provision out of the Rule or protect against the application of the Rule. The court stated: "Thus, although there was a conflict in the expert testimony as to attorney negligence in drafting the option, no witness disagreed with the premise that the option would have been protected from any Rule dispute if defendants had considered the Rule, had recognized the clear potential for dispute, and had either included a savings clause or excluded the language making the option binding on heirs, successors, and assigns." *Id.* at 199.

In summary, while legal malpractice in this case was alleged against the law firm for "missing" a Rule against Perpetuities issue for a real estate option, the court denied the claim (the option was upheld, so the Rule Against Perpetuities did not apply). Nonetheless, the plaintiff's claim for legal malpractice was sent back to the trial court for further proceedings. In doing so the Court said:

"Thus, although we hold here that the option did not violate the Rule against Perpetuities, the question remains whether defendants [law firm] as reasonably prudent attorneys, should have foreseen that the option, as drafted, was likely to result in litigation and whether other attorneys, in similar circumstances, would have taken steps to prevent such a result. . . . In short, resolution of the Rule of Perpetuities issue does not conclusively resolve the issue of whether defendants [law firm] met the applicable standard of care in preparing the option contract." *Id.* at 198, 199.

Temple Hoyne is still good law today, so drafter beware.

INTERESTED IN EMINENT DOMAIN?

The Colorado Bar Association's Real Estate Section recently established an Eminent Domain Subcommittee. The Subcommittee seeks to study and keep bar members informed of developments in the field of eminent domain. The Subcommittee's goals and priorities will include, without limitation, to discuss significant issues, cases, or current or proposed legislation involving eminent domain, to advise the Real Estate Section on eminent domain policy, practice, and procedure, and to assist and advise the Section or the CBA in preparing amicus briefs or submitting articles for publication. To become a member of the Subcommittee, you must be a member of the Real Estate Section and you can sign up directly on the Real Estate Section's website. For more information, please contact Richard Rodriguez, Duncan Ostrander & Dingess, PC, at rrodriguez@dodpc.com or 303-779-0200.

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**THE NEW CIVIL ACCESS PILOT PROJECT:
NEW CHALLENGES FOR REAL ESTATE AND BUSINESS LITIGATORS**

By Michael J. Repucci, Johnson & Repucci LLP

As many are undoubtedly aware, the Colorado Supreme Court voted in June 2011 to implement the new Civil Access Pilot Project program. The final rules were adopted in July 2011 and recently amended in October 2011. The program will go into effect on January 1, 2012 and apply to all covered actions filed on or after that date. The pilot stage of the project will last two years and be applicable to much of the Denver metropolitan area. The Colorado judicial districts covered by the new program include the First Judicial District (Jefferson and Gilpin Counties), Second Judicial District (Denver County), Seventeenth Judicial District (Adams County), Eighteenth Judicial District (Arapahoe and Douglas Counties), and Twentieth Judicial District (Boulder County).

The goal of the program is to increase access to justice and provide for a more speedy resolution of cases. The program involves a new umbrella set of civil procedural rules applicable to the covered types of litigation that require more direct and candid pleadings, more immediate and comprehensive disclosures, and modified rules for expert witness disclosures and reports. All of this is proposed to be achieved through civil rule changes designed to streamline civil lawsuits. In particular, significant changes to the discovery rules in the types of cases covered by the program are intended to cut down on excessive delays and costs.

Except as specifically excluded under Amended Appendix A to the Civil Access Pilot program rules, the new program applies to virtually every breach of contract case, every case involving commercial real property, every case involving the Uniform Commercial Code, and a number of other broad categories of business litigation. The intention of the Civil Access Pilot Project program is to enforce the new rules during the two year pilot period within the designated judicial districts, then analyze the results of the cases governed by the program to determine whether the rules should be applied on a statewide basis and to other types of litigation. A set of the final amended rules can be found at:

http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2011-02amended10-7-11.pdf

As indicated in Amended Appendix A to the Civil Access Pilot program rules, the new program will not apply to employment cases, construction defect actions, actions subject to the Colorado Governmental Immunity Act, cases involving certain types of employment actions, cases solely involving the payment of rent, Rule 120 proceedings, replevin actions under Rule 104, isolated actions for appointment of a receiver not attached to another complaint stating additional claims, actions brought by commercial banks or other financial institutions solely for the collection of debt, medical malpractice actions, and a number of other types of cases listed in Amended Appendix A.

