

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA)	
)	
Plaintiff,)	Case No: CR 13 2322
vs.)	
)	MOTION TO VACATE and/or ALTER
ANTHONY J. GARCIA)	
)	
Defendant.)	
)	

**DEFENDANTS COMBINED MOTION TO VACATE and/or RECONSIDER
and/or AMEND OR ALTER ORDER OF MARCH 31, 2016**

NOW COMES Anthony Garcia, by and through his attorneys, Robert Motta, II and Jeremy Jorgensen, and respectfully moves This Court for an Order vacating its March 31, 2016 Order (“Withdrawal Order of March 31”) pursuant to Neb. Rev. Stat. § 25-2001 and/or moves This Court to alter or amend the Order pursuant to Neb. Rev. Stat. § 25-1329 and to alter its Order granting leave to withdrawal to local counsel by entering an Order continuing the motion and requiring local counsel to serve a copy of their motions on Anthony Garcia with proper notice thereof, pursuant to statute, and afford him an opportunity to prepare for a meaningful hearing or otherwise secure local counsel for same and/or otherwise Moves This Court to reconsider its Order. As part of his motion, Defendant requests that this Court reserve ruling on the herein Motion until receipt and review of Defendant’s Motion relating to the April 5, 2016 Order and the nunc pro tunc Order of April 6, 2016 correcting same (Hereinafter “Disqualification Order of April 6th”) which shall be filed on or before April 15, 2016.

Lastly, as part of this motion, Defendant asserts that vacating, amending or altering the March 31, 2016 Order results in the Disqualification Order of April 6th being a nullity and respectfully request This Court set-aside the Disqualification Order of April 6th and return the

parties and their counsel to the positions held on March 31, 2016. However, if This Court finds that even if having been admitted on April 4, 2016, This Court would have nonetheless disqualified Alison Motta on the State's Motion, without the need for a more meaningful hearing, than Defendant asserts that the proper procedural safeguard involves This Court issuing an Order stating that the April 6th Order is an Order disqualifying Alison Motta and not an Order denying her pro hac vice admission. In support of his motion, Defendant states as follows:

INTRODUCTION

Anthony Garcia asserts that This Court was without authority to Grant local-counsel leave to withdrawal where the statutory prerequisites of notice and service had not been met and therefore the March 31, 2016 Order is void or otherwise must be vacated.

Defendant further asserts that he was denied due process at the March 31, 2016 hearing as same was heard and decided without the statutorily required notice and he was effectively denied counsel, as his out-of-state attorneys were not afforded the opportunity to address This Court, and denied the right to a meaningful hearing. The rights at issue, on March 31, 2016, were substantive as they effected his ability to retain counsel of his choice and left his unrepresented at a critical stage of the proceedings.

Further, Defendant asserts that "good cause" for withdrawal of counsel cannot be established based on the proposition that the attorney has cause for concern relating to previous conduct of co-counsel which may be deemed to violate the professional rules of conduct; however, good cause *may* result if co-counsel were to indicate an intent to continue with a course of conduct which the attorney finds ethically inappropriate. In this regard, the Nebraska Rules of Professional Conduct do not allow an attorney to withdrawal unless he is requested to

personally engage in behavior that would violate the professional rules of conduct by the client. Unlike other states, the conduct of co-counsel is not a recognized basis for withdrawal.

BACKGROUND

In July 2013, the three out-of-state attorneys, Alison Motta, Robert Motta, and Robert, Sr. (sometimes referred to collectively as "the Mottas"), sought and were Granted admission to represent Defendant in this case with the assistance of local counsel Daniel Stockman and Patrick Dunn; however, Mr. Dunn later withdrew in 2014. Prior to sponsoring the Motta's pro hac vice admission, Mr. Stockman was introduced to Anthony Garcia who agreed to the representation of Stockman. Throughout the pendency of this matter, Mr. Stockman had attorney client visits with Dr. Garcia and provided him legal advice.

From approximately May of 2014 until April of 2015 Daniel Stockman was the only local attorney representing Dr. Garcia and associating with out-of-state counsel for the purposes of their pro hac vice admission. Initially, This Court, by and through Judge Dougherty, indicated that he may not require local counsel's presence throughout the trial. However, in March 2015 This Court indicated an intention to require Dan Stockman's presence throughout the trial and in response thereto Mr. Stockman prepared the attached motion to withdrawal. (Proposed Motion to Withdrawal attached hereto and incorporated herein as "Exhibit A"). However, counsel then discussed the prospect of bringing on another local attorney who would be willing to sit for trial. Thereafter, Mr. Stockman sought out local attorney, Jeffery Leuschen, who was newly admitted to the Nebraska bar. Jeffery Leuschen agreed to enter his appearance and associate with the out-of-state's attorneys, through out the trial, for the purposes of their *pro hac vice* admission.

