

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 15-cv-0281-WJM-KMT

ABBY LANDOW,
JEFFREY ALAN,
SUSAN WYMER,
LAWRENCE BEALL,
GREENPEACE INC., and
NANCY YORK,
Plaintiffs

v.

CITY OF FORT COLLINS,
Defendant.

MOTION FOR JUDICIAL RECUSAL

Defendant, by and through its attorneys, J. Andrew Nathan and Heidi J. Hugdahl of Nathan, Bremer, Dumm & Myers P.C., hereby submits its Motion for Judicial Recusal and supporting authority as follows:¹

Pursuant to 28 U.S.C. § 455(a), a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” In considering recusal motions, the 10th Circuit has stated that the “appearance of impartiality is virtually as important as the fact of impartiality.” *Webbe v. McGhie Land Title Co*, 549 F.2d 1358, 1361 (10th Cir. 1977).²

¹ D.C.Colo.LCivR 7.1(a) does not impose a requirement to confer with opposing counsel because this Motion does not resolve any disputed matter between the parties, but rather is filed pursuant to the Court’s Order inviting such a pleading from either party who believes it to be appropriate.

² Our client’s concerns are as contained in the attached affidavit and in this Motion. [See Ex. A, affidavit of City Manager].

Judge Martinez has candidly indicated that he was a member of the Legal Panel for the ACLU from approximately September 2006 to March 2010. [ECF 11]. As a member of the Legal Panel, Judge Martinez reviewed ACLU staff memos on potential cases brought before the local ACLU chapter and recommended whether to seek legal redress and in what capacity. [Responses of WJM to Senator Jeff Sessions, attached hereto as Ex. B]. In his response to Senator Jeff Sessions, (then-nominee) Judge Martinez indicated that:

The ACLU of Colorado has taken the position that some of the information sought by sub-question 1(a)(i)(1)³ is protected by the attorney-client privilege. The organization informs me the privilege is being asserted to prevent disclosure of the internal legal deliberations of the Legal Panel, including but not limited to the legal advice it has provided. *I have included in my response to this sub-question a discussion of information as to which no attorney-client privilege has been asserted.*

[Ex. B, pgs 1-2 (emphasis added)].⁴ During Judge Martinez's tenure on the Legal Panel, he was aware of, and possibly party to, discussions regarding Colorado cases that had significant First Amendment implications, including: *Benson v. Jefferson County, Colo. School District, et al.* (regarding alleged content/viewpoint discrimination in a public setting); *Curious Theater Company v. Colo. Dep't of Public Health*, 08-SC-351 (considering Colorado ban on indoor smoking and its impact on theatrical indoor smoking on the basis of freedom of expression); and *ACLU v. City and County of Denver*, 08-cv-910 (D. Colo.) (seeking judicial intervention to ensure Denver promptly

³ Description and Citation of Matters Accepted for Representation and Possible Litigation by the ACLU of Colorado.

⁴ A similar assertion of attorney client privilege was made for matters in which the ACLU did not accept representation. [Ex. B, pg. 5].

considered permit requests for demonstrations during the 2008 Democratic National Convention).

Because the attorney-client privilege was asserted as to some of the discussions regarding these First Amendment cases, the Defendant in this case is without the benefit of a full understanding of Judge Martinez's relationship with the Legal Panel. Without an understanding of such information, which the ACLU of Colorado presumably has in its possession as shared with the Legal Panel under their attorney-client relationship, the Defendant cannot assess fully the context, intimacy, or nature of that associational relationship. *Cf. Kissing Camels Surgery Center, LLC v. HCA Inc.*, 2013 WL 309216, at *1 (D. Colo. Jan. 25, 2013) (disclosing full relationship among the parties "[t]o allow all parties and the public to assess the nature of the referenced relationship"). Although Defendant agrees that prior associational relationships are not usually sufficient, standing alone, to require recusal,⁵ Judge Martinez's relationship is distinct in that he rendered legal advice to the very organization now pressing this case before his Court, and presumably upon similar legal issues germane to this case. The Defendant is thus deprived of the ability to evaluate fully whether any such actual conflict exists due to Judge Martinez's prior assertion of the attorney/client relationship with the ACLU, which raises the specter of possible partiality. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002) ("[t]he test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality.").

The lack of full information surrounding Judge Martinez's role on the ACLU's Legal Panel casts a shadow over the current proceedings, in that one side to the lawsuit

⁵ It is for this reason that Defendant does not seek recusal given Judge Martinez's prior association with Greenpeace, another party to this case.

possibly has access to attorney/client privileged information about Judge Martinez's thoughts, advice, and impressions on First Amendment issues. The Defendant does not enjoy a similar privilege and has no way of evaluating whether such an advantage exists since the attorney/client privilege continues to shield some information about that relationship. Given that at least some of the cases addressed by the Legal Panel during Judge Martinez's tenure as a member included challenges to government action on the basis of the First Amendment, a reasonable individual might harbor doubts as to whether impartiality could be maintained. This doubt unfortunately lingers despite Judge Martinez's assurances that he can remain fair and impartial.

Defendant raises this issue not to make a showing of actual partiality; but rather, only to address the perceived possibility of partiality given a prior legal relationship between Judge Martinez and the ACLU. In a similar manner, Judge Arguello, conceding that she had no knowledge of the facts of a pending case, recused herself based solely on her previous employment relationship with the law firm of Davis Graham & Stubbs, LLP, and the entry of appearance of a partner from that firm. *James River Ins. Co. V. Rapid Funding, LLC*, 2012 WL 1459494, at *4 (D. Colo. April 26, 2012). In that case, Judge Arguello felt compelled to recuse herself notwithstanding that defense counsel moved for recusal seven months after she informed them of a possible conflict with her former firm. *Id.* As the basis for her recusal, Judge Arguello stated that "[b]ecause the appearance of impartiality is virtually as important as the act of impartiality, the Court will do now what it should have done when the case was remanded . . . follow its instincts and recuse from presiding further over this case." *Id.*

WHEREFORE, Defendant respectfully requests that Judge Martinez recuse himself pursuant to 28 U.S.C. § 455(a).

Respectfully submitted this 23rd day of February, 2015.

s/ J. Andrew Nathan

J. Andrew Nathan

s/ Heidi J. Hugdahl

Heidi J. Hugdahl

NATHAN, BREMER, DUMM & MYERS, P.C.

7900 E. Union Avenue, Suite 600

Denver, CO 80237-2776

Phone Number: (303) 691-3737

Fax: (303) 757-5106

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2015, I electronically filed the foregoing **MOTION FOR JUDICIAL RECUSAL** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following at their e-mail addresses:.

Hugh Q. Gottschalk (#9750)
Thomas A. Olsen (#43709)
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Email: Gottschalk@wtotrial.com
olsen@wtotrial.com

Mark Silverstein (#26979)
Rebecca T. Wallace (#39606)
American Civil Liberties Union Foundation of Colorado
303 E. 17th Ave., Suite 350
Denver, CO 80203
Email: msilverstein@aclu-co.org
rtwallace@aclu0co.org

s/ Nicholas C. Poppe

Nicholas C. Poppe, Esq.
NATHAN, BREMER, DUMM & MYERS, P.C.