Perhaps the most wide-ranging effect of the program rules relates to the significant new requirements imposed on the substance of expert reports and the elimination of expert depositions. In particular, Pilot Project Rule 10.1(b) requires that the “substance of each expert’s direct testimony shall be fully addressed in the expert’s report,” and Pilot Project Rule 10.1(d) states that “[t]here shall be no depositions or other discovery of experts.” These rules in effect require full disclosure of the expert’s opinions without any ability to explore the basis for those opinions until trial. In addition,

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Pilot Project Rule 10.2 restricts the number of expert witnesses to only one per party per area of expertise “except in extraordinary cases.”

Only time will tell the results of these new rules, and whether the rules will be expanded to apply statewide and to other types of litigation. At this writing, the new Eminent Domain Subcommittee of the Real Estate Law Section has asked the CBA’s Civil Rules Committee to request that the Colorado Supreme Court exempt eminent domain actions from the new program based on the particular procedural rules applicable to condemnation actions. No action has yet been taken on this request, but it would seem that other constituencies may also seek to exclude specific types of litigation from the wide net cast by the Civil Access Pilot Program.

DID YOU KNOW . . . THAT ILC’s ARE NOT FOR OWNERS OR BUYERS?

By Daniel A. Sweetser, The Sweetser Law Firm PC

Section 38-51-108(1), C.R.S. states:

A professional land surveyor may prepare an improvement location certificate for the use of a specific client based upon such professional land surveyor's general knowledge of land boundaries and monuments in a given area if such client is not the owner or buyer; except that a copy of such certificate shall be provided to such owner or buyer.

Apparently some land surveyors have, with some reason, interpreted this language to prohibit a professional land surveyor from preparing an improvement location certificate or “ILC” for the owner or buyer of a property. Under this interpretation an ILC must be prepared for a lender, real estate broker, title company, or some other individual or entity with an interest in the property or the transaction, with a copy then provided to the owner or buyer. In practice, ILC’s are routinely prepared for owners and buyers and the Colorado Real Estate Commission’s form purchase and sale contract provides that an owner may obtain an ILC. The Real Estate Section Council is coordinating with the Land Survey Board to determine what steps may need to be taken to help resolve this ambiguity.

REAL ESTATE LAW SECTION’S “HIGH ALTITUDE” DISCUSSION LIST READY TO LAUNCH

By Michael J. Repucci, Johnson & Repucci LLP

The newest project of the Real Estate Law Section aimed at improving communications and networking opportunities between and among members of the Section is ready to launch. Dubbed “High Altitude”, the Section’s new discussion list is entering the final stages of its beta testing and will be offered to all of the Section members starting December 6, 2011.

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Co-sponsored by the Real Estate Law Section and the University of Colorado Law School, the High Altitude Discussion List is destined to become the internet home for Colorado real estate law professionals. High Altitude is the forum for subscriber posts about Colorado real estate law. If you have a question, concern, observation or comment about Colorado dirt, this will be the place for you! High Altitude is a discussion list where all subscribers who join receive all internet messages posted by other subscribers. These messages will focus on matters of concern to real estate law professionals. Other High Altitude Discussion List subscribers are encouraged to respond or provide other interesting information about these periodic posts. If you are a High Altitude subscriber, you can expect messages every weekday on a variety of topics.

Only members of the Real Estate Law Section may be High Altitude Discussion List subscribers. If you are not a member of the Real Estate Law Section but wish to join, contact the CBA's Membership Department at membership@cobar.org or 303-860-1115.

