DISTRICT COURT, PITKIN COUNTY, STATE OF COLORADO Pitkin County Courthouse 506 East Main Street, Suite E Aspen, Colorado 81611	▲ COURT USE ONLY ▲
Plaintiff: **Marilyn Marks,** vs Defendant: **Kathryn Koch.**	Case Number: 09 CV 294
Attorneys for Kathryn Koch: John P. Worcester, City Attorney James R. True, Special Counsel 130 S. Galena St. Aspen, Colorado 81611 Telephone: (970) 920-5055 Facsimile: (970) 920-5119 E-mail: johnw@ci.aspen.co.us	Div.: 3
DEFENDANT'S MEMORANDUM BRIEF IN REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR ATTORNEY'S FEES AND PLAINTIFF'S REQUEST FOR HEARING	

Defendant KATHRYN KOCH, by and through her attorneys, John P. Worcester and James R. True, hereby submits the following memorandum brief in Reply to Plaintiff's response to the Defendant's motion for attorneys and Plaintiff's request for hearing:

STATEMENT OF CASE

This action was commenced by Plaintiff pursuant to C.R.S. Section 24-72-100.1, et seq., the Colorado Open Records Act, seeking to inspect "digital photographic images" of ballots cast in the City of Aspen's May, 2009 election. Defendant denied the request pursuant to, among other grounds, the mandate set forth C.R.S. Section 31-10-616(1). On March 10, 2010, this Court granted Defendant's motion to dismiss relying primarily on C.R.S. Section 31-10-616(1).

Defendant timely filed a motion for attorney's fees pursuant to C.R.S. Section 24-72-204(5), C.R.S. Section 13-17-102, C.R.C.P. 121, Section 1-22, and C.R.C.P. 11. This memorandum brief is submitted in reply to Plaintiff's response to Defendant's motion.

ARGUMENT

I. The Failure to Confer Does Not Provide a Basis on which to Strike or Deny the Defendant's Motion.

A. The status of the rule change upon which the Plaintiff relies is unclear.

The official Colorado State Judicial website, http://www.courts.state.co.us, provides legal resources for members of the bar and the public. The Court rules, together with committee comments, are contained on this website. Accessing the Court rules from this website leads to the following statement:

> "Rules adopted or amended by the Supreme Court of Colorado and received prior to December 21, 2009"

The rules that are set forth under this heading do not include the changes set forth in the Order dated October 12, 2009 that was attached to Plaintiff's Response. (A copy of Rule 121, Section 1-22(8) and the comments obtained off of this website on April 13, 2010, are attached hereto as Exhibit "A".) Defendant also notes that this rule change was published in the April addition of The Colorado Lawyer, Vol. 39, No. 4, page 101, received by Defendant's counsel after the motion was filed.

Further research on the website will reveal the changes to the rules listed by year not by rule. Although this change was apparently approved by the Court in October of 2009, its official status given the statement above is unclear. Without argument, the rule set forth on the website and attached hereto does not mandate a conference. Defendant is not attempting to assert that her

counsel is not charged with a duty to know and comply with the rules set forth by the Supreme Court. However, given the lack of clarity of the status of the change on the Court's own website, Defendant believes that it would be unjust in this instance to strike or deny the Defendant's motion for attorney's fees due to the failure to confer.

B. The rule change adopted in October of 2009 does not mandate conference in all situations.

Despite the allegations of the Plaintiff, there is still a question as to whether the new rule requires a conference in every instance. Although the rule clearly acknowledges that a conference is not required when no notice is required, such as when one seeks a temporary restraining order, the rule still allows an explanation of why a conference did not occur and the comments still state that a conference "should" occur. As in this instance, when a conference would be futile, Defendant asserts that the explanation for the reason the conference did not occur is compliant.

C. Striking or denying the Motion for failure to confer is not appropriate in this instance.

Plaintiff's request that the Court strike or deny the motion due to the failure to confer, is a drastic remedy that is not supported by the rules or Court decisions.

