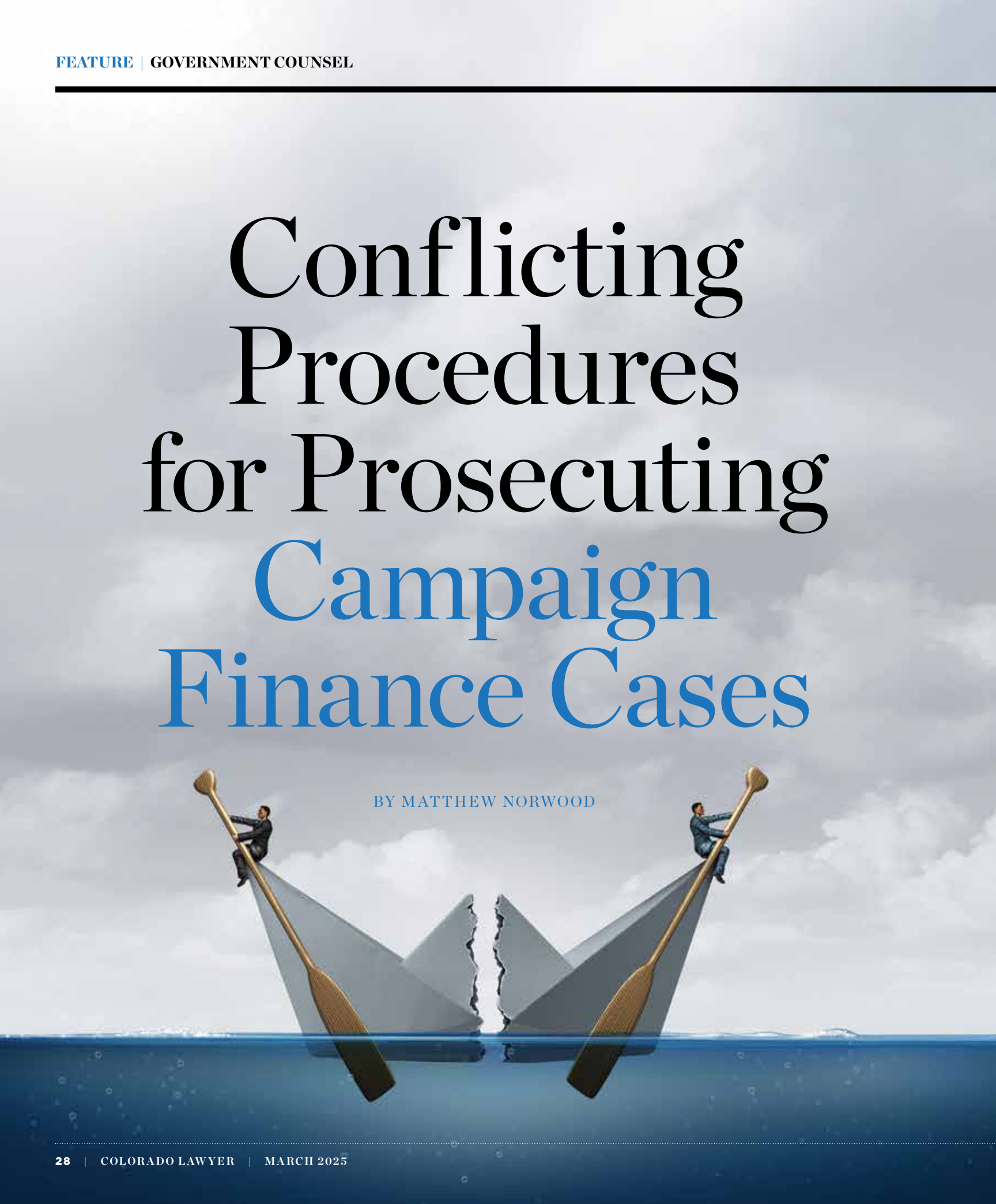
Conflicting Procedures for Prosecuting Campaign Finance Cases

BY MATTHEW NORWOOD



This article discusses challenges caused by two conflicting authorities for enforcing campaign finance requirements.

