


March 31, 2006

Dr. Richard Wehmhoefer, Esq.
Colorado Commission on Judicial Discipline
899 Logan Street, Suite 307
Denver, CO 80203

RE: Inquiry concerning , First Judicial District

Dear Dr. Rick:

Thank you for your reply, dated February 10, 2006 and also for the time you took to speak with me by phone on March 28. In response to my February 6th 2006 complaint of a refusal to render a decision on a pending recusal motion for over nineteen months (directly implicating Canon 3A and indirectly implicating Canons 1A and 2A), your written reply reminded me that you have repeatedly explained to me that the Commission “is not a court [and] does not have any authority to review legal or factual aspects of a person’s case. It also does not have the authority to review the rulings, orders or decision that a judge may make when presiding over a person’s case.”

My question, as I shared with you during our phone conversation, was, “If the Commission is truly disallowed from reviewing the legal or factual aspects of [any] case, including rulings, orders or decision, then how is it possible for the Commission to enforce Canon 3A and the discharge of the duties of a judge’s office (which primarily involves making rulings, orders and decisions regarding the factual and legal aspects of a given case)?”

In my February 6th letter, I explained that the gravamen of my complaint was the fact that the judge had not issued any ruling at all –a ruling on a procedurally special statutory matter that requires a prompt peremptory ruling.

I have reviewed the Commission’s Annual Reports, published in the Colorado Lawyer. I note that examples of private letters of discipline issued to judges by the Commission included letters to judges who, “**Delayed issuing rulings in cases pending before the judges, violations of Canon 3A(5), Colorado Code of Judicial Conduct.**”¹

¹ This quotation is excerpted directly from the Report of the Commission and has not been paraphrased.

Here are other examples of disciplinary letters, appearing in one such report:

— Engaged in *ex parte* contacts with litigants or attorneys in **cases pending before the judges**, violations of Canons 1, 2A. and B., and 3A.(4), Colorado Code of Judicial Conduct.

— Delayed issuing **decisions in cases pending before the judges**, violations of Canon 3A.(5), Colorado Code of Judicial Conduct.

— Experienced losses of temper or control with litigants or attorneys **in cases pending before the judges**, violations of Canons 1, 2A. and B., and 3A.(3), Colorado Code of Judicial Conduct.

— Made inappropriate remarks about the conduct of an attorney to the media, a violation of Canons 1 and 3A.(6), Colorado Code of Judicial Conduct.

— **Heard a case** involving an individual who was a client of the part-time judge's law firm, a violation of Canons 1, 2A. and B., 3C.(1)(a), (b), and (c), 8B.(7), and 8C.(1) and (3), Colorado Code of Judicial Conduct.

— Became intemperate and verbally abusive toward an employee and customer of a business establishment, a violation of Canons 1 and 2A. and B., Colorado Code of Judicial Conduct.

— Pled guilty to driving while the judge's ability was impaired by alcohol, a violation of Canons 1 and 2A., Colorado Code of Judicial Conduct.

— Was found to have sexually harassed an employee of the judge, a violation of Canons 1 and 3A.(3), Colorado Code of Judicial Conduct.

Four of the eight excerpted examples, highlighted hereinabove, include matters dealing with the conduct, action or inaction of a judge in, "a person's case." However, one of these, which you asserted in your reply [that] the Commission cannot investigate for want of jurisdiction, pertains to delayed rulings, which is precisely the subject of my grievance.

I gathered from our conversation that you apply the exhaustion-of-appellate-remedies test, much as the Supreme Court does for granting extraordinary writs, in determining whether the Commission has "jurisdiction" – the power to act – on a particular matter. If a trial judge fails to rule, a writ in the nature of *mandamus* is the proper remedy. *City of Trinidad v. District*

Court, 196 Colo. 106, 581 P.2d 304 (1978); *See also* 45 A.L.R.2d 937 (Mandamus as the remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification). A copy of 45 Amer. Law Rev. 937 is included on the accompanying compact diskette as “[mandamus-as-the-proper-remedy-for-failure-to-decide-recusal-motion.pdf](#).” Indeed, I have exhausted any and all appellate remedies.

