

# LAW WEEK

## COLORADO

PRO BONO PROFILE

TOM MACDONALD



Otten Johnson's Tom Macdonald and the "offending" mural. | LAW WEEK PHOTO JAMIE COTTEN

## Helping Mad Hatters, Asylum Seekers

By **Matt Masich**  
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DENVER — Most people know Tom Macdonald as one of Denver's top commercial real estate lawyers, but fewer know him as the Mad Hatter's defender, or as the advocate for a family targeted by violent communist rebels. These are the roles he plays as a pro bono lawyer.

Macdonald, a shareholder at Otten Johnson Robinson Neff & Ragonetti, devoted several hundred hours last year doing free legal work. The motivation behind it was simple: "I do it because I like the people I'm helping."

One of those people is Mike Mahaney, owner of Headed West, a pipe and smoking supply shop on South Broadway in Englewood. Hoping to prevent graffiti, Mahaney commissioned a local artist to paint two large murals on the sides of his building. One mural depicted musical heroes of the 1960s, and the other showed a scene from Lewis Carroll's "Alice's Adventures in Wonderland," complete with the Mad Hatter, the White Rabbit and a hookah-smoking caterpillar.

"The city [of Englewood] didn't take any action until one of the members of city council complained that the murals promoted drug use," Macdonald said.

The city ordered Mahaney to remove the murals because he had not received a sign permit or city manager approval. He refused to get rid of the mural, arguing the city was violating his First Amendment right to free expression. The ACLU of Colorado got involved on Mahaney's behalf, and asked Macdonald if he'd lend a hand.

### Case overlaps practice

"I like the First Amendment, and I like sign code stuff because it overlaps with my land-use practice," Macdonald said. "There are some of the same issues that consistently arise."

He also had some experience representing clients in similar pro bono cases. A few years earlier, Macdonald convinced the Salida city attorney's office to drop its prosecution of a woman who had an anti-war mural on her wall.

But in this case, Englewood would not back down. The city initiated proceedings against Mahaney in municipal court. Macdonald and a pro bono team from Otten Johnson responded by challenging the constitutionality of Englewood's sign code as it applies to murals.

Macdonald argued that the sign code was a form of "prior restraint" — essentially the government regulating constitutionally protected speech before it occurs.

"Courts will recognize that at times prior restraints are allowable," he said, "but only if you're entitled to a quick decision and a quick review of that decision, and if the criteria the government uses in issuing or withholding the permit are objective criteria."

Macdonald said the sign code didn't pass constitutional muster because it imposed no time limit on the city manager to make a decision about mural requests — effectively granting the city unlimited power to censor murals.

Arapahoe County District Court Judge Cheryl Post disagreed, ruling that the sign code was constitutional, and she

granted summary judgment for the city. But a three-judge panel of the Colorado Court of Appeals in October 2009 reversed that decision. The panel found that the sign code, as applied to murals, is indeed unconstitutional prior restraint.

### Death threats

While the First Amendment rights at stake in the mural case were serious, the pro bono case Macdonald is working on now could be a matter of life and death.

He is representing three Colombians — a woman and her parents — who are seeking asylum in the U.S.

"Her family in Colombia had aided a local government official who had been targeted for assassination by FARC," Macdonald said. FARC, or the Revolutionary Armed Forces of Colombia, is a rebel group engaged in a four-decade-long guerrilla war against the Colombian government.

The family fled the country when FARC agents found out the son of the targeted government official worked in the bakery owned by Macdonald's clients. He began representing the daughter and then her parents after getting the case through the Rocky Mountain Survivors Center, a now-defunct nonprofit that assisted survivors of war trauma and torture.

The daughter was initially granted asylum before Macdonald got involved, but the U.S. government appealed on the grounds that she was simply the victim of extortion in Colombia and not political persecution. Macdonald disputes that assessment.

"They experienced serious death threats from FARC before they got out of

Colombia," he said. "FARC is a very violent organization — the uncle of my initial client, her father's brother, was murdered by FARC. So I think there's significant danger to their lives if they're sent back to Colombia."

The combined cases of the daughter and her parents will have their next hearing in September. Macdonald believes he can get asylum or withholding of removal for the family, but he does worry about it.

"The stakes are so high and the subject matter is so arcane and specialized," Macdonald said. "It causes me a great deal of stress."

Macdonald takes inspiration in his pro bono work from historical heroes like Clarence Darrow and Thurgood Marshall, as well as U.S. Bankruptcy Court Judge Bruce Campbell, who used to work with Macdonald at Otten Johnson.

"Bruce was on the board of directors of the Legal Aid Foundation for many years and encouraged me to undertake pro bono representations," Macdonald said.

Macdonald is also involved in inspiring the next generation of lawyers. He recently helped coach the Lakewood High School mock trial team, of which his son Garrett is a member, to the Colorado state championship. Macdonald plans to accompany the team to the national competition next month in Philadelphia •

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