COLORADO INDEPENDENT ETHICS COMMISSION

Complaint No. 08-01

MOTION TO TRANSFER TO AN ADMINISTRATIVE LAW JUDGE OR, IN THE ALTERNATIVE, MOTION TO RECUSE COMMISSIONER WOOD AND PROVIDE DISCLOSURES BY COMMISSIONERS

In the Matter

Of

Michael Coffman

Respondent, Michael Coffman, by and through his attorneys, respectfully submits this motion to (I) transfer this matter to an administrative law judge. In the alternative, Mr. Coffman motions for (II) Commissioner Roy Wood's immediate recusal from all proceedings involving this case; and (III) the disclosures of any potential conflicts of interest by the Commissioners.

BACKGROUND

The Independent Ethics Commission ("Commission") was established by Article XXIX of the Colorado Constitution and Colo. Rev. Stat. § 24-18.5.101. The purpose of the Commission is to give advice and guidance on ethics issues arising under Article XXIX of the Colorado Constitution and any other standards of conduct or reporting requirements as provided by law; the Commission also hears complaints, issues findings, and assesses penalties and sanctions, where appropriate.

Commission members include Chairperson Nancy Friedman (Democrat; Governor Bill Ritter's appointee), Vice Chairperson Matt Smith (Republican; Colorado Supreme Court Chief Justice Mary Mullarkey's appointee), Commissioner Sally Hopper (Republican; Colorado Senate appointee), Commissioner Roy Wood (Democrat; Colorado House of Representative appointee), and Commissioner Larry Lasha (Independent; appointee of the other four members).

Any person may file a written complaint with the Commission, asking whether a public officer, member of the General Assembly, local government official, or government employee has failed to comply with the provisions of Article XXIX of the Colorado Constitution or any other standards of conduct or reporting requirements provided by law. To date, four complaints have been filed with the Commission and the Commission has dismissed three of these complaints.

On October 6, 2008, the Commission voted 3-1 (Commissioner Smith dissenting) to deem the complaint non-frivolous and proceed to a public hearing. The Commission's website states that "Commissioner Hopper recused."

I.

THIS MATTER SHOULD BE TRANSFERRED TO AN ADMINISTRATIVE LAW JUDGE.

Mr. Coffman requests this matter be transferred to an Administrative Law Judge for all further proceedings. Rule 8(B) of the Independent Ethics Commission Rules provides that the Commission, at its discretion, may refer a particular matter to an administrative law judge or hearing officer.

The instant matter is the first to be heard since the passage of Amendment 41. The Complaint does not involve allegations that fall within the purview of the substantive provisions of Amendment 41 (*i.e.*, gift ban violations or restrictions on representations after leaving office). Rather, the allegations in this matter fall arguably within the "other standards of conduct" over which the Commission has concurrent jurisdiction, pursuant to Section 5(1) of Article XXIX.

Further, Amendment 41 contemplates that the hearing will take place before five commissioners, of which two are Democrats, two are Republicans, and one is an Independent. Currently, the composition of the Commission hearing the instant action consists of two Democrats, one Republican, and one Independent. Mr. Coffman is a Republican. Hence, the Commission is not balanced in a manner prescribed by Amendment 41; it would not be so balanced, even if Commissioner Wood is recused. In fact, this would lead to other complications, such as the ability to issue subpoenas as set forth by Senate Bill 07-210.

The General Rules of Procedure, as utilized in all cases before the Office of Administrative Court, provides proper procedural guidelines that will ensure that Mr. Coffman's procedural and substantive due process rights are fully protected. This is paramount, where, as here, Ethics Watch's complaint is premised on violations of criminal law, requiring review by, at a minimum, an administrative law judge. Both parties involved in this process are represented by legal counsel, who understand and can aptly navigate the discovery rules allowed under such proceedings, motions practice, evidentiary rules, and other such matters.

Indeed, administrative agencies are obligated, as are courts, to be fundamentally fair to the individual in the resolution of a legal dispute that threatens to deprive an individual of a significant property interest. *Venard v. Dep't of Corrections*, 72 P.2d 446, 449 (Colo. Ct. App. 2003). For the foregoing reasons, notions of fundamental fairness dictate that this matter be transferred to an administrative law judge -- especially given that Ethics Watch's complaint is primarily based upon criminal allegations and is wholly unrelated to the gift ban outlined in Amendment 41.

II.

COMMISSIONER WOOD MUST BE IMMEDIATELY DISQUALIFIED FROM ADJUDICATING ANY ASPECT OF THIS MATTER.

If this Commission denies Mr. Coffman's motion to transfer this matter to an administrative law judge, Mr. Coffman moves for Commissioner Wood's immediate recusal from adjudicating any aspect of this matter.

