

Moye|White

Mechanic's Liens 101 – It's About Relationships



PRESENTED BY



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RELATIONSHIPS ARE COMPLEX

January 2008, Colorado adopted most of the
American Bar Association Model Rules of
Professional Conduct

➤ ***Relationships Part I***

The ABA Model Rules changed focus:
Instead of focusing on “*dos*” and “*don’ts*,”
the Model Rules of Professional Conduct
focus on *relationships*.

What is my role?

Paragraphs 2 and 3 of the Preamble and the Model Rules describe the lawyer in the following roles:

As advisor [Rule 2.1];

As advocate [Rules 3.1 through 3.9];

As negotiator [Rules 4.1 through 4.5];

As evaluator [Rules 2.3 and 2.4]; and

As a third-party neutral [Rule 2.4].

➤ *Duties to Prospective Client.* Rule 1.18 The lawyer “shall not use or reveal information learned in the consultation except as Rule 1.9 would permit with respect to information of a former client.”

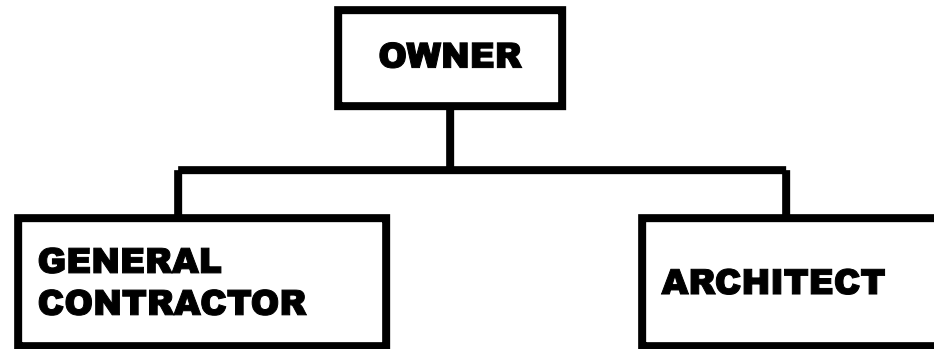
Subject matter;

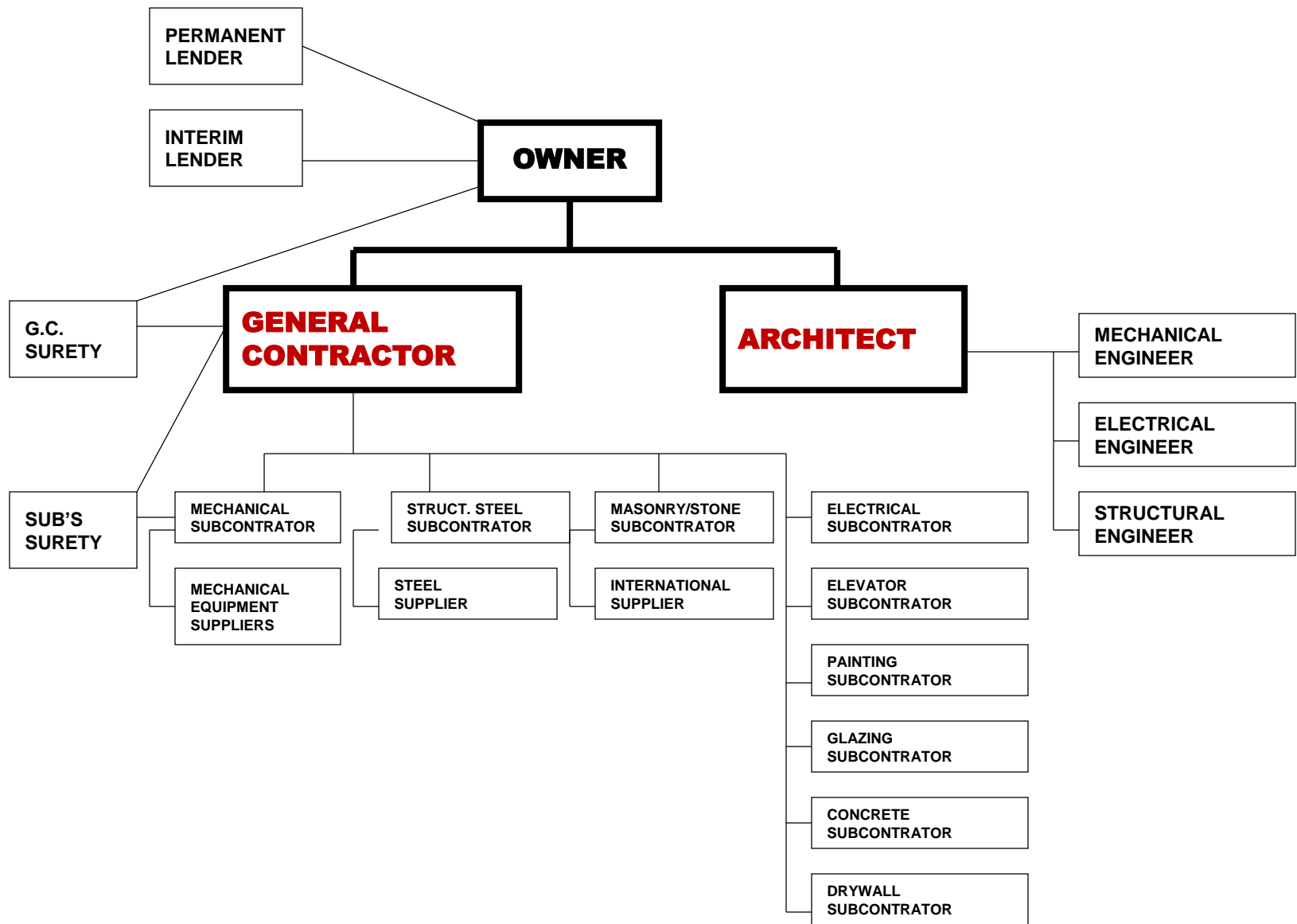
Names and identifying information for the parties involved – including the prospective client;

Value of the case;

Demeanor of the prospective client.

