

September 16, 2006

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Attorney Regulation Counsel
1560 Broadway, Suite 1800
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Re: Request for Investigation of David R. Gloss, 06-02271

Dear Ms. Smith:

I received your seven-page Sept. 14 letter this afternoon, and because I wish to respond immediately, this letter addresses only a few of the statements in your letter that are either factually inaccurate or inaccurate as a matter of law.

First, I note that you fail in your letter to address the threshold issue concerning your decision to refuse to recuse yourself in this matter: that you are a co-defendant, along with Mr. Gloss, in the pending federal litigation. You are correct that I was never told that you would recuse yourself from the matter. Nor did I say I was told that. What I said was that I was told you would have other attorneys review the matter after you reviewed it. When I asked once again for your recusal, I was told that my request would be passed along to you. A few days later, someone—it was either Rosemary Gosda or Robin Lehman; I can't recall which—phoned me and said you had said it was your understanding that the federal lawsuit was over, yet in the copy of my email to Gloss that I had forwarded to your office I mentioned the lawsuit as ongoing. I was told that you had instructed Ms. Lehman (or Ms. Gosda) to phone me and request a clarification. I clarified the status of the case. I then was asked if I knew the appellate case number. I inferred that the reason for the phone call was that if the federal lawsuit was over, there was no conflict for you in considering the complaint against Gloss—the necessary implication being that you recognized the existence of a conflict if the federal lawsuit was *not* over; otherwise, what was the purpose of the inquiry to me about the status of the federal lawsuit? The federal lawsuit is not over.

What is clear to me by now from my dealings with your office is that in the opinion of its lawyers, there is no such thing as conflict of interest, no such thing as attorney fraud, and no attorney obligations to the client. Thus your statement in early 2005 that attorney Stephenie Lorimer has no conflict of interest in representing my niece in the guardianship matter, which was filed less than a month after—purportedly acting as *my father's* lawyer, but admittedly acting at the behest of my niece—she obtained my father's signature on two power of attorney documents naming my niece his attorney in fact and claiming that my father wished my niece to be his guardian, should he ever need one. The power-of-attorney documents *falsified a Colorado address for my father* (he still lived in Illinois at the time) and also stated that my father was mentally competent at the time—the latter a statement that Lorimer and my niece have both conceded was false. And thus your refusal to recuse yourself from this matter although you and Gloss are co-defendants in the federal lawsuit, a lawsuit whose subject matter overlaps with my allegations against to your agency.

A blindness to conflict of interest—indeed an apparent inability even to understand the *concept* of conflict of interest—apparently is a hallmark of the legal profession in Colorado, at least in some quarters. Judge Rodgers has now acknowledged that his rulings are intended to keep my father within the First Judicial District of Colorado until his death so that the ensuing will-probate matter will be litigated before Judge Rodgers. Judge Rodgers is aware that in my father’s will, I am named the executor. In the motion upon which Judge Rodgers was ruling in his Aug. 3 order, I had alleged that the judge plans to remove me as executor and replace me with my niece or one of my sisters, who then will dismiss my father’s estate as a plaintiff in the federal lawsuit (and in the Denver state court malpractice lawsuit against Gloss) and who will file motions to force me to reimburse my father’s estate for my niece’s lawyer’s legal fees—motions that the judge will grant on the basis, he said, in his order of what he “learned” while assigned to the guardianship matter.

The judge said in that order that he is entitled to do so—and in Colorado he probably is, at least unless the Colorado Supreme Court ultimate hears the case. And if the Colorado Supreme Court does hear the case, newly appointed Justice Allison Eid will be required by law to recuse herself, because before her appointment to the court on February 15, 2006 she held a top position in the Office of the Colorado Attorney General, which is representing (among other defendants) you, in the federal litigation. You and John Gleason are required by law to recuse yourselves, too. And so is Judge Rodgers.

As for your suggestion that I appeal from the judge’s rulings, you might consider suggesting to your co-defendant, Judge Rodgers that he grant my pending motion for entry of an order under C.R.C.P. 54 making the rulings in the probate case final and appealable. Gloss, not incidentally, filed a response to my motion, asking that Judge Rodgers deny the motion because a grant of it would (in his opinion) negatively impact Gloss’s and Rodgers’s positions in the federal appeal. That, of course, is perfectly ethical conduct in Colorado, according to your agency, I’m sure.

