Louisan-3 Polulle

## BEFORE THE COMMISSIONER OF POLITICAL PRACTICES STATE OF MONTANA

MARY JO FOX,	)
	)
Charging Party,	)
VS.	)
BRAD MOLNAR,	)
Respondent.	POSTMARKED
	SEP <b>1 6</b> 2009

## DECISION ON DISQUALIFICATION OF COUNSEL AND MOTION TO DISMISS CHARGES

## I. Background & Issue

The undersigned is the Hearing Officer in this matter. This matter was previously scheduled for final hearing on June 25 and 26. A pre-hearing order established a time line for specific action by counsel prior to that hearing. One matter directed in the pre-hearing order was that counsel for both parties were to disclose anticipated witnesses. Pursuant to that order, the Respondent served notice that counsel for the Charging Party was to be a witness for the Respondent.

It is undisputed that Rule 3.7, Rules of Professional Responsibility, prohibits a lawyer from serving as advocate if he or she is "likely to be a necessary witness." An exception to this rule occurs when "disqualification of the lawyer would work substantial hardship on the client." See *Vestre v. Lambert*, 249 Mont. 455, 817 P.2d 219 (1991).

When counsel for the Charging Party learned he was named to be a witness for the Respondent, he sought to disqualify himself from further serving as counsel in this proceeding. Because this issue arose several days prior to the scheduled hearing, the hearing dates were vacated.

A hearing was held on the disqualification issue. At that time, counsel for the Charging Party stated that he believed that his client could find alternative counsel and that his client concurred. The undersigned agreed to stay the hearing until alternative counsel could be found, but ruled that the Charging Party's then current counsel would continue until other counsel was named; a status authorized by the Rules of Professional Responsibility.

Thereafter, the Charging Party attempted to find alternative counsel. On August 8, 2009, the Charging Party, through counsel, gave notice that she was unsuccessful in finding new counsel, and that her previous counsel should not be disqualified. Through her existing counsel, she argued that her attorney was not a "necessary" witness because his testimony would not be relevant or material, and that disqualifying him would require that she proceed *pro se*. She also argued that requiring her to proceed *pro se*, (disqualification of her attorney) would cause her "substantial hardship."

The Respondent argued that the Charging Party's counsel was a necessary witness, and that the delays occasioned by this issue should result in the dismissal of the complaints against him.

A hearing on the matter was held on September 9, 2009. During the hearing, counsel for the Respondent argued that the Charging Party's attorney was a "necessary witness" because his testimony may be required to prove respondent's allegation that a conspiracy existed to undermine him, and that the complaints against him were the result of that conspiracy.

## II. Decision

It is determined that the alleged conspiracy issue raised by the Respondent is not relevant or material to the issue of whether he did or did not violate Montana law as alleged in the complaints. The existence or non-existence of a conspiracy to undermine Respondent or his recent reelection campaign is not relevant or material to the narrow charges against him. Consequently, the testimony of Respondent's counsel regarding conspiracy is not "necessary" for the purpose of the hearing. However, Respondent may make "offer of proof" regarding the alleged conspiracy and its relevance and materiality to this proceeding at the hearing or before. Second, if opposing counsel were disqualified, given the fact that the Charging Party would be forced to proceed *pro se*, would "work substantial hardship" over her in this highly charged and complicated proceeding.

It is Ordered there is no need for counsel for the Charging Party to disqualify himself under Rule 3.7, and that the delay that occurred to resolve this issue is not adequate to dismiss the complaint against the Respondent.

Dated: September 16, 2009.

William L. Corbett, Hearings Examiner

Win L. Consett