Traditional Project Delivery System Design-Bid-Build





GOVERNMENT REGULATIONS

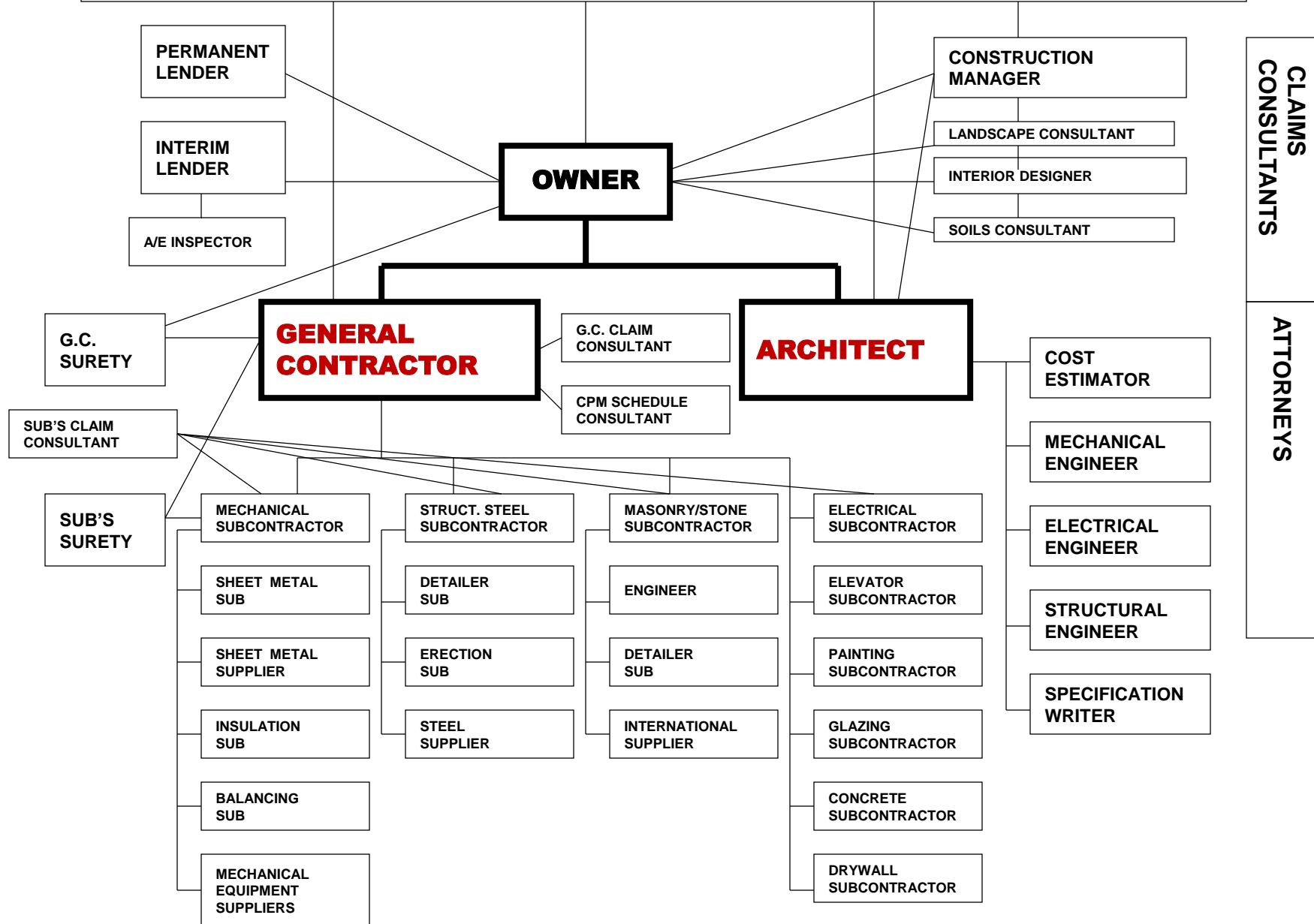
MBE/WBE
OSHA

PERMITS
ADA

ENVIRONMENTAL REGULATIONS
DEPARTMENT OF LABOR