High Altitude will be an "opt-out" forum for Section members where all current Section members will be enrolled on the discussion list unless a member specifically opts out by clicking on the link provided with the first welcome message. We look forward to your participation in this interesting and informative online forum!

COMMITTEE REPORTS

Colorado Bar Association Board of Governors.

The Fall 2011 CBA Board of Governors' meeting was held on October 29th in Vail. Following are some areas of note addressed by the Board.

CBA Staff member Reba Nance provided an update on the myriad of law practice assistance tools available from the Bar Association, many of which can be accessed directly from CBA's website, www.cobar.org. Casemaker has now developed an app for access directly from your mobile device. Go to <http://mobile.lawwriter.net> to download this app. An archive of the weekly C-Brief CBA newsletter as well as current Colorado Supreme Court and Court of Appeals decisions are also directly available from CBA's website. Ms. Nance also reported that a Forms2Share data base is in the works for the sharing of law practice management forms (i.e. confidentiality agreement and hiring agreements for contract lawyers).

The State Judicial Branch will be taking over e-filing from LexisNexis effective December 31, 2012. The Bar Association is looking for volunteers to help with input for the creation of the new system. Contact Andy Toft (303-436-0980) to volunteer.

The Professionalism Coordinating Council is the process of developing the 2011 Colorado Principles of Professionalism. This is the product of meshing two current distinct codes of professionalism currently maintained by the Colorado Bar Association and the Denver Bar Association. It is anticipated that the new Colorado Principles will be before the Board of Governors' for adoption at the Spring meeting.

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The Judicial Nominating Commission is seeking volunteers. This is a wonderful opportunity to participate in the merit selection system in Colorado. To volunteer contact Charlie Garcia (303.329.0675).

The Joint Judicial Task Force is now in place and working toward setting up public education programs concerning our impartial judicial system. The JJTF will also be actively involved in addressing future ballot initiatives aimed at limiting or eliminating the impartiality of Colorado's current judicial selection system.

Peter J. Griffiths, Land Title Guarantee Company (pgriffiths@ltgc.com), currently serves as the Real Estate Section Representative to the CBA Board of Governors.

[Thanks to Peter J. Griffiths, Land Title Guarantee Company, for this update.]

Legislative Policy Committee.

Each legislative session of the Colorado General Assembly, members of the Real Estate Section Council review, and in some cases recommend sponsoring, proposing changes to, supporting or opposing proposed legislation affecting real property. Any such actions by the Real Estate Section Council ("RESC") require the approval of the Legislative Policy Committee of the Colorado Bar Association ("CBA") and, in some instances, of either the Board of Governors of the CBA or the Executive Council of the CBA. For more information on the policies and procedures of the Legislative Policy Committee visit the CBA website:

<http://www.cobar.org/index.cfm/ID/456/dpadm/Department-of-Legislative-Relations/>.

Members of the Legislative Policy Committee, together with members of the Real Estate Council, have met with State Legislators to consider uniform acts which might be desirable to adopt in Colorado. Those discussed include the following:

Uniform Statutory Trust Entity Act. This Act has particular interest to real estate practitioners because the entity structure vests an ownership interest of each participant of the entity directly in the property of the entity. This is being touted as a means to accommodate IRC § 1031 exchanges for individual participants in lieu of using tenant-in-common arrangements (TICs). The advantages stated to arise in using the statutory trust entity as opposed to a TIC include registration of record title to the real estate in the name of the trust entity as opposed to each individual tenant in common.

While similar in structure to Delaware Business Trusts, the word "Business" has been replaced with the title of "Statutory." Delaware Business Trusts have routinely been determined to be corporations and avoiding calling these creatures Business Trusts is intended to avoid a similar classification of this new form of entity with use of the "Statutory" descriptive title. This new entity also includes the word "entity" in its title to attempt to make it clear that it is not just a trust but also a formally recognized entity.

This Act is presently being vetted by various CBA Sections.

