

IN THE TENTH CIRCUIT COURT OF APPEALS

06-1418

Civil Action N^o 05-cv-01858-EWN-MJW

SEAN HARRINGTON

Appellant,

v.

MADELINE WILSON and the “LAW OFFICE OF MADELINE WILSON”;
CHRISTY RYAN;
LAURA ARCILISE, in her personal capacity;
LOUISE CULBERSON-SMITH, in her personal capacity;
JOHN GLEASON in both his personal and official capacity;
WENDELL PRYOR in his official capacity;
ROBERT EVANS, in his official capacity; and
the JEFFERSON COUNTY COMBINED COURT (a/k/a “THE FIRST JUDICIAL DISTRICT”),
by and through the COLORADO ATTORNEY GENERAL, JOHN SUTHERS, in his official
Capacity.

Appellees

APPELLANT’S REPLY BRIEF

Please Note: This Reply Brief will adhere generally to the outline of Appellant’s
Opening Brief

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STATEMENT OF THE CASE & RELEVANT FACTS

Lost amidst the legal theory and arguments of this case is a young child, concealed from her father by her mother and mother's attorney for nearly four years. Defendants offer no valid reason why injuries suffered from such extreme and outrageous conduct are not redressable.

Secondly, "It is certainly true that any active conduct or words, which tend to produce an erroneous impression, may amount to fraud, and half the truth may be a lie, in effect." *Twing. v. Schott*, 338 P.2d 839, 843 (Wyo. 1959). Defendants' Statement of Facts consists of numerous factual allegations that are disrespectful of the truth by both commission and omission.¹ Although Plaintiff should not waste valuable briefing space refuting or clarifying myriad allegations that he should have been given an opportunity to prove or disprove in the court below, the Court may assume that these disputed facts work to Plaintiff's favor because, the question under Rule 12 is not whether plaintiff would prevail on his claims, but whether he is entitled to offer evidence to support them. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (overruled on other grounds by *Davis v. Cherer*, 468 U.S. 183 (1984)). Thus, where factual allegations are in dispute, they must be resolved in Plaintiff's favor. *Id.*

¹ (*E.g.*, the background of the divorce proceedings and state cases; the civil commitment in a state mental hospital, facilitated by Defendant Ryan by and through her direct supervisor (the Clinical Director of the county mental health agency); previous state court findings; the outcome of the two state appeals recently decided in Plaintiff's favor; *inter alia*). As relevant here, Plaintiff's federal Complaint provides background information dating back to December 1999 but, *all* causes of action accrued after November 6, 2001. **Doc. 47 at 3-6**. Also, the Colorado Appeals Court did not merely remand two cases for "further proceedings," but rather vacated and reversed two orders dealing with Defendant Fyfe's fees. **Doc. 69 at ¶6, n.1; doc. 71 at §III.**

ARGUMENT

COMPLIANCE WITH RULE 8(A)(2)

A complaint does not violate Rule 8 solely because it is lengthy. *Karlinsky v. New York Racing Ass'n*, 52 F.R.D. 40, 43-44 (S.D.N.Y. 1971). While brevity is desirable in order that the time of court and counsel may be conserved, such considerations do not rank in importance with the right and obligation of a litigant to earnestly present the merits of his case in a style and form comporting to his own notions of the strengths and weaknesses thereof. In the mechanics of getting his claim before the court, a plaintiff is afforded wide latitude, and the claim is whatever he, in good faith, declares it to be. *Atwood v. Humble Oil & Refining Co.*, 243 F.2d 885, 888 (5th Cir. 1957). *See also In re Honeywell Int'l Inc. Sec. Litig.*, 182 F. Supp. 2d 414, 416 (D.N.J. 2002). “What is a ‘short and plain’ statement depends, of course, on the circumstances of the case,” *Atwood*, 243 F.2d at 889 (citing 2 James Wm. Moore, *Moore's Federal Practice*, 1653 (2d ed 1986)).

In *Mann v. Boatright, et al.*, N^o 05-1559 (10th Cir., February 15, 2007), a panel of this Court found that an attorney proceeding *pro se* submitted a complaint with a “first and only ‘Claim for Relief,’ [that] goes on for 463 paragraphs, spanning 83 pages, and yet it neither identifies a concrete legal theory nor targets a particular defendant. She requests specific relief at the end of her pleading, but, by this point, not even the most attentive of readers could figure out who did what to whom.” By contrast, in the case at bar, Plaintiff logically divided his allegations into identifiable sections concerning defendant's fraud and the guilty parties. These sections contained chronologically-ordered allegations replete with clear, concise headings and subheadings identifying the subject matter and separate claims for relief. Under Rule 8, no more is required.

There is, however, tension among the Rules: Rule 8(a), which requires defendants be given fair notice of plaintiff's claims and the grounds therefor, must be construed in harmony with the Rule 9(b) dictate to plead fraud with particularity with the pleading-in-the-alternative allowance of Rules 8(e)(2) and 18(a). Notwithstanding a liberal construction, a *pro se* complaint may be subject to dismissal for a failure to allege sufficient facts. Therefore, it is in a *pro se* plaintiff's best interests to err on the side of caution for particularity. After all this, Rule 8(f) commands that "[a]ll pleadings shall be so construed as to do substantial justice."

