

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 South Potomac Street Centennial, Colorado 80112	COURT USE ONLY
Plaintiff(s): JAMES BURNESON v. Defendant(s): DAM EAST HOMEOWNERS ASSOCIATION, et al.	
ORDER	

The Court has before it five motions in the above-captioned case. In filing date order, these motions are (1) "Plaintiff's Review of Action Taken by the Court at the February 13, Case Management Hearing Require Judge Stewart [sic] to Recuse Herself and Motions and Orders Issue be reversed by a New Appointed Experienced District Judge;" (2) Defendant's "Motion for Sanctions for Failure to Comply With Order Compelling Discovery Requests;" (3) "Plaintiff Recuses Jeffrey Lane from Representing the Dam East Homeowners Association Affidavit;" (4) "Plaintiff's Motion to Hold a Hearing for the Recusal of Judge Spencer and [to] Conduct a Review of Plaintiffs Motions I. Mr. Lane Cannot Represent Defendants 2. Plaintiff's Motions Book[s] to be Inspected Open Years 2000 to Present [] Plaintiff's Motion 3. For Defense Counsel to Give Notice Who He Represents in this Litigation;" and (5) "Plaintiffs Motion to Hold this Court to Statue [sic] 13-5-136 Forfeit of Salary." The Court first addresses Plaintiffs motion for judicial disqualification. The remaining Motions shall then be addressed in order of

filing date.

I. FACTS

This action arises from a homeowner association member, Plaintiff James Burneson ("Plaintiff"), seeking a court order requiring the Defendant, Dam East Homeowners Association ("HOA"), to permit Plaintiff to inspect and copy homeowner association records. On July 11, 2007, Plaintiff submitted a "Notice of Intent [sic] Inspect Association Records" to the Defendant. On July 10, 2007, the Defendant HOA denied Plaintiffs request for failure to comply with the requirements of COLO. REV. STAT. § 7-36-102. Plaintiff also seeks to hold the individual HOA officers and directors liable for denying his request.

On August 15, 2007, Plaintiff filed the Complaint in this action. In the Complaint, Plaintiff seeks a court order requiring Defendant to permit inspection and copying of HOA records pursuant to the HOA's bylaws and pursuant to the Colorado Common Interest Ownership Act ("CCIOA") § 38-33.3-317 and § 38-33.3-319. Defendant responds that inspection has been properly denied because Plaintiff has failed to comply with the statutory and HOA bylaw requirements for the records inspection he seeks. *Defendants wrongly quoted REV. STAT. §7-36-102 which doesn't apply in this case since the CCIOA supersedes all other laws pertaining to HOAs.*

The Parties were scheduled for an initial case management conference with the Court on January 22, 2008. The Honorable John McMullen heard the matter. Plaintiff did not appear. Defense counsel made a brief record that he had a lengthy history of litigating against Plaintiff, and it was unlike Mr. Burneson not to appear for court. Defendants also requested the Court to set the at issue date so that discovery could proceed, but the Court denied that request and stayed discovery until the case management conference was held. The initial case management conference was set over, and Plaintiff was to coordinate a new setting.

Before the next initial case management conference, Mr. Burneson filed a Motion titled "1. PLAINTIFFS MOTION BOOK TO BE INSPECTED OPEN YEARS 2000 TO THE PRESENT STATUES 13-80-108 WHEN A CAUSE OF ACTION ACCRUES. 2. PLAINTIFF'S MOTION FOR DEFENDANT'S COUNSEL TO GIVE NOTICE WHO HE REPRESENTS IN THIS LITIGATION RULE 1.13, RULE 1.7, AND RULE 1.16. 3. PLAINTIFF'S MOTION FOR MR. LANE TO WITHDRAW DUE TO HIS EMOTIONAL INVOLVEMENT RULE 1.16(2)." This Motion was hand-delivered to the Court for e-filing, and a courtesy copy was brought to chambers on February 11, 2008. The certificate of service shows that Mr. Burneson mailed a copy to opposing counsel on February 11, 2008. The document was uploaded onto LexisNexis by the Clerk of Court the morning of February 12, 2008. The parties were due to appear before the Court the next day.

Both Plaintiff and Defendant appeared for the initial status conference on February 13, 2008, before the Honorable Valeria Spencer. Plaintiff, Mr. Burneson, appeared *pro se*. Defendant appeared through counsel Jeffrey Lane. The Court first addressed Plaintiff's obligations as *a pro se* litigant: he must follow the same procedures and laws that any attorney must follow and has the same obligations in the judicial process that an attorney has. Plaintiff was instructed that his repetitive filings on the same point and character attacks on the individual board members and the counsel of the HOA are not appropriate motions to put before the Court and would not be entertained. Further, Plaintiff was ordered not to engage in any more inappropriate personal attacks in his motions, and that order was extended to defense counsel as well. *Any claimed attacks by Plaintiff are expressions of Free Speech 1st Amendment and can't be denied by this court. If the opposing party deems statements made by Plaintiff as attacks then their Legal recourse is a lawsuit for slander. This court can't defend Jeffrey Lane and remain impartial as a judge.*

The case at issue date was set at October 2, 2007. Defendants' notice of Plaintiff's deposition and its subsequent complications were addressed, and the Court ordered that Defendants' deposition of Mr. Burneson was to take place March 6, 2008, at 8:30 am at the Arapahoe County Justice Center. The Parties were ordered to check in with Division staff for the deposition. Plaintiff was also ordered to turn over all written discovery responses, interrogatories, and documents to defense counsel's office by 5:00 pm on February 20, 2008, in response to Defendants' Motion to Compel. The Court instructed Defendant to comply with this timeline for the orderly procession of the case.