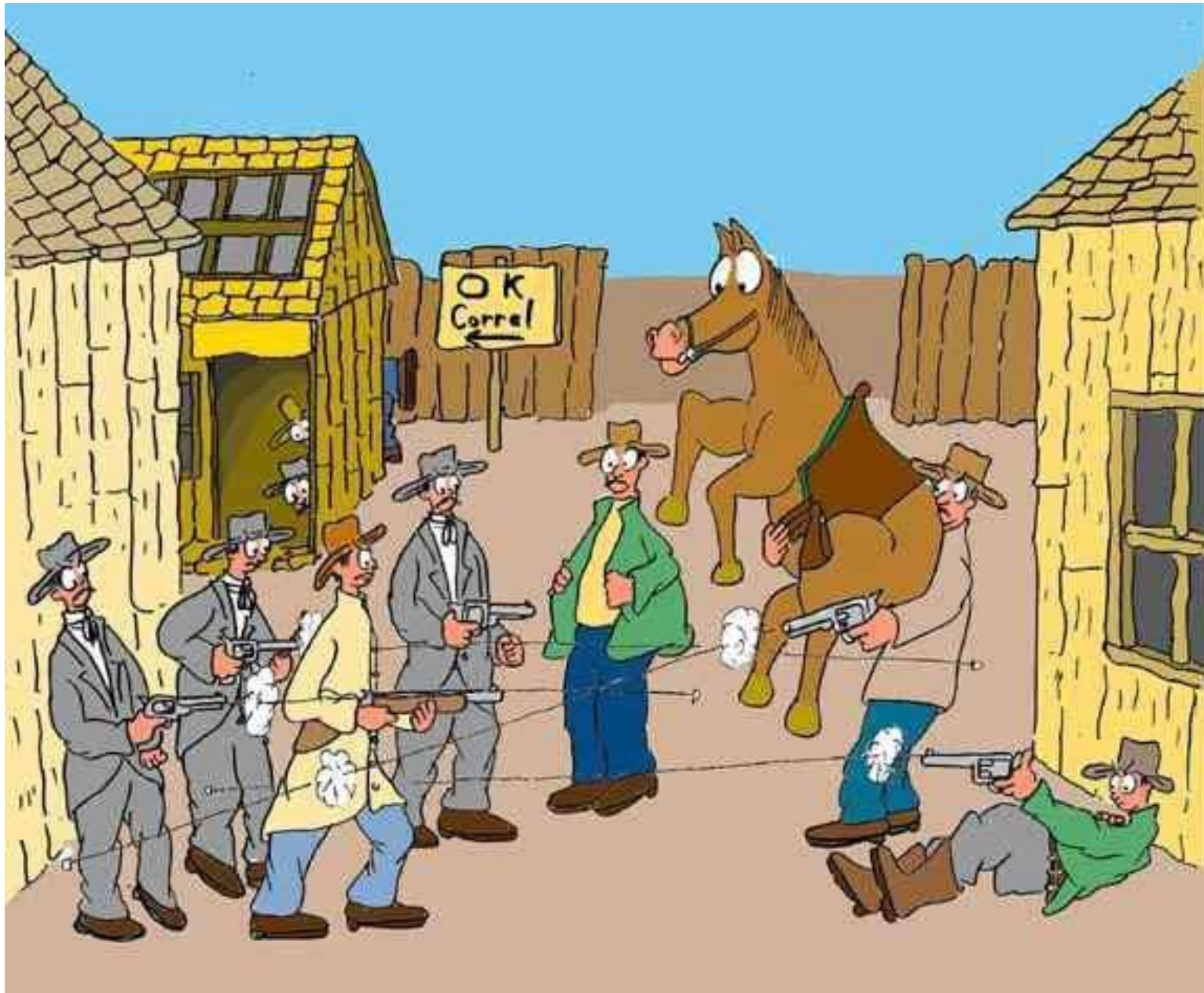
SALES TAX
IMMIGRATION

BUILDING CODES
BUILDING INSPECTORS

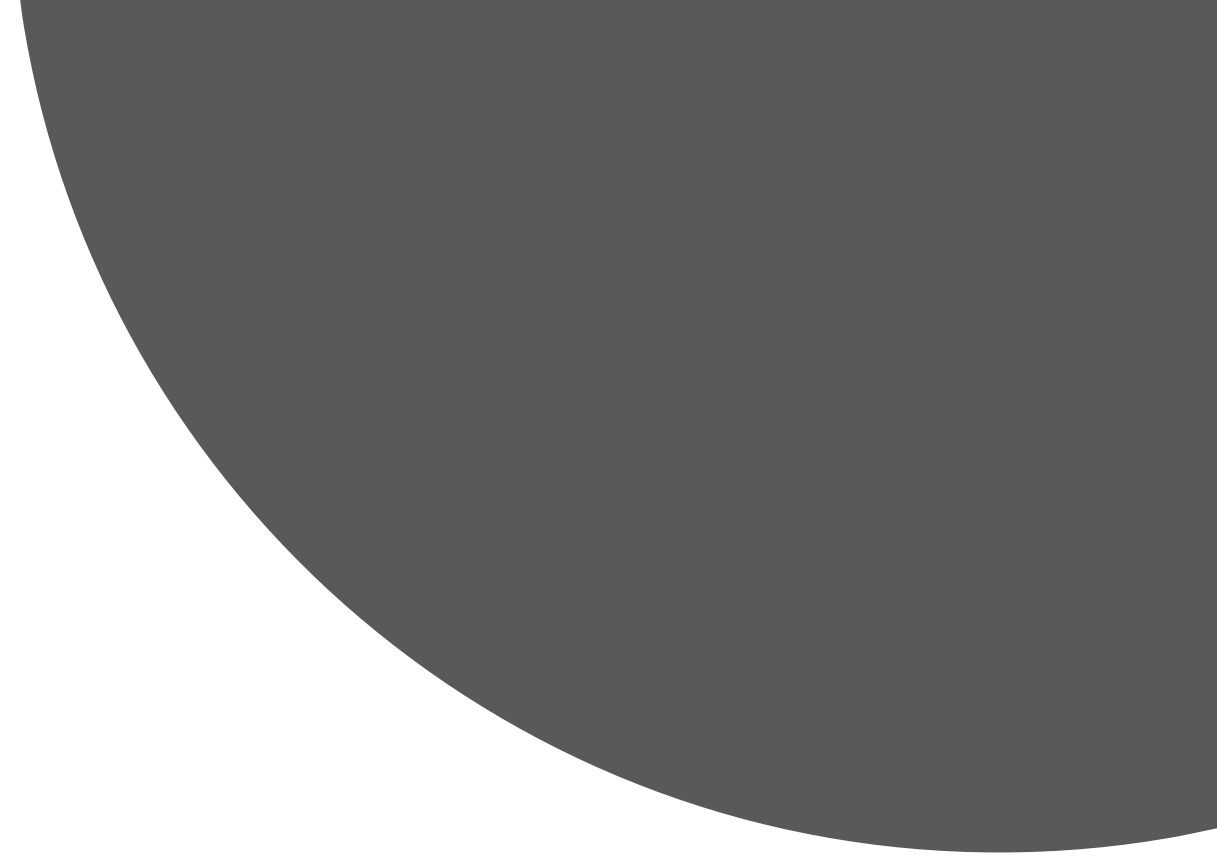
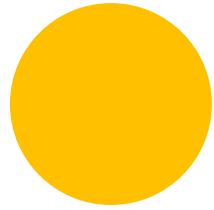
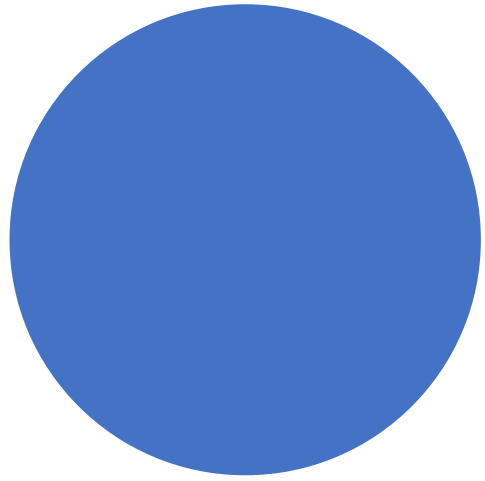




