

NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, L.L.C.)
Renewal No. 1, Permit NACC-1302)
Revision No. 9, Permit NACC-1302)
Applications)

Case No. RC-19-189
Case No. RC-19-190

**RESPONSE TO MOTION TO DISQUALIFY CROWLEY FLECK PLLP FROM
REPRESENTING COYOTE CREEK MINING COMPANY, L.L.C.**

[¶1] Before the North Dakota Public Service Commission (“Commission”) is Casey and Julie Voigt’s (“Voigts”) Motion to Disqualify. (Docket No. 75 in RC-19-189); (Docket No. 86 in RC-19-190). In the Motion, the Voigts seek to disqualify the undersigned and Crowley Fleck PLLP from representing Coyote Creek Mining Company, L.L.C. (“CCMC”) in RC-19-189 and RC-19-190. For the reasons discussed below, CCMC respectfully asks the Commission to deny the Motion. For the reasons discussed below, CCMC further respectfully asks the Commission to consider this Motion with respect to CCMC’s Motion for Attorney’s Fees, as this Motion is another example of the Voigts’ vexatious and frivolous antics before the Commission. (Docket No. 73 in RC-19-189); (Docket No. 84 in RC-19-190).

SUMMARY OF ARGUMENT

[¶2] This Motion represents the Voigts’ second attempt to disqualify the undersigned and Crowley Fleck PLLP in these matters. On October 3, 2019, Judge Dawson denied the Voigts’ first motion, concluding it was questionable whether he had the authority to disqualify an attorney with respect to an informal hearing. (Docket No. 26 in Case No. RC-19-189); (Docket No. 34 in Case No. RC-19-190). Conspicuously absent from the Voigts’ current motion is that Judge Dawson also concluded that, assuming he had the authority to so, he would not disqualify the undersigned

under the North Dakota Rules of Professional Conduct. *Id.* (concluding “Mr. Mann did not act substantively in the previous proceedings, he acted in a procedural manner in a public hearing and in an informal conference.”). In this Motion, the Voigts fail to even acknowledge Judge Dawson’s conclusion and instead recycle the same arguments Judge Dawson rejected. While the Voigts would like to pretend Judge Dawson did not make that conclusion, they have offered no argument for why Judge Dawson was incorrect. This motion is emblematic of the Voigts’ conduct in these matters—despite issues already having been decided, the Voigts insist upon relitigating those decisions with which they disagree. While the Voigts have the right to participate in these matters, they do not have the right to waste this Commission and CCMC’s time and resources, which is all the pending motion seeks to accomplish. This reincarnated Motion only underscores the necessity of the Commission awarding CCMC attorney’s fees, as CCMC has requested.

BACKGROUND

[¶3] The undersigned first joined what would become the firm of Crowley Fleck PLLP in November of 2007. On January 1, 2014, the undersigned accepted a gubernatorial appointment as Director of the North Dakota Office of Administrative Hearings and served as an administrative law judge (“ALJ”) for approximately two years, during which time the office presided over hundreds of hearings and the undersigned individually presided over dozens of the same. The undersigned rejoined Crowley Fleck PLLP in January of 2016.

[¶4] The Voigts own certain surface and mineral estates in Mercer County, North Dakota. In 2010, the Voigts, with the assistance of counsel, negotiated a lease covering approximately 3,508.96 acres to an affiliate company of CCMC for coal mining. This lease was recorded in Mercer County, North Dakota as Document No. 196024. “The lease addresses CCMC’s right to mine coal on the Voigt’s property, compensation for damages to crops and livestock, and repair

and replacement of roadways. Administration of the lease agreement between the Voigts and CCMC is not within the jurisdiction of the [Commission].” (Docket No. 60, ¶ 12 in RC-19-189; (Docket No. 68, ¶ 12 in Case No. RC- 19-190).