One inaccurate statement you make in your current letter is that there is a “restraining order”—a legal term of art—prohibiting me from any contact with my father. Prerequisites to permanent restraining orders, under both Colorado law and Fourteenth Amendment due process, are the filing and service of a petition for restraining order; a statement in the petition that states the factual and legal grounds for a restraining order (i. e., that alleges specific harm service of the sort that can be permissibly restrained by law); notice of a hearing; and a hearing itself. None of these things occurred with respect to me (or anyone else, for that matter, from whom my father has been forcibly sequestered). On December 2, 2004, my niece did file a petition for temporary restraining order. The petition stated as its sole grounds that I had attempted to “wrongfully remove” my father from the nursing home in Lakewood, where my niece had placed him. The petition was presented, *ex parte*, to and granted by Jefferson County Judge Tina Olson. I was never served with the petition or order, and the order was dissolved and the case closed on January 27, 2005. (Judge Olson is a co-defendant in the federal lawsuit, but only because the lawsuit challenges the constitutionality under due process and personal-jurisdiction jurisprudence of Jefferson County’s apparent policy and practice of granting TRO petitions, simply for the asking, to anyone claiming to have a power of attorney for the person on whose behalf the TRO petition ostensibly is brought; the court had no jurisdiction over me *or my father* to issue an order barring us from contact with each other.)

The order that you probably have in mind is not a restraining order—not as a matter of legal terminology, anyway. Although my niece’s attorney has of late taken to referring to it in probate court documents as a “protective order”—a term that, like “restraining order,” necessary implies notice, service, allegations of past or imminent harm, and a hearing, and therefore a term certainly serves that lawyer’s and her client’s interest in using it—it is neither a protective order nor a restraining order, even though it does restrain me and everyone else from seeing or speaking with my father unless authorized by my niece to do so, and then only if she monitors and censors the communication in order to prevent anyone from “disparaging” her (a term actually used in the order) and to prevent anyone from telling my father of the guardianship order and its past and ongoing consequences. Those terms were placed into the order granting my niece’s petition for unlimited guardianship. There was no prior notice of the possibility of incorporation of any such terms, no allegation that I (or anyone else) would harm my father, no evidence presented of any past or possible future harm, nor any reason stated for the incorporation of those terms into the guardianship order. Those provisions in the guardianship order came absolutely out of the blue. The terms were included with the approval and in fact assistance of Gloss but without the knowledge, much less approval, of my father; neither Gloss nor anyone else has ever claimed that my father wished to be estranged from me or anyone else or wished to have his granddaughter determine whom he can see and speak with by phone and what could be said to him (about his granddaughter or anything else).

You’ve now conceded, in your letter, that your agency considers it appropriate for a court-appointed attorney to aggressively contradict the wishes of his client; to refuse to adhere to the suggestions of the client’s physician, even though the suggestion accords with what surely are the client’s wishes; to deliberately misuse a letter obtained from the physician to keep the client from learning of the guardianship proceedings and then of the guardianship order and from contesting them; to misinform the client about the nature of the legal proceeding and its potential consequences and to withhold from him the relevant information—including that he has been stripped of his legal autonomy and is subject complete control by (in this case) a granddaughter who had never lived in the same region of the country as he and who almost never phoned him (except to ask for money), in order to state to the court that the client has not said he wishes to contest the guardianship petition or the guardianship—i.e., to deliberately deceive the client in order to further the interests of *another* party to the legal matter and to further the interests of the lawyer himself.

Which highlights another, more important misstatement in your letter: that the only means I have of addressing Mr. Gloss’s misconduct is via appeal of the probate judge’s orders denying my motions to remove Gloss as my father’s court-appointed purported counsel and replace him with genuine counsel. There are significant federal constitutional requirements of court-appointed counsel, most fundamentally that the attorney actually represent the client rather than another party and that the attorney fully and accurately apprise the client regarding the legal matter and take direction from the client himself rather than from another party. As my father’s newly appointed guardian *ad litem* appears to recognize—I spoke with her at length on Sept. 12, after she met with my father and then spoke with Gloss—Gloss’s actions in the probate case have directly countermanded, and continue to countermand, my father’s wishes.

A central issue in the federal litigation is the constitutionality of a court’s sham appointment of counsel for an adult-guardianship respondent as a mechanism for denying the respondent genuine counsel. In this case, neither Gloss nor the probate judges have ever pretended that Gloss is taking

direction from my father; instead, the purpose of the appointment has always been, quite openly, to obstruct my father's access to court in order to contest the guardianship petition and the guardianship itself. And now, in light of your letter, a separate issue will be the legal propriety under the Fourteenth Amendment, the federal Older Americans Act, and the Americans with Disabilities Act, of your agency's open countenancing of such conduct by the lawyers it licenses.

Another avenue of challenge to Gloss's conduct is a lawsuit that I will be filing shortly in Denver state court on my father's behalf alleging legal malpractice, and on my own behalf alleging outrageous conduct.