Yet, defendants have requested that this Court affirm dismissal on the sole basis of an alleged violation of Fed.R.Civ.P. 8(a)(2). This would be a punitive disposition of the litigation that does not do substantial justice. There have been no findings, such as articulated in *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992), of (1) prejudice to the other party; (2) interference with the judicial process; (3) culpability of Plaintiff; (4) prior and advance warnings that dismissal would be a likely sanction for noncompliance; and (5) efficacy of lesser sanctions. *Id.*

Under the *Ehrenhaus* factors, the Court should note that Plaintiff was deprived of an opportunity to seek leave to file a second amended complaint at any time either before or in response to the magistrate's recommendations concerning Rule 8(a)(2).²

² The magistrate noted that, "[P]laintiff has stated . . . that '[i]f the Court were to find any deficiencies in the Complaint, Plaintiff requests the Court grant leave to amend.' (Docket No. 27 at 7). In view of this request, notwithstanding the pleading's noncompliance with Rule 8, and in the interest of judicial economy, the court has reviewed the Amended Complaint and the various alternative arguments for dismissal, and recommends dismissal of this action for the reasons stated below." **Doc. 73 at 15.**

Also, in an expression of humility, Plaintiff requested that his case be placed on a list that the clerk maintains for volunteer counsel, which is an established procedure.

Doc. 11.³ Plaintiff attached to his motion fourteen responses from attorneys, each declining representation because that case involved complexities that exceeded his/her expertise, time or caseload.⁴ There is no shortage of evidence that Plaintiff has reached out for help in getting his claims properly before the court. In fact, Professor Erwin Chemerinsky might have argued the instant appeal, but for a scheduling conflict that arose. **Exhibit A to Appellant's 1/19/2007 Cross Reply.**

Lastly, “The failure . . . to set forth the claim by means of a short and plain statement is not ordinarily a ground for dismissal of an action with prejudice . . . The court should not deny leave to file a proposed amended complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief.” 61A Am. Jur. 2d Pleading § 194 (collecting cases). “[B]efore dismissing a *pro se* complaint under Fed.R.Civ.P. 8(a)(2), the court must make an effort to specifically explain the deficiencies in the complaint and invite the plaintiff to amend.” *Id.* The trial court extended no such invitation.

³ The trial court mistook Plaintiff’s request, apparently, as a request for appointment of counsel, and denied the motion. **Doc. 16.**

⁴ The instant case involves disability law, domestic relations, federal practice, civil rights and contract law.

STRIKING OF PLAINTIFF'S OBJECTION, REFUSING TO RECONSIDER AND
REJECTING ALIAS BRIEF WAS ARBITRARY AND CAPRICIOUS.

First, defendants contend that the district court met the procedural requirements of both Section 636(b)(1) and Fed.R.Civ.P. 72(b), "regardless of whether Plaintiff's objections were stricken." **Answer at 11.** Yet, defendants also concede that, "Fed.R.Civ.P. 72(b) requires a District Court to consider specific written objections to a Magistrate Judge's recommended disposition." **Answer at 17.** Only one of these two assertions can be correct. It is the latter.

Second, the scenario advanced by the defendants [that the trial judge conducted a de novo review a second time] is implausible. **Answer at 16.** Given the voluminous record, it is a practical improbability that the trial judge, after dismissing the case *before* the timely objections had been filed, expended time examining the entire record for a second time only after receiving Plaintiff's objections [that he declined to review and struck out].

Defendants alternatively argue, without specificity, that Plaintiff's objections were vague, immaterial, impertinent or redundant. **Answer at 18.** A reasonable person would conclude otherwise. The objections were specific, comprehensive and devoid of conclusory rhetoric. **Exhibit A to doc. 81.**

Significantly, defendants avoid discussion of the issues regarding the Electronic Filing Guidelines, hyperlink-technology and CM/ECF functionality. **Op. Brief at 5.**⁵ Instead, they assert that it would have been necessary to "pile through" the filing to

⁵ By way of example, if the Opening Brief + hyperlinks had been filed in CM/ECF, it would appear as 11,815 pages (instead of 47 pages). This Reply brief + hyperlinks would have appeared as 4,556 pages (instead of 25 pages).

make sense of it, “requiring the abandonment of all other cases.” Even if, *arguendo*, this were true, a litigant should not be penalized for making use of technology that the court, itself, has made available and authorized through its rules.

EXERCISE OF HYPOTHETICAL JURISDICTION AND DISMISSAL “WITH PREJUDICE” FOR WANT OF JURISDICTION WAS AN ABUSE OF DISCRETION

The defendants have not disputed that adoption of the magistrate’s numerous alternate bases for dismissal (for reasons other than lack-of-jurisdiction) was an expansive exercise of “hypothetical jurisdiction,” a practice formally denounced by the Supreme Court. **Op. Brief at 9.** Likewise, defendants do not dispute that the trial judge’s *sua sponte* characterization of the entire case as “vexatious and frivolous,” was in excess of jurisdiction, because, when a trial court “determines that it lacks subject matter jurisdiction, it cannot decide the case on the merits.”⁶ *Id.* Defendants do not dispute that dismissals for want of jurisdiction or lack of standing must be without prejudice and that the Order of dismissal “with prejudice” contradicts the adopted magistrate’s findings that, “The state court provides an adequate forum to hear such claims . . . Plaintiff has adequate remedies in state court.” *Id.*

Next, defendants do not dispute that the magistrate: failed to give Plaintiff **any** reasonable inference to be drawn from the complaint; construed the complaint favorably to the *defendants*; acted as a proponent for the defendants with numerous

⁶ Significantly, defendants did not argue in accord with the trial judge that Plaintiff’s case, or any portion thereof, was vexatious or frivolous.

sua sponte arguments for dismissal; and inserted, paraphrased or inferred evidentiary and ultimate facts from the Complaint that were alleged by neither party.⁷ **Id at 10-11.**

LACK OF OPPORTUNITY TO PREPARE AGAINST *SUA SPONTE* BASES FOR DISMISSAL
OR OPPORTUNITY TO AMEND WAS A PROCEDURAL DUE PROCESS VIOLATION