Having found local counsel willing and able to appear throughout trial, Mr. Stockman continued to act as Dr. Garcia's local counsel without fear that same would cripple his practice.

Nonetheless, Mr. Stockman made it clear that his continued representation of Dr. Garcia was contingent upon him not being required to be present for trial. Mr. Stockman specifically stated, in summary, that if bringing in Mr. Leuschen results in him not having to be present throughout Dr. Garcia's trial then he will not withdrawal but if This Court was going to nonetheless require Mr. Stockman to appear, he would have no option but to file a motion to withdrawal. (See Exhibit A). However, on or about March 29, 2016 Mr. Stockman was again presented with the possibility that his physical appearance, as opposed to that of Jeffery Leuschen's, would be required through out Dr. Garcia's trial.

Then after the State filed its motion seeking to disqualify the Mottas, Daniel Stockman and Jeffrey Leuschen filed motions to withdrawal as local counsel. The Mottas were lead to believe that Mr. Stockman was filing same as a precautionary measure, to establish that he was not able to handle this trial, should This Court grant the States motion. The Mottas were further under the impression that the Motion's reference to Stockman's determination that Alison Motta may have potentially violated a Rule on Professional Conduct and seeking to distance himself from same, was simply included to establish he did not ratify the conduct, but not an indication that he intended to abandoned Anthony Garcia three-days prior to his capital murder trial and leaving him with no counsel.

During the March 31, 2016 hearing, based on undersigned counsel's recollection, Stockman referenced discussion with the counsel for discipline as having influenced his determination and as support for what necessitated him bringing said motion. Based on Undersigned counsel's recollection either Mr. Stockman or Mr. Leuschen took it one step further informing This Court that the counsel for discipline advised that he/they "shall withdrawal". However, upon out-of-state counsel inquiring of Mr. Weber, counsel for the commission of

discipline, why the commission would suggest or support local counsel withdrawing without regard to their duties to Dr. Garcia and how could the commission believe it is appropriate for an attorney to abandoned his client and leave him unrepresented days before trial. In response, Mr. Weber was adamant that no such suggestion was made and moreover, the only instance that Mr. Weber discussed what “*shall*” take place in relation to these matters was to advise Mr. Stockman that he “*shall be present for the trial*” unless This Curt waived same.

These facts are relevant to whether local counsel established “good cause” to withdrawal and support Defendant’ position that proper notice and an opportunity to a meaningful hearing local facts support the conclusion that Stockman was motivated to withdrawal for reasons having much less to do with a possible ethical violation but instead more to do with not being compelled to sit for a six-week trial which would be extremely detrimental to his practice.

ARGUMENT

Orders entered without proper notice are void. See *Elliott v. Garvin*, 166 F. 278, 279 (8th Cir. 1908) (“*As it is conceded that the first judgment was void for want of notice to the administrator, the action depends upon the validity of the second judgment*”); see also *Metro. Dade Cty. v. Curry*, 632 So. 2d 667, 668 (Fla. Dist. Ct. App. 1994). (“*An order entered without notice or opportunity to be heard is a void order. (citations omitted)*”). According to the Nebraska Supreme Court, “[w]henver a court must determine an uncertain fact before entering an order, the party affected by the order is entitled to reasonable notice and an opportunity to be heard.” *In re Thomas M.*, 282 Neb. 316, 317, 803 N.W.2d 46, 49 (2011) (emphasis added).

Moreover, the Nebraska Supreme Court has held that orders or judgments entered without notice should be vacated. See *Simmons v. Lincoln*, 176 Neb. 71, 125 N.W.2d 63 (1963).

(where a party did not learn of an order because of a failure to comply with § 25-1301.01, the order should be vacated.).

At the hearing on their motions to withdrawal, local counsel failed to inform This Court that said motion was brought without meeting the requisite statutory requirements as there was no notice whatsoever to the Defendant nor had either withdrawing counsel so much as informed the Defendant of same or advised the Defendant of the ramifications of same being Granted; All which acted to deny the Defendant due process at the March 31, 2016 hearing as well as denied him the opportunity to secure replacement counsel or at least to secure counsel for the purposes of the March 31, 2016 hearing.