[¶5] On November 1, 2013, CCMC submitted an application seeking a permit to engage in surface coal mining and reclamation operations on approximately 8,091.511 acres in Mercer County, North Dakota. (Docket No. 1 in RC-13-850). Brian Bjella with Crowley Fleck PLLP represented CCMC in that application. On November 24, 2014, Casey Voigt requested a hearing on the permit application. (Docket No. 35 in RC-13-850). On December 18, 2014, the undersigned appointed the Honorable Janet Demarais Seaworth to preside as the procedural ALJ in that matter. (Docket No. 45 in RC-13-850). Judge Seaworth presided over the first day of the hearing but could not continue. (Docket No. 47 in RC-13-850). The undersigned presided over the remainder of the hearing but did not issue any recommended findings of fact, conclusions of law, or any proposed order. *Id.* Despite the undersigned’s previous employment with Crowley Fleck PLLP the year before, and despite Crowley Fleck PLLP representing CCMC with respect to the application, the Voigts did not object to the undersigned’s involvement in that matter.

[¶6] The Commission approved CCMC’s application, subject to certain additional conditions, and issued Permit NACC-1302. (Docket No. 125 in RC-13-850). Permit NACC-1302 had an effective date through October 22, 2019. The Voigts appealed the Commission’s conclusions in that matter to the state district court pursuant to N.D. Cent. Code § 28-32-42. Case No. 08-2015-CV-01056. The district court affirmed the Commission’s decision, concluding the weight of the evidence supported the Commission’s decision. Case No. 08-2015-CV-01056 Docket No. 185. The Voigts further appealed, and the North Dakota Supreme Court again affirmed. *Voigt v. N.D. Public Serv. Comm’n.*, 2017 ND 76, 892 N.W.2d 149.

[¶7] On December 17, 2014, CCMC filed a revision application seeking to expand Permit NACC-1302 to include approximately 352.105 acres necessary for a haul road and a coal processing facility. (Docket No. 1 in RC-14-846). Brian Bjella with Crowley Fleck PLLP again represented CCMC in this new matter. On May 14, 2015, the undersigned was designated as the presiding ALJ. Despite the undersigned's previous employment with Crowley Fleck PLLP a little over a year before, and despite Crowley Fleck PLLP representing CCMC, the Voigts again did not object to the undersigned's involvement in this new matter.

[¶8] After the hearing in RC-14-846, the Voigts, Commission staff, and CCMC each filed their own proposed findings of fact, conclusions of law, and accompanying orders. (Docket Nos. 31-33 in RC-14-846). On June 15, 2015, the undersigned issued a Recommended Findings and Ruling and Recommended Order. (Docket No. 38 in RC-14-846). The Voigts made no objection to the undersigned issuing the recommendation to the Commission despite knowing at the time that the undersigned had been with the firm of Crowley Fleck PLLP a little over a year before. On June 16, 2015, the Reclamation Division for the Commission filed a memorandum supporting the undersigned's recommendations. (Docket No. 54 in RC-14-846). The Commission, upon its own independent review, subsequently adopted the undersigned's recommendations and approved the application. (Docket Nos. 56-58 in RC-14-846).

[¶9] Rather than appeal that decision, the Voigts thereafter filed a federal lawsuit against CCMC, alleging violations of the Clean Air Act. Case No. 1:15-cv-00109. Crowley Fleck PLLP again represented CCMC in that litigation. Despite the undersigned's involvement in the matters identified as RC-13-850 and RC-14-846, and despite Crowley Fleck PLLP representing CCMC, the Voigts did not object to Crowley Fleck PLLP's representation in the federal action. The federal district court granted summary judgment in CCMC's favor. *Voigt v. Coyote Creek Mining*

Company, LLC, 329 F. Supp. 3d. 735 (D.N.D. 2018). The Voigts appealed and that matter is currently pending before the Eighth Circuit Court of Appeals. *See* Case No. 18-2705. Crowley Fleck PLLP continues to represent CCMC in that appeal.

[¶10] Now before the Commission are an Application for Renewal of Permit to Engage in Surface Coal Mining and Reclamation Operations (“Renewal Application”) filed on May 23, 2019 (Docket No. 1 in RC-19-189) and an Application for Revision of Permit to Engage in Surface Coal Mining and Reclamation Operations (“Revision Application”) filed on May 20, 2019 (Docket No. 1 in RC-19-190). The proposed renewal and the proposed revision are governed by distinct statutory provisions and each required a separate application. Each separate application is assigned its own case number. The Renewal Application and the Revision Application are separate and distinct matters from the two applications filed by CCMC several years earlier and assigned two separate case numbers by the Commission. *See* RC-13-850 and RC-14-846. The Commission scheduled an informal conference on the applications for October 8, 2019.