Defendants do not dispute that Plaintiff was disallowed from moving the court for leave to amend his Complaint either prior to the magistrate’s recommendations [**docket 65**], or in response to alleged pleading deficiencies identified by the magistrate. Because of the timing of the filed objections and the trial judge’s premature dismissal of the case, a motion for leave to amend or supplement by that time would have been futile. The law “does not require the doing of a futile act” *Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

ROOKER-FELDMAN DOCTRINE IS INAPPLICABLE TO TEMPORARY ORDERS

Plaintiff argued that he wasn’t seeking review of any state court judgments, which is why both the magistrate and defendants identified none. **Op. Brief at 14.** Defendants argued, however, that Plaintiff’s case, in part, consists of, “challenges to the state court’s processes . . . [and] . . . procedural mechanisms.” **Answer at 24.** These, however, are the kind of challenges properly before the court in *Catz v. Chalker*, 142 F.3d 279, 294 (6th Cir. 1998) and *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), to name only two.

⁷ *E.g.*, the magistrate speculated that, “Plaintiff complains that . . . Arcilise did not immediately accede to plaintiff’s telephonic request that she fax him a copy of a motion set for hearing.” **Doc. 73 at 35-36.** This exists nowhere in either party’s pleadings or exhibits.

Plaintiff further explained that, as to the five temporary restraining orders obtained by Defendant Wilson, three were abandoned or denied (never became final or “actually decided” on the merits); one was ruled *against* Wilson at the permanent hearing (thus, Plaintiff is not “a state court loser”); and a fifth (now vacated) was void, because the procedure followed in entering it violated Plaintiff’s due process rights. **Op. Brief at 16-17.** Plaintiff argued that *ex parte* **temporary** restraining orders are not judgments on the merits (which occur only when a hearing is held) and that *Rooker-Feldman* only applies to final judgments that were “actually decided” on the merits. *Id.* Defendants avoided this legal discussion and, instead, substituted a three page academic thesis of *Rooker-Feldman*, leading up to their inconclusive claim that, “The restraining orders were final at the time the federal action was commenced.” **Answer at 19–22.**

YOUNGER ABSTENTION IS INAPPLICABLE WHEN THERE ARE NO PENDING
STATE COURT PROCEEDINGS OR AN ADEQUATE STATE REMEDY

Defendants’ *Younger* argument is based entirely on an erroneous premise of ongoing state proceedings and by avoiding analysis of the Colo.R.Civ.P. 97 indefinite suspension of the proceedings since August, 2004, which has put Plaintiff out of state court. Defendants did not dispute that the state judge even acknowledged the divestiture of jurisdiction created by her refusal to rule on the Rule 97 motion. **Doc. # 76-3 at 3; doc. # 61 at 3, n.2** (quoting February 10th 2005 order). Instead, defendants argue that the state divorce court has continuing jurisdiction over its decrees. This, however, leads to the absurd result that, because the state court might one day choose to become available, the federal court is forever “off-limits.”

Further, defendants did not brief whether a state divorce court is incompetent by reason of bias to decide the issues before it (in light of Plaintiff's claim of ineffective state court recusal mechanisms; that the trial judge and defendant Fyfe conspired to fix fees; that the trial court was in violation of the ADA; that the trial judge's division clerk discriminated against Plaintiff as a "class of one" in her successful efforts to frustrate meaningful, effective and adequate access to the court, etc.). **Op. Brief at 20.**

Alternatively, defendants point to two state appeals. However, not only were those concluded (in Plaintiff's favor), but they also were limited solely to the issue of the validity of Fyfe's appointment and his fees, which do not constitute an important state interest. **1st Amd.Compl. at ¶6.** Neither appeal was a forum for Plaintiff to pursue any claims (other than reversal of the overcharges), because appeals courts are of limited jurisdiction.

Given that the pendency of these two state appeals was immaterial, the question is whether the state divorce court was either an available or an adequate forum for all of Plaintiff's claims.⁸ Defendants declined to tackle this question candidly and, instead, offered the conclusory misleading statement that, "The record reflects that Harrington has litigated in state court for years against Ryan and Wilson . . . he was allowed to pursue such claims during the course of the state litigation." **Answer at 25.** The fact that Plaintiff has litigated issues involving the same parties in the past does not establish that the causes of action are the same. Accepting defendants' assertion at

⁸ For these foregoing reasons, defendants' argument that Plaintiff tried to have it both ways by arguing that pending (non-final) appeals were a bar to *Rooker-Feldman*, but that there was no ongoing litigation for purposes of *Younger*, is specious.

face value would require the Court to disregard all of Plaintiff's allegations in the Complaint regarding the many issues that had been presented to and disregarded by the state court; or that the state court expressly declined to adjudge; or that were never presented to the state trial court (because inappropriate forum, lack of an adequate forum or absence of a state-court filing requirement). Op. Brief at 15; Docket # 76-2 at 1-3.