In the instant case, the Plaintiff has not asserted any prejudice realized as a result of the Defendant's failure to confer regarding this motion. The futility of the conference was demonstrated by the response that Plaintiff filed. Plaintiff is not stating that she would have agreed to any form of payment of attorney's fees. Further, Plaintiff's assertion that the motion was premature and likely to waste judicial resources is without merit. Although the Plaintiff

would be correct that Defendant's motion would be mooted if the Court were to grant Plaintiff's motion to reconsider, filing the motion to reconsider in no way changes the Defendant's obligation to comply with the timing set forth in C.R.C.P. 121, Section 1-22. Defendant was compelled to comply with that time frame set forth in this rule. Perhaps, she may have requested an enlargement of time but that enlargement of time would have been discretionary with the Court and could have led to an argument that the Defendant did not comply with the strict time frame set forth in the rule. In any event, regardless of the conference, a conference that would have been futile, Defendant would have proceeded with filing this motion.

Plaintiff states that the action of the Supreme Court in amending the rule following the discussion by Justice Rice in a dissent in Cornelius v. River Ridge Ranch Landowners Association, 202 P.3d 564 (Colo. 2009) suggests that a failure to confer is a basis for striking or denying a non-compliant motion. This is completely the opposite of the position of Justice Rice in that case. In Cornenlius, a water rights case, the Supreme Court dismissed the applicant's claims asserting that delays and discovery violations had prejudiced the opposing parties. Justice Rice dissented stating that dismissal was a drastic remedy and that had movants conferred with the Plaintiff over discovery issues, perhaps those issues could have been resolved in a more appropriate manner. She suggested that a conference would not have been useless and that the failure to confer on the part of the movant should have shielded the applicant from the drastic remedy of dismissal. Plaintiff here argues the opposite. She asserts that the failure to confer should be used as a sword, to defeat the Defendant's right to pursue a legitimate claim against the Plaintiff, even though the Plaintiff cannot demonstrate any prejudice resulting from the failure to confer.

Plaintiff has not cited and Defendant is unaware of any case in Colorado where a claim of this nature has been dismissed or stricken for failure to confer.

D. Plaintiff's reliance on People v. Ain is inappropriate, misleading and nothing more than a veiled threat to file a grievance.

Plaintiff asserts that the failure to confer before filing a motion is sufficiently serious that it has constituted a breach of the Rules of Professional Conduct, relying on People v. Ain, 35 P.3d 734 (Colo.O.P.D.J.,2001) for this assertion. Specifically, Plaintiff cites paragraph 42 of the Complaint against attorney Ain in a disciplinary action. The Complaint against Ain contained 89 paragraphs in support of various allegations of misconduct. Paragraph 42, noted that Ain filed a motion for enlargement of time and not only did not confer but also did not provide opposing counsel with a copy of the filed motion. The issue was notice not the lack of a conference. Further, this allegation is not part of the specific ruling by the Supreme Court. To assert this case as support of her request to deny is without merit, at best, and offensive, at worst.

II. Defendant Is Entitled to Attorney's Fees Pursuant to C.R.S. Section 24-72-204(5), C.R.S. Section 13-17-102(4) and C.R.C.P. 11.

Defendant does not dispute Plaintiff's representation regarding the burden that is applied to a party in considering a motion for attorney's fees. However, in applying this burden to prove entitlement by a preponderance of the evidence, it is clear that the Defendant has met her burden. Although Defendant does not understand what is meant by Plaintiff's representation that her action was "affirmatively not a frivolous, vexatious or groundless action" (Emphasis Plaintiff's), the only objective conclusion is that this action was not asserted in good faith and was nothing more than an effort to challenge an election, which she lost, months after her right to challenge

had expired. The evidence in support of Defendant's position is within the record before the Court and requires no additional evidentiary hearing.

A. This action was frivolous.

The standard to be considered in determining whether an action is frivolous is well settled and apparently undisputed by the Plaintiff. As Defendant has previously noted, the Court in Colorado Ethics Watch v. Senate Majority Fund, LLC, __ P.3d ___ (Colo. App. 2010), the Court stated:

"Under the case law construing section 13-17-102, a claim is frivolous if its proponent can present no rational argument based on the evidence or the law to support it. *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l. L.L.C.,* 97 P.3d 140, 151 (Colo.App.2003)."