[¶11] Despite not objecting to the undersigned going from Crowley Fleck PLLP to ALJ on Case Nos. RC-13-850 and RC-14-846 and back to Crowley Fleck PLLP, the Voigts moved to disqualify the undersigned and Crowley Fleck PLLP on September 24, 2019. (Docket No. 16 in RC-19-189); (Docket No. 22 in RC-19-190). Judge Dawson denied the Voigts’ motion prior to the informal hearing. (Docket No. 26 in Case No. RC-19-189); (Docket No. 34 in Case No. RC-19-190). Judge Dawson concluded, in an informal hearing, “it is unclear whether an ALJ has the authority to disqualify an attorney based on violation of the North Dakota Rules of Professional Conduct. As such, this ALJ is not going to exercise the power to disqualify.” *Id.* Judge Dawson further concluded he would not grant the Voigts’ motion if he had authority because the undersigned “did not act substantively in the previous proceedings, he acted in a procedural manner in a public

hearing and in an informal conference.” *Id.* (emphasis added). Despite fourteen pages of briefing, and despite repeated references to Judge Dawson’s order, the Voigts fail to mention or reference that conclusion. *See* (Docket No. 75 in RC-19-189); (Docket No. 86 in RC-19-190).

[¶12] The undersigned represented CCMC at the informal hearing requested by the Voigts on October 8, 2019. After the informal conference, the parties and the presiding ALJ submitted proposed findings of fact and conclusions of law to the Commission. (Docket Nos. 43-45 in RC-19-189); (Docket Nos. 51-53 in RC-19-190). The Commission approved CCMC’s applications on October 21, 2019. (Docket No. 60 in RC-19-189); (Docket No. 68 in RC-19-190). Following that approval, the Voigts requested a formal hearing on CCMC’s applications. (Docket No. 64 in RC-19-189); (Docket No. 75 in RC-19-190). That formal hearing is currently set for December 16, 2019. Despite Judge Dawson’s previous order, and despite being on the eve of the formal hearing, the Voigts now again seek to disqualify the only law firm that has ever represented CCMC on regulatory matters before the Commission.

ARGUMENT

[¶13] The Voigts seek disqualification based upon the undersigned’s perceived involvement several years ago in RC-13-850 and RC-14-846. Their argument is replete with problems. Notably, the Voigts’ argument mischaracterizes what the Commission may or may not consider in RC-19-189 and RC-19-190; mischaracterizes how the Commission’s conclusions in RC-13-850 and RC-14-846 relate to the current matters, (RC-19-189 and RC-19-190); and mischaracterizes the undersigned’s involvement in RC-13-850 and RC-14-846. Compounding those problems, the Voigts’ delay in bringing the current motion based upon what has transpired over the past six years will cause CCMC substantial prejudice and would result in the Commission violating its own

governing statutes. The Voigts have not carried their heavy burden of showing the extraordinary relief of disqualification is necessary under the circumstances.

1. A party has the right to counsel of their own choosing, subject to the North Dakota Rules of Professional Conduct.

[¶14] This Commission has promulgated regulations for all persons appearing before it. “All persons appearing before the commission must conform to the standards of ethical conduct required of practitioners before the courts of the state of North Dakota.” N.D.A.C. § 69-02-01-06. The Commission or a hearing officer has discretion to bar a person from appearing before the Commission for improper conduct. *Id.* (providing the “commission or a hearing officer may bar a person from appearing before the commission for improper conduct.”) (emphasis added).