Defendants also claim that Plaintiff, "now asserts that these claims are not sufficiently related to the marital relationship to be decided in a domestic relation proceeding." In fact, Plaintiff has always asserted that these claims shouldn't be decided by a divorce court sitting in equity. Doc. 27 at 3-4; doc. 69 at ¶6. A Colorado divorce court cannot:

- ✓ provide a jury;
- ✓ award nominal or punitive damages for Defendant Ryan's outrageous conduct in concealing the whereabouts of his minor child;
- ✓ award nominal or punitive damages against Defendant Wilson for either malicious prosecution (in collateral proceedings) or conspiracy to conceal the minor child. Further, Wilson is an attorney-of-record in those divorce proceedings, not a defendant;
- ✓ hear *ex Parte Young* claims against the Director of the Colorado Civil Rights Division for failing to enforce the state equivalent of the ADA in Colorado court buildings or programs;
- ✓ hear *ex Parte Young* or civil rights claims regarding the Office of Attorney Regulation Counsel or hear a constitutionality challenge to disciplinary Rule 251.9;
- ✓ determine whether Defendant Fyfe violated any of the Consumer Protection Act claims of Massachusetts, Minnesota or Colorado or whether Defendants Ryan and Wilson violated Tex.Fam.Code § 42.002 or 42.003; or

- ✓ award Plaintiff non-economic-loss damages for contract breach by Fyfe and, where Fyfe is not a party to the divorce proceedings and where the divorce trial judge is alleged to be a co-conspirator with Defendant Fyfe.

Defendants did not dispute that a federal district court has no discretion to dismiss, rather than to stay, whichever claims for monetary relief are not redressable in the alleged ongoing state court proceedings [**Op. Brief at 21**] and failed to overcome Plaintiff's contention that, if the district court had exercised jurisdiction, it would not have interfered with, disrupted, truncated or enjoined the presently-suspended state court proceedings. *Id.*

DOMESTIC EXCEPTION TO DIVERSITY JURISDICTION IS INAPPLICABLE
TO MERE TORT ACTIONS WITH DOMESTIC RELATIONS OVERTONES

Though the parties have been divorced for nearly seven years, defendants' urge that, if parties once had a domestic relationship, any contract or tort claims that might later arise between them are inactionable because, the domestic relations exception precludes "the whole subject of domestic relations."

Answer at 26. Defendants rely on the 1890 Supreme Court case of *Ex parte Burrus*; a 1990 slip opinion (*Short v. Short*, 730 F.Supp. 1037 (D.Colo.)); and its citation to 1979 case law. However, recent decisions by the U.S. Supreme Court in *Marshall v. Marshall*, 126 S. Ct. 1735, 2006 WL 1131904 (2006) and *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) have found that the lower courts (like *Short*) applied the exception "well beyond the circumscribed situations posed by *Barber* and its progeny" (*id.* at 701) and that the exception does not apply to cases merely having domestic relations overtones. *Id.*

Finally, defendants incorrectly argue that a collateral cause of action against Fyfe for contract breach is barred, because Colo.Rev.Stat. § 14-10-116 (furnished as Answer-Attachment-A) gives the state court “exclusive jurisdiction” over the same.

Answer at 29. This is Colorado Divorce Industry hypocrisy. *The Role of the Child and Family Investigator and the Child's Representative in Colorado*, First Ed. (Robert M. Smith ed., CLE in Colo., Inc., Supp. 2005) (attached hereto as **Attachment A**), **co-authored by Defendant Fyfe** and others,⁹ provides, in pertinent part:

§ D1.5.4—Small Claims Action

Many mental health professional CFIs — in addition to the order of appointment — have detailed written agreements with parties regarding fees and payment procedures. This agreement is a contract, and could be enforced in small claims court if the amount due is \$7,500 or less. The outcome would result in a judgment, which would be enforced as described above. Before choosing to go this route, the CFI should consider whether it would be wiser to proceed before the district court judge, who is already familiar with the case, the parties, and the CFI, or to start anew with a county court judge who knows nothing about the case history.

Id. at D1-9. While Fyfe asserts his right to enforce contracts collaterally, he seeks shelter under the statute for the false proposition that the other party cannot do the same. Unless otherwise agreed, a valid contract empowers both parties to an equity-in-arms to vindicate their rights under the Law of Remedies. *See* A.A.S. Zuckerman, Interlocutory Remedies in Quest of Procedural Fairness, 56 *The Modern Law Review*, 3 (May, 1993) at 325. The Colorado Appeals Court upheld the validity of this particular contract in Case N⁰ 04CA1161. **Doc. 69 at ¶6, n.1.**

⁹ Including members of the Colorado Supreme Court standing Committee on Family Issues, who drafted the Special Advocate Standards (published as Chief Justice Directive 04-08)

STANDING TO SUE EXISTS UNDER § 1983, *EX PARTE*
YOUNG AND FOR PROCEDURAL INJURY

Plaintiff challenged the constitutionality of Rule 251.9, which has not been addressed by the attack on Plaintiff's standing. Moreover, defendants did not dispute that Plaintiff's official-capacity claims under *ex Parte Young* concerned violations of rules and procedures arising from an attorney regulation complaint process in, which the complainant is a participant to judicial proceedings, which implicate federal constitutional guarantees. Further, defendants neither contested Plaintiff's procedural injury standing arguments nor denied that Section 1983 (including retaliation for Plaintiff's exercise of First Amendment petitioning and threatening Plaintiff with prosecution for his continuing exercise of the same) and Section 1986 confers standing. Rather, defendants describe Plaintiff's claims as "disguised" as civil rights violations and then proceed to evaluate those claims, "if stripped of the civil rights and procedural language." **Answer at 39**. Under Rule 12, defendants may not "strip away" the language that entitles a pleader to relief.