The parties and the Court coordinated to set the case management plan under Rule 16 and engaged in lengthy colloquy regarding Plaintiffs proposed modifications to the plan with his tendered case management issues. The proposed modifications also mirrored the relief requested in the February 11, 2008 Motion Part (1). In essence, Plaintiffs case management modifications

The Court notes that Mr. Lane was still affiliated with Patterson, Nuss, and Seymour as of this February 13, 2008 hearing date. The notice that Mr. Lane changed firm affiliation to Springer and Steinberg was filed with the Court February 20, 2008. *See* Plaintiffs Motion to Recuse Mr. Lane from Representing Dam East, *infra* Part IV.

were discovery requests for the document inspection and copying that Plaintiff seeks in the Complaint. The Motion Part (1) seeks inspection of the HOA books from 2000 to the present. The modification was not appropriate to a case management plan for the same reasons Motion Part (1) was contextually denied. First, the general request under both the case management modifications and the Motion was premature as it seeks the relief Plaintiff demands in the case as a whole. Second, the request is more properly made through the rules of discovery. For these reasons, Plaintiff was instructed to make very specific requests for HOA books and records copying under the rules of discovery.

Mr. Bumeson then continued to argue that the records of the HOA could not be kept in defense counsel's office, that he wanted to inspect all of the records, that he only needed eighteen or so documents out of the hundreds of pages, and that prior improper conduct by defense counsel for the HOA and the HOA president had prevented complete inspection. Because Plaintiff challenges the completeness of the HOA records as well as the integrity of the documentation and location of specific records, the Court ordered professional Bates stamping and copying of the Dam East HOA records for the time period Plaintiff seeks. *Past experience has proven after three court orders to allow inspections of the records the records were provided intentionally incomplete. This court fails to understand Bate stamping incomplete records is a worthless expense. Before any records are Bates Stamped they must be certified to be complete by the Board of Directors and Jeffrey Lane. They will not certify anything as the board doesn't know what complete records look like. This continued order of Bate stamping without certification is another point of prejudice by this court.*

At this order, Plaintiff balked because professional Bates stamping and copying is an expensive process for which he must bear the expense because he is the requesting party. The Court understands that Plaintiff believes there to be a less expensive way to identify specific documents and complete the record. The Court believes that Mr. Burneson's suggested method is not a fundamentally reliable method to create and complete the record in this case. Mr. Bumeson suggests that he himself, an interested party in this litigation, inspect and copy certain documents and also note those documents that he does not find but believes should be present. However, the Court maintains the order for professional Bates stamping and copying as the most reliable method for completing the record or pointing to documents that are not within a record. *The court shows her inexperience by continuing to order Bate stamping of records not certified as being complete. The physical stamping of records number 1 through 3,000 is worthless when records 20 to 300 are missing. They are hidden in Mr. Lane's office and never got stamped. This is stupidity at its highest. Lane gets his way by causing Mr. Burneson undue expense and he gets to hide the important records that are the smoking guns of evidence against three crooked lawyers that stole money from the HOA. Mr. Lane in his ex parte coaching of Judge Spencer failed to advise her records must be certified first and then Bate stamped. Mr. Lane would never give such advice since his main purpose is to hide certain records before Bate stamping which is what happens by the order by the Court?*

Plaintiffs final matter was a request for the Court to issue a subpoena *duces tecum* of the HOA bank records at Wells Fargo Bank. The Court denied this request for two reasons. First, the Defendants were not served with the Plaintiffs request for the Court to issue a subpoena *duces tecum*. Parties must serve documents on each other, no matter the motion being made to the Court. Second, the Court denied this request because the documents are such that are

properly subject to the rules of discovery and should be requested through the Defendants, not attempting to circumvent that parry. The bank records will have to be subpoenaed to fill in the missing records not Bate stamp. **Plaintiff had approval by the bank cost \$65.00 to pull the records and \$3.50 per page of copies.**

At this juncture, the Court takes notice that while Plaintiff sought possibly discoverable information the Court will not make any advance ruling on discoverability or relevance-via the subpoena *duces tecum*, he has not followed the discovery mandates Cow. R. Civ. P. 26 without being compelled to do so by Defendants' motions. Notably, Plaintiff has produced only his initial disclosures, and those were only made after a Motion to Compel the same was filed.

IL PLAINTIFF'S REVIEW OF ACTION TAKEN BY THE COURT AT THE FEBRUARY 13, CASE MANAGEMENT HEARING REQUIRE JUDGE STEWART [SIC] TO RECUSE HERSELF AND MOTIONS AND ORDERS ISSUE [SIC] BE REVERSED BY A NEW APPOINTED EXPERIENCED DISTRICT JUDGE

As an initial matter, the Court again reminds Plaintiff that he is obligated to follow the same laws, rules, and procedures as any attorney qualified to practice in the courts of Colorado by voluntarily choosing to proceed *pro se*. "If a litigant, for whatever reason, sees fit to rely upon his own understanding of legal principles and the procedures involved in the courts, he must be prepared to accept the consequences of his mistakes and errors." *Manka v. Martin*, 200 Colo. 260, 267, 614 P.2d 875, 880 (Colo. 1980) (citing *Viles v. Scofield*, 128 Colo. 185, 261 P.2d 148 (1953)). Here, Mr. Burneson must reap the consequences of his mistakes and errors as this document, its allegations, and requests have no basis in law and none of the required supporting factual bases.

First, no provision exists in the Colorado Rules of Civil Procedure allowing a parry to file a "review" of a court's action at any stage within a pending case. Although every citizen enjoys the freedom of speech under the First Amendment to the United States Constitution, a citizen choosing to pursue a legal action must comply with the rules of procedure set forth by the courts of that jurisdiction. In proceeding *pro se*, Mr. Burneson accepted the responsibility of complying with the Colorado Rules of Civil Procedure throughout this action. The formal requirements for pleadings and motions are set forth in COLO. R. Civ. P. 7, 8 & 10 (2007). A parry requesting an order from the court shall make such application in the form of a motion. COLO. R. Civ. P. 7 (b). The local rules for motions under district court practice standards are found under COLO. R. Civ. P. 121, § 1-15.