Colorado has two conflicting provisions for prosecuting campaign finance complaints: one under the Colorado Constitution, and another under a Colorado statute. Colorado courts have yet to fully resolve this conflict. The Colorado Secretary of State (SOS) uses the statutory, not the constitutional, procedure to enforce campaign finance violations. These conflicting procedures create a problem for enforcement and a potential defense for anyone accused of a campaign finance violation. This article outlines the two provisions and discusses the relevant case law.

Enforcement Under Article XXVIII

In 2002, the voters added Article XXVIII to the Colorado Constitution by initiated measure. According to Section 1, the purpose of the Article was to limit the influence of wealthy individuals, corporations, and special interest groups in elections. Section 1 provides that "the interests of the public are best served by . . . strong enforcement of campaign finance requirements." The enforcement procedure is set out in Article XXVIII, Section 9(2)(a).

Under Section 9(2)(a), citizen complaints are to be submitted to the SOS, and the SOS is required to forward such complaints to an administrative law judge (ALJ) within three days. This procedure insulates the SOS, an elected position, from any accusations of political favoritism in initiating campaign finance cases. The citizen complainant then prosecutes the case before the ALJ. ALJs typically hear cases brought by agencies, but this provision is unique in that there is no agency involved after the original referral. Section 9(2)(a) further provides that the "decision of the administrative law judge shall be final and subject to review by the court of appeals, pursuant to [CRS § 24-4-106 (11)], or any successor section."

Development of Procedure Under CRS § 1-45-111.7

In *Holland v. Williams*, the Colorado federal district court found Section 9(2)(a) unconstitutional. Shortly thereafter, the SOS released new administrative rules for filing and prosecuting campaign finance cases. The legislature essentially adopted those rules when it passed CRS § 1-5-111.7.

Holland v. Williams

Tammy Holland had been subject to an administrative complaint per the administrative process in Section 9(a)(2). In 2018, she brought a case in federal district court against the then Secretary of State Wayne Williams to declare the citizen enforcement method unconstitutional under the First and Fourteenth Amendments to the US Constitution.[1] US District Court Judge Raymond Moore granted summary judgment, finding Section 9(2)(a) facially unconstitutional.[2]

Although he noted that Williams had failed to argue that the citizen enforcement method was reasonable, Judge Moore wrote that

> the Court sees nothing reasonable about outsourcing the enforcement of laws with teeth of monetary penalties to anyone who believes that those laws have been violated. . . . Moreover, how is it reasonable to encroach upon First Amendment speech by allowing a person to enforce campaign finance regulations when that person may have no experience in campaign finance regulations? . . . The enforcement provisions, obviously, also facially allow for someone with an abundance of campaign-finance regulation experience to enforce the same. But why it is reasonable for the enforcement provisions to leave the enforcer to chance is beyond the Court, and is certainly not reasonable, especially when considered in light of the asserted injury—a diminution of First Amendment speech.[3]

Judge Moore's concern was with the *method* of bringing the original complaint. He expressed no concern about the ALJ making the decision. He later denied Holland's motion for permanent injunction.[4] He did so at least in part because of assurances from Williams that he had adopted new administrative rules for the filing of campaign finance complaints.[5] The federal case was administratively closed, and Williams and then Attorney General Cynthia Coffman did not appeal Judge Moore's order.

Under the SOS's new rules, (1) the newly created "Elections Division"[6] of the SOS office would review citizen complaints; (2) the Division, not the citizen complainant, would prosecute the case; (3) the case would be heard by a hearing officer,[7] not an ALJ; and (4) a deputy SOS would make the "final" decision,[8] subject to review by a state district court.[9] In 2019, the legislature enacted CRS § 1-45-111.7, which is nearly identical to the new rules.