[¶15] A “party’s right to select its own counsel is an important public right and a vital freedom that should be preserved.” *Macheca Transport Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006). Motions to disqualify opposing counsel must be viewed with “extreme caution.” *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 871 (N.D. 1993). Such motions warrant that strict scrutiny “because disqualification can be used to gain a tactical advantage and to harass the opposing party.” *Id.*; *see also Macheca Transport*, 463 F.3d at 833 (noting “disqualification motions should be subjected to particularly strict scrutiny.”). Accordingly, “the extreme measure of disqualifying a party’s counsel of choice should be imposed only when absolutely necessary.” *Macheca Transport*, 463 F.3d at 833. “The moving party bears the burden of proving that disqualification is required.” *Awnings v. Fullerton*, 912 F.3d 1089, 1096 (8th Cir. 2019).

[¶16] The North Dakota Rules of Professional Conduct narrowly qualify a party’s right to retain counsel of its own choosing. Rule 1.12, N.D.Prof. Conduct, governs when a former judge may or may not represent certain clients in certain matters. In relevant part, that rule provides “a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally

and substantially as a judge or other adjudicative officer or . . . unless all parties to the proceeding consent in writing after consultation.” N.D.R.Prof. Conduct 1.12. As relevant, N.D.R.Prof. Conduct 1.12 precludes a former judge from representing a client in the same “matter” that the former judge “personally and substantively” participated as a judge or other adjudicative officer.

[¶17] For purposes of N.D.R.Prof. Conduct 1.12, the term “matter” is defined as “any judicial or other proceeding, application, request for a ruling or other determination, contract claim, controversy, investigation, charge, accusation, arrest, or other transaction.” N.D.R.Prof. Conduct 1.0(i). CCMC has not found, and the Voigts have not cited, any binding authority further defining that term for purposes of N.D.R.Prof. Conduct 1.12.

[¶18] Rule 1.12, N.D.Prof. Conduct, does not specifically define what constitutes “personal and substantive” participation for purpose of the rule. The rule, however, notes it does not apply in instances where a judge’s involvement “did not affect the merits” of the matter. N.D.R.Prof. Conduct 1.12 cmt. 1; *see also In re Application for Disciplinary Action Against Hoffman*, 2003 ND 161, ¶ 12, 670 N.W.2d 500 (concluding N.D.R.Prof. Conduct 1.12 applied because the judge exercised adjudicative authority); N.D. Ethics Committee Opinion 95-10 (quoting former ABA Disciplinary Rules and Ethical Considerations for the proposition a “lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.”). A judge’s involvement affects a matter’s merits when the judge exercises adjudicative authority. *Hoffman*, 2003 ND 161, ¶ 12 (concluding an attorney violated N.D.R.Prof. Conduct 1.12 by representing a client in a matter in which he had issued final findings of fact, conclusions of law, and an order for judgment); *see also* N.D. Ethics Committee Opinion 95-10 (same). As applied, a judge has “personally and substantively” participated in a “matter” by exercising adjudicative authority.

[¶19] The foregoing makes clear CCMC had the right to retain the undersigned, subject to the narrow qualifications set forth at N.D.R.Prof. Conduct 1.12. In attempting to divest CCMC of that important right, the Voigts have the high burden of showing the necessity of disqualification under N.D.R.Prof. Conduct 1.12. The Commission must, with strict scrutiny, determine whether to grant that extraordinary remedy. The Voigts have fallen woefully short in this respect.

2. *RC-19-189, RC-19-190, RC-13-850, and RC-14-846 are not the same “matter.”*

[¶20] In order for N.D.R.Prof. Conduct 1.12 to apply, RC-13-850 and RC-14-846 must be the same “matter” as RC-19-189 and RC-19-190. As discussed above, RC-19-189 and RC-19-190 can only be considered the same “matter” as RC-13-850 and RC-14-846 if they concern the same proceeding, application, request for a ruling or other determination, or other transaction. These separate applications and proceedings with separate case numbers seeking separate determinations are not the same “matter” because the substance and standards the Commission considered several years ago in RC-13-850 and RC-14-846 and what the Commission is statutory limited to consider in RC-19-189 and RC-19-190 are wholly distinct.