A. LEGAL STANDARD

Whether in fact there is actual bias or not, Commissioner Hopper believed the appearance of impropriety or potential for bias was strong enough to force her to *sua sponte* recuse herself from handling any aspect of this case.

Mr. Coffman is entitled to a hearing before members of the Commission who are impartial, are disinterested, or do not create an appearance of impropriety or bias. Indeed, the very cornerstone of Amendment 41 was to create higher standards of ethical conduct by persons professionally involved with governmental activities. Hence, in order to ensure the propriety and to preserve public confidence, it is axiomatic that Commissioners adjudicating complaints about a respondent's ethical conduct are free from any actual or perceived conflicts of their own. Therefore, if a party reasonably believes a Commissioner is biased or prejudiced, that Commissioner should disqualify himself or herself, or a party must be able to move to disqualify the Commissioner.

Many of the issues presented here are matters of first impression. There can be no doubt that the Commission will be judged and its credibility determined by how it adjudicates these proceedings. Importantly, however, the Commission has not adopted a rule or standard governing the disqualification of Commission members. Where, as here, an administrative proceeding is quasi-judicial in character, board members should be treated as the equivalent of judges and a party has the right to move to disqualify a member of this Commission from hearing this matter. *Venard,* 72 P.3d at 449.

1. Federal Court Standards

The United States Code governs when a federal judge must disqualify herself from adjudicating a particular matter. 28 U.S.C. § 455. Most importantly, § 455(a) requires disqualification for the mere *appearance* of partiality. 28 U.S.C. § 455(a) (a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."). Moreover, if a party believes a federal judge is biased or prejudiced, that party may seek to disqualify the judge under 28 U.S.C. § 455(a). Section 455(a) governs disqualification not only of district court judges, but "[a]ny justice, judge, or magistrate judge of the United States." It can be invoked not only by motion, but it also requires judges to recuse *sua sponte* where appropriate.

In evaluating a motion under § 455(a), courts in the Tenth Circuit apply an objective standard. A trial judge must recuse himself when "a reasonable person, knowing all the facts, would harbor doubts about the judge's impartiality." *United States v. Evans*, 363 F. Supp. 2d 1292, 1294 (D. Utah 2003) (citing *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 347, 350 (10th Cir. 2002)). If the issue of disqualification is a close one, the judge must recuse.

2. State Court Standards

In ruling on a motion to disqualify, state courts generally adopt the same or similar standards. Colorado courts recognize that even an *appearance of impropriety* is a basis for disqualification, and thus the truth (or not) of the allegations is generally unimportant. *See Goebel v. Benton*, 830 P.2d 995 (Colo. 1992). A motion to disqualify is decided on the face of the motion and a motion is legally sufficient to require disqualification if it states facts from which it may be reasonably inferred that the judge has a bias or prejudice that will prevent the judge from dealing fairly with the party seeking recusal. *Tripp v. Rochard*, 29 P.3d 345 (Colo. Ct. App. 2001). A motion for recusal of a judge is legally sufficient when the motion and affidavit state facts from which one may reasonably infer that the judge has a bias or prejudice that will prevent the judge from dealing fairly with the moving party. *Parsons ex rel. Parsons v. Allstate Ins. Co.*, 165 P.3d 809 (Colo. Ct. App. 2006). Thus, the only issue is whether the grounds and facts alleged are sufficient to compel disqualification and the judge does not pass on the truth of the allegations of the motion. *People in the Interest of S.G.*, 91 P.3d 443 (Colo. Ct. App. 2004); *Venard*, 72 P.3d at 449-50.

Affidavits submitted in connection with a motion for recusal must be accepted as true, without any inquiry by the court or challenge as to their veracity. *Holland v. Bd. of County Comm'rs,* 883 P.2d. 500 (Colo. Ct. App. 1994); *Wright v. Dist. Ct.*, 731 P.2d 661 (Colo. 1987).

Other states take the same approach. By way of further example only, in Florida, "[i]f the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." Fla. R. Jud. Admin. 2.160(f). The facts set forth in the disqualification motion must be taken as true, and, if those facts satisfy the requirements for disqualification, the Court must disqualify itself. *James v. Theobold*, 557 So. 2d 591, 593 (Fla. 3d DCA 1990). Actual prejudice on the part of the trial judge need not be demonstrated. *Pistorino v. Ferguson*, 386 So. 2d 65, 67 (Fla. 3d DCA 1980). "[T]he standard for determining whether a motion is legally sufficient is 'whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair trial.'" *Enterprise Leasing Co. v. Jones,* 789 So. 2d 964, 968 (Fla. 2001) (citations omitted); *accord, e.g., MacKenzie v. Super Kids Bargain Store*, 565 So. 2d 1332, 1334-35 (Fla. 1990); *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983); *Williams v. Balch*, 897 So. 2d 498, 498 (Fla. 4th DCA 2005) ("Disqualification is required when litigants demonstrate a reasonable, well-grounded fear that they will not receive a fair and impartial trial or that the judge has pre-judged the case.").

