

DISTRICT COURT, PARK COUNTY, COLORADO 300 Fourth Street P.O. Box 190 Fairplay, CO 80440	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiff: INDIAN MOUNTAIN CORP. v. Defendant: INDIAN MOUNTAIN METROPOLITAN DISTRICT	
David S. Kaplan, #12344 Alan Schindler, #15PPA0038 HADDON, MORGAN AND FOREMAN, P.C. 150 East 10th Avenue Denver, CO 80203 Tel: 303.831.7364 Fax: 303.832.2628 dkaplan@hmflaw.com; aschindler@jmflaw.com <i>Attorneys for Indian Mountain Corp.</i>	<p style="text-align: center;">Case No. 14 CV 30056 Division _____ Courtroom _____</p>
SUBSTITUTION OF COUNSEL AND MOTION TO CONTINUE	

Adam C. Davenport hereby withdraws as attorney for Plaintiff, Indian Mountain Corp (“IMC”), and David S. Kaplan and Alan Schindler of the law firm Haddon, Morgan and Foreman, P.C. are substituted therefor. Copies of all pleadings are to be hereafter directed to David S. Kaplan and Alan Schindler at the address listed herein. In addition, IMC, by and through new counsel, hereby submits this Motion to Continue in accordance with C.R.C.P. 107(c) and Rules 3.7 and 8.4(d) of the Colorado Rules of Professional Conduct. In support thereof, IMC states as follows:

I. Substitution of Counsel at this Time is Necessary to Avoid Potential Violations of the Colorado Rules of Professional Conduct

Upon this Court’s Order Denying IMC’s Motion for Reconsideration, Reassignment and Reset, dated September 1, 2015, (the “September 1 Order”), Mr. Davenport approached Haddon, Morgan and Foreman, P.C. to request a substitution of counsel for IMC in this contempt proceeding, citing concerns that his continued representation of IMC may result in potential violations of the Colorado Rules of Professional Conduct (“Colo. R.P.C.”). We believe that due to Mr. Davenport’s

representation of IMC from the inception of this dispute through and after trial, including the period in which the actions giving rise to this indirect contempt proceeding took place, it is likely that he will be called as a necessary witness at the contempt hearing. As this Court is aware, Colo. R.P.C. Rule 3.7 prohibits an attorney from acting as an advocate in a trial or hearing under such circumstances.

Due to the expedited procedure inherent in indirect contempt actions, this potential conflict did not and could not have become readily apparent to Mr. Davenport until after the September 1 Order was issued. On August 19, 2015, Indian Mountain Metropolitan District (“IMMD”) filed its Verified Motion for Show Cause Order Regarding Criminal Contempt of Court. This Court thereafter initiated this contempt proceeding by issuing the Order to Show Cause and Citation on August 20. With the reasonable belief that IMC would have been granted, at a minimum, a resetting of the September 9, 2015 show cause date, Mr. Davenport continued to represent IMC by submitting the Motion for Reconsideration and Request for Reassignment and Resetting on August 21 (the “Motion for Reconsideration”) and subsequent reply in support of the same on August 31 (the “Reply Motion” and together with the Motion for Reconsideration the “Reconsideration Motions”). Once it became apparent that the show cause hearing might proceed as scheduled on September 9, Mr. Davenport grew concerned that he may be a necessary witness at that hearing. He then immediately sought substitution of counsel to avoid even the potential for a violation of Colo. R.P.C. Rule 3.7.

Further, while we have no doubts concerning Mr. Davenport’s competence throughout his representation of IMC, Mr. Davenport’s practice is primarily civil litigation. Given the dual criminal and civil nature of contempt proceedings, we believe that IMC would be best served by counsel more familiar with the rights and procedural protections afforded a defendant in a criminal proceeding. Accordingly, to avoid the appearance of misconduct under Colo. R.P.C. Rule 8.4(d), allowing the substitution of Mr. Davenport at this juncture in the proceeding is appropriate.

II. IMC Respectfully Requests a Continuance of the September 9, 2015 Show Cause Hearing

IMC hereby adopts each of the grounds for reconsideration and resetting set forth in its Reconsideration Motions. In addition, IMC requests a continuance of the show cause hearing so that new counsel may have sufficient time to familiarize themselves with the complicated factual and legal issues underlying this contempt proceeding. Without additional time, the mandate inherent in C.R.C.P. 107(c) that due process of law is afforded to defendants in contempt proceedings will not be met. To ensure that due process is afforded to IMC, it is essential that the defendant be represented by conflict-free counsel that has the requisite skill and knowledge to defend the case of the prosecution. *West v. People*, 341 P.3d 520, 525 (Colo. 2015). Although through

substitution, IMC now has conflict-free counsel, absent a continuance, IMC's right to due process will not be fully secured. *Id.* ("That a person who happens to be a lawyer is present at trial alongside the accused...is not enough to satisfy the constitutional command.") (citing *Strickland v. Washington*, 104 S. Ct. 2052, 2063(1984)).