Pursuant to Nebraska Court Rules, This Court has authority to Grant leave to withdraw upon notice to the Defendant and proof of service filed with the clerk. “Upon motion for withdrawal and notice to all counsel ***and the client involved***, an attorney who has appeared of record in a case ***may*** be given leave to withdraw for ***good cause*** shown after filing with the clerk the motion, notice of hearing, and ***proof of service upon counsel and the client involved***. NE R CT § 6-1510 (Emphasis Added). Further, “[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.” NE R PROF COND § 3-501.16. Moreover, “it is inherent in right to trial de novo that there be adequate notice of time and place of hearing, opportunity to be heard, and right to effective representation by counsel.” *State v. Stone*, 198 Neb. 721, 255 N.W.2d 57 (1977) overruled on other grounds by *State v. Smith*, 199 Neb. 368, 259 N.W.2d 16 (1977). R.R.S.1943, §§ 29-611, 29-613.

According to the Nebraska Supreme Court, an Order entered “without or in excess of its power” is void and accordingly the corresponding Order ***must*** be vacated. See *Cruz-Morales v. Swift Beef Co.*, 275 Neb. 407, 417-18, 746 N.W.2d 698, 706-07 (2008) (Default judgment

vacated because no notice to defaulting party). The Workers' Compensation Court has a similar restriction to that in 6-1510 and in *Swift Beef* the Court held:

We conclude that under § 48–162.03(1), the Workers' Compensation Court has authority to enter default judgments, but the defaulting party must receive notice of the motion for default judgment under Workers' Compensation Court rule 3. *Swift Beef* did not receive notice of Cruz–Morales' motion because she sent notice to the wrong address. Therefore, the compensation court “acted without or in excess of its powers” when entering and affirming the default judgment. We reverse the review panel's judgment and remand the cause to that court for further remand to the trial judge for proceedings consistent with this opinion with directions to vacate the default judgment and award.

The *Swift Beef* ruling is equally applicable to the case at bar. Pursuant to NE R CT § 6-1510, notice to Dr. Garcia was required before leave could be granted to Mr. Stockman and Mr. Leuschen to withdrawal. Since This Court is without authority to Grant a motion to withdrawal unless the statutory requirements are met, it was incumbent upon local counsel to inform the Court, in connection with having their motion heard, that the proper statutory requirements for seeking leave to withdrawal had not yet occurred at which point This Court could have continued the matter.

Had This Court been advised that the Defendant had not been informed as to what was occurring or even consulted about the withdrawal, then This Court would have been alerted to the need to inquire as to the Defendant's consent to entertaining the motion to withdrawal absent appropriate notice and time to adequately prepare for a meaningful opportunity to be heard and/or oppose any allegation of “good cause” or present corresponding law regarding the necessity for a balancing test or request a continuance to secure counsel. Pursuant to Nebraska Revised Statutes, “[a] judge of any court established under the laws of the State of Nebraska shall, in any case in which that judge is authorized to act, have power to exercise the powers conferred upon the judge and court, and specifically to: ... (d) With the consent of the defendant,

hear and determine pretrial and post trial matters in criminal cases; ... Neb. Rev. Stat. Ann. § 24-734 (West).

However, This Court was not so informed and by Granting local counsel's motions to withdrawal, especially considered the undisclosed facts asserted above, without even addressing the Defendant or inquiring if he understood what was happening or objected to same, was a structural error as, in essence, the Defendant was unrepresented at that critical stage of the proceedings which resulted in substantial prejudice to the Defendant in one of the most significant ways possible; he lost his lead counsel, Alison Motta.

Pursuant to the Nebraska Judicial Rules of Conduct, § 5-302.6 Ensuring the Right to Be Heard, "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." NE R CODE OF JUD COND § 5-302.6. Moreover, "[t]he right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed." NE R CODE OF JUD COND § 5-302.6 (comment 1).

Nebraska law defines "Substantive Rights" as "A "substantial right" affecting the defendant, from which an order affecting such right would be appealable, is an essential legal right, not a mere technical right. Neb.Rev.St. § 25-1902. *State v. Volcek*, 2007, 729 N.W.2d 90." Neb. Rev. Stat. Ann. § 25-1902 (West). "An order entered by a court may affect a substantial right and be subject to review as a final order although it could not or need not be properly denominated a judgment. Neb.Rev.St. § 25-1902. *State v. Loyd*, 2005, 696 N.W.2d 860, 269 Neb. 762." Neb. Rev. Stat. Ann. § 25-1902 (West). Here there is no question that Dr. Garcia's substantive rights were at risk as this is a capitol case and just days before the scheduled trial he

faced the possibility that his lead counsel would be disqualified from representing him and he would be left wholly unrepresented.