Defendants further urge that Plaintiff has no standing to assert an injury from a "failure on behalf of [the OARC] to discipline an attorney" [**Answer at 39**], despite that attorneys are licensed and regulated exclusively by the State; that they are officers of the court; and that they are, "gatekeepers — that is, positioned to disallow transactions that do not meet the applicable disclosure requirements." Geoffrey C. Hazard, Jr., *The Privity Requirement Reconsidered*, 37 S. Tex. L. Rev. 967, 972 (1996). "The negative aspect of lawyer participation is that lawyers who neglect their gatekeeper roles become accessories to fraud." *Id.*

“The primary purpose for disciplining lawyers is to ‘protect the public, not to punish the offending lawyer.’” A. Rothrock, *Attorney Discipline and Disability Process and Procedure - Part I*, 36 Colo.Law. 2 at p. 3 (citing *In re Cardwell*, 50 P.3d 897, 904 (Colo. 2002)). As a member of the public, Plaintiff filed suit to secure that protection —not to punish the offending lawyer— which distinguishes Plaintiff’s case from *Doyle v. Oklahoma Bar Ass’n*, 998 F.2d 1559 (10th Cir. 1993) (which defendants claim is identical).

In *Doyle*, the underlying facts arose from a divorce proceeding and the handling of a bar grievance against the ex-wife’s attorney. 998 F.2d at 1563. The similarities end there. A panel of this Court concluded that:

Essentially, [Doyle] wanted a lawyer disciplined or at least greatly inconvenienced at the state level, and to use the result to somehow mount a collateral attack on a state court judgment. His complaint for damages rests on a core assertion that he was unconstitutionally deprived of these aims.

Id. at 1566. For his alleged damages, Doyle sought \$4 million against the defendants, and advanced no theories of recovery under either *Ex Parte Young*, or “procedural injury.” *Id.* at 1565.

As noted in the Opening Brief at 27 (with citations to the Complaint), Plaintiff does not seek to “inconvenience” the attorney or to somehow use the result to mount a collateral attack on a state court judgment. Plaintiff, instead, petitions for redress, accountability and protection. Plaintiff’s injuries and claims are unlike Doyle’s, and include: (1) violation of Section 1983 for retaliation of and threatening prosecution for First Amendment petitioning; (2) violation of Section 1986 (knowledge of the conspiracy to conceal Plaintiff’s daughter but, did nothing to intervene, despite being in a unique position to do so); (3) violation of applicable rules and procedures; (4)

modification of practices and policies intended to suppress a justiciable controversy; (5) disparate exclusion of plaintiff (deliberate indifference and equal protection violation against a “class of one”); and (6) exercise of discretion not authorized under Rule 251.9.

In further contrast, “Doyle failed to state a procedural due process claim” (998 F.2d at 1569-70), whereas Plaintiff here stated a procedural due process claim in his Fifteenth Claim for relief. “A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.” *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002).

PROSECUTORIAL IMMUNITY IS INAPPLICABLE UNDER *EX*
PARTE YOUNG AND FOR NON-INVESTIGATIVE ACTS

Significantly, defendants do not dispute that prosecutors have no absolute immunity from claims for injunctive relief under *Ex Parte Young*. They urge that the essence of prosecutorial immunity is the decision to pursue or not pursue discipline against an attorney. **Answer at 40.** However, violation of the rules and procedures of a judicial processes and agency rules, which are protected by the Due Process clause, certainly isn’t the essence of a prosecutorial function.

PLAINTIFF'S ALLEGATIONS WERE LEGALLY SUFFICIENT TO ESTABLISH
BOTH STATE ACTION AND PRIVATE CONSPIRACY CLAIMS

Defendants decline to refute the private conspiracy of concealment of Plaintiff's daughter [**Op. Brief at 34**]¹⁰ but, rather, direct their arguments solely against the conspiracies implicating state actors, insisting that Plaintiff's Complaint contained only conclusory allegations supported by no allegations of fact tending to show agreement or concerted action. **Answer at 40.**

Putting defendants' assertion to the test, a cursory review of a few factual allegations of another example (the conspiracy to fix fees between the trial judge and Defendant Fyfe) demonstrates that defendants' arguments are without merit:

- ⇒ Fyfe and the trial judge are on the Board of Governors of a lobbying group [**Doc. 69 at ¶10 & n.3**] and Fyfe has praised only this particular trial judge on his Web site. **1st Amd.Compl. at n.57.**
- ⇒ When Plaintiff moved the state court to compel Ryan to perform under certain contractual obligations, the state judge denied the Motion, directing Plaintiff to, instead, seek relief by filing a formal motion for contempt under Rule 107. When Plaintiff complied, the trial court ignored his motions. **1st Amd.Compl. at n.10.**
- ⇒ When Fyfe, a non-party, wrote a simple letter to the judge [**1st Amd.Apx. F at ¶25**], containing no request for relief, alleging that Plaintiff believed that the Order of Appointment allocated fees at 50% (but omitting that there a private contract was in place), the trial judge perceived a request for relief and issued the Order (now reversed by the Appeals Court) requiring Plaintiff to pay 100%.

¹⁰ Defendants do not deny that the trial court declined to take notice of *Hall-Stradley*, 13 Fam. L. Rep. (BNA) 1108 (Colo. Dist. Ct. Case N^o 84-CV-2865, 1986) and prevailing circuit court case law regarding concealment of a minor child from a parent with a lawful right of access.