The grant of a motion to dismiss subjects a party to a claim for attorneys fees as a frivolous claim. See, Hamilton v. Noble Energy, Inc., 220 P.3d 1010 (Colo. App. 2009)

In the case at bar, the Plaintiff is still unsuccessfully attempting to articulate a basis for her claim. Defendant does not disagree that if Plaintiff could set forth a novel legal theory, then the Court would be justified in denying her motion for attorney's fees. However, in this case, the Plaintiff's novel legal theory is a request that the Court ignore the plain language of the statute or interpret it in a manner that is patently absurd. As has been argued throughout this case, acceptance of Plaintiff's "novel" legal theory would allow all privacy restrictions to be eviscerated by the use of a Xerox® machine. Further, the Plaintiff's position requires the Court to ignore the plain language of not only the election law but also the C.R.S. Section 13-26-103 concerning photographic records. Simply because no one has made a similar frivolous argument before does not make it novel nor a matter of first impression. The Plaintiff's case is frivolous

and the record presently before the Court establishes this at least by a preponderance of the evidence.

B. Plaintiff's Case and Actions throughout the Case Were and Are Vexatious.

In Consumer Crusade, Inc. v. Clarion Mortgage Capital, Inc., 197 P.3d 285 (Colo. App. 2009) the Court stated at pages 289 and 290:

> "A claim is vexatious if brought or maintained in bad faith to annoy or harass another; vexatiousness includes 'conduct that is arbitrary, abusive, stubbornly litigious, or disrespectful of truth.' *Bockar v. Patterson,* 899 P.2d 233, 235 (Colo.App.1994)."

See, also Mitchell v. Ryder, 104 P.3d 316, 321 (Colo.App.2004); City of Holyoke v. Schlachter Farms R.L.L.P., 22 P.3d 960, 963 (Colo.App.2001). Bockar v. Patterson, 899 P.2d 233, 235 (Colo.App.1994); City of Holyoke, 22 P.3d at 963; and Western United Realty, 679 P.2d at 1069.

Defendant asserts that Plaintiff's efforts throughout the case support a finding that the claim and her actions were vexatious. Plaintiff's attempts to address the unequivocal language set forth in C.R.S. Section 31-10-616(1) were based, in part, on an attempt to change the representations made in the Complaint and in stipulations to the Court. As previously noted, in her Motion for Amendment of Judgment filed with the Court on March 24, 2010, Plaintiff asserted in footnote 3, page 4 that she wished to "emphasize" that the Complaint did not allege that the TIFF files are, in fact, accurate representations of the original paper ballots. The Plaintiff attempts to dismiss this footnote as "inoffensive", yet Plaintiff attaches an affidavit to her response that attempts to prove the allegation of the footnote based on a self-serving test

performed on April 1, 2010. Defendant notes that all she proves in this test is that the scanner produces "photographic digital images" as is the position in the complaint and the basis of the motion to dismiss but that the images may be, not definitively just may be, of poor quality. This is again an effort to change the facts to avoid attorneys' fees, to avoid the dismissal, or to challenge the election. As the Court noted in its order granting the Defendant's motion to dismiss, the Complaint alleges that the TIFF files are "digital photographs of the ballots." To assert that this is anything other than what the complaint alleges, a "photograph of the ballot", is disrespectful of the truth.

Finally, the Plaintiff's continuing effort to disregard the truth is evidenced in her response to Defendant's motion. In bullet point five, on page 10 of the Plaintiff's Memorandum, Plaintiff complains about what she alleges are Defendant's "unreasonably inflated" attorneys' fees and states as an example the following:

> "Filing a motion for protective order to stop the deposition of TrueBallot, even after the Court approved the deposition over the Defendant's courtroom objection. (12.5 hours.)"

This suggests that the Defendant filed a motion contrary to a Court order to allow the deposition. This statement is, at best, misleading. At worst, it is a blatant misrepresentation of the facts. As can be seen in the transcript attached hereto as Exhibit "B", the Court stated, at page 5, lines 9-17:

> "All right. Well, I can't say exactly how that will play out. It is a case where some discovery is appropriate. At least based on – and I – I'm not trying to invite further pleading wars or delays, but nevertheless, I think given what I've heard right now I'm simply going to authorize the deposition to go forward. <u>If that triggers a motion for some kind of Protective Order, I guess I'll have to let that motion get plead and I'll resolve it once it's fully before the Court.</u>" (Emphasis supplied.)

