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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	CR. NO. 06-00068 SOM
)	
Plaintiff,)	
)	MEMORANDUM IN SUPPORT OF
vs.)	MOTION
)	
HAMLET C. BENNETT)	
)	
Defendant.)	
)	
_____)	

MEMORANDUM IN SUPPORT OF MOTION

I. MOTION TO DISQUALIFY

A. The Facts

As the Court is aware from prior motions filed by the United States concerning the choice of counsel by Defendant, HAMLET C. BENNETT, the Defendant is a tax protester who

associates closely with other individuals in the tax protestor movement. Previously, the United States raised its concerns about the representation of the Defendant by Attorney Jeffrey A. Dickstein, an individual who is prominently featured in the materials sold by convicted tax protestor Royale LaMarr Hardy, one of the Defendant's close tax protestor associates. The United States recently learned from Attorney Dickstein that the Defendant had terminated him and sought new counsel. On July 19, 2006, the Court granted Arkansas attorney Oscar Stilley's motion to appear in this case *pro hac vice*. See Exhibit 1.

The United States now brings before the Court similar concerns regarding the representation of the Defendant by Mr. Stilley, who, in the same vein as Attorney Dickstein, has faced sanctions in other districts for his frivolous court filings. See Exhibits 3, 5-8. The concerns differ, however, in two important respects. First, Mr. Stilley is the subject of a criminal investigation in the Northern District of Oklahoma. See Exhibit 2. Second, on May 4, 2006, Mr. Stilley was suspended from the practice of law in the State of Arkansas, a matter which Mr. Stilley omitted entirely from his application to appear *pro hac vice* in this district.¹ See Exhibit 3.

¹The suspension was stayed pending Mr. Stilley's appeal. However, as discussed below, the stay did not relieve Mr. Stilley of his duty to advise the Court of the suspension order.

B. The Law

1. Representation by an attorney who is the subject of an investigation

When an attorney is the subject of a criminal investigation by the United States Department of Justice, a concern arises that the attorney's representation of a criminal defendant may be compromised by the attorney's "own legal maneuvering with the United States Department of Justice." United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001). The Ninth Circuit has established that "[e]ffective assistance of counsel "includes a right to conflict-free counsel." Id., 256 F.3d at 861 (citing United States v. Mett, 65 F.3d 1531, 1534 (9th Cir. 1995)). "An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action." Baker, 256 F.3d at 861 (citing United States v. Levy, 25 F.3d 146, 155 (2d Cir. 1994)).

2. Failure to inform Court of attorney's suspension from the practice of law

A defendant's Sixth Amendment right to choice of privately retained counsel must be respected "unless it would unreasonably delay proceedings or burden the court with retained counsel who was incompetent or unwilling to abide by court rules and ethical guidelines." United States v. Panzardi Alvarez, 816

F. 2d 813, 818 (1st Cir. 1987). In addition, "Federal Courts have an independent interest in ensuring that criminal trials are conducted with the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160 (1988). "When a district court finds that counsel has a conflict of interest, real or potential, it retains 'substantial latitude' to disqualify counsel, even where a defendant consents in representation." United States v. Collins, 920 F. 2d 619, 627 (10th Cir. 1990). "Courts also may consider an attorney's ethical fitness before granting a motion to proceed *pro hac vice*." Id., at 626.

Local Rule 83.1(e) of the Local Rules of Practice for the United States District Court for the District of Hawaii, sets forth the obligations of an out-of-state attorney seeking to appear *pro hac vice* in the District of Hawaii. It provides in pertinent part as follows:

(e) Pro hac vice. An attorney who is a member in good standing of, and eligible to practice before, the bar of any United States Court or of the highest court of any State or of any Territory or Insular Possession of the United States, who is of good moral character, and who has been retained to appear in this court, may, upon written application and in the discretion of this court, be permitted to appear and participate in a particular case subject to the conditions of this rule.

...

The *pro hac vice* application shall be presented to the clerk and shall state under penalty of perjury:

...

that the attorney is **not currently suspended** or disbarred in any other court;

...

Local Rule 83.1(e) (emphasis added).

C. Discussion

1. Stilley's status as a subject of a criminal investigation

The United States has attached as Exhibit 2 a copy of a transcript of proceedings that occurred on June 15, 2006, before a federal court in the Northern District of Oklahoma. During the hearing, the Assistant United States Attorney handling the matter advised the Court of the ongoing investigation involving Mr.

Stilley, at one point stating as follows:

I'm telling the Court as an officer of the Court that I've been informed that Mr. Stilley is a subject of an investigation by our office..."

Exhibit 2, Transcript of Proceedings, June 15, 2006, 11-12.

In addition to the disclosure by the Oklahoma Assistant United States Attorney, Mr. Stilley advised the Court that he had been called to appear before a federal grand jury. Exhibit 2, 9. The undersigned attorney has spoken to prosecutors from the Northern District of Oklahoma and confirmed that Mr. Stilley's

status with respect to the federal investigation has not changed: he remains a subject. See Declaration of Counsel.

For the record, Mr. Stilley was not involved as either a subject or witness in the federal grand jury's investigation in the District of Hawaii that resulted in the indictment against the Defendant. Moreover, as to the nature of the ongoing investigation in the Northern District of Oklahoma, the United States cannot divulge specific details and certainly cannot violate the secrecy rules governing matters that may be occurring before a federal grand jury. However, in light of what is known, it is clear that Mr. Stilley's situation may place him in a "position of choosing whether to help himself or his client or of pursuing anything less than a zealous appeal on behalf of his client because of any conflicting personal interest." Baker, 256 F.3d at 861.