- ⇒ Nearly one year later, Fyfe wrote an *ex parte* letter to the trial judge (in violation of Chief Justice Directive Standard 18), complaining that Plaintiff had not yet acceded to his extortion. **1st Amd.Compl. at n.10; 1st Amd.Apx. F at ¶¶33-36.** Although he again requested no specific request for relief, the trial judge, who refused to rule on the pending recusal motion for over a year at that time in order to suspend the proceedings, immediately came to Fyfe's defense, again perceived a request for relief, and issued an Order for Plaintiff to appear to show cause why he should not be held in contempt. **1st Amd.Apx. F at ¶33.** The order was not issued in compliance with either Colo.R.Civ.P. Rules 107 or 4 and she had previously ruled that she would not rule on any motions because the case was on appeal (the case was still on appeal at the time of this order).¹¹ **1st Amd.Apx. D at ¶13.**
- ⇒ When Plaintiff notified the state trial court (by motion, filed through counsel) that his daughter had been whisked out of the state without notice either to Plaintiff or the court and was being actively concealed, the state court ignored the motion. **Doc. 61 at n.3; doc. 76-8 at 3, n. 33.**

A reasonable person would infer from the foregoing facts that Judge Sciuillo-Tidball went to extraordinary lengths to accommodate Fyfe's extortionate scheme, whilst disregarding the rights of the parties. The only evidence that Plaintiff could offer that is more probative would be a written confession. There is no such requirement. Rather, Plaintiff should be afforded the opportunity to discover and offer further evidence in support of his claims.

Alternatively, defendants argue that the conspiratorial conduct was neither to accomplish an unlawful end nor accomplished by an unlawful means. **Answer at 45-46.** This argument is without merit: Concealment of a minor child is in violation of Colo.Rev.Stat. §§ 14-10-123.8 , 14-10-124(1), Tex.Fam.Code 42.002 & .003 and the Nov. 6th 2001 stipulated order. Fyfe's extortion of fees was in violation of, not one,

¹¹ Shortly afterwards, the trial judge ruled that she would not rule on motions, because she still had not yet decided the pending recusal motion. **Doc. 76-3 at 3.**

but two court orders. Doc 32 at 6. Any conspiracy to frustrate another’s meaningful and effective access to the courts is for an “improper purpose.”

Additionally, defendants’ insistence that, “private parties to litigation and their lawyers are not state actors” [Answer at 42], indicates a parochial understanding of state-actorship determination, which is a pretext for defendants to avoid analysis of **conduct**, as urged by Plaintiff.

Op. Brief at 31-33. The determination is based on the conduct, not role, title or position. Only by rejecting the *Brentwood Academy* analysis exhortation, is it possible to advocate axiomatic holdings, such as that a child and family investigator (CFI) can never be a state actor, often credited to *Meeker v. Kercher*, 782 F.2d 153 (10th Cir. 1986).

Not only has *Meeker v. Kercher* been narrowed by *West v. Atkins*¹² [Op. Brief at 30-33] (uncontested by defendants) but, *Meeker* is inapplicable to the particular facts and **conduct** of the case at bar. Though *Meeker* is still good case law, where the appropriate role of the attorney guardian *ad litem* or attorney child legal representative (CLR) is to serve independent of the appointing judge and as a fiduciary of the child, the role of non-attorney CFI (f/k/a “special advocate”) has been separated from the CLR. The state legislature in 1997 revised C.R.S. § 14-10-116 to bifurcate the role of the GAL in domestic relations cases into either a CLR or a CFI.¹³

¹² 487 U.S. 42, 50-51 (1988) (limiting the holding in *Polk County* to the unique role of a public defender representing an indigent criminal defendant, where such representation was inherently at odds with the state).

¹³ The present division of roles is analyzed in *The Role of the CFI and CLR in Colorado, supra*, at §A1. “With the separation of the former GAL role, it is the CFI, who writes the report and testifies, while the CLR represents the child’s best interests and is prohibited from testifying” *Id.* at INT-2; “The migration of the CFI into other roles has been a subject of intense scrutiny by a subcommittee of the Chief Justice-appointed Standing Committee on Family Issues. Each potential change from the previous role of the court’s neutral investigator to a new role helping

The CLR role of today is similar to the former role of GAL (as in *Meeker*) with a duty to the minor child, whereas the CFI owes a duty to the court and is required to investigate, report and make independent and informed recommendations regarding the best interests of the child. This “independence” is the only vestige connecting the CFI role to *Meeker*. An evaluation of whether Fyfe’s **conduct** was independent, such as the analysis in *Kirtley v. Rainey*, 326 F.3d 1088, 1094 (9th Cir. 2003) (citing *Meeker*),¹⁴ reveals that *Meeker* is inapplicable to this case for the proposition that Fyfe cannot be a state actor. **Op. Brief at 31-33.**

42 U.S.C. §§ 1985(3) AND 1986 CLAIMS INCLUDE CONSPIRACIES
BASED ON RELIGION AND “CLASS OF ONE”

Defendants neither deny that Plaintiff alleged discrimination on the basis of a perceived disability, religious orientation, Plaintiff’s spouse’s ethnicity and a “class of one,” nor do they dispute that the magistrate erred in concluding that only a racially-based animus is legally sufficient to state a claim under Section 1985(3).

Op. Brief at 36. Defendants do not dispute that a “class of one,” agnosticism (or atheism) are classes protected under Section 1985(3).

one or more family members was closely examined for possible ethical implications. The result was that a CFI can only move from that investigative position to the position of parenting coordinator but not back again, should new issues arise that require investigation. C.R.S. § 14-10-116 specifically prohibits the CLR and SA [CFI] from being the same person at the same time; and while the statute does not specifically address the point, the legislative intent appears to keep the two roles completely separate by not allowing any migration from one to the other.” *Id.* at B1-4. *see also* Celeste Holder Kling, *Division of the GAL Role in Domestic Relations Cases*, 27 Colo.Law. 45 (April 1998).

¹⁴ In *Kirtley*, the court resorted to an alternate statutory scheme analysis, because Plaintiff there did not allege specific facts for a “*Brentwood* exception” analysis of conduct. 326 F.3d at n.5. While Plaintiff here did provide a reviewable factual basis, a statutory scheme analysis yields no different result: Under *Kirtley*’s joint-action analysis, the “state” here is a beneficiary, because it is so heavily reliant on CFIs to do the court’s fact-finding work, necessary to move the docket along. *See* Colo. Dep’t of Regulatory Agencies 2003 Sunset Review at 41. Under the public function test, investigation is a traditional state function. *See In re Marriage of Redmond and Bezdek*, 131 P.3d 1167, 1171 (Colo.App. 2005) (“Thus, the new statutes make clear that . . . [the] special advocate [role] was an investigator”).