“I can’t pay you
until I get paid !!”



Public		Private
Federal	State	
Miller Act Bond Claim	Bond (Public)	Bond (Private)
	Verified Claim	Mechanic's Lien
	Trust Fund Claim	Disburser's Notice
		Trust Fund Claim
		Oil & Gas Lien
		Garagemen's Lien



What is a mechanic's lien?

An encumbrance on the property of another to secure the debt of a claimant who improved real property.



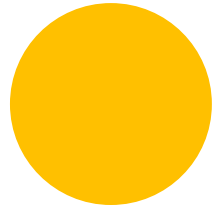
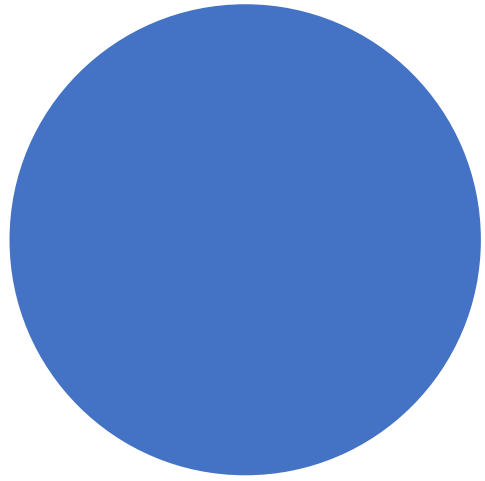
Key Elements

- **Statutory Remedy**
- **Must be perfected to be enforced**
- **Enforced through judicial foreclosure**
- **Must comply strictly with statute**

Who can claim a mechanic's lien? (334 words)

- Every person who
 - furnishes or supplies laborers, machinery, tools, or equipment
 - in the prosecution of the work, and
- mechanics, materialmen, contractors, subcontractors, builders, and all persons of every class
 - performing labor upon
 - or furnishing directly to the owner or persons furnishing labor, laborers, or materials to be used in
 - **construction, alteration, improvement, addition to, or repair,**
 - either in whole or in part, of
 - any building, mill, bridge, ditch, flume, aqueduct, reservoir, tunnel, fence, railroad, wagon road, tramway, or any other structure or improvement upon land, including adjacent curb, gutter, and sidewalk,
- and also architects, engineers, draftsmen, and artisans who have
 - furnished designs, plans, plats, maps, specifications, drawings, estimates of cost, surveys, or superintendence, or
 - who have rendered other professional or skilled service, or
 - bestowed labor in whole or in part, describing or illustrating, or superintending such structure, or work done or to be done, or any part connected therewith,
- **shall have a lien upon the property upon which they have**
 - furnished laborers or supplied machinery, tools, or equipment or
 - rendered service or
 - bestowed labor or
 - for which they have furnished materials or mining or milling machinery or other fixtures,
- **for the value of such laborers, machinery, tools, or equipment supplied, or services rendered or labor done or laborers or materials furnished,**
 - whether at the instance of the owner, or of any other person acting by the owner's authority or under the owner, as agent, contractor, or otherwise
 - for the laborers, machinery, tools, or equipment supplied, or work or labor done or services rendered or laborers or materials furnished by each, respectively, whether supplied or done or furnished or rendered at the instance of the owner of the building or other improvement, or the owner's agent;
 - and every contractor, architect, engineer, subcontractor, builder, agent, or other person having charge of the construction, alteration, addition to, or repair, either in whole or in part, of said building or other improvement **shall be held to be the agent of the owner for the purposes of this article.**

“Who may claim a mechanic's lien?”
answered by a simple
334-word sentence.