[¶21] This Commission’s statutory authority to issue coal mining permits, and renewals of the same, is codified at N.D. Cent. Code ch. 38-14.1. Any party seeking to engage in surface coal mining operations must make an application to the Commission. N.D. Cent. Code § 38-14.1-13. The Commission can approve the application and issue a permit only after making formal findings of fact that the applicant has complied with the exacting standards set forth in N.D. Cent. Code ch. 38-14.1. N.D. Cent. Code § 38-14.1-21(3). This requires formal findings as to a litany of issues. If the Commission formally finds the applicant has satisfied these standards, it may issue a coal mining permit with a term of up to five years. N.D. Cent. Code § 38-14.1-12(2).

[¶22] Once the Commission issues a coal mining permit, the permittee has the “the right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit.” N.D. Cent. Code § 38-14.1-22(1). To deny the permit renewal, the Commission must find the permit holder has not complied with the terms and conditions of the permit and the current coal mining and reclamation operations do not comply with N.D. Cent. Code ch. 38-14.1, or the renewal substantially jeopardizes the operator’s continuing responsibility on existing permit areas and the performance bond in place is insufficient concerning the renewal period, or the permittee has not revised or updated the information required by the Commission. N.D. Cent. Code § 38-14.1-22(1). Any opponents of the renewal have the burden to show why the permit should not be renewed. N.D. Cent. Code § 38-14.1-22(2). Any renewal term cannot exceed the permit’s original term. N.D. Cent. Code § 38-14.1-22(3).

[¶23] Under this plain statutory procedure, obtaining a mining permit in the first instance is separate and distinct from obtaining a renewal of that permit. The two are wholly separate applications with wholly separate proceedings that require the applicant meet different standards and that require the Commission to make different findings. The terms “permit” and “permit renewal” are separately defined. Of significance, “permit renewal” means the extension of the permit term “upon the expiration of the initial permit term.” N.D. Cent. Code § 38-14.1-02(15) and (18). These standards and findings are in no way related to one another. Whereas the application for a mining permit requires the applicant satisfy certain criteria prior to issuance of the permit, N.D. Cent. Code § 38-14.1-21(3), the application for renewal concerns whether the applicant has complied with different criteria subsequent to that issuance. N.D. Cent. Code § 38-14.1-22(1). Whether an applicant’s conduct justifies renewal under N.D. Cent. Code § 38-14.1-22(1) is distinct from whether the applicant satisfied the criteria necessary for the initial issuance

of that permit. The permit has to expire for the renewal permit to commence. The distinct inquiries in distinct proceedings concerning distinct applications, having their own separate case numbers and subject to distinct standards, are plainly and wholly distinct.

[¶24] That reality is conspicuously absent from the Voigts' argument that CCMC's application for the mining permit and CCMC's separate application for renewal of that permit are the same "matter." Instead, the Voigts make vapid and fleeting references as to how the determinations made in RC-13-850 and RC-14-846 may come to bear in RC-19-189 and RC-19-190. For instance, the Voigts represent "the matter at issue is nonetheless substantively the same as what Mr. Mann ruled upon in 2015: whether the PSC should modify [CCMC]'s fugitive dust control plan to minimize dust." The Voigts further suggest the Commission might have to address its previous findings regarding air quality, reclamation, and alluvial valley floors in considering the pending applications. These arguments ignore the limited statutory scope of what this Commission may consider with respect to the pending applications and what this Commission has held.

[¶25] While the Voigts suggest the Commission will have to consider whether to modify CCMC's fugitive dust plan, the Voigts do not provide any statutory authority under which this Commission may do so. That lacking is for good reason. It is well-established the Department of Environmental Quality (f/k/a Department of Health) has exclusive jurisdiction to consider the propriety of the fugitive dust plan, not this Commission. *Voigt*, 329 F. Supp. 3d at 739 (noting the Department of Health "is the state agency charged with the administration and enforcement of the [Clean Air Act] and North Dakota's air quality laws."). This Commission has repeatedly come to that same conclusion, which is again conspicuously absent from the Voigts' briefing to the Commission. (Docket No. 60, ¶ 67 in RC-19-189) (concluding the "DEQ has exclusive jurisdiction over permitting of air quality in North Dakota pursuant to the Clean Air Act.");

(Docket No. 68 in RC-19-190) (same). This is exactly the same conclusion this Commission previously reached. (Docket Nos. 38, 56 in Case No. RC-14-846) (concluding the Department of Health “has exclusive jurisdiction over permitting of air quality in North Dakota”). Notably, the Voigts tacitly acknowledged that jurisdictional limitation by not appealing the Commission’s conclusion and instead challenging the Department of Health’s conclusions in the federal litigation. *Voigt*, 329 F. Supp. 3d at 739. Despite the Commission repeatedly rejecting the Voigts’ attempt to interject the fugitive dust issue into proceedings before it, the Voigts attempt to use that issue to justify disqualification. The Voigts cannot use matters over which the Commission has no jurisdiction to manufacture the similarity justifying disqualification.

