

**NOTICE OF MEETING FOR THE PROBATE TRIAL AND PROCEDURE
COMMITTEE OF THE TRUST AND ESTATE SECTION AND ELDER LAW SECTION
OF THE COLORADO BAR ASSOCIATION**

Wednesday, December 6, 2023, at 10 a.m.

Colorado Bar Association
West 1

<https://cba-cle.zoom.us/j/89554779264?pwd=QWNIT09vRVljUzY2ZHN5V3hWd0lYUT09>

Meeting ID: 895 5477 9264

Passcode: 043692

Call-in: 12532158782

AGENDA

1. Welcome and Introductions

REMINDER – JUDGE WERNER AND MAGISTRATE RAHAMAN FROM THE 4TH JUDICIAL DISTRICT WILL BE PRESENTING AT 10:30.

2. Review of Minutes from November 1, 2023.
3. Chair's Report – Tammy Conover and Andrew Rogers
4. Updates/Reports from current committees:
 - a. E-Will Committee – Letty Maxfield
 - b. Wrongful Death Subcommittee – Aaron Evans
 - c. Court Visitor Subcommittee – Aaron Evans
 - d. UPL – Tammy Conover/Susie Germany
 - i. Met on 11/28 (notes attached).
 - ii. Will meet again Friday, January 19th and Friday, February 3rd from 10:30 to 12:30. The meetings will be in person (hybrid available), at the CFPD offices located at 1355 S. Colorado Blvd., Suite 920. Zoom link will be sent out.
 - iii. Let Tammy know if you want to be included in emails/meetings.

- e. Mandatory Mediation and Simplified Procedure in Probate Cases – Spencer Crona
 - i. New York statutes as consideration for amendment here (attached)
- f. County Bench Bar Meetings – Angela Rockwood
 - i. Judge Werner and Magistrate Rahaman to present today
 - ii. Materials included – CMO used on contested Probate matters in the 4th JD, Topics and notes from the Bench/Bar meeting in October.
- 5. UGCOPPA – Letty Maxfield & Andrew Rogers. Joint T&E, Reporting updates.
- 6. New Business
 - a. Holiday Party today – University Club at 4pm.

NEXT MEETING: January 3, 2023 @ 10 a.m.

REMINDER: Join the Committee through CBA Membership Department, email tammy@conoverlawllc.com for monthly updates.

11.28.23 – Unauthorized Practice of Law Subcommittee Meeting

I didn't get a list of attendees – sorry!

Lisa Dunn has offered to keep notes and get them out – whoot whoot!

- Reviewed the opinion letter we received from John Gleason and follow up email
 - Brief history –
 - Does the conduct *protect, enforce, or defend* any *right* or *duty* of another person
 - Doesn't matter what legislature says, judiciary will regulate and control practice of law
 - Real estate exception history, was the practice of law, but said they should not be enjoined from the actions.
 - More aggressive approach from OARC recently, but he has not handled a professional fiduciary matter
 - Does believe that some work done by professional fiduciaries is the practice of law
 - Court would probably find beneficial factors and be ok
 - Annual reports fine, requesting relief the key difference
- Students from Stetson University are doing research on state trends in UPL. Will have information mid-January
- The CBA Ethics committee has looked at the issue in the past. Tammy will meet with Michael Kirtland to get the background.
- At this point, time to get “pen to paper” and work on presenting what we think a good policy proposal would be to OARC. Still a lot of different views, but not much more to just talk about – we know the concerns so move forward
 - Meeting in person, really brainstorm. CFPD is central, will host. Zoom option. We will get the link out to everyone.
- Other related issues – who can be Petitioner in a case?
 - Professionals that take cases on contracts (hospitals/guardianship). Who needs to Petition? A Petition is inherently asking for relief.
- Limited representation
 - Example – motion to sell real estate counsel may be needed, but don't want to have to file reports, etc. and don't want to get in and out of cases
 - If there is representation, how much do they have to review reports they file
 - Objections to initial or annual reports – can they defend?
- Also have additional reference material from Katrina Jones. Will post on the committee webpage.

PROBATE BREAKFAST October 11, 2023 TOPICS AND SUMMARY NOTES

Thank you to all those who attended this year's breakfast meeting. Here's a summary of the points we discussed – and a few others that we didn't address with you - at the October 11th meeting. **For next year's meeting we promise not to start at 7:00 a.m.**

1. Introductions and welcome by Judge Werner, Mag. Hoffecker and Mag. Rahaman.

Welcome new Probate Court Magistrate Hoffecker to Div. W. We're all happy to have you on board.