State Courts' Views

But what about the different procedure in Section 9(2)(a)? Was it invalidated by Judge Moore's opinion? The Colorado Supreme Court says no. In *Alliance for a Safe & Independent Woodmen Hills v. Campaign Integrity Watchdog, LLC*, the court wrote:

> In *Holland v. Williams*, [citation omitted] the United States District Court (1) granted the plaintiff's motion for summary judgment and found the private enforcement provision of section 9(2)(a) to be facially unconstitutional and (2) declined to enter judgment pending further proceedings on the plaintiff's motion for a permanent injunction. Apparently, the defendant [Secretary of State Williams] did not appeal that decision, but the case ended before the court ruled on the permanent injunction motion. This decision is not binding on this court, and we need not address the constitutionality of section 9(2)(a)'s enforcement provision (an issue that neither party briefed here), because, assuming the provision is constitutional, Watchdog's enforcement action is time-barred.[10]

In *Day v. Chase for Colorado*, the Colorado Court of Appeals considered the appeal of Day from a decision by the Elections Division to dismiss as untimely his campaign finance complaint.[11] The SOS's rules, not the current statute, were then in effect. The rules directed appeals of such dismissals to the district court (as now reflected in the statute), not to the court of appeals as required by Section 9(2)(a). The court of appeals dismissed Day's appeal due to the procedural defect in appealing to it and not to the district court. Although the court did not rely on the procedure set forth in Section 9(2)(a), the court said:

> We recognize that because *Holland* was a federal district court opinion, we are not bound by it. Consequently, we could disagree with or ignore *Holland*, treat section 9(2)(a) as constitutional and still enforceable, and analyze whether we have jurisdiction under its provisions. Day encourages us to do so, albeit for the first time in his reply brief. But even if we were to go down this road, it does not lead to a conclusion that we have jurisdiction.
>
> Article XXVIII, section 9(2)(a) provides that "[t]he decision of *the administrative law judge* shall be final and subject to review by the court of appeals." (Emphasis added.) Day's appeal is not from a decision of an ALJ. It is from a decision of the Elections Division. Therefore, even if we were to ignore *Holland* and apply section 9(2)(a), we would still conclude that we lacked jurisdiction over Day's appeal.[12]

Day begs the question of why the case was not heard by an ALJ per Section 9(2)(a). Under both the Colorado Constitution and CRS § 1-45-111.7, complaints are initially submitted to the SOS. Current Secretary of State Jena Griswold has followed CRS § 1-45-111.7's process of screening citizen complaints to determine which ones merit prosecution. Following the statute, the SOS no longer refers cases to an ALJ. Instead, hearing officers have been hired to conduct hearings per CRS § 1-45-111.7(6). A deputy of the SOS then reviews the decision of the hearing officer.[13] That decision is then subject to review by the district court per CRS § 24-4-106.

> "Under the SOS's new rules, (1) the newly created 'Elections Division' of the SOS office would review citizen complaints; (2) the Division, not the citizen complainant, would prosecute the case; (3) the case would be heard by a hearing officer, not an ALJ; and (4) a deputy SOS would make the 'final' decision, subject to review by a state district court."

A Challenge for Enforcement

For individuals charged with campaign finance violations, this conflict appears to present a compelling defense. A statutory process in conflict with the constitution raises a jurisdictional problem. The constitutional provision prevails in any such conflicts.[14] In addition, Article XXVIII, Section 11 specifically provides: "Any provisions in the statutes of this state in conflict or

inconsistent with this article are hereby declared to be inapplicable to the matters covered and provided for in this article." The matters covered in Colorado Constitution Article XXVIII are campaign finance complaints.