There is no way to reconcile the Plaintiff's statement in this bullet point with the discussion of the Court other than to question Plaintiff's willingness to distort the truth. Again, this example provides evidence of the vexatious nature of the Plaintiff's actions.

C. Is Plaintiff's Complaint Groundless?

As the Plaintiff properly noted, Defendant did not assert that this action was groundless. Defendant performed the same analysis as Plaintiff and reached the same conclusion. Thus, Defendant did not assert that Plaintiff's claim was groundless.

III. The Fees Requested Are Appropriate.

Plaintiff's statement that the Defendant is asking the Court to bless the City's effort to "turn a hefty financial profit" is itself a frivolous argument. Defendant's position is based on undisputed facts and undisputed law with regard to what was reasonably done in this action and what is reasonably charged by attorneys in this area.

A. Defendant's claim for attorney fees is not limited to what is paid as compensation as in-house counsel.

The issue of how attorney's fees should be awarded to governmental or other public service attorneys has been addressed in numerous state and federal cases. In a leading case on this issue, Blum v. Stenson, 465 U.S. 886, 897, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984), the US Supreme Court rejected arguments in a 42 U.S.C. Section 1988 action that fees should be awarded based on cost of providing the legal service and that fees awarded based on market rates conferred a windfall to a non-profit organization. The Supreme Court, as the 10th Circuit Court of Appeals had earlier in Ramos v. Lamm, 713 F.2d 546, 553 n. 2 (10th Cir.1983) held that in

calculating legal fees awarded to public interest lawyers, fees should be determined no differently that lawyers in private firms.

The Colorado Supreme Court considered an argument almost identical to Plaintiff's argument in American Water Development, Inc. v. City of Alamosa, 874 P.2d 352 (Colo.,1994). There the Court acknowledged that the Plaintiff American Water Development, Inc. (AWDI) did not object to the reasonableness of the hourly rate charged by attorneys from private law firms. It stipulated that $100 per hour, the rate charged, was a reasonable rate for those attorneys. However AWDI did object to the rates at which the State's attorneys, who were on the staff of the State attorney general, billed their time. The State claimed, and the trial court awarded, $100 per hour for attorney time and $50 per hour for the time of legal assistants. AWDI objected to this award because the interdepartmental billings for services of attorneys and legal assistants on the staff of the State attorney general at the relevant time were based on hourly rates of $40.75 and $27.44 respectively. AWDI argued that the state employees cannot be awarded more than these hourly rates as these were true cost of the attorney and the paralegal. The trial court and the Supreme Court rejected this argument, stating:

> "The trial judge considered the reasonableness of fees issue and expressly determined that '[one] ***387*** hundred dollars an hour by water lawyers ... is an extremely minimum rate and eminently reasonable, whether it be in the public or the private sector.'
>
> "We have previously held that attorneys are entitled to an award of reasonable attorney fees at market rates for attorneys of comparable skill, experience and reputation…"

Also, Plaintiff's reliance on City of Wheat Ridge v. Cerveny, 913 P.2d 1110, (Colo.,1996) is misplaced. That case considered circumstances surrounding the use of contingent agreements

and said that such an agreement could be taken into account. The Court decision actually supports Defendant's position holding that:

> "The court of appeals correctly determined that "a party need not be obligated to pay attorney fees to be entitled to such an award authorized by a statute." *Cerveny,* 888 P.2d at 341. *See* 1 Robert L. Rossi, *Attorneys' Fees* § 7:14 at 387 (2d ed.1995) ("awarding fees even where the legal services are provided at no cost promotes the policies that generally underlie fee statutes: encouragement of private enforcement of the law and the deterrence of improper conduct" and "[c]ourts have also reached the same result where a party incurs no legal expense because its fees are paid by another") (footnotes and cases cited therein omitted).
>
> "The court's task in assessing reasonable attorney fees under the circumstances of the case is not linked to the nature of compensation negotiated between the party and his or her attorney. In *Blanchard v. Bergeron,* 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989), the Supreme Court considered whether, on a motion for attorney fees in a civil rights case brought under 42 U.S.C. § 1988 (1988 & Supp. V 1994), an attorney was limited to compensation as set forth pursuant to a contingent fee agreement. The Supreme Court held that the attorney fees award was not so circumscribed and rejected the argument that the attorney would receive a windfall recovery. In doing so, the Supreme Court noted that properly calculated attorney fees are reasonable under the circumstances of the case. The Supreme Court explained, however, that the nature of the agreed-upon compensation was a factor that could be considered in determining what constitutes reasonable attorney fees. *See also In re Marriage of Swink,* 807 P.2d 1245, 1248 (Colo.App.1991) (holding that under the Uniform Dissolution of Marriage Act, the trial court was allowed to 'enter an order requiring a party to pay a reasonable sum for legal services rendered to the other party by a pro bono attorney in dissolution of marriage proceedings')."