2. Division W case filings through the end of September 2023. Thank you to Sarah (Registrar) for keeping these stats.

2023 Year to Date through September 2023 numbers for cases filed in Division W are approximately 2,286 cases, which include **Estates** – 1145. **Protective Proceedings** – 448. **Mental Health** – 593. We are on target for approximately 3,000 cases filed for 2023.

3. Best Practices Comments to the Bar by the judicial officers –

(Mag. R) Please make sure to prepare your clients for hearings, ie; hit the elements for proving up guardianship, emergency guardianship, estate cases. E-Filed copy of Will v. Lodging Copy/Original of Will – please make sure to lodge the original or copy with the Court. Please be nice when you interact/speak with Court Visitors. **(Mag. H)** Exhibits on contested cases – please do not file them pre-hearing. Admit your exhibits at hearing and then upload/file them after hearing. You are welcome to bring exhibit binders to hearings. A JDF208 has to be submitted with petitions on all protective proceedings cases. GAL Reports/Templates - Mag. H is working on an updated GAL template. Please remember that you have a duty to confer with counsel and parties on motions. **(Judge W)** Motions to Withdraw pursuant to RCP 121 have to be filed on all cases. Summaries of documents are very helpful. As to emergency hearings, what is/is not an emergency? A need for a blood transfusion...right now...is an example of an emergency!

4. Bonus Practice Pointer:

Please note that the Probate bench has decided that an Information of Appointment (JDF940) must be on file before Letters Testamentary or Administration will be issued.

5. Status Reports are helpful to the Probate Bench

A Status Report, however, is not a motion. So, if a request is being made in a status report you must confer pursuant to 121 and title it "Status Report and Request for...." And submit a proposed Order with your status report/quasi motion.

6. Shi/Ana (Protective Proceeding Monitors) will attend this year's National Guardianship Assn. National Conference Oct. 13-16. We are wrapping up our one-on-one meetings with fiduciaries.

Thank you fiduciaries for taking the time out of your day to meet with us. Fiduciary Standards are to be updated; more information will be provided late 2023/early 2024.

7. If you are contacting Division W staff and asking for an emergency hearing you must have a petition filed beforehand for whatever emergency exists that requires a hearing.

8. **Conservators oversight of funds invested/placed with advisors/brokers.**
Conservators/Fiduciaries, if you are turning protected person's funds over to a financial advisor or brokerage house (UBS, Edward Jones, etc) you must have an understanding of where those funds are being invested and associated fees/costs being charged the estate. A Conservator recently asked us how long they need to keep files? Please keep files for ten years (State of Colorado Guidelines for Colorado Public Administrators).
9. **Mental health Topics Per Mag. Paprzycki.** Please see Magistrate Paprzycki's below update on mental health matters - I've been very involved in the Department of Human Services effort to expand assisted outpatient treatment (AOT) in the 4th. A working group (initiated by DHS) has been meeting regularly to support this effort. The effort includes collaboration across agencies to support patients so that they can attend scheduled appointments. Many respondents are un-housed, which makes AOT a challenge. The Denver Sheriff's Office supports outpatient respondents by locating them in the community and assisting them in getting to their appointments. DHS at the state level is looking to get a similar program underway in the 4th. The Dept. of Human Services has also taken the position that respondents will do much better with AOT if the judicial officers overseeing their cases are very involved and make a personal connection with the respondent. Much research supports the premise that for mental health and substance abuse commitment cases, the respondents have a higher level of compliance if the judicial officer is engaged and invested in the outcome. A presentation on this topic was recently arranged by DHS for the AOT working group. The AOT group is meeting monthly. Anyone interested in joining the effort should contact me and we can include them on the meeting invitation. Future meetings will include a briefing on the upcoming changes to the mental health statutes as well as an overview of the legal process for commitments.
10. **Evidence Picks by the three judicial officers.** Pick one area of evidence that you want to address with the Bar. **Mag. R** – please know CRE 801 (Hearsay), 803 (Hearsay Exceptions) and 804 (Declarant Unavailable). **Mag. H** – Experts. For emergency hearings expert reports/opinion letters are not required. **Judge W** – please see/familiarize yourself with CRE 1006 on Summaries.
11. **We are in need of Court Appointed Counsel and Adult GALs.** Please let Division W staff know if you would like to be on our Court Appointed Counsel and/or Adult GAL list. If you are currently on our appointments list, please try to respond to emails from Div. W staff within forty-eight hours about your appointment availability.
12. **Questions and Answers from the audience.** Thank you all for your thoughtful questions/comments. Lengthy discussion about the Cost and Compensation Act 15.10.601 et. seq. Guardians and fiduciaries please speak with the Conservator about your fees and getting paid. Particularly if you exceed the Financial Plan and Inventory budget. Please know the fee dispute procedures as set forth in 15.10.604. The group also discussed the importance of civility to others and acting professionally in and out of the Courtroom.
13. **El Paso County District Court Judge Diana May is the coordinator for the El Paso County Pro Bono Attorney Project.** The project is in desperate need of new attorney volunteers to handle