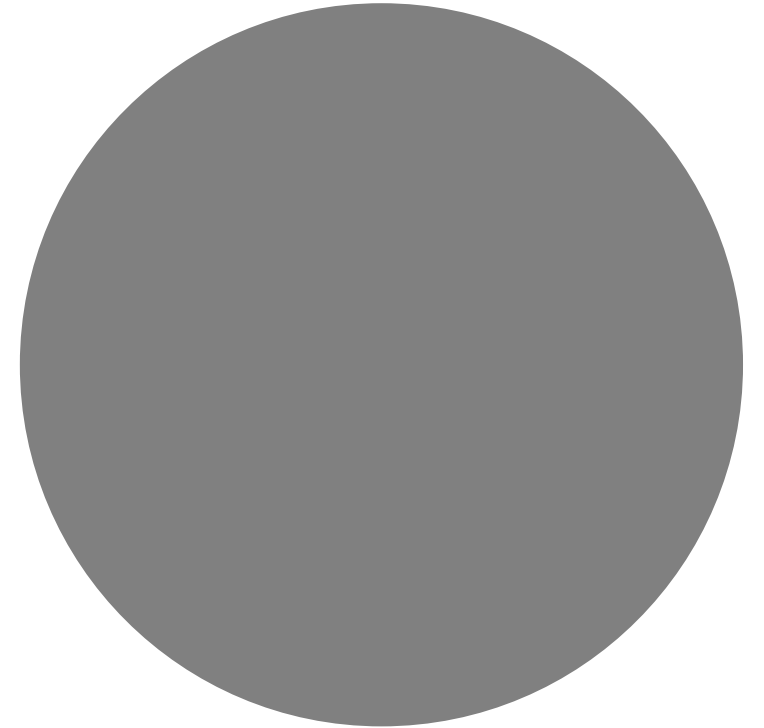


Breaking it down...

Does your client fall
within the description?

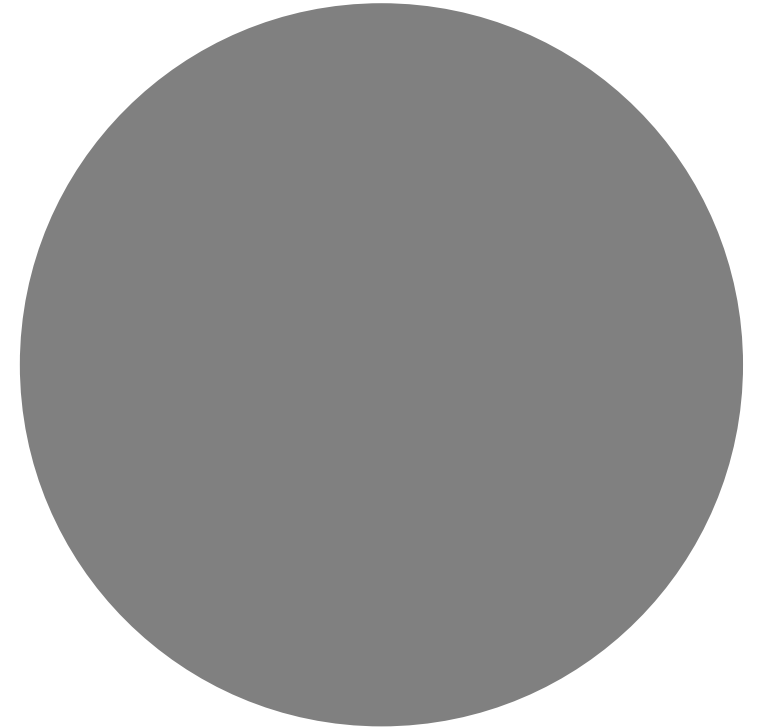
What was done?

Did claimant help with the construction, alteration, improvement, addition to, or repair?



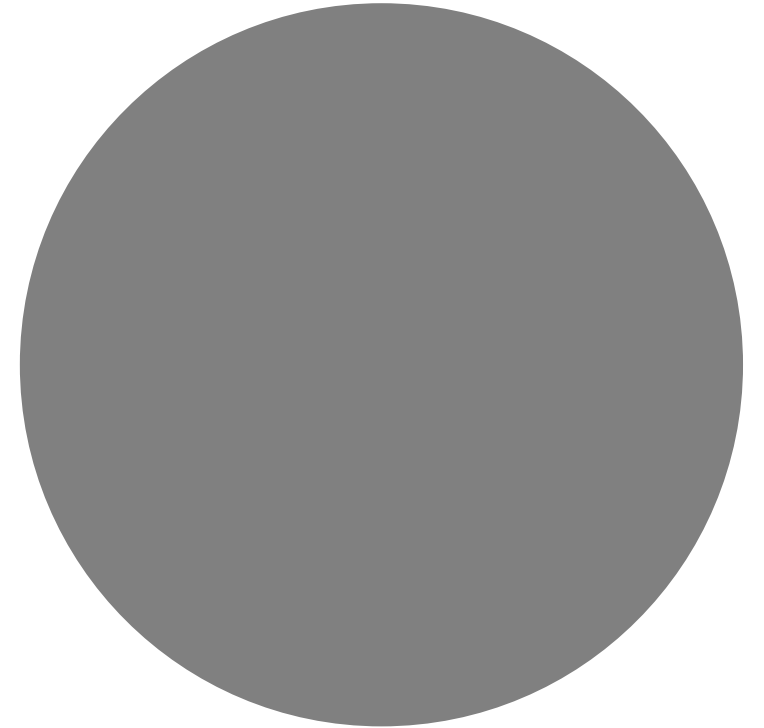
For whom?