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Uniform Commercial Code – Article 9. Amendments to Article 9 are expected to be introduced in this Legislative Session. One aspect of the proposed amendments will pertain to appropriate names to be used on UCC Financing Statements. Secured parties, filing financing statements and potential secured parties searching financing statements, have competing interests. Those filing desire flexibility as to the name of the debtor used, while those searching would like a narrow, strict limitation on what constitutes a valid filing. For instance, on natural persons, those searching would prefer that a filing would be effective if and only if the name used was identical to that set forth on the debtor's driver's license or state issued identification card. On the other hand, a secured creditor seeking to perfect its security interest does not want its interest declared unperfected or unenforceable as to a subsequent secured creditor simply because the name used was not exactly as stated in the driver's license. The amendment likely to be introduced will provide some flexibility. It is expected that there will be a safe harbor for the filing creditor, if the name set forth on the financing statement is identical to the driver's license or state issued identification card, but it will additionally be a valid filing if the financing statement sets forth the individual's true first name and surname, regardless of whether the same as on the drivers license.

Another aspect of the proposed amendments will deal with a clarification of where a financing statement for a limited liability partnership is to be filed. Is it a general partnership the location of which, for financing statement filing purposes, is where its principal place of business is located? Or, is it a registered organization that is organized under the laws of the state where it files its limited liability registration statement? See, CRS, §4-9-307.

Uniform Electronic Legal Material Act. This Act will enable materials, such as State statutes, court decisions, and regulatory agency rules and decisions to be available electronically and constitute the "official" reports thereof.

This Act is expected to be introduced this Session.

Uniform Environmental Covenants. This Act will not be introduced this year and there is considerable opinion that it is not needed in Colorado.

Uniform Collaborative Law or Rule. This proposed Act (or Civil Rules) is one of extreme interest to the legal profession, in general. The general intent of the Act/Rules is to permit legal counsel and clients to engage in an approach to resolution of disputes which is non-adversarial and cooperative in nature requiring open and full disclosure between the participants. Because of the direct impact on traditional notions of the attorney-client relationship, such as privilege, confidentiality, and fiduciary duties between attorney and client, a CBA Task Force is meeting regularly to debate and vet the proposed Act/Rules. One of the points of debate gives rise to the continued reference to it as "Act/Rules." An initial analysis by the reviewers indicates that to implement the substance of collaborative law practice, it will require not only Legislative action but also simultaneously adopted Supreme Court Rules governing legal counsel. State legislators are very motivated to introduce legislation on collaborative law in this Session, but it looks like it may be limited to family law (domestic relations) practice. Real estate practitioners should be aware, however, that the long term goal of proponents of the Act/Rules is to have it apply to business disputes, inclusive of real estate disputes.

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James G. Benjamin, Benjamin, Bain & Howard, LLC (jgbenjamin@bbhlegal.com), currently serves as the Real Estate Section Liaison to the Legislative Policy Committee.

[Thanks to James G. Benjamin, Benjamin, Bain & Howard, LLC, for this update.]

Title Standards Committee.

The Title Standards Committee of the Real Estate Law Section of the CBA is appointed by the RESC and the RESC is represented by a liaison to the Committee. “The charge of the committee is to consider current title problems and draft and propose title standards or legislation for their solution.” Real Estate Title Standards (revised and effective July 1, 2008). The resulting Colorado Real Estate Title Standards address, “the impact of certain specified title issues on the marketability of title” and provide instructions, “as to the duties of an examining attorney and scope of a title search.” *Id.* The 2010 Colorado Real Estate Title Standards are available on the CBA website at http://www.cobar.org/repository/Real%20Estate/2010_TitleStandards.pdf.

The Colorado Bar Association Board of Governors adopted the following title standard at its Fall 2011 meeting:

7.1.5 Unequal Joint Tenancies – Recalculation Upon Death of a Joint Tenant

Problem (A): A, B and C hold title to Blackacre as joint tenants as follows: A – 30%, B – 30% and C – 40%. Following the death of A, assuming satisfactory recorded evidence of proof of the death of A as contemplated by Title Standard 7.1.1, may the examiner recognize title in Blackacre as follows: B – 3/7ths and C – 4/7ths?