cases ranging from DR to small claims. If you have some time to take on a Pro Bono case, it would be very much appreciated. Below is the QR Code that links to the Project website and attorney application. Or you can reach out to Judge May directly Diana.May@judicial.state.co.us



As we approach the 2024 holiday season Judge Werner, Magistrate Hoffecker and I wanted to wish you, your staff and loved ones all a happy/safe holiday season and all the best for 2024. Thank you all for your work in our community.

Judge Werner, Magistrate Hoffecker, Magistrate Rahaman and Division W/15 Staff.

2. A challenge prior to issuance of letters is a defense in response to a petition for administration.
- iv. Unless sooner barred, all objections to the validity of a will must be filed no later than the earlier of the entry of an order of final discharge of the personal representative or 1 year after service of the notice of administration.
- v. *In re Estate of DeLuca*, 748 So. 2d 1086 (Fla. 4th DCA 2000) -
 1. Admission of later-discovered codicils commenced new limitations period for challenging validity of will and thus a beneficiary who did not receive a new notice of administration regarding the codicils could petition for revocation before discharge and was not barred by 3-month limitation from original notice.

c. New York -

- i. Surrogate's Court Procedure Act ("S.C.P.A.") permits a potential objectant in a probate proceeding to request pre-objection discovery. S.C.P.A. § 1404.
 1. A potential objectant generally must request pre-objection discovery (or, if the potential objectant does not do so, file probate objections) on or before the return date of the probate citation.
 2. Upon requesting pre-objection discovery, the potential objectant can obtain document discovery concerning the preparation and execution of the propounded will, the testator's medical affairs, and the testator's finances. *Matter of MacLemon*, 808 N.Y.S.2d 918 (N.Y. Sur. 2005).

3. The potential objectant also can take the pre-objection depositions of the propounded will's attorney-draftsperson and attesting witnesses, as well as the petitioner and nominated fiduciary if the instrument contains an in terrorem clause. S.C.P.A. § 1404.
 4. Under Estates, Powers and Trusts Law ("E.P.T.L.") § 3-3.5, a party will not risk triggering a will's in terrorem clause by merely requesting pre-objection discovery pursuant to S.C.P.A. § 1404. E.P.T.L. § 3-3.5.
- ii. "Once the [pre-objection discovery] is [complete], [a potential objectant] must file objection within ten days unless the court orders otherwise or the parties stipulate otherwise." Margaret V. Turano, Practice Commentaries: S.C.P.A. § 1404 (McKinney's 2011 ed.); 22 N.Y.C.R.R. 207.36.
1. The failure to timely file objections with the Surrogate's Court within ten days of concluding pre-objection discovery may result in the Surrogate's Court rejecting the objections. *Matter of Esteves*, 31 A.D.3d 1028 (N.Y. App. Div. 2006).
 2. In *Matter of Esteves*, the potential objectants' counsel served probate objections on the petitioner's counsel and mailed them to the Surrogate's Court for filing on the tenth day after the conclusion of S.C.P.A. § 1404 examinations. The Surrogate's Court did not receive the objections until eleven days after the conclusion of the examinations. After counsel for the parties engaged in a letter-writing campaign, the Surrogate's Court rejected the objections as untimely. The Appellate Division affirmed.

- a. Papers “are not deemed filed until received by the Clerk of the Court”.
- b. There was no court order or stipulation setting a due date for the objections other than ten days after the conclusion of the S.C.P.A. § 1404 examinations.

3. In *Matter of Gross*, the petitioner moved for summary judgment dismissing objections to probate. It then came to light that the objections, which were timely served upon the petitioner’s counsel, had not been filed with the Surrogate’s Court. As the petitioner’s counsel refused to consent to the late filing of the objections, the objectants moved for an order extending their time to file the objections.