Local Counsel Failed to Establish Good Cause for Instant Withdrawal

Local counsel owed a duty of loyalty to the Defendant and before they could seek to withdraw they were legally and ethically required to take all steps possible to mitigate the consequences of their withdrawal. See § 3-501.16 Under the Nebraska Rules of Professional Conduct, permissive withdrawal seemingly does not encompass past conduct of co-counsel which may violate the professional rules. See NE R PROF COND § 3-501.16. Moreover, even if the client had suggested the attorney engaged in unethical conduct, withdrawal on the basis of same would only have been permitted if the client continued to persist in such conduct after being advised same was unethical. NE R PROF COND § 3-501.16.

Pursuant to § 3-501.16 “a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) ***the client persists*** in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; ... (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement...

In fact, the term “co-counsel” is not even referenced in the Rules whatsoever. However, other states specifically authorize permissive withdrawal if the best interests of the client will be served by withdrawal because of the attorney’s inability to work with co-counsel, but Nebraska does not.

Additionally, it is questionable whether Nebraska allows for withdrawal while a motion is pending as most state and federal Rules do not allow for withdrawal until any pending motions have been resolved, including the eight circuit.

The Rules of Professional Conduct vary very little from state to state and most states' Rules mirror each other in language with changes seen only on specific issues. As for Nebraska's Rules, one such change is not including language related to co-counsel as a specific basis for withdraw. This fact does not foreclose the possibility that, under certain circumstances, the Rules may allow a lawyer to seek permissive withdrawal based on co-counsel's conduct, however Nebraska has nonetheless intentionally chosen to leave the co-counsel issue outside its list of specified grounds for permissive withdrawal.

Moreover, Pursuant to § 3-501.16. Mr. Stockman had a duty to not only provide Mr. Garcia with with reasonable notice of his intent to withdrawal but also to allow time for him to find new counsel. "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." NE R PROF COND § 3-501.16.

Additionally, the fact that under the Rules Mr. Stockman could not be held responsible for the independent conduct of co-counsel plays against any finding of "good cause" or any need for expedited ruling on his motion. Under the Rules, "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal

department of a corporation or other organization. NE R PROF COND § 3-501.0. Moreover, pursuant to § 3-505.1, Responsibilities of a Partner or Supervisory Lawyer, the Rules provide:

A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

NE R PROF COND § 3-505.1

Further, there is no basis under the law for the premise that Mr. Stockman could be liable for even the negligence of co-counsel. See *Macawber Eng'g, Inc. v. Robson & Miller*, 47 F.3d 253 (8th Cir. 1995) (holding that local counsel with limited functions operating under direction of other firm is not liable for other firm's negligence unknown to counsel); *Wildermann v. Wachtell*, 267 N.Y.S. 840 (N.Y. Sup. Ct. 1933), *aff'd*, 271 N.Y.S. 954 (N.Y. App. Div. 1934) (holding that lawyer is not liable for negligence of co-counsel in another state when lawyer, without negligence recommended retention of foreign lawyer and relied on that lawyer); *Armor v. Lantz*, 535 S.E.2d 737 (W. Va. 2000) (holding that local counsel is not vicariously liable for outside counsel's negligence where there is no evidence of profit sharing, no control exercised by local counsel, and local counsel rules did not require assumption of vicarious liability). See also George M. Cohen, *The Multilawyered Problems of Professional Responsibility*, 2003 U. Ill. L. Rev. 1409, 1476 (2003).

As a direct result of a lack of notice and adequate time to prepare a response, combined with the lack of candor with This Court as it relates to not fulfilling the notice requirements and

that neither local counsel consulted with the Defendant prior to moving to hearing on their pending motion, This Court was not presented with a total picture of the factual circumstances or the important legal principles relevant to the motion to withdrawal and the options available for ruling thereupon including, but not limited to, the ability to deny Mr. Stockman and Mr. Leuschen's motion, requiring the appearance of substituted counsel before granting leave or entering and continuing same to allow for adequate notice and time to prepare for meaningful hearing.

Vacating The March 31, 2016 Order Nullifies The Order Denying Alison Motta Pro Hac Vice Admission

The Disqualification Order of April 6th denying Alison Motta pro hac vice status is dependent upon This Court's March 31, 2016 order allowing local counsel to withdrawal. If the March 31, 2016 Order is vacated then the Disqualification Order of April 6th must be set-aside as a nullity. See *Cf. U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 15-16, 122 S. Ct. 431, 439, 151 L. Ed. 2d 323 (2001) (*However, earlier vacated or reverses Order has res judicata effect if relief from same not timely sought*). Accordingly, if This Court's March 31, 2016 Order is vacated then the March 31, 2016 petition and/or filing relating to Jeremy Jorgenson, David Reed and James Owen acting as local counsel and associating with Alison Motta for the purposes of her pro hac vice acts to prevent Alison Motta's admission from terminating at a later, properly noticed, hearing on Dan Stockman's or Jeffery Leuschen's motion to withdrawal. Accordingly, the Defendant would not have been unrepresented at the April 4, 2016 hearing or effectively denied counsel at the March 31, 2016 hearing.