Under none of these Rules is a review of the actions taken by the Court an appropriate filing. ***Neither is coaching A Judge by one attorney ex parte before a trial and during the interim time of the next court hearing. Mr. Lane helped the court write this Order ex parte.***

In addition, the filing of an "Updated" version of the motion following Defendants' Response was procedurally inappropriate. The relief Mr. Burneson requests _____ the disqualification of the undersigned and review and reversal of her orders _____ must comply with the Rules for the form and content of motions as mentioned above. ***This court was going to use the old trick of not ruling on motions for 90 days. That's what judges do with motions that are an embarrassment to***

*both the court and counsel for the defense. Then Plaintiff files the Motion under **STATUE 13-5-136 Forfeit of Salary.** Judges forfeits 90 days of their salary for failure to rule on motions within the 90 day time limit. That's when this 14 page answer was rushed to filing by Judge Spencer. If this judge can't have the ex parte advice from Mr. Lane during the rest of her judgeship she will be lost and the evidence of a mistrial will scream from this transcript.*

The Court does note that COLO. R. Ctv. P. 121, § 1-15 (3) provides that "[i]f the moving party fails to incorporate any legal authority into the motion" ... "the court may deem the motion abandoned and may enter an order denying the motion." *Id.* Although leniency is given to *pro se* pleadings, at least some basis in law and fact must be provided to the Court to support a consideration and ruling. The Court may deny Plaintiffs motion to disqualify the undersigned based upon the complete lack of any supporting legal authority in either the initial or updated version of the Motion. However, because of the underlying nature of the Motion made by Plaintiff, the Court will proceed to address the Motion on its merits. **The motions filed by Plaintiff need no case law to be considered by this court. This suggestion came directly from Mr. Lane.**

Colorado Rule of Civil Procedure 97 provides the substantive test and procedural mechanism by which a judge may be disqualified in an action.

A judge shall be disqualified in an action on which he is interested or prejudiced, or has been counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein. A judge may disqualify himself on his own motion...or any party may move for such disqualification and a motion by a party for disqualification shall be supported by affidavit.

CoLo. R. Civ. P. 97 (2007). The Court also looks to the Colorado Code of Judicial Conduct Canon 3(C) and Colorado Revised Statute § 13-1-122 for guidance. All provide similar grounds for judicial qualification and, when read in conjunction, provide a considered understanding of the applicable standards and authority.

The test of the sufficiency of a motion to disqualify is whether the motion and required affidavit state facts from which it may reasonably be inferred that the judge harbors bias or prejudice that will prevent him or her from dealing fairly with the party seeking recusal. *Moody v. Corsentino*, 843 P.2d 1355 (Colo.1993). The affidavit shall set forth specific facts that are sufficient to compel the judge to disqualify him or herself. Supporting affidavits are insufficient to warrant recusal where the allegations, even if accepted as true, do not state actual facts and statements evidencing impartiality or bias. See *In re Goellner*, 770 P.2d 1387 (Colo. Ct. App. 1989). If the motion and supporting affidavit merely allege opinions or conclusions that are unsubstantiated by facts supporting a reasonable inference of actual or apparent bias or prejudice, disqualification is not required. *Holland v. Bd. of County Comm'rs*, 883 P.2d 500 (Colo. Ct. App. 1994). "To sustain a motion under C.R.C.P. 97, the facts alleged in the affidavits may not be based on `mere suspicion, surmise, speculation, rationalization, conjecture, [or] innuendo,' nor can they be `statements of mere conclusions of the pleader.'" *Goellner*, 770 P.2d at 1390. "A judge's opinion formed against a party from evidence before the court in a judicial proceeding ... is generally not a basis for disqualification." *People ex rel. S.G.*, 91 P.3d 443 (Colo. Ct. App.

This entire reply has been published on the Internet and the action of the court stated herein is enough to convince the public this judge can't continue in this trial due to the prejudice show by her answers and the misconduct claimed on the part of Mr. Jeffrey Lane now employed by Springer and Steinberg. There is no way this judge can carry on in this trial without continuing to be prejudice in favor to Mr. Lane and thus a mistrial is growing bigger by each filing.

2004).

In *Goellner*, a party moved for the trial judge to disqualify himself, alleging that the conduct of the trial court towards her counsel was hostile and prejudiced. The party attached several affidavits to her motion. The trial court denied the motion and the party appealed. The Colorado Court of Appeals concluded that the trial court did not err in denying the motion to disqualify because "[t]he supporting affidavits...were insufficient to warrant disqualification of the trial judge. The allegations in the affidavits did not concern 'actual events and statements which, if true, evidenced partiality or the appearance of bias or prejudice against' [the party] on the part of the judge." *Goellner*, 770 P.2d at 1390. *This case law cited above is one of many cases on record. Attached as Plaintiff's Exhibit 2 is a list of cases all pertaining to recusal and ex parte communication. The court needs to read all of them before issuing a decision as instructed by Mr. Lane.*

In a divorce proceeding, *In re Elmer*, a husband moved to have the trial judge disqualified because he believed that the court intended to enter an order that was not supported by the law. *In re Elmer*, 936 P.2d 617, 619 (Colo. Ct. App. 1997). The trial court denied the motion, and the husband appealed. The Colorado Court of Appeals upheld the trial court's decision, finding that "[c]onclusionary statements that a judge is biased do not establish a reasonable basis for concluding that the disqualification is required." *Elmer*, 936 P.2d at 619.

The case of *Moody v. Corsentino*, 843 P.2d 1355, 1373-76 (Colo. 1994), affords a third view of COLO. R. Ctv. P. 97 in action. In *Moody*, a criminal defendant filed a motion for judicial recusal during a writ of habeas corpus petition that was attempting to finally force sentencing in his case seven years after his conviction. The defendant also had filed a civil action against the judge that complained of some of the same judicial conduct that was the basis of the judicial recusal motion in the petition. The Colorado Court of Appeals held that the defendant's civil action against the judge for similar matters and defendant's conclusory statements that the judge was biased were insufficient to show that recusal was required. *Id.* at 1875-76.