[¶26] While the Voigts further suggest the Commission may have to revisit its previous findings regarding air quality, reclamation, and alluvial valley floors, the Voigts again do not provide any statutory authority under which this Commission may do so. As discussed above, N.D. Cent. Code § 38-14.1-22 limits this Commission’s review of RC-19-189 and RC-19-190 to whether circumstances occurring since issuance of Permit NACC-1302 justify denying the permit renewal. This does not allow reconsideration of the circumstances justifying issuance of the permit in the first instance. *See* N.D. Cent. Code § 38-14.1-22. Moreover, the proceedings associated with RC-19-189 and RC-19-190 do not afford an opportunity to relitigate those issues already decided. *Cridland v. N.D. Workers Compensation Bureau*, 1997 ND 223, ¶ 17, 571 N.W.2d 351 (noting administrative res judicata “prohibits relitigation of claims that were raised or could have been raised in a prior proceeding between the same parties or their privies, and which were resolved by a final judgment in a court of competent jurisdiction.”). The Commission has no authority to reconsider its previous findings regarding air quality, reclamation, and alluvial valley floors.

Again, the Voigts cannot use matters over which this Commission has no statutory authority to manufacture the similarity necessary to justify disqualification.

[¶27] Perhaps recognizing the disparateness of what this Commission considered in RC-13-850 and RC-14-846 and what the Commission must now address in RC-19-189 and RC-19-190, the Voigts rely on two ethics opinions, Opinions 95-10 and 96-03, from the State Bar Association of North Dakota's Ethics Committee for an expansive reading of the term "matter." Notwithstanding the nonbinding nature of these opinions, neither provides the expansive definition of "matter" proffered by the Voigts. While the Voigts cite Opinion 95-10 as defining the term "matter" to include any topic "collaterally" related thereto, Opinion 95-10 did not purport to define the term "matter," whether through reference to collateral or otherwise. *See id.* While the Voigts rely on Opinion 96-03 as defining the term "matter" to include any issue related to a general topic area, Opinion 96-03 considered a situation where the attorney's previous and current representation directly related to an identical topic. *See id.* Neither provides the liberal and expansive definition of "matter" necessary for the Voigts to paper over the plain statutory differences between obtaining a coal mining permit and obtaining a renewal of the same.

[¶28] Furthermore, we are not free to speculate as to the meaning of "matter" in this situation as the Voigts would like us to do. "Matter" for purposes of Rule 1.12 is defined in Rule 1.0(i) and we must apply that definition of "matter". The applicable definition of "matter" for purposes of Rule 1.12 does not support the Voigts' argument so they instead ask the Commission to apply a different definition of "matter" that applies to a different rule, Rule 1.11. But the Voigts are seeking disqualification under Rule 1.12, not Rule 1.11, and are not free to cut and paste different definitions into the applicable rule to fit their needs. The Commission cannot simply ignore the actual definition of "matter" in Rule 1.0(i) and apply a different definition of the term "matter"

from a different rule or rely on the Voigts' manufactured definition of the term "matter" based on their tortured interpretation of two old and distinguishable ethics opinions.

[¶29] The Voigts cannot escape the reality that RC-13-850 and RC-14-846 considered standards, burdens, and evidence separate and distinct from that which this Commission must consider in RC-19-189 and RC-19-190. While the Voigts would apparently like to revisit the adverse rulings made several years earlier by this Commission in RC-13-850 and RC-14-846, this Commission lacks, both by statute and administrative res judicata, the authority to do so. Because RC-19-189 and RC-19-190 request the Commission consider issues substantively and procedurally different than those considered years ago in RC-13-850 and RC-14-846, the Voigts have not carried their strict burden of demonstrating the necessity of disqualification.