The United States Supreme Court has stated “[t]he rule is abundantly settled both in this court and elsewhere that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error.” (citations omitted) *Reed v. Allen*, 286 U.S. 191, 203, 52 S. Ct. 532, 535, 76 L. Ed. 1054 (1932). In *Reed* however, the party was ultimately denied relief for failing to appeal the first order as one who fails timely to appeal an adverse decision is bound by that decision in later proceedings. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 481, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1970) *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 16, 122 S. Ct. 431, 439, 151 L. Ed. 2d 323 (2001).

Accordingly, if This Court vacates or reconsiders its April 1, 2015 Order the April 5, 2016 Order is a nullity and Defendant Requests This Court accept the appearances of Jeremy Jorgensen, David Reed and/or James Olsen as substituted local counsel associating with Alison Motta for the purposes of her pro hac vice admission.

This requests represents a balanced way to address the issues before This Court. It allows for the status quo to be maintained and affords the Defendant the assistance of knowledgeable effective assistance of counsel as it relates to any future hearing to disqualify Alison Motta. As any such motion is best addressed by the Motta’s and should be considered in conjunction with the intertwined motion to disqualify the County Attorney and appoint special prosecutor. Further, such procedure affords the Defendant with knowledgeable effective assistance of counsel as it relates to the pending motions before This Court, which includes a substantive and extensive motion by Alison Motta to exclude the whitepages.com search and includes complex electronic data issues of which she is the lawyer most familiar with.

WHEREFORE, Anthony J. Garcia Respectfully Requests that This Court reserve Ruling on the herein Motion until receipt of the to-be-filed motion attacking the Disqualification Order of April 6th and considering the herein motion in conjunction with same; and to Enter an Order:

- A. Vacating, or otherwise altering or amending, the March 31, 2016 ruling, as it relates to granting leave to withdraw, and as a result thereof set-aside or deem the Disqualification Order of April 6th a nullity as it has no purpose if the March 31, 2016 Order is vacated or otherwise altered or amended as Alison Motta would have retained her pro hac vice status absent same; and
- B. Allowing the appearances of Jeremy Jorgensen, David Reed and James Owens to act as substituted appearances for that of Daniel Stockman and Jeffery Leuschen as it relates to said local counsel associating with Alison Motta, Robert Motta, II and Robert Motta, Sr. for the purposes of their pro hac vice admission; and
- C. Setting the State's motion to revoke and the Defendant's response thereto and corresponding motion to appoint a special prosecutor for hearing on April 21, 2016; or in the alternative,
- D. If This Court finds that even if having been admitted on April 4, 2016, This Court would have nonetheless disqualified Alison Motta on the State's Motion, without the need for a more meaningful hearing, than Defendant asserts that the proper procedural safeguard involves This Court issuing an Order stating that the April 6th Order is an Order disqualifying Alison Motta and not an Order denying her pro hac vice admission.

Respectfully submitted,

By: /s/ Jeremy Jorgenson
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NOTICE OF HEARING

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that the Defendant shall proceed to hearing on the herein Motion before the District Court at 1:30 p.m. the 21st of April, 2016 in Courtroom No. 316 before the Honorable Judge Gary Randall

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above and foregoing was served on Don Kleine, Deputy County Attorney, via efileing this April 11, 2016 after 5:00pm

/S/ DAVID REED

Certificate of Service

I hereby certify that on Tuesday, April 12, 2016 I provided a true and correct copy of the Motion to Vacate to the following:

Garcia,Anthony,J represented by Jeremy C. Jorgenson (Bar Number: 23815) service method: Electronic Service to mylawfirm@nebraskaslawfirm.com

State of Nebraska represented by Brenda D. Beadle (Bar Number: 20033) service method: Electronic Service to brenda.beadle@douglascounty-ne.gov

State of Nebraska represented by Sean Lynch (Bar Number: 25275) service method: Electronic Service to sean.lynch@douglascounty-ne.gov

State of Nebraska represented by Donald W. Kleine (Bar Number: 15429) service method: Electronic Service to donald.kleine@douglascounty-ne.gov

Signature: /s/ Reed, David James (Bar Number: 24345)