As a final point of authority regarding this Motion, the Court cites *Goebel v. Benton*, 830 P.2d 995 (Colo. 1992). The presiding judge in *Goebel* denied a motion for judicial disqualification based on *ex parte* communications, and the Supreme Court of Colorado reversed, holding that the motion and affidavit provided sufficient basis for disqualification. The factual basis for the motion involved a lunch where the judge dined with the executive director to a former party in the case and its legal counsel. In its holding, the Colorado Supreme Court stated:

While it is inappropriate for a judge to initiate an *ex parte* communication concerning a pending proceeding with an interested party, C.J.C. Canon 3(A)(4), not all *ex parte* communications are *per se* grounds for disqualification. The critical test under *Wakefield* is whether the affidavits in support of the motion for disqualification, along with any other matters of record, establish facts from which it may reasonably be

inferred that the judge is prejudiced or biased, or appears to be prejudiced or biased, in favor of or against a party to the litigation.

In contrast to *Wakefield*, in which the judge's *ex parte* communication with the respondent mother was prompted by a misguided effort to ensure fairness to the mother, the affidavits here establish that Judge Benton's *ex parte* meeting with MHCD's executive director and its attorneys related directly to MHCD's ability to provide services to the mentally ill, an issue of critical significance to the respondent judge's ultimate ruling on the adequacy of the state's remedial plan. (*S.S. v. Wakefield*, 764 P.2d 70 (Colo. 1988)). *In this Order the Case law omitted the full case name cited as "Wakefield." This is a standard trick of Jeffrey Lane's in previous cases where he would site case laws with incorrect numbers and or dates that would cause the case to not be found as described. This case is not on point of the law with the charges of Plaintiff against Mr. Lane for his ex parte meetings with Judge Spencer. The sole purpose of these meetings were to coach the judge how to steer the case to a point Mr. Burneson's request to see the books would be defeated.*

Id. at 1000. Thus, in the *Goebel* facts, the affidavits clearly reflect a sufficient establishment of *ex parte* communication, so judicial disqualification was appropriate. In the other cases where disqualification was proposed and denied based mostly upon speculation, innuendo, or conclusionary assertions or on rulings or potential rulings against the party, the motions and affidavits did not sufficiently establish bias, prejudice, or bent of mind of the trial judge that makes disqualification necessary.

Plaintiff alleges that the undersigned has engaged in *ex parte* communications with defense counsel because of the timing of the parties' arrivals at the courthouse the morning of the case management conference, the start time of the actual conference, and the behavior of the Division Clerk when Plaintiff checked in back in chambers that morning. From this limited evidence and Plaintiff's history of litigating against Mr. Lane, which is not before this Court, Plaintiff states that Mr. Lane and the undersigned had to have been holding an *ex parte* meeting prior to the case management conference in order to script the conference. "To sustain a motion under C.R.C.P. 97, the facts alleged in the affidavits may not be based on `mere suspicion, surmise, speculation, rationalization, conjecture, [or] innuendo,' nor can they be `statements of mere conclusions of the pleader.'" *Goellner*, 770 P.2d at 1390. Mr. Burneson's speculation and insinuation of wrongdoing followed by his conclusory statements that the undersigned must be biased as a result are not facts sufficient to support disqualification. Plaintiffs allegations, without affidavit, do not come close to meeting the level of sufficiency in *Goelbel*, 830 P.2d 995, that supports judicial disqualification. Alleged *ex parte* communications do not form the basis for judicial disqualification in this case. *Mr. Burneson notes the court has not denied the ex parte meeting with Mr. Lane. She asks for more proof of a meeting which can only be obtained by the deposing the Court's staff. Mr. Burneson will set a date to depose all court staff members on this subject. They will be able to verify Mr. Lane appeared in their office and proceed to Judge Spencer's chamber and close the door. Until Plaintiff is allowed Discovery of his charges of ex parte meeting between Judge Spencer and Mr. Lane this issue remains open not closed at the Courts discretion. This is another point a mistrial is in progress.*

Plaintiff further argues that the Court's orders requiring the HOA records requested by Plaintiff to be professionally Bates stamped and copied-at the requesting party's expense-and the order to participate in ADR show inexperience and prejudice. The undersigned has no bias or prejudice against Mr. Burneson and has treated him in the courteous, professional manner in which all litigants are treated. Qualifications of a judicial officer have nothing to do with COLO. R. Ctv. P. 97 as they do not relate to the possible bias or prejudice of that officer. Plaintiff may not pick and choose the judicial officer who hears his case by continuing to move to recuse each judicial officer who has ruled unfavorably in each of his cases. If Plaintiff would like the option of selecting his hearing officer, then arbitration or mediation would be the appropriate venue. If he chooses to continue litigation, then the assigned judge will hear his case. All judges have been selected through a rigorous selection committee process and then selected by the governor after further proceedings. Questioning the competency of the presiding authority based upon her rulings is not an appropriate measure for any party. *Upon review of this entire Response and answers provided by Plaintiff it will be totally transparent the Court's ruling and denial of motions were completed without requested hearing by the Plaintiff. Because of this refusal to hold a hearing in open court on all motions where Defendant could present his evidence supporting his motions the denial of same is further evidence of a mistrial. Judge Spencer must realize a trial is to be held and she by her own actions can no longer continue as an impartial Court. Arbitration will not succeed as Plaintiff filed for a trial in the 18th District Court and has paid his fees to the County and must be given a fair trial. A mistrial will be overturned by a higher court.*

With regard to the Court's rulings on the Bates stamping and ADR issues, the Court notes that "[a] judge's opinion formed against a party from evidence before the court in a judicial proceeding ... is generally not a basis for disqualification." *People ex rel. S.G.*, 91 P.3d 443 (Colo. Ct. App. 2004). The record is abundantly clear regarding Mr. Burneson's disputes with the HOA and Mr. Lane over the HOA records, and the Court's order following such a record is not bias it is performance of judicial duties. Likewise, this Court and all others within this judicial district have a standing Order that all parties in a civil action must participate in ADR and file a certificate of completion at least sixty days prior to trial. Defendants' request to participate in ADR is nothing the parties would not have been compelled to do in the first instance or risk losing their trial date as a sanction. Again, Plaintiffs allegation of prejudice against him due to these rulings is a conclusionary claim that does not satisfy the requirements of COLO. R. Civ. P. 97.