3. *The undersigned did not "personally and substantively" participate in RC-13-850 and RC-14-846.*

[¶30] Even if we assume for the sake of argument that the four separate applications, with the four separate case numbers, seeking four separate determinations were the same "matter," disqualification under N.D.R.Prof. Conduct 1.12 is warranted only if the undersigned "personally and substantively" participated in RC-13-850 and RC-14-846. As discussed above, N.D.R.Prof. Conduct 1.12 does not specifically define what constitutes "personal and substantive" participation for purposes of the rule. As applied in *Hoffman* and Opinion 96-03, a judge "personally and substantively" participates in a "matter" by exercising binding adjudicative authority.

[¶31] By statute, the undersigned lacked any authority to exercise any adjudicative authority in RC-13-850 and RC-14-846. In RC-13-850, the undersigned served strictly as a procedural ALJ with no authority to make any substantive findings or orders. In RC-14-846, the undersigned served as a substantive ALJ with the authority to issue recommended findings of fact, conclusions of law, and order which could be adopted by but was not binding upon the Commission. N.D.

Admin. Code § 69-02-04-07(2). Whether to adopt those recommendations was solely within the Commission's determination, as the Commission retains exclusive statutory authority as to all findings of fact, conclusions of law, and orders. N.D. Cent. Code § 38-14.1-21(1). The Commission is free to disregard the hearing officer's recommendations if, after review and in the Commission's own judgment, that recommendation is incorrect. That statutory limitation is inherent in Judge Dawson's conclusion that he would deny the Voigts' motion at the informal hearing if he had that authority. (Docket No. 26 in Case No. RC-19-189) (concluding "Mr. Mann did not act substantively in the previous proceedings, he acted in a procedural manner in a public hearing and in an informal conference."); (Docket No. 34 in Case No. RC-19-190) (same). Contrary to the Voigts' characterization of the scope of the undersigned's involvement, the undersigned had no binding adjudicative authority in RC-13-850 and RC-14-846.

[¶32] That statutory limitation and Judge Dawson's conclusion to that effect are wholly missing from the Voigts' motion. Although noting no less than five times that the undersigned issued recommendations regarding RC-14-846, the Voigts do not address the Commission's ability to reject that recommendation if not supported by fact and law. The Voigts essentially ask the Commission to believe the undersigned personally approved Permit NACC-1302 and its revisions despite lacking any statutory authority to do so. That lack of adjudicative authority readily distinguishes the undersigned's involvement from *Hoffman* and Opinion 96-03, where the judges at issue possessed and exercised final adjudicative authority, subject only to appellate review. Accordingly, the Voigts have not carried their burden of demonstrating the necessity of disqualification even if the four distinct cases could somehow be viewed as the same "matter."

4. *Disqualification will result in substantial prejudice to CCMC and would result in the Commission violating N.D. Cent. Code ch. 38-14.1*

[¶33] In a final plea, the Voigts argue disqualification is appropriate because an appearance of bias exists, as perceived by them. According to the Voigts, they are concerned about the undersigned appearing in RC-19-189 and RC-19-190 and the undersigned's representation calls into question the validity of RC-13-850 and RC-14-846. These arguments ring hollow in myriad respects, most notably of which is the absence of context.

[¶34] As discussed above, the undersigned joined Crowley Fleck PLLP in November of 2007. The undersigned became Director of the North Dakota Office of Administrative Hearings on January 1, 2014. Despite the undersigned's previous employment with Crowley Fleck PLLP, and despite Crowley Fleck PLLP's representation of CCMC, the Voigts did not object to the undersigned's involvement with RC-13-850 or RC-14-846. The undersigned returned to Crowley Fleck PLLP on January 1, 2016. Despite the undersigned's involvement with RC-13-850 and RC-14-846, the Voigts did not object to Crowley Fleck PLLP's continued representation of CCMC.