The Court can consider the nature of a compensation agreement such as whether it is a contingent fee agreement, pro bono or some other form. However, the determination of fees is based, as stated above in AWDI, the market rate for attorneys of comparable skill, experience and reputation.

B. The Defendant's attorney fees are reasonable for the work performed and required.

Defendant's counsel submitted an affidavit reflecting the experience of counsel and an accounting of the time that was expended in this action. Defendant also submitted an affidavit of a local attorney stating that the hourly fee and the time spent were reasonable. Plaintiff's response criticizes the actions of the attorneys but submits no evidence to contradict the evidence submitted by Defendant's expert Maria Morrow.

Further the complaints of the Plaintiff with regard to the Counsels' actions range from mystifying to misleading. For instance, it is hard to understand a criticism that the brief for the motion to dismiss was twenty pages too long when the Complaint itself was 15 pages with 27 pages of exhibits.

Also, with regard to work performed prior to filing the complaint, it was clear that the complaint was going to be filed. Although counsel for Defendant had explained to the Plaintiff and then her counsel on several occasions the basis of the City's position, Plaintiff, personally and through her counsel continued to insist that she would file suit if the City did not give her the ballots or their images. Thus, when it was evident that the litigation was forthcoming, Defendant's counsel commenced work on the motion to dismiss. The work done by counsel was necessary whether it was done before or after the complaint was filed. The only questions are the necessity of the work, the reasonableness of the time expended and the rate charged, all of which Defendant has supported with Ms. Morrow's affidavit. See, Ramos v. Lamm, 539 F. Supp. 730 (D.Colo. 1982), *rev. in part*, *affirmed in part*, Ramos, *supra*.

Finally, as noted above, the complaint regarding the motion for protective order is factually inaccurate.

The fees requested are reasonable and no evidence has been submitted to the contrary.

IV. Defendant's Response to Plaintiff's Request for a Hearing.

C.R.C.P. 121, Section 1-22 allows the Court to grant a hearing upon a timely request submitted by either party. The request must set forth the issues to be heard. However, unless the hearing is mandated, the decision to conduct a hearing is within the sound discretion of the Court. In this case, a hearing is not mandated and the Plaintiff has not submitted any evidence or argument that would justify a hearing in this matter. The issue of whether Plaintiff's action is frivolous or vexatious or whether the request for attorney's fees should be stricken or denied is contained within the record before the Court. A hearing would not provide any additional evidence or law.

With regard to the Plaintiff's third issue submitted in her request for a hearing, Plaintiff has submitted no evidence to contradict Defendant's affidavits. Plaintiff has only submitted argument that the time spent was unreasonable and that Defendant would incur some windfall. Neither of these arguments justifies a hearing.

Thus, Defendant requests that the Court consider the criteria set forth in C.R.S. Section 13-17-103, make specific findings of fact and law pursuant to that section and based on those findings of fact and law award the attorney fees requested by Defendant in her motion.

WHEREFORE, Defendant requests an order awarding her $67,047.75 for her attorney fees incurred in this action.

DATED this 16th day of April 2010

Original signature on file
John P. Worcester, #20610
City Attorney

Original signature on file
James R. True, #9528
Special Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April 2010, a true and correct copy of the foregoing **DEFENDANT'S MOTION FOR ATTORNEY'S FEES** was filed electronically with Nexis/Lexis to the following person(s):

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Denver, Colorado 80202

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Original signature on file
Tara Nelson