Your letter contains several other inaccuracies of fact and law. One consequence of your agency's curious policy of barring complainants from communicating their complaints in writing is that inevitably there will be misstatements and miscommunications about what the complaint said in the requisite phone conversations. The objective undoubtedly is the same as the effect of this bizarre policy of barring written communications: it enables your office to misstate the nature and details of the complaint. But your letter does concede that Gloss admitted in an email message to me, a copy of which I forwarded to you, that he deliberately mailed court-document notices to me at my very old Chicago address and stated (falsely) that that address is the address I am using in the federal lawsuit. He makes no claim that that is the address that I am using, or have ever used, in the probate case.

So your claim makes no sense that you've failed to follow up on the allegation of misconduct because I did not forward to you copies of the actual documents Gloss filed with the Certificate of Service bearing the false address. As you know, I misplaced my copies of them, but the court has the originals and Gloss has copies. As for which documents they were, I was, contrary to your statement, very specific about which documents they were and when they were filed. Gloss himself had no trouble recalling which documents they were—as indicated by his email message. If your agency wished to enforce the provision of the Rules of Professional Responsibility, it would obtain copies of the court documents you say it needs, by requesting copies from Gloss, the judge, or the court clerk's office, and it would ask Gloss to explain his conduct. But your office is not interested in enforcing the Rules of Professional Conduct against Gloss—and perhaps not against any other attorney; it does so only when compelled by a court to do, if your own statements are accepted as accurate.

Contrary to your agony's claim, Colorado law does not require a trial- or appellate-court finding of impropriety before your agency has jurisdiction to investigate an allegation of misconduct. Quite the contrary. That is what your state's Supreme Court said, yet again, very recently, in *In the Matter of the Estate of Thorvald G. Myers, Petitioners: Donald Myers and Olsen & Traeger, LLP v. Respondent: Marion Porter*. Case No. 05SA231, Supreme Court of Colorado, 130 P.3d, 1023; 2006 Colo. LEXIS 146 (2006): "It is, however, the exclusive authority of [the Supreme Court] to supervise and regulate the practice of law in this jurisdiction. *In re Cardwell*, 50 P.3d 897, 904 (Colo. 2002)." This is so irrespective of whether or not a judge has ruled that the conduct violates the Colorado Rules of Professional Conduct; the Rules proved what they provide, and it is your agency that, *as an arm of the Supreme Court*, has *original and primary* jurisdiction to investigate allegations of misconduct. And, logically, it is all the truer when, as in this instance, the judge is a co-defendant of the attorney in a closely related case in which the judge himself acknowledges that he is ruling in that case with an eye toward the effect upon the related case, and in why, as here, the attorney files a court document expressly asking the judge to rule in accordance with the attorney's and the judge's

personal interests in the related case. Does it not trouble you that the judge—who knows exactly what documents Gloss filed, and when, that had false certificates of service—has countenanced Gloss’s having filed the false certificates? Lorimer filed a false one at virtually the same time, and the judge is aware of that, too, and has countenanced it. Should this judge’s rulings regarding Gloss really remove your agency’s jurisdiction to investigate allegations that Gloss has violated the Rules of Professional Conduct by using his appearance as my father’s court-appointed counsel to keep my father from representation by genuine counsel acting at *my father’s* direction? And what is the legal basis for your claim that it does?

I cited *Myers* to you earlier; apparently you and your colleagues disagree with it and refuse to follow it. In any event, you do not even mention it in your letter, and continue to claim that Colorado is what *Myers* says it is *not*.

A rather comical irony here is that you, Mr. Gleason and all the other attorneys in your office spend *four full weeks each year* (!) at out-of-town trade-association conferences—conferences sponsored by the National Association of Attorney Regulation Counsel (or whatever the name of your trade association is; I forget), paid for by the attorney licensing and renewal fees that refund your agency. What, exactly, do they discuss at these junkets—I mean, conferences? Presumably not issues such as conflict of interest, attorney responsibilities, fraud, attorney-regulation-agency jurisdiction, or the like. Or maybe you and your colleagues miss the discussions of these issues while out on the golf course.

I keep wondering how your state’s residents would react to your agency’s curious practices and views of its jurisdiction and of the Colorado Rules of Professional Conduct if, say, Aaron Harber or Andrew Cohen publicized it. So, I suspect, would the Colorado legislature, whose statutes, including the Rules of Professional Conduct, are apparently routinely distorted by your agency to authorize exactly the type of conduct that the Rules are designed to prohibit.

Your agency no more has the legal authority to authorize the denial of genuine counsel to a respondent or ward in an adult-guardianship matter than its does to authorize the denial of genuine counsel to criminal defendants and respondents to petitions for involuntary commitment to a mental institution. Nor do state probate judges and court-appointed (ostensible) counsel. I expect that the outcome of the federal litigation will make that clear.

Truly yours,

Beverly Mann
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cc: David Gloss
Stephenie Lorimer
Friedrick C. Haines
Frederic B. Rodgers