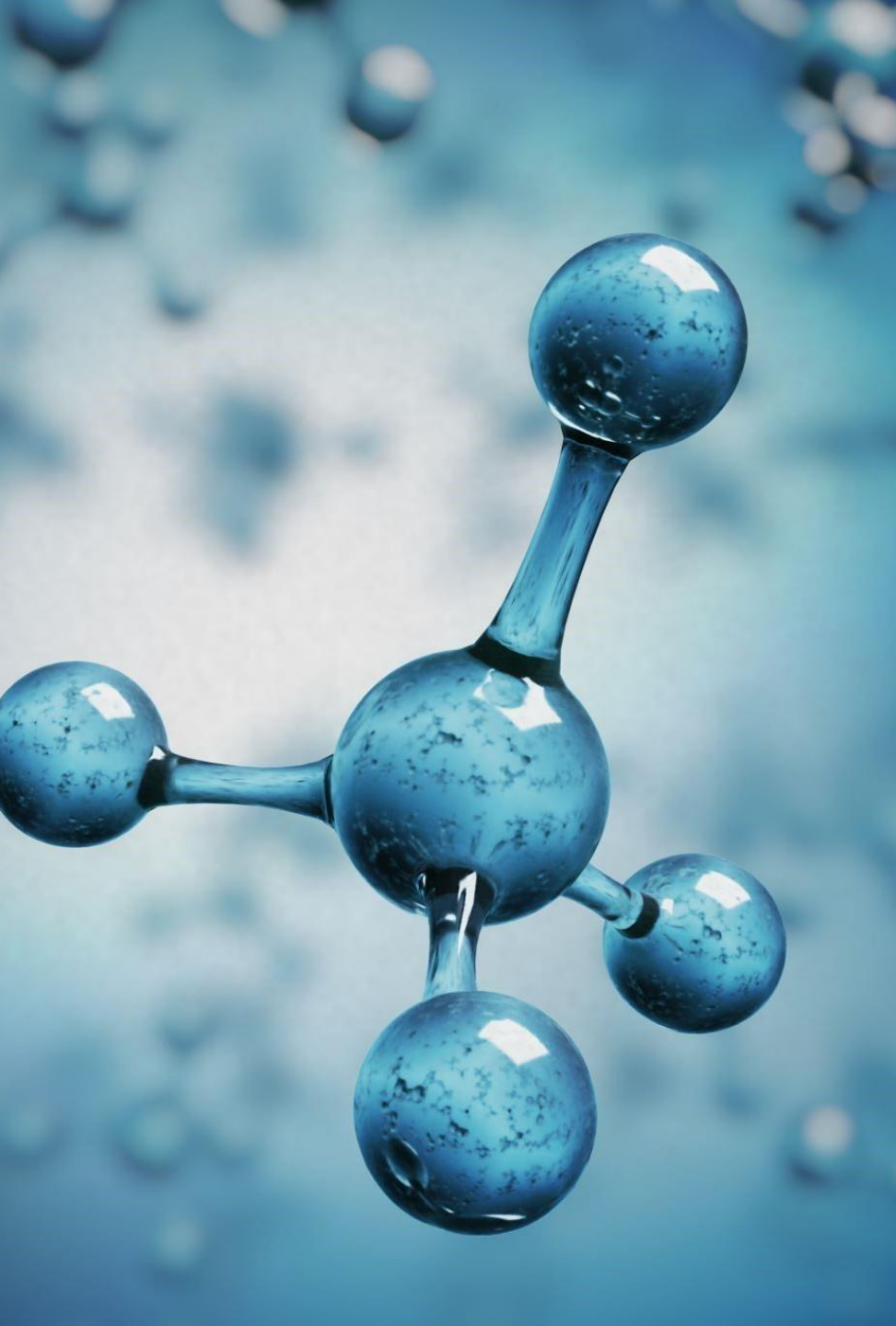
Did claimant perform work for the owner or someone acting as the owner's agent?



What is the value of the work?

Quantum meruit is the measure, and is often defined by the contract price.





ELEMENTS OF ENFORCEMENT

- 10-day advance written notice duly delivered
- Must record within 4 months of last work/material
- Must adequately describe property
- Must contain affidavit of mailing
- Foreclose within 6 months of completion of project
- Must timely record *Notice of Lis Pendens*



ISSUES RELATING TO TITLE

- **Liens affect title to property. Before filing a foreclosure action, obtain a litigation guaranty from a title company, and perform a conflicts check.**
- **Determine seniority of other interests in property.**
- **Mechanic's liens has special statutory priority against many other liens.**

B.C. by Johnny Hart



Priority of Liens

- Mechanic's Liens have SUPERPRIORITY, relating back to first work on the project:

Section 38-22-106(1), C.R.S., states that:
All liens established by virtue of this article shall relate back to the time of the commencement of work under the contract between the owner and the first contractor, or, if said contract is not in writing, then such lien shall relate back to and take effect as of the time of commencement of the work upon the structure or improvement. . .

- Defined as the time an architect commences plans and drawings.

➤ *Exercising Independent Professional Judgment - Who is making the decisions?*

It is the lawyer's duty to exercise independent professional judgment [Rule 1.7] and maintain professional independence [Rule 5.4] throughout the representation.

When representing the organization, the lawyer must also maintain her professional independence under Rule 5.4.

- When dealing with members of an organization who is represented by counsel, the lawyer cannot have direct contact with the organization's members under Rule 4.2 – there are exceptions, however.

Comment 7 to Rule 4:

Consent of the **organization's** lawyer is not required for communication with a former constituent. If a constituent of the **organization** is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare [Rule 3.4\(f\)](#).

