

FILED

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 7955

WAKE COUNTY, C.S.C.

HOPE-A WOMEN'S CANCER CENTER,)
P.A., and RALEIGH ORTHOPAEDIC)
CLINIC, P.A.,)

Plaintiffs,)

vs.)

STATE OF NORTH CAROLINA;)
et al.)

Defendants.)

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS'
AMENDED MOTION TO DISQUALIFY

MEMORANDUM OF LAW

The North Carolina Institute for Constitutional Law (the "Institute") was organized in 2003 under Chapter 55A, the North Carolina Nonprofit Corporation Act, for the purpose of engaging in all activities permissible for an organization exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. Beginning at the Institute's inception in 2003 and continuing to 2009, the activities of the Institute's licensed attorneys specifically include engaging in litigation on behalf of citizens and for the public interest to protect and enforce constitutional rights. The attorneys of the Institute have in a variety of capacities represented clients at all levels of state and federal courts, including the North Carolina Supreme Court, North Carolina Court of Appeals, North Carolina Superior Court, United States District Court for the Eastern District of North Carolina, United States Court of Appeals for the Fourth Circuit, and United States Supreme Court. The attorneys of the Institute have represented clients in litigation against North Carolina state and local governments and private interests from the time of its

inception until now. We address the novel position of counsel for the Defendants in this Amended Motion to Disqualify for the first time.

Counsel for the Defendants allege in their Motion to Disqualify and Amended Motion to Disqualify that “(a) the Institute is not organized for the sole purpose of rendering indigent legal services and (b) the Plaintiffs in this action are for-profit legal entities that have previously retained private counsel in this action.” Amended Motion to Disqualify ¶ 8. Counsel for the Defendants conclude, therefore, that the duly licensed attorneys of the Institute and the Institute itself are not permitted to represent the Plaintiffs in this action. Amended Motion to Disqualify ¶ 9.

An order granting a motion to disqualify counsel affects a substantial right because “[t]he attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client’s choice.” *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 293 (1992). On review, a trial court’s decision regarding whether to disqualify counsel is “within the discretion of the trial judge and, absent an abuse of discretion, a trial judge’s ruling on a motion to disqualify will not be disturbed on appeal.” *Travco Hotels, Inc.*, 332 N.C. at 295 (citing *In re Lee*, 85 N.C. App. 302, 310 disc. rev. denied, 320 N.C. 513 (1987)).

1. Section 84-5.1 is a special grant of authority, not a restriction.

“It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State” N.C. GEN. STAT. § 84-5 (2008). Counsel for the Defendants state in their Amended Motion to Disqualify that “[t]he only statutory exception” to North Carolina’s longstanding prohibition on the practice of law by a corporate entity “is contained in N.C. Gen. Stat. § 84-5.1.” Amended Motion to Disqualify ¶ 7. Because counsel for

the Defendants argue that the Institute does not fall within the sole exception to section 84-5, they summarily assert that the Court must disqualify the Institute from providing legal services to the Plaintiffs.

Counsel for the Defendants argue a position heretofore unrecognized by the membership of the North Carolina bar. Under Chapter 84 of the North Carolina statutes, a licensed attorney is permitted to practice in all general courts of Justice in the State of North Carolina. *See* N.C. GEN. STAT. § 84-1 (2008). The primary limitations under this general grant of authority to practice law operate to prohibit (a) a for-profit entity deemed to be an attorney “actor” from representing a client with a conflict of interest with that for-profit corporation, *see, e.g., Gardner v. North Carolina State Bar*, 316 N.C. 285 (1986) and (b) any attorney from representing a client where there exists a cognizable conflict of interest under the North Carolina Rules of Professional Conduct, *see, e.g. Robinson & Lawing, LLP v. Sams*, 161 N.C. App. 338 (2003).

Section 84-5.1 is not a limitation on the ability of licensed attorneys to practice law. It is a special grant of authority. It states that a nonprofit corporation “may render” indigent legal services. *See* N.C. GEN. STAT. § 84-5.1. The statute is permissive, not restrictive.

Section 84-5.1 had a genesis in a particular set of legislative circumstances. The statute’s acknowledgement of special authority arose in 1977 in the context of a perceived need for protective legislative language applicable to an already-existing nonprofit legal services corporation, Legal Services of North Carolina, Incorporated (LSNC). Section 84-5.1 provided a grant of power to permit LSNC and other similar nonprofit corporate entities to practice law – as nonprofit corporate entities – on behalf of indigent clients. Counsel for the Defendants fail to cite any relevant authority in support of their position that section 84-5.1 is a limitation on the ability of licensed attorneys to practice law in North Carolina.

Counsel for the Defendants' attempt to use the shield provided in section 84-5.1 as a sword against Plaintiffs, their duly licensed legal counsel, and the Institute. Their efforts are misplaced. Section 84-5.1 does not intend to exclude licensed attorneys from the practice of law on the mere basis of their employment at a public interest nonprofit organization. Neither the counsel for Plaintiffs nor their employer are for-profit corporations with a conflict of interest with their clients. No for-profit corporate entity is purporting to practice law or appear in court. No conflict of interest under the North Carolina Rules of Professional Conduct exists or has been alleged. Two duly licensed attorneys are acting to represent the legal interests and public policy concerns of their clients. Accordingly, the strained and conclusory argument of counsel for the Defendants must fail.