Answer: Yes.

Problem (B): A, B, C and D hold title to Blackacre as joint tenants as follows: A – 1/2, B – 1/4, C – 1/8 and D – 1/8. Following the death of A, assuming satisfactory recorded evidence of proof of the death of A as contemplated by Title Standard 7.1.1, may the examiner recognize title in Blackacre as follows: B – 1/2, C – 1/4, and D – 1/4?

Answer: Yes.

Notes: C.R.S. § 38-31-101 (6) (c) states, “Upon the death of a joint tenant, the deceased joint tenant's interest is terminated. . . . In the case of two or more surviving joint tenants, their interests shall continue in proportion to their respective interests at the time the joint tenancy was created.” Each joint tenant owns an interest in the whole. The deceased joint tenant's interest is not transferred or inherited. The interests of the surviving joint tenants are recalculated in accordance with the statute. The recalculated interests should generally be stated as a fraction, irrespective of how the interests are described in the instrument creating the joint tenancy. The recalculated interests may be converted to percentages or decimals, provided the conversion can be done without rounding any interest. In certain circumstances, applicable law may

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affect the recalculation contemplated by C.R.S. §38-31-101 (6)(c). *See e.g.*, C.R.S. §15-11-803(3)(b) – *Effect of Homicide on Joint Assets*.

Formula: Calculate total interest of the surviving joint tenants before decedent's death, and then divide the individual interest of each surviving joint tenant before death by this total.

Problem A - Prior to death of A: A – 30%, B – 30% and C – 40%. B+C = 70%. To determine B's interest following death of A, divide 30 by 70 = 3/7ths. To determine C's interest following the death of A, divide 40 by 70 = 4/7ths.

Problem B – Prior to the death of A: A – 1/2, B – 1/4, C – 1/2 and D – 1/2. B+C+D=1/2. To determine B's interest following the death of A, B holds $1/4 \div 1/2 = 1/2$. To determine C's and D's interests following the death of A, C and D each hold $1/8 \div 1/2$, so C and D each hold 1/4.

Julia Waggener, Waggener & Foster, LLP (jwaggener@waggenerfoster.com), currently serves as the Real Estate Law Section Liaison to the Title Standards Committee. Suggestions for title problems for consideration by the Committee should be sent to Diane Davies (ddavies@faegre.com).

[Thanks to Geoff P. Anderson, Sweetbaum Sands Anderson, PC, for this update.]

Trusts and Estates Section.

The Trusts and Estates Section, through its various standing committees, continues to work with the Real Estate Section on a number of different projects and legislative proposals of common interest to both sections.

The Colorado version of the Uniform Disclaimer of Property Interests Act, which had involved extensive discussion between the two Sections in arriving at a final version accepted by both sections, was enacted into law this year. Currently a subcommittee of the Statutory Revisions Committee of the Trust and Estates Section is working with the Title Standards Committee in drafting a mutually acceptable statutory provision dealing with a successor trustee's title to real estate held in the name of a trustee who is no longer available for reasons such as death, resignation or disability.

David W. Kirch, David W. Kirch, P.C. (dkirch@dwkpc.net), currently serves as the Trusts and Estates Section Liaison to the Real Estate Law Section Council.

[Thanks to David W. Kirch, David W. Kirch, P.C., for this update.]

Real Estate Commission Forms Committee.

The RESC is represented by a liaison to the Real Estate Commission Forms Committee which recommends changes to the forms adopted by the Real Estate Commission in response to new laws, changes in practice and consideration of public protection. Input of the Council is frequently sought for revisions to forms before they are finalized and approved by the Real Estate Commission.