Conflicts of Interest: Joint Representation – Informed Consent

The Rules as to conflicts of interest focus on **“who is the client?”**

Rule 1.7 – Conflict of Interest: Current Clients;

Rule 1.8 – Conflict of Interest: Current Clients: Specific Rules;

Rule 1.9 – Duties to Former Clients;

Rule 1.10 – Imputation of Conflicts of Interest: General Rule [to lawyers in an organization or firm]; and

Rule 1.11 – Special Conflicts of Interest for Former and Current Government Officers and Employees.

Comment 1 to Rule 1.7 provides the overview of the conflict of interest rules: “[1] **Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.**” Comment 2 provides a 4-part analysis for analyzing conflicts of interest:

Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly **identify the client** or clients; 2) **determine whether a conflict of interest exists**; 3) **decide** whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, **consult** with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

Rule 1.7(a) provides: “. . . a lawyer shall not represent a client if the representation involves a **concurrent conflict of interest.**” A “concurrent conflict” is (1) representing a client who is **directly adverse** to another client; or (2) the representation of **one or more clients** presents a “**significant risk**” that the lawyer’s responsibilities to another client, a former client or a third person will be “**materially limited;**” or (3) the representation presents a “significant risk” of “materially limiting” the lawyer’s representation due to “**a personal interest of the lawyer.**”

Common Defenses, Bonding off Mechanic's Liens and Pitfalls



Related Issues

- Trust Fund Violations
- Defective Construction Claims
- Indemnity
- Bonds

Substitution of Bond Allowed

C.R.S. 38-22-131

- (1) Whenever a mechanic's lien has been filed in accordance with this article, the owner, whether legal or beneficial, of any interest in the property subject to the lien may, at any time, file with the clerk of the district court of the county wherein the property is situated a corporate surety bond or any other undertaking which has been approved by a judge of said district court.
- (2) Such bond or undertaking plus costs allowed to date shall be in an amount equal to one and one-half times the amount of the lien plus costs allowed to date and shall be approved by a judge of the district court with which such bond or undertaking is filed.
- (3) The bond or undertaking shall be conditioned that, if the lien claimant shall be finally adjudged to be entitled to recover upon the claim upon which his lien is based, the principal or his sureties shall pay to such claimant the amount of his judgment, together with any interest, costs, and other sums which such claimant would be entitled to recover upon the foreclosure of the lien.

Why Would You Want to Bond Around a Mechanic's Lien?

Frees the subject real property from the mechanic's lien

1. Disputed lien - there are no quick ways to get a mechanic's lien resolved
2. Required by lender to get or continue financing
3. Required by contract with owner or contractor
4. Small lien amount that the contractor or owner do not want to resolve

Who Can Bond Around a Mechanic' Lien?

1. Statute states specifically Owner, whether legal or beneficial, of any interest in the property subject to the lien
2. Most common, General Contractor
3. Subcontractor

➤ **Relationships Part II.**

Rule 4.4 addresses Respect for Rights of Third Persons when the lawyer has “transactions with persons other than clients.”

FAIR DEBT COLLECTION PRACTICES ACT

FDCPA and CFDCPA – Overview. The FDCPA is mirrored in the Colorado Fair Debt Collection Practices Act. Both acts apply to “**consumer debt**” and are intended to eliminate “abusive, deceptive and unfair” practices. Both acts outline prohibited conduct and provide the injured consumer with redress. Both the FDCPA and CFDCPA influence the collection of “commercial debt” given the breadth of definition of a “**consumer**” as **any natural person obligated or allegedly obligated to pay any debt.** 15 U.S.C. 1692a(3) and 5-16-103(5), C.R.S.

FAIR DEBT COLLECTION PRACTICES ACT

Debt – “means any obligation or alleged obligation of a consumer to pay money arising out of a transaction, whether or not such obligation has been reduced to judgment.” §5-16-103(8)(a), C.R.S.

FAIR DEBT COLLECTION PRACTICES ACT

Debt collector – “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purposes of which is the collection of debts or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. §1692a(6). *Note: The definition includes attorneys, law firms, private investigators employed by debt collectors and collection agencies.*

FAIR DEBT COLLECTION PRACTICES ACT

Communicating with the Debtor:

- A **debt collector** is prohibited from communicating with a **consumer** if the **debt collector** knows the **consumer** is represented by an attorney, unless the attorney fails to respond in a reasonable amount of time or consents to direct communication between the **consumer** and the **debt collector**.
- A **debt collector** is prohibited from communicating with a **consumer** at the **consumer's** place of business.
- If the **consumer** notifies the **debt collector** in writing that the **consumer** refuses to pay the debt and to cease all further communications, the **debt collector** is prohibited from further contact. *For the purpose of this section, **consumer** includes the **consumer's** spouse, parent (if the consumer is a minor), guardian, executor or administrator.*

FAIR DEBT COLLECTION PRACTICES ACT

Ceasing communications with the Debtor:

15 U.S.C. 1692c provides that if a consumer notifies a debt collector *in writing* that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to the debt except --

- (1) to advise the consumer that the debt collector's further efforts are being terminated;
- (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
- (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If the written notice is sent by the consumer, the notice is complete upon receipt by the debt collector.

FAIR DEBT COLLECTION PRACTICES ACT

Collection Letters:

The FDCPA (15 U.S.C. 1692a(2)) and the CFDCPA (§5-16-105, C.R.S.) require the following notice in consumer debt collection letters that are the “initial communication:”

Federal and Colorado law require that we give you the following notice:

This is an attempt to collect a debt. Any information obtained will be used for that purpose. Unless you dispute the validity of the debt, or any portion thereof, within thirty (30) days after receipt of this letter, we shall assume the debt to be valid. If you notify us in writing of your dispute within the 30-day period, we will obtain verification of the debt or judgment and will mail you a copy. Upon your written request within the 30-day period, we will provide you with the name and address of the original creditor if different from the current creditor. We may proceed with suit against you without waiting the 30 days if so requested by our client. A Consumer has the right to request in writing that a debt collector or collection agency cease further communication with the consumer. A written request to cease communication will not prohibit the debt collector or collection agency from taking any other action authorized by law to collect the debt.