3. Administrative Proceedings

The Commission is acting in a quasi-judicial role, and, therefore, Commission members must be treated as the equivalent of judges. *Venard*, 72 P.3d at 449-50; *Wells v. Del Norte Sch. Dist. c-7*, 753 P.2d 770, 771 (Colo. Ct. App. 1987). Even though a judge or board member in an administrative proceeding may be convinced of his own impartiality, it is the duty of the tribunal to eliminate all reasonable doubt that a trial or hearing by a fair and impartial council may have been denied. *Venard*, 72 P.3d at 449.

If counsel for a party files a motion to disqualify and submits a verified affidavit alleging conduct that evidences bias, prejudice, or the appearance thereof, it is an abuse of discretion for the tribunal to refuse to withdraw from the case. *Venard*, 72 P.3d at 449-50; *Johnson v. Dist. Ct.*, 674 P.2d 952, 955-57 (Colo. 1984). The motion and affidavit are legally sufficient if they state facts from which it can be reasonably inferred that the judge has a bias or prejudice that will prevent him from dealing fairly with the party seeking recusal. *Venard*, 72 P.3d at 449-50; *Johnson*, 674 P.2d at 955-57.

B. COMMISSIONER WOOD MUST BE RECUSED.

The Commission bears the responsibility to eliminate any reasonable doubt as to its fairness and impartiality. *Venard*, 72 P.3d at 449. The standards recognize that even an *appearance of impropriety* is a basis for disqualification, and thus, the truth (or not) of the allegations is generally unimportant. *See Goebel v. Benton*, 830 P.2d 995 (Colo. 1992). Indeed, "[i]t is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling." *State ex rel. Brown v. Dewell*, 179 So. 695, 697 (Fla. 1938) (emphasis added). If the facts set forth in the motion "are reasonably sufficient to create such a fear, it is not for the trial judge to say that it is not there." *Livingston*, 441 So. 2d at 1087 (internal citation omitted).

Here, the facts clearly demonstrate, as attested to by Mr. Coffman, an ample basis for finding that Mr. Coffman reasonably fears that Commissioner Wood will not sit impartially in this matter. Mr. Coffman describes his past business relationship as "negative, antagonistic and hostile." This situation was exacerbated by the parties' political differences, which were voiced by Commissioner Wood to Mr. Coffman in particularly partisan ways. Mr. Coffman states that he has "no doubt that [Commissioner] Wood harbors significant ill feelings towards me . . . and cannot objectively decide the complaint filed against me because of our past association and business relationship." Based upon the foregoing, Mr. Coffman properly requests that Commissioner Wood be disqualified from any further participation in this proceeding. A copy of Mr. Coffman's affidavit is attached hereto as **Exhibit A** and incorporated herein by this reference.

Clearly, the motion and affidavit compels the disqualification of Commissioner Wood. *Wilkerson v. Dist. Ct.*, 925 P.2d 1373, 1376 (Colo. 1996); *Prefer v. PharmNet Rx, LLC*, 18 P.3d 844 (Colo. Ct. App. 2000). The issue is not whether Commissioner Wood believes he can be fair or impartial. Mr. Coffman's affidavit evidences, at a minimum, an appearance of impartiality or

prejudice, clearly sufficient to cast doubt on the impartiality of his decisions in this case and requiring the Commission to recuse Commissioner Wood accordingly.

III.

THE COMMISSIONERS SHOULD DISCLOSE ANY RELATIONSHIP BETWEEN THEMSELVES, A PARTY REPRESENTATIVE, WITNESS OR ANY OTHER RELATIONSHIP OR INTEREST WHICH WOULD AFFECT HIS OR HER IMPARTIALITY.

Amendment 41 demands that the highest set of ethical standards be employed by the Commission at all times, but particularly in adjudicating complaints. The Commission bears the responsibility of eliminating any reasonable doubt as to its fairness and impartiality. *Venard*, 72 P.3d at 449. In the event that this Commission denies Mr. Coffman's motion to transfer this matter to an administrative law judge, Mr. Coffman moves this Commission not only for an Order immediately disqualifying Commissioner Wood from adjudicating any aspect of this matter, but also for all commissioners to disclose any relationship between themselves, a party representative, a witness, or any other similar relationship.

As discussed above, the Commission acts in a quasi-judicial capacity and should be treated as the functional equivalent of judges. The Commission has an absolute duty to be fundamentally fair to Mr. Coffman. Hence, Commissioners must not only be impartial, but parties must have confidence in their impartiality. Therefore, all evidence of any relationship, no matter how insignificant, should be disclosed to the parties. This would include any and all communications (including e-mail communications), conferences, meetings, and *ex parte* communications between any Commission member and the parties, party representatives, or witnesses. It would also include details of the contact event (e.g., business meetings, consultations, professional or trade associations, coffees, dinners, drinks, or other social or business gatherings).