- a. In granting the objectants’ motion, the Surrogate’s Court concluded that there was “no basis upon which to deny” it.
- b. The petitioner had notice of the objections; proceeded with the litigation in due course, participating in discovery; and moved for summary judgment dismissing the objections.
- c. In addition, there was ample reason to permit “further inquiry into the circumstances surrounding the execution of the will”, since the propounded instrument disinherited two of the decedent’s three children and was drafted by the sole beneficiary’s neighbor and attorney.

II. Statute of Limitations to Contest a Trust -

a. **Arizona** -

Probate Trial and Procedure Committee

Minutes of the November 1, 2023, Meeting

The Probate Trial and Procedure Committee met in-person and virtually through the Colorado Bar Association on November 1, 2023. The meeting was called to order at approximately 10:00 a.m.

The following members were present in person or participated by Zoom:

Lindsay Andrew	Aaron Evans	Angela Rockwood
Eric Apjoke	John Ferguson	Tom Rodriguez
Lauren Beversluis	Leah Gates	Andrew Rogers
Lisa Blattner	Susie Germany	Al Sahlstrom
Tim Bounds	David Imbler	Zach Schlichting
Lynne Bruzzese	Stan Kent	Catherine Seal
Annie Campbell	Keith Lapuyade	Kathy Seidel
Kelly Campbell	Kimberly Lavin	Sandra Sigler
Geoffrey Carpenter	Victoria Long	Sara Stein
Shari Caton	Letty Maxfield	Rubea Taylor
Scott Challinor	Emily McDaniel	Tamara Trujillo
Marco Chayet	Nick McWharter	Herb Tucker
Molly Clarke	Sydney Merrel	Chelsea Ziegler
Tammy Conover	Kevin Millard	Kris Zumalt
Kelly Cooper	Kayla Nelson	Lisa Dunn
Lisha Coultrip	Matthew Perkins	Stephen Wilson
Spencer Crona	Sara Price	Morgan Wiener
Kaitlin Davis	Sal Quintana	
	Brian Reynolds	

Welcome/Introductions

The minutes of the October 4, 2023, meeting were approved.

I. Chair's Report

- Email and content locations – Emma will be emailing out meeting materials, and they will also be posted on the PTPC website, which you can get to through T&E and Elder Law. Tammy working on having subcommittee stuff posted there as well.

II. Updates/Reports

- Statutory Revisions for E-Wills – Letty gave update. Discussed possibly having a database for E-Wills, similar to an LLC. Committee is meeting monthly, hope to have something to SRC and PT&P by April 2024. Reach out to Letty if interested in joining/being involved.

- Unauthorized Practice of Law – Tammy and Susie gave update. Meeting cancelled for this month, next meeting will be November 28, 2023, 11:00 a.m.
- Mandatory Mediation / 16.1 Committee – Spencer spoke with Judge Leith, met with Angela Rockwood – got some information from Judge Leith Spencer will share. Going to meet again before December Probate Day. Reach out to Spencer if interested in participating.
- UGCOPPA – Letty and Andrew Co-Chairing – Letty gave update. Meeting on a weekly basis, on Fridays, 1:00-3:00 p.m. at Wade Ash/virtual attendance. Currently going through the Act. Contact Letty or Andrew if interested in participating.
- Virtual Court Proceedings – No update this month.
- Wrongful Death Subcommittee – No update this month, upcoming meeting on November 30, 2023. Committee is reviewing other states where heirs and PR have standing to bring claim, to see different approaches.
- Court Visitor Subcommittee – Connie Lind retiring. Aaron reaching out.
- County Bench Bar – Angela Rockwood – 4th Judicial District at 10:30 a.m. at next meeting in December – Magistrate Rahaman will speak 15-20 minutes, maybe Judge Werner.
 - Matthew Perkins – says Jefferson County willing to do bench bar meeting – Matthew will talk to Judge Vriesman and Magistrate Allen. Kris Zumalt – Jeff Co. has its own bench bar meetings regularly.

III. New Business

- Marco Chayet – on Supreme Court Nominating Committee – says nominations have been made, now in a comment period. Looking at 6 candidates for open judge positions.
- Annual Holiday Party - December 6, 4pm.
 - Possible topics for panel – early mediation/how discovery would work, what rules apply CRCP/partial/bridge between rules of civil procedure and probate procedure.

IV. Adjournment

The meeting adjourned at approximately 11:05 a.m.

District Court El Paso County, Colorado 270 South Tejon St. Colorado Springs, CO 80903	COURT USE ONLY
In the Matter of the Estate of: Deceased.	
CASE MANAGEMENT SCHEDULING CONFERENCE ORDER	

THIS MATTER came before the Court on August 22, 2023 for a Case Management Scheduling Conference. The Court invokes this Case Management Order. A hearing/trial on the matter of Petition for Relief is set for (date) commencing at 1:00 am/**pm** and is scheduled to conclude at 5:00 am/**pm**.