In light of the Colorado Supreme Court's decision in *Woodmen Hills,* the *Holland* decision is not controlling, and Section 9(2)(a) remains valid. Provided one avoids the pitfall identified in *Day*, it appears that any adverse campaign finance decision by the SOS's deputy is subject to a jurisdictional challenge. Jurisdictional defects can be raised at any time, even on appeal.[15]

Playing this out, assume the deputy SOS makes a "final" order that a person or organization should be fined. Per CRS §§ 1-45-111.7(6)(b) and 24-4-106(4), appeal of the final order is to the district court. One could argue that the district court doesn't have jurisdiction to review because Section 9(2)(a) provides that appeals are to the court of appeals. How would the court of appeals ultimately have jurisdiction to hear any appeal from the district court if no appeal had been made directly to it in the 49 days set out in Section 9(2)(a) and CRS § 24-4-106(11)? *Colorado Department of State v. Unite for Colorado* involved an appeal from the district court's reversal of a campaign finance decision by the deputy SOS.[16] The court did not comment on this jurisdictional issue, however, and the issue does not appear to have been raised.[17]

Conclusion

CRS § 1-45-111.7(6)'s allocation of responsibility to the deputy SOS for issuance of the final order conflicts with Section 9(2)(a) of the Colorado Constitution. Without a binding court decision, the authority for enforcement of campaign finance violations remains unclear. CL

Matthew Norwood retired last year after serving for nearly 25 years as an administrative law judge for Colorado's Office of Administrative Courts. Previously, he served as an assistant attorney general and a first assistant attorney general for the Colorado Attorney General from 1987 to 2000. He is a graduate of Colorado College and the University of Colorado Law School.

Coordinating Editor: Mary Elizabeth Geiger, megeiger@garfieldhecht.com

NOTES

1. *Holland v. Williams*, 457 F.Supp.3d 979 (D.Colo. 2018).
2. *Holland*, 457 F.Supp.3d at 998.
3. *Id.* at 993.
4. *Holland v. Williams*, No. 16-cv-00138, 2018 U.S. Dist. LEXIS 245935, *8–9 (D.Colo. June 29, 2018).
5. *Id.* at *7–8.
6. Currently defined at CRS § 1-45-111.7(1)(c).
7. Hearing officers do not necessarily have the same qualifications as an ALJ. *See* CRS § 24-30-1003.
8. 8 CCR 1505-6, Rule 18.2 (Aug. 30, 2018) (repealed). This provision is now reflected in CRS § 1-45-111.7(6). The SOS rules originally appeared in Rule 18.2 of the August 30, 2018, version of 8 CCR 1505-6, https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=7708&fileName=8%20CCR%201505-6. That version of the rules was repealed after CRS § 1-45-111.7 was passed. The current SOS rules related to campaign finance complaints are found in 8 CCR 1505-6, Rule 23 (2025), which includes references to CRS § 1-45-111.7.
9. 8 CCR 1505-6, Rule 18.2.5(d) (Aug. 30, 2018) (repealed). This provision is now reflected in CRS § 1-45-111.7(3)(b)(I).
10. *All. for a Safe & Indep. Woodmen Hills v. Campaign Integrity Watchdog, LLC*, 450 P.3d 282, 287, n. 3 (Colo. 2019) (citing *Ahart v. Colo. Dep't of Corrs.*, 964 P.2d 517, 522 (Colo. 1998)).
11. *Day v. Chase for Colo.*, 479 P.3d 1 (Colo.App. 2020).
12. *Id.* at 3 (citing *Ahart*, 964 P.2d at 522).
13. CRS § 1-45-111.7(6)(b).
14. *Lang v. Colo. Mental Health Inst.*, 44 P.3d 262, 266 (Colo.App. 2001).
15. *Olson v. Hillside Cmty. Church Sbc*, 124 P.3d 874, 878 (Colo.App. 2005).
16. *Colo. Dep't of State v. Unite for Colo.*, 551 P. 3d 687 (Colo.App. 2024). The author acted as ALJ in the underlying case.
17. A writ of certiorari was granted in this case on November 25, 2024, on a question involving a different section of the Colorado Constitution.