To facilitate disclosures in arbitrations, the American Arbitration Association utilizes a Notice of Appointment form, which must be executed by every neutral arbitrator. If information received from the Commissioner seems vague or incomplete, further inquiries are made to gather pertinent facts for transmittal to the parties.

Mr. Coffman is charged by Colorado Ethics Watch with violations of the Colorado Criminal Code. The Commission is being asked to adjudicate the allegations of the Complaint in a quasi-judicial role. Disclosures are not being sought to harass or annoy the Commission, but rather to ensure that there are no conflicts of interest, bias or prejudice, or evidence of the same, which would serve to undermine this process and deny Mr. Coffman a fair hearing.

WHEREFORE, Mr. Coffman requests that this Commission (I) transfer this matter to an administrative law judge. In the alternative, Mr. Coffman requests (II) Commissioner Roy

Wood's recusal from all proceedings involving this case; and (III) the disclosures of any potential conflicts of interest by the Commissioners.

Respectfully submitted this 10th day of December, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December 2008, a true and correct copy of the foregoing MOTION TO TRANSFER TO AN ADMINISTRATIVE LAW JUDGE OR, IN THE ALTERNATIVE, MOTION TO RECUSE COMMISSIONER WOOD AND PROVIDE DISCLOSURES BY COMMISSIONERS was sent via U.S. Mail to:

Ms. Chantell Taylor, Director
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Denver, Colorado 80202

Karen Brock, Legal Assistant
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Exhibit A

AFFIDAVIT OF MIKE COFFMAN

December 1, 2008

I, Mike Coffman, having been first duly sworn, declare as follows:

(1) In 2000, I sold a firm called the "Colorado Property Management Group, Inc." (CPMG).

(2) In 1991, CPMG was awarded a contract to manage the Barclay Towers Condominiums Association ("Barclay Towers" or "Association"), located at 1625 Larimer Street, Denver, Colorado 80202.

(3) Roy Wood, a member of the Independent Ethics Commission was a resident in the Barclay Towers.

(4) Bill Cox, was a resident and member of the Board of Directors of the Association at the time I was awarded the contract.

(5) I have known Mr. Cox since the early 1980s and developed a strong friendship which exists to this day. Mr. Cox was instrumental in encouraging me, among others, to bid on the management of the building.

(6) In 1992, Mr. Cox voluntarily resigned from the board of directors, but was still a resident of the Barclay Towers.

(7) In 1995, Mr. Wood was elected by the condominium owners to serve on its five member board of directors and was elected by the board to serve as President of the condominium association. It appeared that Mr. Wood's was completely consumed with his role as board president and appeared to treat this as a full-time job.

(8) Mr. Wood was extremely difficult to work for. I would describe our relationship as negative, antagonistic and hostile during his tenure on the board of directors for the homeowners association.

(9) By way of example only, even though I hired a property manager to handle the day-to-day management of the Barclay Towers, Mr. Wood insisted that I personally be involved in the day-to-day management of the building. Mr. Wood insisted that I personally carry out any and all special projects that he requested even though these items were outside the scope of my contract and provided no additional compensation.

(10) Mr. Wood was never satisfied with my ability to meet his demands. I can remember questioning him about this and his response was that I should put in the additional time because he too was dedicating an extraordinary number of hours in his role as the board president. In my opinion, Mr. Wood was either unable or not interested in distinguishing

between my involvement as a small business owner and his involvement as a volunteer. This exacerbated our already unpleasant working relationship.

(11) Our relationship was further strained by our apparent political differences. Mr. Wood would attempt to provoke me with his political disagreements that went to the core of his partisan viewpoints. For example, Mr. Wood would inform me about why he was a Democrat and why he disliked the Republican Party. I never responded to these statements when he discussed our political differences.

(12) In 1998, Mr. Wood stood for re-election to the condominium board in a very tough and divisive election in which Mr. Cox was significantly involved in his opposition. Mr. Wood was cognizant of my close friendship with Mr. Cox. Mr. Wood lost his re-election to the board and Mr. Cox and one of his allies was elected to the two board seats at stake that year. Upon information and belief, this engendered hard feelings by Mr. Wood.

(13) In late 1999, Bill Cox was elected president by a majority of the board members. Shortly thereafter, Mr. Wood sold his condominium and moved out of Barclay Towers.

(14) I have no doubt that Mr. Wood harbors significant ill feelings toward me. I strongly believe that Mr. Wood cannot objectively decide the complaint filed against me because of our past association and business relationship and that he should immediately remove himself from any further participation in these proceedings.

Mike Coffman

Subscribed and sworn before me this 10 day of December, 2008.

Carolyn Snook

Notary Public

my commission expires:
September 14, 2010