Finally, Plaintiff finds fault with the Court's denial of Plaintiffs request for the Court to issue a subpoena *daces tecum* on the grounds that Defendants had not received service of the request, which is required as Plaintiff seeks access to Defendant HOA's bank records, and because this was another example of a request that was properly made to Defendants through the channels of discovery. Only if there was some refusal on the part of Defendants might it be appropriate for Plaintiff to seek these records directly, and, then, only on motion and ruling from the Court would such be allowed. The Court made this ruling based upon the record before it and well-settled rules of civil procedure. Thus, it was not an example of bias or prejudice. The Court finds that disqualification in this action is not appropriate. The allegations proffered in Plaintiff's Motion are insufficient under COLO. R. C v. P. 97 and the related case law already discussed. In the absence of a valid reason for disqualification relating to the subject matter of the litigation, the trial judge has the duty of presiding over the case. *Blades v. DaFoe*, 666 P.2d 1126 (Colo. Ct. App. 1983), *rev'd on other grounds*, 704 P.2d 317 (Colo. 1985). Therefore, the Motion for Recusal of Judge Spencer is **DENIED**.

III. MOTION FOR SANCTIONS FOR FAILURE TO **COMPLY WITH ORDER COMPELLING**

DISCOVERY REQUESTS

Defendants move for sanctions against Plaintiff for his failure to comply with this Court's Orders to provide responses or objections to written discovery. The written discovery was served upon Plaintiff by Defendants on November 28, 2007, almost two months after the case at issue date. As discussed in Part I, *supra*, Plaintiff contested any discovery prior to the case management conference, which occurred February 13, 2008. The Court ordered Plaintiff to produce requested written discovery to Defendants' counsel by February 20, 2008, and Plaintiff has not done so. *The written Discovery was mailed to Mr. Lane on February 20th to his Grand Junction Office and Mr. Burneson has received notice that Mr. Lane had received the written Discovery as Ordered by this court.* Further, the Court ordered that Defendants' deposition of Plaintiff was set on March 6, 2008 at 8:30 am at the Arapahoe County Justice Center. Plaintiff did not attend this deposition. *Mr. Lane filed notice with the Court on February 18th, 2008 "Substitution of Counsel" which must be approved by the court and until this motion is so approved Mr. Lane's appearance as counsel for the Defendants is not valid and moot. The court tries to approve this Motion of Substitution in this Order published June 5, 2008. Plaintiff's motion of recusal of Judge Spencer dated February 29th 2008 removes the courts authority to rule on any motions until the motion of recusal is granted or denied. The Court ruled in this Order to deny Plaintiff's motion to recuse dated June 5, 2008. All actions between February 29th and June 5, 2008 can not be acted upon until after this Order dated June 5, 2008 was issued.*

Plaintiff states in his Motion to Recuse Judge Stewart, which this Court interprets to mean the undersigned, that the case is at a "mistrial" and any Orders entered by the Court are void. Presumably, Plaintiff intends that statement to encompass all of the Court's orders, even as to setting the case management plan dates under the presumptive case management plan of COLO. R. C ▶ v. P. 16 or setting the courthouse deposition location of Plaintiff's deposition. Rule 16 is a self-operating rule and is a binding obligation on the parties once all responsive pleadings have been filed and any motions to dismiss are decided, i.e., once the case becomes at issue. That occurred on October 2, 2007, in this case. A case becomes at issue without the Court specifically ordering it so, even though the Court was forced to formally set the at issue date at the case management conference due to Mr. Burneson's refusal to engage in discovery or attend the Defendants' properly noticed deposition of Plaintiff that may be taken without leave of the Court under COLO. R. C ▶ v. P. 30 (a)(1). *The court cannot rule retroactively on something after the fact 91 days past the occurrence. Judge Spencer under the control of Mr. Lane ex parte couching realized she could not approve or deny Mr. Lane' Motion of Substitution until after she ruled on Plaintiff's Motion of Recusal. So from the date of the recusal February 29, 2008 to the June 5th 2008 there has been no judge who was in a position to rule on this lawsuit. Judge Spencer was neutered until June 5th 2008 when this order was issued filed. For 91 days this court didn't have a judge to rule or issue rulings on any matter but recusal. Only after a ruling on the Motion to Recuse did all the other pending motions become alive to be ruled on and that was after June 5, 2008.*

Plaintiff fails to recognize that the discovery process is self-executing, requiring no leave or order of this Court except under specified circumstances laid out under the Rules. Such are the exceptions, not the Rule. As the Plaintiff in this action, Mr. Burneson has a duty to fulfill his obligations, including completing all requirements laid out for a party under COLO. R. CI v. P. 16,

and COLO. R. CI v. P. 26 *et seq.*, regardless of the presiding authority. Proceeding *pro se* is no excuse to avoid the responsibilities of a Plaintiff to prosecute a case. *Until a ruling was issued on Mr. Lane's Motion of Substitution of Counsel this case was in neutral and nothing was self-executing.*

Plaintiff has flagrantly violated his obligations as the Plaintiff in this action to comply with the mandates of the Court and the requirements of the Colorado Rules of Civil Procedure. As Plaintiff was warned at the case management conference, he will be held to the same standards as any attorney, which includes fulfilling discovery obligations under the timelines of COLO. R. Civ. P. 16, and COLO. R. C v. P. 26. Defendant's Motion for Sanctions is hereby GRANTED. are awarded all reasonable costs and fees they have incurred in preparation of this Motion for Sanctions and in preparation for the discovery to be turned over on February 20, 2008 and in preparation for the deposition on March 6, 2008 at which Plaintiff did not appear. Defendants shall file an affidavit of reasonable costs and fees within fifteen (15) days. The parties shall each file a brief stating the sanctions they would suggest the Court impose within fifteen (15) days. The briefs should contain appropriate authority. Each party shall then have five (5) days to respond to the measures suggested by the opposing party. No reply briefs shall be accepted. *The Court cannot Grant a Motion for Sanctions when the Plaintiff did not violate any provision of the written Discovery and did not miss a Deposition date that was no longer valid. This is another example of inexperience on the part of Judge Spencer. On March 8, 2008 Plaintiff filed a Motion recusing Jeffrey Lane from representing the Defendant. The issues addressed in this motion have not been answered by Judge Spencer.*