In addition, because the Order to Show Cause and Citation contemplates the possibility of punitive sanctions, including a fine or imprisonment or both, this contempt action is more analogous to a criminal proceeding than a civil proceeding. As in traditional criminal proceedings, Rule 107(d) requires that the defendant be provided a proper advisement as to all his legal rights. For example, Rule 107(d) requires that the accused be advised of the right to plead guilty or not guilty to the charges, the presumption of innocence, the right to cross-examine all witnesses, etc. It is unclear whether Mr. Ingalls has been appropriately advised of such rights. Thus, to subject Mr. Ingalls to a hearing in which he may be subject to criminal penalties, including imprisonment, without first being given a proper advisement, would be contrary to the hallmarks of criminal law and procedure.

Lastly, because this is an indirect contempt proceeding, the identity of the prosecuting party in this action is unclear to IMC. IMC therefore requests clarification accordingly.

III. IMC Respectfully Requests that the Court Reconsider its Order Denying Reassignment to a Different Judicial Officer

IMC recognizes that the question regarding reassignment has been already briefed by the parties and considered by this Court. However, there remains one point of argument that has not yet been addressed and so IMC respectfully requests additional consideration of this matter.

In its Response in Opposition to Motion for Reconsideration, IMMD argued that C.R.C.P. 107(d) does not apply in this case because IMMD, rather than this Court, initiated these proceedings. We believe that IMMD has misinterpreted the relevant language in Rule 107(d), by failing to read section (d) in conjunction with section (c). Through a proper reading of Rule 107 as a whole, it is clear that this Court did, in fact, initiate the proceedings, and thus, IMC has the right to have this action heard by another judge.

First, Rule 107(c) states that "[w]hen it appears to the court by motion supported by affidavit that indirect contempt has been committed, the court may *ex parte* order a citation to issue to the person so charged to appear and show cause at a date, time and place designated why the person should not be punished." The initiation of the contempt proceedings therefore, is the issuance of the *citation* by the court, and not the filing of the

motion supported by affidavit. *See, e.g. People v. J.M.*, 22 P.3d 545, 548 (“initiation of a proceeding for indirect contempt requires *issuance of a citation...*”) (citing C.R.C.P. 107) (emphasis added).

This is the only plausible interpretation of Rule 107(c), given the nature of indirect contempt proceedings. By definition, indirect contempt is a contempt “that occurs out of the direct sight or hearing of the court.” C.R.C.P. 107(a) (3). Because indirect contempt *always* occurs outside of the sight or hearing of the court, *all* indirect contempt allegations must be first brought to the court’s attention by some other party. Bringing the allegations to the court’s attention is the purpose of the motion and supporting affidavit. If the motion and supporting affidavit marked the initiation of the contempt, as IMMD suggests, contempt proceedings would *never* be initiated by the judge, and the applicable language in Rule 107(d) would therefore be rendered meaningless.

Of course, it cannot be the case that an accused’s right to have an indirect contempt action heard by another judge, as provided by Rule 107(d) is meaningless. That is because courts have long recognized that in indirect contempt proceedings “the semblance of due process is a sham when the judge is both prosecutor and judge.” *Harthun v. District Ct. In and For Second Jud. Dist.*, 178 Colo. 118, 123(Colo. 1972). In *People v. Jones*, the court compared the need for the rule entitling the accused to have a different judge in an indirect versus direct contempt proceedings. There, the court noted that “some appearance of bias is inherent in any situation in which the trial judge effectively acts as both prosecutor and adjudicator. This concern apparently is at least part of the reason for the rule entitling an accused to a different judge in indirect proceedings initiated by a judge...[In contrast] the nature of direct contempt—being a type personally observed by the trial judge—is such that a different judge need not be assigned in all cases...” 262 P.3d 982, 990 (Colo. Ct. App. 2011).

IMMD interprets the “[i]f the judge initiates the contempt proceedings...” language in Rule 107(d) as meaning that there is an alternative to a judge-initiated indirect contempt proceeding. In reality, the “if” in that clause is tied to the court’s *decision* to initiate the contempt proceeding, and not the initiating *party*. Because this Court decided to initiate indirect contempt proceedings by issuing the citation and order to show cause, Rule 107(d) applies in this case. Even if this Court disagrees with IMC’s interpretation of Rule 107, the statute is at best ambiguous, and the rule of lenity requires that ambiguous criminal statutes are to be construed in favor of the accused.

WHEREFORE, IMC respectfully requests that the Court grant its Substitution of Counsel and Motion to Continue, and reconsider its Order Denying Reassignment.

Dated: September 4, 2015.

Respectfully submitted,

s/Adam C. Davenport

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Certificate of Service

I certify that on September 4, 2015, a copy of this *Substitution of Counsel and Motion to Continue* was served via ICESS upon the following:

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