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Since the last newsletter there have not been any substantive changes to the approved Colorado Real Estate Commission forms. The forms adopted by the Commission are all posted on the Division of Real Estate website under the Rulemaking Tab at this time. After January 1, 2012, the forms will move over to the Forms Tab of the Division of Real Estate's website. The best link to use to download the zip file of all the adopted forms (including the slight modification to the Inspection Resolution form (NTC43R) effective January 1, 2012) is to use the following URL: <http://www.dora.state.co.us/real-estate/rulemaking/CREC/index.htm>, then click on the following link: [F-7 Commission Approved Forms \(Eff. 11/30/11\)](#)

The Forms Committee welcomes any suggestions, the earlier the better. Please send any recommendations to Kent Levine at Kent@Kent-law.com.

Kent Jay Levine, Kent Jay Levine, P.C. (Kent@Kent-law.com), currently serves as the Liaison to the Forms Committee.

[Thanks to Kent Jay Levine, Kent Jay Levine, P.C., for this update.]

Interprofessional Committee.

The Real Estate Law Section is represented by liaisons to the Interprofessional Committee, whose purpose is to promote a better understanding among real estate professionals and whose members also (besides the CBA, represented by the Real Estate Law Section) include the Colorado Division of Real Estate, Colorado Association of REALTORS, the Land Title Association of Colorado and the Colorado Division of Insurance.

As the Colorado House and Senate gear up for the 2012 legislative session, the Interprofessional Committee is beginning to review and discuss some potential legislation.

The Committee recently discussed Division of Real Estate proposed legislation regarding Appraisal Management Companies ("AMC's"), which legislation will likely be introduced during the upcoming legislative session. The legislation is intended to address, among other matters, complaints surrounding the public release of appraisals, prohibited actions of AMC's, and E&O insurance requirements for AMC's.

The Committee also discussed potential legislation requiring title companies to maintain a physical presence in Colorado. The so-called "brick and mortar" bill will be introduced by the Land Title Association of Colorado during the upcoming legislative session.

Finally, the Committee reviewed a summary of legislative changes that the Colorado Secretary of State would like to make to the Colorado Notarial Law. These changes include simplifying the registration and renewal process for notaries, clarifying notarial requirements to reduce the number of complaints and admonishments, clarifying the duties and authority of the Secretary of State relating to the certification of documents, and eliminating the Notary Cash Fund.

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The Real Estate Law Section's current liaisons to the Interprofessional Committee are Candyce D. Cavanagh, Orten Cavanagh Richmond & Holmes (ccavanagh@ocrhlaw.com), and Peter J. Griffiths, Land Title Guarantee Co. (pgriffiths@ltgc.com).

[Thanks to Candyce D. Cavanagh, Orten Cavanagh Richmond & Holmes, for this update.]

Colorado Housing Council.

The Real Estate Law Section is represented by liaisons to the Colorado Housing Council, whose purpose is to see to it that the public is better served in its housing needs through the advancement of communication among industry members, delivery of programs and information to the public, cooperation with legislative and regulatory bodies, and coordination with major employers and federal, state and local agencies. The current liaisons from the RESC are Catherine A. Hance, Davis, Graham & Stubbs, LLP (catherine.hance@dgsllaw.com), and Deanne Stodden, Castle Meinhold & Stawiarski LLC (dstodden@cmsatty.com).

The Colorado Division of Housing's current Housing News Digest can be found at <http://www.divisionofhousing.com> and foreclosure reports can be found at <http://dola.colorado.gov/cdh/researchers/index.htm#Snapshots>. The Colorado Division of Housing's current Housing Snapshot report can be found at <http://divisionofhousing.blogspot.com/2010/06/june-2010-housing-snapshot-now.html>.

Membership Committee.

The Membership Committee of the Real Estate Law Section is reaching out to local bar associations to gauge interest in jointly organizing real estate CLE luncheons and programs in the communities served by the local bar associations. The Membership Committee has plans to sponsor a CLE luncheon with the El Paso County Bar Association to be held in Colorado Springs during the Spring of 2012. Look for details about this program in the coming months.