2. Counsel for Defendants present no legal authority defining the term "indigent" to warrant excluding the counsel for the Plaintiffs from this case.

Section 84-5.1 states that nonprofit corporate entities may practice law -- as corporate entities -- in providing "indigent" legal services to their clients. Counsel for the Defendants make no attempt to cite legal authority defining the term "indigent," a term with meaning necessary to construe the intent and applicability of section 84-5.1.

In their Amended Motion to Disqualify, counsel for the Defendants simply assert that Plaintiffs are for-profit legal entities that have procured private legal counsel and, "accordingly," are not indigent. Amended Motion to Disqualify, ¶ 9. No rule of law is cited by which one may determine whether or to what extent counsel for Defendants are alleging that Plaintiffs are not "indigent." No legal meaning of indigent is asserted whatsoever in the Motion. Surely counsel for the Defendants are not asking counsel for the Plaintiffs or this Court to defer to their bare logic.

Accordingly, Defendants' argument fails for neglect of citation to requisite legal authority in support of their position.

3. The interpretation of Section 84-5.1 urged by Counsel for the Defendants violates the First Amendment to the United States Constitution.

The interpretation of section 84-5.1 urged upon the court by the Defendants speaks in favor of a position that would so confine the ability of North Carolina citizens to associate with pro bono public interest nonprofit groups as to run afoul of First Amendment jurisprudence announced over forty years ago. In *NAACP v. Button*, the State of Virginia attempted to place restrictions on the practice of law by lawyers for the NAACP who were "organized as a staff and paid by" the NAACP. *NAACP v. Button*, 371 U.S. 415, 434 (1963). The State incorrectly asserted that it was entitled to regulate the conduct of NAACP's attorneys because it was merely regulating the practice of law within the State to prevent perceived dangers, not curtailing First Amendment freedoms. The Court, however, found that when nonprofit legal groups engage in public interest or constitutional litigation, "litigation is not a technique of resolving private differences" but "a form of political expression" and "political association." *Button*, 371 U.S. at 429, 431; *see also In re Primus*, 436 U.S. 412, 428 (1978). "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Button*, 371 U.S. at 429. Accordingly, the Court struck down Virginia's regulations on the practice of law by a nonprofit public interest group on the ground that the group's activity constituted a closely protected First Amendment right of persons to speak on public policy through litigation and to associate with policy-aligned groups for the purpose of advancing their positions through litigation. *See Button*, 371 U.S. at 428-29 ("We hold that the activities of the NAACP, its

affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments . . .”).

The United States Supreme Court in *In re Primus* reaffirmed that “[s]ubsequent decisions have interpreted *Button* as establishing the principle that ‘collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.’” *In re Primus*, 436 U.S. at 426 (quoting *United Transp. Union v. Michigan Bar*, 401 U.S. 576, 585 (1971) and citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n. 32 (1977)). Thus, the Court again found that a nonprofit public interest legal group is shielded by the United States Constitution from State efforts to infringe on the group’s ability to assert, protect, and enforce constitutional and other legal rights on behalf of clients through litigation.

Counsel for the Defendants here assert an interpretation of Section 84-5.1 – a statute originally intended to grant under-privileged persons greater access to legal remedies – that would *restrict* the rights of disenfranchised persons to voice lawful disapproval of their government or to call their public officials to legal account for violations of the constitution or other laws. Such a broadly restrictive interpretation of a statute originally designed as a special grant of authority to enable greater protection of under-resourced citizens cannot be permitted under law. It turns the intent of section 84-5.1 on its head. Although the State urges this Court to adopt a position long-recognized as an affront to the First Amendment, the United States Supreme Court has resolved the issue: “‘broad rules framed to protect the public and to preserve respect for the administration of justice’ must not work a significant impairment of ‘the value of associational freedoms.’” *In re Primus*, 436 U.S. at 426 (quoting *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967)).

Conclusion

For each of the above reasons, the Court should deny the Defendants' Amended Motion to Disqualify the attorneys of the Institute from representing the Plaintiffs in this action.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion for Judgment on the Pleadings was served on the persons indicated below by United States Mail, first class, postage prepaid, addressed as follows:

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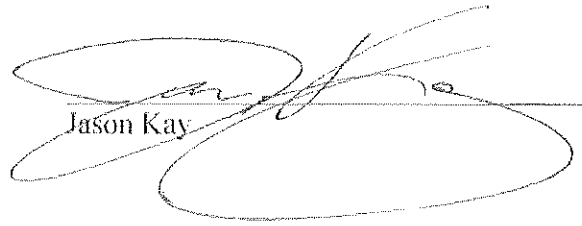
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This the 16th day of January, 2009.


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