IV. PLAINTIFF RECUSES JEFFREY LANE FROM REPRESENTING THE DAM EAST HOMEOWNERS ASSOCIATION AFFIDAVIT

Plaintiff moves to recuse Mr. Jeffrey Lane from his representation of the Dam East Homeowners Association and its directors. Among other things in this motion, Plaintiff moves to disqualify Mr. Lane, order his dismissal from Springer & Steinberg, order no contact between Mr. Lane and the Dam East HOA, and order retention of two unaffiliated lawyers by Defendants. Mr. Burneson also states that he will bring charges asking the Colorado Supreme Court for the disbarment of Mr. Lane, Mr. Springer, and Mr. Steinberg. As a basis for this motion, Plaintiff states that he was at one time represented by Mr. Harvey Steinberg, a criminal defense attorney who is a partner in the law firm Mr. Lane joined during this action. The Court received notice of Mr. Lane's change of firm affiliation from Patterson, Nuss & Seymour to Springer & Steinberg on February 20, 2008. Plaintiff filed the Motion to Recuse Mr. Lane on March 10, 2008.

Plaintiff states in his Motion and Reply that Mr. Steinberg represented him in a case that involves all of the cases for which Mr. Lane has represented the Dam East Homeowners Association and its officers or directors. Mr. Steinberg is a highly respected criminal defense attorney who represented Mr. Burneson in Arapahoe County District Court case number 97CR2332, which was filed in 1997. He also represented Mr. Burneson in case number 02CV 1962, a 2002 filing, in which the record of 97CR2332 was sealed. Mr. Burneson has offered no evidence showing Mr. Steinberg's representation of him, and the Court has no records of Mr. Steinberg representing Plaintiff in any cases other than 97CR2332 and 02CR1962. Because the record is sealed in the criminal action, no further information is available or shall be provided.

Mr. Burneson usually appears *pro se* in cases other than the 1997 representation by Mr. Steinberg and the 2002 record sealing. Mr. Burneson was briefly represented by counsel in Arapahoe County Court case B04 C 4421. That counsel had and has no relation to Springer & Steinberg of which this Court is aware. In all other cases against Dam East HOA and its officers and directors, Plaintiff has proceeded *pro se*.

Mr. Lane represented the Dam East Homeowners Association and its officers in the following cases: *The Dam East Homeowners Association, et. al v. James W. Burneson*, Arapahoe County Court, case number B04 C 4421; *James W. Burneson v. The Dam East Homeowners Association, et. al*, District Court for Arapahoe County, case number 02 CV 1748; *James W. Burneson v. The Dam East Homeowners Association, et. al*, District Court for Arapahoe County, case number 02 CV 1748; *James W. Burneson v. The Dam East Homeowners Association, et. al*, District Court for Arapahoe County, case number 02 CV 0028; *James W. Burneson v. The Dam East Homeowners Association, et. al*, District Court for Arapahoe County, case number 05CV4675; *James W. Burneson v. The Dam East Homeowners Association, et. al*, District Court for Arapahoe County, case number 05CV4676; *James W. Burneson v. The Dam East Homeowners Association, et. al*, District Court for Arapahoe County, case number 07CV1609; and *James W. Burneson v. The Dam East Homeowners Association, et. al*, Court of Appeals, case number 04 CA 999. Based upon these docket numbers, Mr. Lane's representation of the Dam East HOA has spanned from 2002 to present.

The Colorado Rules of Professional Conduct govern the representation of parties in situations where counsel might have a conflict of interest. The pertinent rule in the present case is Rule 1.9, which provides as follows:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

COLO. RULES PROF'L CONDUCT R. 1.9 (2008). Further, COLO. RULES PROF'L CONDUCT R. 1.10 (a) provides for imputing conflicts to a firm:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7. or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

COLO. RULES PROF'L CONDUCT R. 1.10 (a). Rule 1.10 (a) thus imputes any conflict that Mr. Steinberg might have to the rest of the firm, i.e., to Mr. Lane. The purpose of Rules 1.9 and 1.10 is to protect and foster the confidential communications between an attorney and client. *Funplex Partnership v. F.D.LC.*, 19 F. Supp. 2d 1201, 1207 (D. Colo. 1998).

However, as the comments to these Rules and the Colorado state and federal cases interpreting them emphasize, the proponent of attorney disqualification must show specific facts, not speculation or conjecture, demonstrating the necessity of attorney disqualification. *F.D.I. C. v. Sierra Resources, Inc.*, 682 F. Supp. 1167, 1170 (D. Colo. 1987). The proponent of attorney disqualification must establish four factors by specific facts: (1) an attorney-client relationship existed in the past; (2) the present case involves a matter that is 'substantially related' to the prior litigation; (3) the present clients' interests are materially adverse to the former client's interests; and (4) the former client has not consented to the disputed representation after consultation. *Funplex Partnership v. F.D.I.C.* 19 F. Supp. 2d 1201, 1206 (D. Colo. 1998); see *Food Brokers, Inc. v. Great Western Sugar Co.*, 680 P.2d 857 (Colo. Ct. App. 1984). The United States District Court for the District of Colorado has adopted the Colorado Rules of Professional Conduct. See D. C. Colo. LR 83.6. As the Colorado state court cases interpreting these Rules are few, the Court does look to federal cases in the United States District of Colorado for guidance.