Parties, including *pro se* parties (litigants without lawyers), and counsel shall appear in person for hearing/trial unless excused by the Court for good cause. If a party cannot appear in person they shall file a Motion and Order to Appear by video/Telephone with the Court consistent with the rules of procedure, or if emergency, no later than 48 hours preceding the hearing.¹

Hearing date is:

Discovery requests/Subpoenas shall be completed by:

Discovery production shall be completed by:

Depositions are to be completed:

Expert witness designation/report shall be disclosed no later than:

Rebuttal expert witness designation/report shall be disclosed no later than:

Witness and Exhibit lists shall be exchanged no later than:

Exhibits shall be exchanged no later than:

Objections to exchanged Exhibits shall be filed no later than – objections will be addressed at hearing

Mediation is/is not required and is to be completed no later than:

Motion Practice – counsel are directed to CRCP 10 and Local Practice Rule 121 1-15

Counsel/parties shall file with the Court either a **Pre-Trial Disclosure Statement** or **Hearing Memorandum** (see below) and exchange copies of the same with all other counsel/parties no later than:

The **Pre-Trial Disclosure Statement** SHALL contain the following:

1. **Factual Issues in Dispute:** A concise list of the factual issues each party is asking the Court to resolve and a statement of each party's position on those issues.
2. **Legal Issues:** A statement of each legal issue involved in the case. additionally, the Court may or may not request trial briefs (a written paper advising the Court about points of law) on the legal issues involved in the case.

¹ Please note that the Court may not Grant your request to appear by telephone and may still require you to appear for the scheduled hearing in person.

3. Witnesses: A list of the names, addresses, and telephone numbers and a brief description of the testimony of each fact witness each party intends to call at trial. Witnesses whose names, telephone numbers, and a statement are not listed on the Pre-trial Disclosure Statement, unless offered only "in rebuttal" (to rebut the testimony of a previous witness), **will not be permitted to testify**.
4. Expert Witnesses: A list of each party's proposed expert witnesses, if any. Expert witnesses should be sparingly used, and unlike fact witnesses, expert testimony will come **only** with the Court's permission. Parties shall disclose in the Pre-trial Disclosure Statement the proposed expert's testimony and indicate whether the expert's written report(s) and curriculum vitae has/have been exchanged.
5. Exhibits: A list of the exhibits, such as reports, pictures, or other documents, each party intends to offer at trial. Exhibits not listed on a party's Pre-Trial Disclosure Statement, unless offered only "in rebuttal", **will not be admitted**.
6. Pre-Trial Motions: A list of pre-trial motions, if any, that are contemplated by each party.
7. Evidentiary Objections: Objections are when an individual does not believe certain documents, witnesses or other evidence should be considered by the Court. Typical objections include, but are not limited, hearsay, relevance, etc. The Court also requires a statement as to the applicability of the Dead Man's Statute to proposed witnesses listed by either party. Motion to exclude under C.R.S. § 13-90-102 must be filed *in limine*. If a party, after reviewing the Pre-trial Disclosure Statement(s) filed by the other parties, has any objection to the witnesses, expert witnesses, or exhibits proposed by the other parties, the objecting party shall file a written objection with the Court, no later than the deadlines identified previously in this Case Management Order.
8. Other: Any other matters the parties consider important to the efficient conduct of the trial.

OR

In the alternative to the above Pretrial Disclosure Statement, the parties may file a **Hearing Memorandum**. Hearing Memorandums are helpful to the Court. A Hearing Memorandum shall be no more than ten pages, double-spaced, and outlines for the Court the parties' respective positions on the disputed issues that are set for hearing; the relevant law and authority; and a brief recitation of the witnesses and exhibits to be presented at the hearing.

NOTE: FAILURE TO COMPLY WITH THE ABOVE DATES AND/OR FILING REQUIREMENTS MAY RESULT IN SANCTIONS INCLUDING, BUT NOT LIMITED TO, DISALLOWANCE OF PRESENTATION OF CERTAIN EVIDENCE (IE: TESTIMONY AND/OR EXHIBITS).

The order of judgment was issued with consent, and any appeal must be taken pursuant to Rule 7(b), Colorado Rules for Magistrates.

DONE THIS ____ DAY OF _____, 2023:

BY THE COURT:

Vincent N. Rahaman,
Magistrate