[¶35] Despite nearly six years of administrative and legal proceedings, the Voigts have only now found concern and moved for disqualification on that basis. Disqualification will require CCMC to obtain new counsel needing to familiarize themselves with nearly six years of relevant proceedings and thousands of documents in order to proceed. The Voigts acknowledge disqualification will cause significant delay and have represented they will not oppose a continuation of the hearing date in RC-19-189 and RC-19-190 to accommodate substitute counsel.

[¶36] With their motion, the Voigts openly invite the Commission to violate the plain statutory procedure for considering CCMC's applications. As was their right under N.D. Cent. Code ch. 38-14.1-30, the Voigts requested a formal hearing on CCMC's applications after the Commission approved the same. Under the plain statutory language of N.D. Cent. Code 38-14.1-30(3)(a), that formal "hearing must be held within thirty days of a request for a formal hearing" Contrary

to the Voigts' suggestion that the Commission can ameliorate the substantial disruption disqualification will cause CCMC, the Commission has no statutory authority to continue the hearing beyond the thirty-day period set forth at N.D. Cent. Code 38-14.1-30(3)(a) so as to allow substitute counsel to prepare. If the Commission granted the pending motion, the Commission would necessarily violate N.D. Cent. Code 38-14.1-30(3)(a). The Commission cannot pick and choose which statutes it follows, which is what the Voigts effectively request.

[¶37] The Voigts finally argue the undersigned's representation causes them concern about the validity of RC-13-850 and RC-14-846. That concern is grossly belated because, again, the Voigts could have addressed any concern at the time RC-13-850 and RC-14-846 were pending. Moreover, that concern is borne of lay opinion that every court, including the North Dakota Supreme Court, has rejected. To the extent the Voigts suggest the Commission will blindly follow the undersigned's arguments regarding RC-19-189 and RC-19-190, the Voigts can assuage that concern, real or contrived, through the ample means of judicial review available to them—means with which the Voigts are by now well familiar.

[¶38] The pending motion is nothing more than the Voigt's latest attempt to secure their desired end through alternative means, despite Judge Dawson already denying the Voigts' identical motion. The realities of the numerous administrative and legal proceedings over the past six years belie the Voigts' newfound concern of the undersigned and Crowley Fleck PLLP's involvement in RC-13-850 and RC-14-846 and now RC-19-189 and RC-19-190. The Voigts could have addressed the concerns they now espouse at any time in the last six years. Yet, they waited until now, on the eve of formal hearing for CCMC's application, to raise these concerns. By delaying in raising their concerns, the Voigts have maximized the disruption accompanying the requested disqualification. When placed in context, the Voigts' concerns are pretextual and tactical.

Disqualification does not exist for that purpose, and the subtext of the current motion is precisely why disqualification is strictly reviewed. *Sargent County Bank*, 500 N.W.2d at 871. Just as Judge Dawson concluded, the Voigts have not demonstrated disqualification is necessary.

CONCLUSION

[¶39] The Voigts have the burden to demonstrate the necessity of the Commission exercising the extreme remedy of disqualification. The Voigts have not done so because the substance and standards of RC-19-189 and RC-19-190 are materially different than that which the Commission considered in RC-13-850 and RC-14-846. The Voigts further have not done so because the undersigned did not have, nor exercise, any final adjudicative authority in RC-13-850 and RC-14-846. Compounding that failure, granting the Voigts' belated motion would cause CCMC undue prejudice and would further cause the Commission to violate N.D. Cent. Code ch. 38-14.1.

[¶40] Neither N.D.R.Prof. Conduct 1.12(a) nor the totality of the circumstances warrants disqualification. In their reincarnated motion, the Voigts have offered nothing that Judge Dawson did not consider in concluding disqualification was unwarranted. Pursuant to the discretion afforded to the Commission under N.D. Admin. Code § 69-02-01-06, CCMC requests the Commission deny the pending motion.

[¶41] Dated this 9th day of December, 2019.

/s/ Wade C. Mann
Wade C. Mann (ND #05871)
wmann@crowleyfleck.com
CROWLEY FLECK PLLP
Attorneys for Applicant Coyote Creek Mining Company,
L.L.C.100 West Broadway Ave., Suite 250
P.O. Box 2798
Bismarck, ND 58502-2798
Phone: (701) 223-6585