When we spoke by phone, you asked that I set forth the factual details of my complaint, which I herewith endeavor:

- (1) Nineteen months ago, on or about the 16th of August, 2004, I filed a verified motion seeking substitution of Judge [REDACTED]. An electronic copy of my motion is included on the accompanying compact diskette as, “[2004-08-20_Respondent's-supplement-to-motion-for-substitution-of-judge.doc](#).”
- (2) Judge [REDACTED] responded with an order declining to decide the motion, stating that [REDACTED] was divested of jurisdiction to decide [any] motions, including the recusal motion and a motion for reconsideration of an [unrelated] order issued two weeks prior (despite that no event of jurisdictional significance had occurred since that time; the notice of appeal had issued many months earlier on June 21st 2004 and Judge [REDACTED] had issued several orders since that time). A copy of the August 30th order declining to decide the recusal motion is attached hereto and made part hereof by reference as, “[2004-08-30_ORDER.pdf](#).”²
- (3) On or about October 8th 2004, I filed a Petition for a writ of mandamus with the Colorado Supreme Court. A copy of my petition is included on the accompanying compact diskette as, “[2004-10-07_petition-for-rehearing-&-writ-of-mandamus.pdf](#).” The Colorado Supreme Court denied my petition, without comment, on October 14,

² Note that, merely because the judge issued an Order justifying [REDACTED] refusal to rule, doesn't convert this into a purely “appealable” matter, because it doesn't alter the fact that [REDACTED] has refused to rule or that [REDACTED] is failing to discharge the duties of [REDACTED] office. Moreover, it is unlikely that the August 30, 2004 Order would have been considered final and appealable, because it did not dispose of, but rather stayed, the justiciable issues. Indeed, it's been nineteen (19) months, already, and [REDACTED] failure to rule persists to this day, irrespective of any appellate pendency (the CoA has already issued two opinions (one (03CA1825) affirmed in part; reversed in part and the other (04CA1161) reversed and remanded with instructions). Further, A trial court always retains jurisdiction to determine a recusal motion. (*see, e.g., Kittles v. Rocky Mountain Recovery, Inc.*, 1 P.3d 1220 (Wyo. 2000) (regarding a disqualification motion, the court observed, “The District Court did not rule on that motion, having erroneously concluded that it lacked subject matter jurisdiction over the appeal. On remand, we direct the district court to issue a ruling on the merits of [the recusal] motion”)).

2004. A copy of the court's order is included on the accompanying compact diskette as, "[2004-10-14_ORDER_DENIED_petition-for-rehearing.pdf](#)."

- (4) Every motion that I have filed (with or without counsel) since August of 2004, I have directed the motion to the magistrate (rather than the judge) and have included a disclaimer that I do not want the judge to rule on the motion until and unless the recusal motion has been decided. The reason is because any application of relief that is made without regard for the pending recusal motion is considered a *de facto* waiver of the right to object to the authority of the judge -i.e., it nullifies the pending recusal motion. *See Aaberg v. District Court*, 136 Colo. 525, 319 P.2d 491 (1957) (Where a party seeks to disqualify a judge for bias and prejudice, and at the same time asks for affirmative relief by motion, appearance before such judge for any other purpose than to question his authority to act, waives the right to object to his authority); *see also* Waiver or loss of right to disqualify judge by participation in proceedings, 24 A.L.R.4th 870, §870+ (1983); Time for asserting disqualification of judge, and waiver of disqualification, 73 A.L.R.2d 1238, §14+ (1960).
- (5) On February 10th 2005, Judge [REDACTED] issued an Order acknowledging that the recusal motion was still pending and citing that as [REDACTED] reason for declining to rule on any and all other motions, which Order dispels any notion that the recusal motion had somehow already been denied *sub silentio*. A copy of the February 10, 2005 Order is included on the accompanying compact diskette as, "[2005-02-10_ORDER.pdf](#)."
- (6) However, the February 10th Order, like the August 30th 2004 Order, provided a specious rationale: The supposed divestiture of jurisdiction that Judge [REDACTED] alluded to in both orders did not prevent [REDACTED] from issuing orders and continuing to rule on other motions. *See, e.g.*, accompanying CD for [2004-09-16_ORDER \(Tanitta-not-to-call-the-Court\).pdf](#)³ (issued two weeks after the August 30th 2004 Order), [2004-08-16_ORDER_DENIED_Respondent's Motion\[s\].pdf](#) (issued two weeks before the August 30th 2004 Order) and [2005-01-31_ORDER.pdf](#) (issued two weeks before the February 10th 2005 Order). Please note that there was no Notice of Appeal or Mandate from the Colorado Court of Appeals or any other event of jurisdictional significance that explains any of these self-enlargements or self-restrictions of