If the factual contexts of the present and former representations are similar or related, then substantiality is present. See *Funplex Partnership*, 19 F. Supp. 2d at 1207 (citing *English Feedlot, Inc. v. Norden Lab., Inc.*, 833 F. Supp. 1498, 1506 (D. Colo. 1993)). The moving party "must provide the court with sufficient evidence to enable the court 'to reconstruct the attorneys' representation of the former client, to infer what confidential information could have been imparted in that representation, and to decide whether that information has any relevance to the attorney's representation of the current client.- *Id.* (citing *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1384 (10th Cir. 1994)). "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." *Cole*, 43 F.3d at 1384 (quoting ABA Model Rule 1.9 cmt.).

Mr. Burneson has stated that he was represented by Mr. Steinberg, that Mr. Steinberg gave him advice to sue Mr. Lane for slander, that Mr. Steinberg is in possession of letters from the time period of his representation of Plaintiff that complain about Mr. Lane, that Mr. Lane now works for Mr. Steinberg's law firm, and that Plaintiff has informed Mr. Steinberg in writing that he objects and waives no privileges. The Court takes Mr. Burneson's argument to be that a substantial relationship exists between the matter in which Harvey Steinberg previously represented him and the matter in which Jeffrey Lane represents the Dam East Homeowners Association, its officers, and directors because Mr. Burneson's former counsel is privy to certain communications and advice regarding Mr. Lane and now Mr. Lane is a member of that counsel's firm. With this understanding of Mr. Burneson's objection to Mr. Lane's presence as counsel on this case, the Court turns to the four factor test from *Funplex Partnership*. On factor one of the *Funplex* analysis, the Court looks to the specific facts shown by proponent. The only specific fact shown here is that Mr. Lane is now a member of Springer & Steinberg, as evidenced by the notice he filed with the Court. The statement by Plaintiff that Mr. Steinberg represented him in prior cases is only shown upon review of the Court's records of the existence of a criminal case involving Mr. Burneson. Such is not shown with great specificity, but there is sufficient "persuasive evidence" given the Motion and the available record for the Court to conclude that Mr. Steinberg did represent Mr. Burneson in a criminal matter at one point in time. *See Funplex Partnership*, 19 F. Supp. 2d at 1208. Thus, a prior attorney-client relationship has been established. The Court also accepts that factors three and four of the *Funplex* analysis are met with specific facts: Mr. Burneson is the opposing party to the HOA, and Mr. Burneson has continually objected to Mr. Lane's representation of the Dam East HOA.

In analyzing the second factor, the Court concludes that Plaintiff has failed to make the critical showing of substantiality linking the former and current representations. The question is whether Mr. Steinberg was so involved in the matter ____ that being the Dam East HOA records inspection-in the previous litigation that it is justly regarded as a changing of sides in the present litigation when a conflict Mr. Steinberg may have is imputed to Mr. Lane. *See Cole*, 43 F.3d at 1484. Plaintiff alleges, without support, that advice from Harvey Steinberg about Mr. Lane and the existence of several letters from himself to Harvey Steinberg regarding Mr. Lane constitutes evidence of the conflict. These allegations are not shown by any specific facts and, therefore, cannot serve as a basis for attorney disqualification. *See Sierra Resources*, 682 F. Supp. at 1170. The Court does not find this to be persuasive evidence.

Even if the Court were to find these allegations to be persuasive, they would be of no consequence because Mr. Burneson's communications to Mr. Steinberg regarding Mr. Lane are not in any way substantially related to the actual subject matter of the present litigation. *How does Judge Spencer know this to be true other than by way of ex parte communication by Mr. Lane?*

See Funplex Partnership, 19 F. Supp. 2d at 1208. The present litigation seeks to inspect and copy the books and records of the Dam East HOA. Mr. Lane is merely counsel for the HOA-he is not a party. Therefore, his representation of the HOA is not related to Mr. Steinberg's representation of Plaintiff on a criminal matter, regardless of what discussion there might have been between attorney-client regarding Mr. Lane. Phrased another way, questions to and advice from prior counsel regarding the present counsel simply do not relate to the actual subject matter of

the litigation: the HOA records. The Court finds that Plaintiff has failed to carry his burden to set forth persuasive evidence of specific facts that demonstrates a matter in the present litigation is substantially related to the prior litigation. *Mr. Steinberg and Mr. Burneson and Chief Judge Sylvester are the only parties who are aware of the content of an Order to Seal Rcds and now Mr. Lane has that information while being employed at Springer and Steinberg. Until Mr. Steinberg is a witness in this court in an open hearing this court doesn't have the facts to make any ruling on this subject. The Court did not address the issue Mr Lane does not have permission to represent the Association and the Board of Directors at the same time. To have this authority the Dam East Homeowner Association MEMBERSHIP has to vote giving Mr. Lane the authority to represent two parties sue in this complaint. Judge Spencer skipped over this issue. Its past 90 days for a ruling.*

Without any legally sufficient substantial relationship between the prior litigation and the present litigation, the Court will not disqualify Mr. Lane. However, the Court acknowledges that Mr. Lane and Mr. Steinberg work in the same law firm. To the extent that the firm does not have internal protocols that protect Mr. Burneson's criminal case file, the Court hereby Orders that such file be screened from Mr. Lane. Recognizing Mr. Burneson's demands under this Motion, the Court Orders compliance with all Colorado Rules of Professional Conduct, inclusive the client confidentiality provisions of Rule 1.6. The Plaintiff's Motion to Recuse Jeffrey Lane is **DENIED**.

PLAINTIFF'S MOTION TO HOLD A HEARING FOR THE RECUSAL OF JUDGE SPENCER AND [TO] CONDUCT A REVIEW OF PLAINTIFF'S MOTIONS 1. MR. LANE CANNOT REPRESENT DEFENDANTS 2. PLAINTIFF'S MOTIONS BOOK[S] TO **BE INSPECTED OPEN YEARS 2000 TO PRESENT** [] PLAINTIFF'S MOTION 3. FOR DEFENSE COUNSEL TO GIVE NOTICE WHO HE REPRESENTS IN THIS LITIGATION

As to the recusal of Judge Spencer, this Motion is **DENIED AS MOOT** based upon the ruling made in Part II, *supra*, of this Order. In regard to holding a hearing to conduct a review of Plaintiff's Motions 1-3 that were filed in the February 11, 2008 Motion, that request is **DENIED**. The Court heard from the parties and made rulings on the Motions during the February 13, 2008 Case Management Conference.