FOR INFORMATION ABOUT THE COLORADO FAIR DEBT COLLECTION PRACTICES ACT,
SEE <https://coag.gov/node/547>.

FAIR DEBT COLLECTION PRACTICES ACT

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Consumer Credit Unit

The Consumer Credit Unit regulates (through licensure/registration programs) companies and individuals involved in consumer lending, debt collection, and debt management and enforces a variety of statutes governing those and related practices. The Unit regulates supervised lenders, credit sellers, credit counseling and debt settlement companies, and collection agencies. It enforces a variety of state laws related to those industries.

The Administrator for the Colorado Fair Debt Collection Practices Act (CFDPCA) hosted a meeting for licensees, industry groups, client groups and other interested parties on July 30, 2018. View the [transcript](#) from the meeting.

[Senate Bill 17-216](#) was recently enacted and contains some substantive changes to the Colorado Fair Debt Collection Practices Act (CFDPCA). This [memo](#) from the Administrator of the CFDPCA outlines the changes.

In accordance with Senate Bill 17-216, the Administrator of the CFDPCA has prepared a biannual report. View the First Bi-Annual CFDPCA Report [here](#). View the Second Bi-Annual Report [here](#).

The Consumer Credit Unit is comprised of three main programs:

- Uniform Consumer Credit Code (UCCC)**
The UCCC program enforces the Colorado Uniform Consumer Credit Code - a state law that regulates the terms and conditions of consumer credit in the State of Colorado. UCCC licenses non-bank lenders (such as finance companies, payday lenders, and second mortgage companies), investigates complaints about lenders and creditors, and takes appropriate disciplinary action when a creditor violates the law.
- Collection Agency Regulation (CAR)**
The CAR program enforces the Colorado Fair Debt Collection Practices Act (CFDPCA) which regulates consumer debt collection as well as the Colorado Child Support Collection Consumer Protection Act. CAR licenses debt collectors, investigates complaints about collection agencies, and takes appropriate disciplinary action when a collection agency violates the law.
- Debt Management (DM)**
The DM program enforces the Colorado Uniform Debt-Management Services Act (DMSA) which regulates companies that offer and provide debt management services to Colorado residents. DM oversees the registration of non-profit and for-profit credit counseling and debt settlement companies, investigates complaints about providers, and takes appropriate disciplinary action when a debt management services provider violates the law.

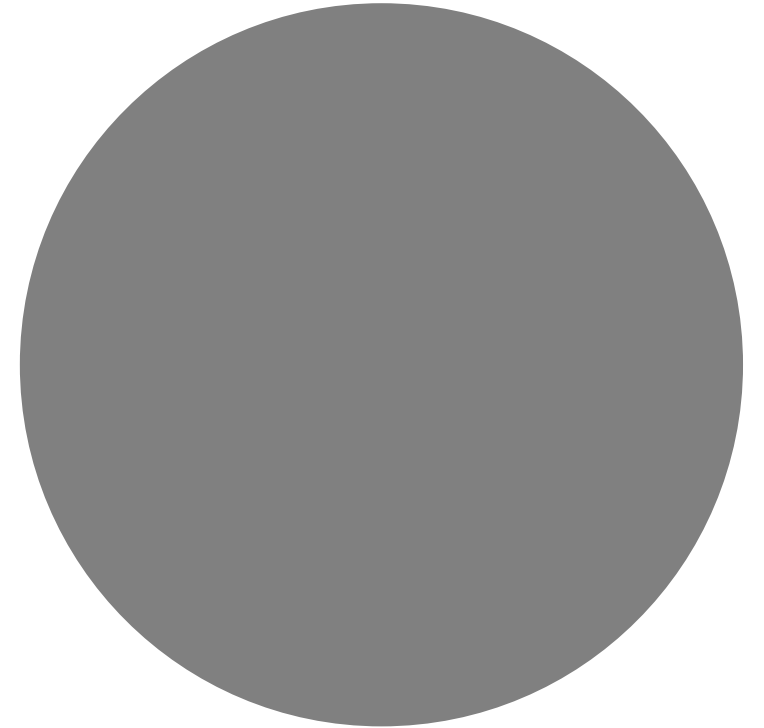
Uniform Consumer Credit Code (UCCC) | Collection Agency Regulation (CAR) | Debt Management (DM)

FAIR DEBT COLLECTION PRACTICES ACT

Obduskey v. McCarthy & Holthus, LLP, 17-1307. Decided March 20, 2019. Dennis Obduskey, age 63, argued on January 7, 2019 that the lawyers representing banks in the Colorado Public Trustee Foreclosure process, violated the FDCPA. The notices required under the process, Mr. Obduskey argues, violate the Act – entitling him to damages.

The Supreme Court ruled that the McCarthy & Holthus, LLP was not a “debt collector” affirming the 10th Circuit.

Assess the situation: Read, Read, Read



Some mechanic's lien issues are more complex than others. Consider your own experience level, the state of the title to the property, the number of parties, and the amount at issue.

Read the mechanic's lien statute carefully and often. Many answers are right there in the text.



Taking it on...

Be curious. Find resources. Take the time to do a good job!

Experience isn't something you
get until just after you need it.

~Mark Twain

Thank you.