AMERICANS WITH DISABILITIES ACT AND REHABILITATION ACT CLAIMS

Defendants do not dispute that Plaintiff is a qualified person under the ADA. Rather, they argue that Plaintiff failed to establish a nexus between the alleged or perceived disability and disparate treatment or disparate impact. They further argue that Plaintiff's claims are nothing more than frustration with the state court's refusal to rule in his favor. In support thereof, "awarding attorney fees to his ex-wife" is cited as one example. Answer at 49. However, defendants omitted the essence from this example —that the fee award was, "because of his mental health." (state judge's March 31, 2000 bench ruling, cited at 1st Amd. Compl. at ¶-36).

Defendants also characterize Plaintiff as, "lament[ing] Evan's (ADA Coordinator for the First Judicial District) failure to respond favorably to his complaints about the same."

Answer at 49.¹⁵ The point is not that Evans failed to respond "favorably," but, rather, that he failed to provide *any* response to requests for reasonable accommodations.

¹⁵ Defendants do not deny that the magistrate imposed a heightened pleading requirement. [Op. Brief at 40]. They, instead, allege that the reasonable accommodation request to Evans was regarding the previously denied request to appear by telephone, which allegation appears nowhere in the pleadings. *See United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) ("This court will not consider material outside the record before the district court"). Nevertheless, the denial of the prior request by the state magistrate, which provided no conclusions of law or findings of fact [1st Amd. Compl. at ¶27] was not a judicial decision but, rather, of "ministerial, or administrative" capacity. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 479 (1983). Thus, when a court decides whether or not to grant ADA accommodations, those administrative decisions are not shielded from review in federal court. *Cf. Tennessee v. Lane, supra* at 1982-83 (2004); *Forrester v. White*, 484 U.S. 219, 229 (1988). Moreover, telephone appearances and similar accommodations happen to be among the accommodations suggested in *Colorado Judicial Department - Access to the Courts: A Resource Guide to Providing Reasonable Accommodations for People with Disabilities - for Judicial Officers, Probation and Court Staff*, at 9-10 (attached to Op. Brief as **Attachment E**).

1st-Amd.Compl. at ¶-31. Defendants declined to address the ADA’s imposition of an affirmative obligation upon a state entity to undertake a fact-specific investigation and to engage the applicant. **Op. Brief at 40.**

Despite these assertions, defendants do not deny that Plaintiff and others have been deprived of the right to participate in judicial proceedings and have been subject to default judgment by reason of incapacitation or unavailability because of involuntary commitment (sometimes on the order of the same district court) and that the Colorado Department of Mental Health has acknowledged this is as a problem.

Op. Brief at n. 36.

Further, defendants did not deny that retaliation for a complaint about ADA violations is subject to a separate inquiry irrespective of whether the complainant is qualified under the ADA. Instead, they argue that the void order was in response a telephone call from sixteen days earlier,¹⁶ rather than the complaint letter (discussing the telephone call, among other things), which was docketed the day prior. This, however, is a question for the jury to decide. Moreover, the proposition doesn’t pass the straight face test: The telephone call would not have resulted in such an order, whereas the complaint letter, which specifically discouraged the recipient from, “tak[ing] any action that might be construed as retaliation for the exercise of protected speech (the submission of the complaint letter)”¹⁷ was obviously interpreted as a “dare.”

¹⁶ **1st Amd.Apx. D at ¶ 9**

¹⁷ **Id. at ¶ 10**

PLAINTIFF’S ALLEGATIONS WERE LEGALLY SUFFICIENT TO OVERCOME
STATE DEFENDANTS’ BOILER-PLATE QUALIFIED IMMUNITY DEFENSE

Defendants offered no opposition regarding Plaintiff’s qualified immunity arguments. **Op. Brief at 42-44.**

QUASI-JUDICIAL IMMUNITY IS UNAVAILABLE FOR COURT CLERKS’
CONDUCT NOT IN AID OF OR AT THE DIRECTION OF A JUDGE

Defendants did not contest Plaintiff’s factual allegations that Defendant Arcilise’s conduct was not judicial in nature and that it was not at the direction of a judge. Consequently, their academic discussion [**Answer at 31-32**] is irrelevant. Instead, defendants summarily argue that “Arcilise is entitled to judicial immunity for conduct that occurred while she was acting as the judge’s clerk.” **Id. at 31.** This view has been rejected by numerous courts, which find that immunity attaches to in-scope conduct, not from rank or title or “location within the Government.” *Butz v. Economou*, 438 U.S. 478, 511 (1978); *see also Forrester v. White*, 484 U.S. 219, 229 (1987) (the court must examine the in-scope conduct, “not the identity of the actor who performed it”).

QUASI-JUDICIAL IMMUNITY IS INAPPLICABLE TO FYFE’S OUT-OF-SCOPE CONDUCT OR
UNDER THE LAW OF CONTRACT

Although, Fyfe was not appointed by the court to conduct any one of the following activities, defendants insist that quasi-judicial immunity covers:

- ✓ breaching a fee Contract in bad faith and extorting fees;
- ✓ failing to provide any or all of the services for, which one had been paid;
- ✓ bartering prospective favorable parenting-time recommendations in exchange for an implied waiver of suit in federal court;
- ✓ retaliating against a party, who does not surrender to extortion; and
- ✓ waiving collection-enforcement of attempted-extorted fees in exchange for a withdrawal of a licensing board grievance.