Plaintiff bases the present Motion in part upon his February 11, 2008 Motion, discussed in Parts I & II, *supra*, and VI, *infra*. The Court ruled on the motions made by Plaintiff during the Case Management Conference held February 13, 2008. (Case Mgmt. Tr. 40:15-43:12.) The Court instructed Plaintiff that the Motion to Inspect Books Year 2000 to present was a Rule 26 issue to be addressed in that manner. The Motion regarding notice of who Mr. Lane represented was addressed in some detail, with the Court giving Mr. Burneson the name to his prior Motion addressing the issue of whether Mr. Lane had authority to represent Defendants and arguing he did not; providing the date of Response to that Motion in which Defendants included documentation showing Mr. Lane had authority to represent Defendants; and, finally, Mr. Lane stating that he represents all named and served Defendants. The Court denied Mr. Burneson's Motion for Mr. Lane to withdraw due to emotional attachment on the basis of what happened in another case due to a lack of jurisdiction to consider such occurrences.

Therefore, Plaintiff's Motion is **DENIED**.

V. PLAINTIFF'S MOTION TO HOLD THIS COURT TO STATUE [SIC] 13-5-136 FORFEIT OF SALARY

Plaintiff filed the above-captioned motion with the Court on May 19, 2008. For the purposes of Plaintiffs Motion, Colorado Revised Statutes § 13-5-136 states:

[i]f any judge of any district court, to whom any motion, issue, or other matter, arising in any cause, is submitted for judgment or decision, fails or neglects to decide or give judgment upon the same within the time limited by section 13-5-135, such judge shall not receive from the state treasury any salary for the quarter in which such failure occurred...

COLO. REV. STAT. § 13-5-136 (1) (2007). In conjunction, Colorado Revised Statutes § 13-5-135 provides that "[e]very motion, issue, or other matter arising in any cause pending or to be brought in any district court of this state, and which is submitted to any such court for judgment or decision thereof, shall be determined by the court within ninety days after the adjournment of court." COLO. REV. STAT. § 13-5-135 (2007).

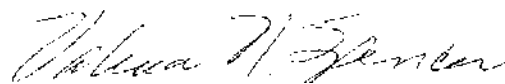
The Court repeats its holding from Part V of this Order: Plaintiffs Motion was ruled upon during the February 13, 2008 Case Management Conference. This Court considers the February 11, 2008 Motion of the Plaintiff fully addressed. It has been so since February 13, 2008. Therefore, Plaintiffs Motion to Hold this Court to Statue [sic] 13-5-136 Forfeit of Salary is **DENIED**.

VII. CONCLUSION

The Court has now ruled on all outstanding motions. "Plaintiffs Review of Action Taken by the Court at the February 13, Case Management Hearing Require Judge Stewart to Recuse Herself and Motions and Orders Issue be reversed by a New Appointed Experienced District Judge" [Motion for Judicial Recusal] is **DENIED**. Defendant's "Motion for Sanctions for Failure to Comply With Order Compelling Discovery Requests" is **GRANTED**. Parties are to file briefs within fifteen (15) days regarding the imposition of sanctions against Plaintiff that they deem appropriate. "Plaintiff Recuses Jeffrey Lane from Representing the Dam East Homeowners Association Affidavit" is **DENIED**. "Plaintiffs Motion to Hold a Hearing for the Recusal of Judge Spencer and [to] Conduct a Review of Plaintiffs Motions 1. Mr. Lane Cannot Represent Defendants 2. Plaintiffs Motions Book[s] to be Inspected Open Years 2000 to Present [] Plaintiffs Motion 3. For Defense Counsel to Give Notice Who He Represents in this Litigation" is **DENIED AS MOOT** as to the hearing on judicial recusal and **DENIED** as to Motions 1-3. "Plaintiffs Motion to Hold this Court to Statue [sic] 13-5-136 Forfeit of Salary" is **DENIED**.

SO ORDERED this 5th day of June, 2008.

BY THE COURT:



Valeria N. Spencer District Court Judge

In the filing by Mr. Lane if he lies about the facts concerning the issues stated herein Plaintiff requires this court to find Mr. Lain as committing perjury and a filing with the District Attorney for charges of perjury to be brought against Mr. Lane for a felony trial.

This written answer with insertions in red is provided as a more convenient means of addressing answers to a very lengthy Order. If the court requests that the inserted portions in red be edited to a separate document It will be provided.

The inserted red print will be indexed as foot notes and the numbers of each paragraph will be marked in this Order.

Submitted on this day _____ June 2008

By James W. Burneson
12641 E. Bates Cir.
Aurora, CO 80014
303-750-1500

CERTIFICATE OF SERVICE

I hereby certify on this day ____ June 2008, mailed copies of this Motion by US Postal mail with correct postage to those addressed below:

Chief Justice Mary Mullarkey
Supreme Court of Colorado
Two East 14th Ave
Denver, CO 80203

Chief Judge Sylvester
18th District Court Arapahoe County
7325 South Potomac Street
Centennial, CO 80112

Jeffrey Lane
Springer and Steinberg P.C.
1600 Broadway Suite 1200
Denver, CO 80202
303-861-2800
Fax :303-832-7116

Copies of this Motion are to be forward to the Board of Directors of the Dam East Homeowner Association. This copy has been mailed to the attention of the Association Lawyer who must forward all correspondence to the Board of Directors as required by SB 100. If these requirements are not completed because Mr. Lane has instructed Mr. Wilder to not forward the copies now received it will become known and your failure to do so is failure to represent your client the Dam East Homeowner Association and their membership.

Mr. James E Wilder
Association Attorney Dam East Homeowner Association
% Cherry Creek HOA Professionals, LLC
14901 E. Hampden Ave Ste #120
Aurora, CO 80014

Blind copies to many.

By _____
Jim Burneson