³ Of particular note, not only was this Order void because it was issued in all absence of jurisdiction (not merely in excess of jurisdiction), but was entered against my wife, who is a non-party to the case. This order was entered as a direct and proximate result of a complaint letter that I addressed to the court clerk (see the included [2004-08-31_letter-to-Arcilise.doc](#), which was "docketed" in the Register of Actions on Sept. 15, 2004 (one day before the Sept. 16th Order was issued in retaliation for this First Amendment expression)) and regarding an innocent phone inquiry that my wife made to the court on my behalf (see the included [2004-09-01_Affidavit_Tanitta_Rungwattanajinda.pdf](#)).

jurisdiction.⁴ Indeed, the recusal motion has been used as a reason to not rule on any of my motions, including four (4) pending contempt motions (some filed *pro se*; some file by counsel), a motion filed in May of 2004 (two years ago) on my behalf by the Special Intervener (Jefferson County Attorney), *inter alia*.

This is a most serious matter because, the filing of a motion to recuse suspends all other proceedings in the case until ruling is made thereon. *Dominic Leone Constr. Co. v. District Court*, 150 Colo. 47, 370 P.2d 759 (1962) (*see also Brouwer v. District Court*, 169 Colo. 303, 455 P.2d 207 (1969)). A judge's refusal to rule on a recusal motion has the effect of putting a litigant out of court. *Cf. See Hines v. D'Artois*, 531 F2d 726 (5th Cir. 1976) ("Whatever the absolute judicial validity of the above sources of information, it seems beyond cavil that the effect of the stay order in this case was to put plaintiffs 'effectively out of court,' for a protracted and indefinite period-at least eighteen months, and possibly much longer. For the purposes of expedition and certainty, the parties here would have been served just as well by a stay pending the arrival of Godot") (quoting *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962) (the Supreme Court noted (in remanding on other grounds) that, "'Appellant was effectively out of court' "); *see also G.C. v. Department of Children and Families*, 804 So.2d 525 (Fla.App. 5 Dist., 2002) ("We are . . . troubled by the remedies suggested . . . : either send a gentle reminder to the judge or apply for a writ of mandamus. Neither of these is a burden that should be placed on the movant. . . the litigant should not be required to nudge the judge. Nor is it a "right" to require a party to file a petition for writ of mandamus"). By this letter, I am formally and respectfully requesting reconsideration of this matter or, in the alternative, an elaboration of the earlier decision.

. . . with kind regards.

⁴ "[S]ubject matter jurisdiction cannot be waived" (*People ex rel. Garner v. Garner*, 33 P.3d 1239 (Colo. App. 2001)) and "[a] court cannot confer jurisdiction where none existed" (*Old Wayne Mut. L. Assoc. v. McDonough*, 204 U.S. 8, 27 (1907)). Jurisdiction is created only by constitution or statute. *People v. Proffitt*, 865 P.2d 929 (Colo. App. 1993). *See also Hudson v. Parker*, 156 U.S. 277, 288 (1895) (A court, "cannot . . . enlarge or restrict its own inherent jurisdiction and powers . . . under the Constitution and laws of the United States").