In support thereof, defendants provided this excerpt from C.R.S. § 14-10-116:

The general assembly hereby finds and declares that, due to the need to continue to encourage court appointments of persons to serve the best interests of children in domestic relations proceedings involving the allocation of parental responsibilities, it is the intent of the general assembly that **quasi-judicial immunity continue to be granted for a child and family investigator** acting within the course and scope of an order of appointment pursuant to Colorado case law.

Answer at 33. *Nota bene*, defendants elected to exclude from bold-emphasis the words, “acting within the course and scope of an order of appointment.” No doubt, this is because a guardian *ad litem* acting outside the scope of his authorized duties is not protected by quasi-judicial immunity for those acts. *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989); *see also Awai v. Kotin*, 872 P.2d 1332, 1336 (Colo. App. 1993) (“[I]t is still necessary to establish that the acts performed were intimately related and essential to the judicial decision-making process.”); *Snell v. Tunnell*, 920 F.2d 673, 686-87 (10th Cir. 1990); *Meyers v. Contra Costa County Dep’t of Social Services*, 812 F.2d 1154, 1157 (9th Cir. 1987).

In *Short v. Short*, *supra*, quasi-judicial immunity was presumed because, unlike here, that plaintiff did, “not allege that guardian *ad litem* acted outside her role or that she conducted herself maliciously or in bad faith.” 730 F. Supp. at 1038-39. Nevertheless, the court noted that, “quasi-judicial immunity does not necessarily shadow every court appointment . . . immunity attaches only to conduct within the scope of a guardian *ad litem's* duties.” *Id.* And *see Falk v Sadler*, 533 S.E.2d 350 (S C App 2000) (same).

Additionally, when Fyfe entered into a private contract, he voluntarily submitted to the Law of Contract, thereby waiving quasi-judicial immunity over that subject matter. *Cf. Malcolm K. H. v. Phegley*, 589 N.W.2d 455 (Wis. App. 1998) (implied finding that contract breach claims could be prosecuted against GAL but, that quasi-judicial immunity covers negligent claims); *Ace Flying Service, Inc. v. Colo. Dep't of Agriculture*, 314 P.2d 278, 280 (Colo. 1957) (held: “when a state enters into authorized contractual relations, it thereby waives immunity from suit”). Fyfe is not entitled to utilize court appointments as a cover to engage in extortionate practices. *See Startzell v. Bowers*, 292 P. 601 (Colo. 1930) (Colorado recognizes the “fundamental equitable principle,” which precludes a tortfeasor from “taking advantage of his own wrong”).

Finally, pecuniary interests and the peremptory recusal doctrine affects the availability of quasi-judicial status. *See Cok, supra*, 876 F.2d at 4 (“allegations of theft or personal profiteering,” would have invalidated quasi-judicial immunity of GAL); *see also* Flamm, Richard E., *Judicial Disqualification - Disqualification of quasi-judicial personnel*, § 29.7.2 (Little, Brown & Co. 1996) (Evident partiality may be found to exist where the subject of a grievance concerns the quasi-judicial appointee’s own employment). In contrast to judges, CFI appointees have a pecuniary interest in the cases that they are involved in, because they derive a substantial portion of their income from the parties that they investigate (whereas judges derive no income from the parties whose rights they adjudicate). Because absolute immunity transcends to an appointee’s quasi-judicial function, the principles of the peremptory recusal doctrine accompany it. Accordingly, if the subject of the litigation is an individual’s employment (fees or a grievance filed with the


professional regulatory authority), quasi-judicial immunity should not attach, whereas, if the claims deal with his determination of facts, quasi-judicial immunity is available. *See Kubat v. Kubat*, 238 P.2d 897 (1951) (disqualification is peremptory when a judge has a, “pecuniary interest in the outcome of the litigation, rather than to a determination of facts and legal questions presented.”); *see also Zoline v. Telluride, Lodge Ass’n*, 732 P.2d 635 (Colo. 1987) (same); *and see* Colo.Rev.Stat. § 13-1-22, Colo.R.Civ.P. 97 and Code of Jud. Conduct, Cannon 2. These same principles even apply to district attorneys. *See* Colo.Rev.Stat. § 20-1-107(2).

CONCLUSION

An abuse of discretion occurs when a district court’s decision is “arbitrary, capricious, or whimsical.” *Cox v. Sandia Corp.*, 941 F.2d 1124, 1125 (10th Cir. 1991) For the forgoing reasons and authorities, the Order dismissing the case, attributable to the refusal to consider Plaintiff’s objections, because they had been filed as a hyperlinked digital brief, should be reversed and reassigned on remand, where reassignment would best serve the interests of justice and the appearance of impartiality.

Respectfully submitted this 17th day of March, 2007,

/s Sean Harrington



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**CERTIFICATION OF COMPLIANCE (TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS)**

The foregoing brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B)(ii) because this brief contains 6,968 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B) and (C). The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2003 ver. 11.5604.6360 in 13.5-point Times New Roman font.

Dated: March 17, 2007

/s Sean Harrington



Sean Harrington

CERTIFICATE OF SERVICE

I hereby certify that, on March 19, 2007, I electronically filed the foregoing Reply Brief and attachments with the Clerk of the U.S. Court of Appeals for the Tenth Circuit and also mailed, as addressed hereto:

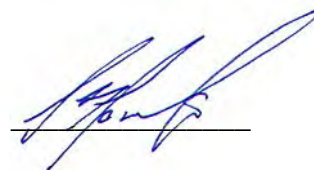
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