Since Mr. Stilley is the subject of a criminal investigation by the United States Attorney for the Northern District of Oklahoma, his conduct as to certain matters is under review by the United States Department of Justice, and perhaps by a federal grand jury. Thus, he is in a position that requires him to interact with the United States Department of Justice on behalf of his own interests. This situation poses a potential conflict and thus a basis for disqualifying Mr. Stilley from the

representation of the Defendant in this criminal case, which is also being prosecuted by the Department of Justice.

If the Court determines that Mr. Stilley can continue with his representation of the Defendant, it should caution the Defendant on the record about the potential conflict with respect to Mr. Stilley's own criminal investigation in the Northern District of Oklahoma. The Defendant must acknowledge the ongoing federal investigation involving Mr. Stilley and that Mr. Stilley's situation may evolve into one in which Mr. Stilley, too, must engage with the United States Department of Justice from a defensive standpoint, a situation that could compromise the Defendant's case.²

2. Stilley's failure to advise the District of Hawaii of his suspension from the practice of law

On May 4, 2006, the Arkansas Supreme Court Committee on Professional Conduct, Panel B, determined that Mr. Stilley had violated four of the Arkansas Model Rules of Professional Conduct. As to the first violation, the Committee Panel found that Mr. Stilley had violated Model Rule 1.7(b) when he "placed his own interests as an attorney in conflict with the interests

²Indeed, the issue of his representation in this case would be further complicated were the investigation to result in an indictment of Mr. Stilley.

of his client..."³ Exhibit 3, Findings and Order, filed May 4, 2006, 2 (hereinafter "Exhibit 3"). Second, the Committee Panel found that he had violated Model Rule 3.1, which provides that "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous..." Exhibit 3, 3. Third, the Committee found that the "intemperate and disrespectful contents" of Mr. Stilley's brief, which offered nothing new demonstrating that the precedential value of earlier opinions should be reversed, violated Model Rule 3.4(c). Id. Finally, the Committee Panel found that Mr. Stilley had violated Model Rule 8.4(d) by "delaying proper and full consideration of his client's cause, and causing the Court to expend additional resources and time in considering his brief..." Exhibit 3, 3-4.

As a result of these findings, the Committee Panel voted to suspend Mr. Stilley for a period of six (6) months. Exhibit 3, 4. Mr. Stilley filed a Motion for Stay Pending Appeal to the Arkansas Supreme Court, which was granted. See Exhibit 4. The stay pending appeal, however, does not mitigate the fact that the Arkansas Supreme Court found multiple bases for suspending Mr. Stilley from the practice of law. Pursuant to Local Rule 83.1(e), Mr. Stilley was required to advise the District Court of

³This finding is one of the primary issues of concern to the United States in this case.

Hawaii of this matter because the ultimate outcome will impact Mr. Stilley's eligibility to represent the Defendant in this district. Staying the suspension pending appeal merely buys Mr. Stilley time until the matter is resolved. In no way does the stay excuse Mr. Stilley for his failure to disclose the Arkansas Supreme Court Committee's Findings and Order in his *pro hac vice* application.

Mr. Stilley's failure to advise the Court of his suspension proceeding raises concerns about his integrity and forthrightness. It also suggests that he is "unwilling to abide by court rules and ethical guidelines." Panzardi-Alvarez, 816 F. 2d at 818. In addition, his ability ultimately to represent the Defendant in this case is in question. If Mr. Stilley's appeal is denied, the stay will be lifted, the suspension will go into effect, and his *pro hac vice* application will undoubtedly be revoked. This could occur on the eve of trial or during trial, which would adversely impact, if not entirely upset, the proceedings before this Court. Representation that would "unreasonably delay proceedings" constitutes a basis for disqualifying retained counsel. Id.

The United States also notes that this is not the first or only instance in which Mr. Stilley has made blatant and material omissions in a *pro hac vice* application. Attached as Exhibits 5, 6, 7, and 8, are orders filed in the District of

Arizona where Mr. Stilley's failure to make the required disclosures to the Arizona Court resulted in the revocation of his *pro hac vice* admission. Similar to this case, Mr. Stilley had failed to advise the Arizona Court of pending disciplinary proceedings in the Arkansas Circuit Court. The United States subsequently advised the Court of this omission, at which point Mr. Stilley then revealed to the Court that there also existed a pending case against him before the Arkansas Supreme Court, as well as a case before the Arkansas Ethics Committee. Notably, Mr. Stilley made these disclosures only after the United States had raised them with the Court and not in his *pro hac vice* application, as was required by law.⁴

In the case before the District of Arizona, the Court found in May, 2005: "Simply, Mr. Stilley had numerous pending ethical issues, which had the Court been aware before admitting Mr. Stilly (sic) as CJA counsel *pro hac vice*, it would have denied the application." Exhibit 8, 5. The same situation exists in this case and the same remedy is warranted. In light of the Findings and Order issued by the Arkansas Supreme Court, as well as Mr. Stilley's failure to make any mention of this suspension proceeding in his *pro hac vice* application, the Court should revoke Mr. Stilley's *pro hac vice* admission to practice in

⁴As is evident from the Arizona Court's orders, Mr. Stilley also attempted to attack the Arkansas proceedings collaterally. See Exhibits 7 and 8.

this district and disqualify him from appearing as the Defendant's attorney this case.

II. CONCLUSION

For the reasons set forth above, this Honorable Court should grant the United States' motion to disqualify Mr. Stilley from representing Defendant Hamlet C. Bennett.

DATED: August 11, 2006, at Honolulu, Hawaii.

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By /s/ Clare E. Connors
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