Please contact Fred Otis of Otis Coan & Peters LLC (flotis@nocolegal.com) or Nicole R. Nies, Rothgerber Johnson & Lyons, LLP (nnies@rothgerber.com) if your local bar association is interested in organizing a joint real estate CLE program with the Membership Committee of the Real Estate Law Section.

[Thanks to Nicole R. Nies, Rothgerber Johnson & Lyons, LLP, for this update.]

Community Service Committee.

The Community Service Committee continues to support and promote the Lawline 9 events for KUSA in Denver. Let us know if you would like to volunteer for this wonderful community service event. If you have not volunteered for Lawline 9 before, please do as you will be certain to enjoy your time on the phone bank.

[Thanks to Daniel A. Sweetser, The Sweetser Law Firm PC, for this update.]

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Ethics Committee.

A new formal opinion of the Ethics Committee, Candor to the Tribunal and Remedial Measures in Civil Proceedings, was mentioned in the July newsletter. It will be published in the December issue of *The Colorado Lawyer*. Even if you never go to court, read it. Its analysis is helpful not only to litigators but also to transactional lawyers faced with a client who has lied, or intends to lie, to another party in the transaction about a material fact. If you need that analysis now, you can find the opinion at <http://cbaclegalconnection.com/2011/10/new-ethics-opinion-candor-to-the-tribunal-and-remedial-measures-in-civil-proceedings/#comments>. The Committee is working on an Ethics blog, also—more news on that to come.

[Thanks to Judy McNerny, Carpenter & Klatskin PC, for this update.]

Courts & Civil Rules Committee.

The Colorado Supreme Court has adopted the Civil Access Pilot Project, effective January 1, 2012. For further information, see the article in this edition of the Real Estate Law Section's Newsletter.

Additional Information. For additional information regarding the activities and responsibilities of the members of the Real Estate Law Section Council, see the article on the Real Estate Law Section page of the Colorado Bar Association Website entitled "What Does the Real Estate Law Section Do for Me?": <http://www.cobar.org/index.cfm/ID/20155/subID/25076/REALES/>.

LEGAL WRITING OPPORTUNITIES

Article Opportunities and Accolades – *The Colorado Lawyer*. The Real Estate Law Section encourages all aspiring authors to contribute articles (or even just ideas for articles) for publication in the real estate column of *The Colorado Lawyer*. Articles submitted need to provide a balanced discussion of new, developing or interesting areas relating to the practice of real estate law in Colorado or nationally. To encourage your creative energy, the Real Estate Law Section will honor the best real estate article published in *The Colorado Lawyer* during 2011/2012 with a stipend of \$500 to the contributing author or firm. Articles should be submitted to Joseph Lubinski at Ballard Spahr (lubinskij@ballardspahr.com), Erik Foster at Moye White (erik.foster@moyewhite.com), or Cynthia Shearer at MDC Holdings (chshearer@mdch.com) for consideration.

Articles, Practice Pointers and Other Contributions Needed for Real Estate Law Section Newsletter. All members of the Real Estate Law Section are invited to contribute to the Newsletter. Please submit articles, practice pointers and other contributions to Michael J. Repucci, Johnson & Repucci LLP (mjrepucci@j-rlaw.com), Daniel A. Sweetser, The Sweetser Law Firm PC (dsweetser@sweetserlaw.com), or Nicole R. Nies, Rothgerber Johnson & Lyons, LLP (nnies@rothgerber.com).

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Request for Input on Real Estate Section Web Page. We are working to improve the Real Estate Law Section page of the Colorado Bar Association website and need your input and suggestions. Are there links or other information you have expected to find on the page only to have your hopes dashed? Have you discovered aspects of the site that you feel could be more user-friendly or informative? Please e-mail your comments to Dana Collier Smith at dcolliersmith@cobar.org or to Michael J. Repucci (mjrepucci@j-rlaw.com). We welcome your suggestions and we will carefully review all of them.

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