

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 97-0588V

Filed: March 29, 2012

KENDALL P. LUMSDEN, a minor, *
by his adoptive mother and natural guardian, *
CYNTHIA PETERS, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Autism; Withdraw of Counsel

ORDER ON MOTION TO WITHDRAW¹

On November 21, 2011, petitioner’s counsel filed a Motion to Withdraw as Attorney of Record (“Motion to Withdraw”). The motion indicated that, notwithstanding her counsel’s belief that there is no reasonable basis to continue with petitioner’s case, petitioner intends to proceed with her claim. On February 16, 2012, respondent filed a Response, opposing the Motion to Withdraw (“R’s Resp”). Respondent asks the court to require petitioner’s counsel to represent petitioner until she has demonstrated cause to continue her claim. On February 27, 2012, petitioner filed her Response to Respondent’s Opposition to the Motion to Withdraw (“P’s Reply”), asserting that an irreconcilable conflict between client and counsel exists. Petitioner asks that the court grant the Motion to Withdraw to preserve petitioner’s right to proceed with her claim.

A. Respondent’s Position.

Respondent asserts three primary arguments in support of her request that I deny the Motion to Withdraw. First, respondent contends that petitioner’s counsel has no absolute right to withdraw. R’s Resp at 2-3. Second, respondent argues that

¹ Because I have designated this order to be published, petitioners have 14 days to request redaction of any medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Vaccine Rule 18(b). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted order. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material. Otherwise, the entire order will be publicly available.

petitioner's counsel has failed to demonstrate that withdrawal would not adversely affect petitioner's interests, as required by the ABA Model Rules of Professional Conduct ("MRPC").² *Id.* at 3. Respondent maintains that I should ascertain petitioner's position before acting upon the Motion to Withdraw.³ *Id.* at 3-4. Third, respondent insists that granting the Motion to Withdraw would force the court and respondent to rely exclusively on the less experienced and prepared *pro se* petitioner, causing the court and respondent to expend more time and resources, delaying the case, and thus constituting harm to the administration of justice. *Id.* at 3, 5.

Instead of granting counsel's Motion to Withdraw, respondent requests the court order petitioner to show cause why her claim should proceed and order petitioner's counsel to continue to represent petitioner while she does so. *Id.* at 3. In particular, respondent maintains that the court should require petitioner's counsel to assist petitioner in such tasks as filing an amended petition, advising the court if petitioner has a medical theory on which to proceed, and advising the court whether petitioner has retained an expert to opine on that theory.⁴ *Id.*

However, reading between the lines, the crux of respondent's objection is that those petitioners who proceed *pro se* require more lengthy and frequent status conferences and more time to attempt to perfect their cases. As petitioners in cases which were a part of the Omnibus Autism Proceeding ("OAP")⁵ have been asked to inform the court whether they wish to proceed with their cases, conflicts between counsel and petitioners have resulted in a significant increase in motions to withdraw.

² The MRPC lists three circumstances in which an attorney is required to withdraw from representing a client and seven circumstances in which an attorney may withdraw. MRPC 1.16. Respondent's discussion of the MRPC is limited to only one example from the MRPC involving discretionary withdrawal and the condition which must be met before withdrawal is appropriate. See MRPC 1.16(b)(1). However, an attorney may withdraw if either the requirements of subsection (1), which respondent references, or any other subsection is met. See *Cherokee Nation of Oklahoma v. U.S.*, 42 Fed. Cl. 15, 17 (1998).

³ Respondent admits "[t]he consent of the client is not dispositive when addressing a motion to withdraw." *Id.* at 4 n.6 (quoting *Robinson v. Delgado*, 2010 WL 3259384 at *2 (N.D. Cal. Aug. 18, 2010)). Still, respondent claims that "[i]t is difficult, if not impossible, to conclude whether withdrawal will have an adverse effect on petitioner without her input." *Id.* at 4. I note that the Rules of the Court of Federal Claims ("RCFC") require only notice to the client of the intent to withdraw; it does not require the client's consent. See RCFC 83.1(c)(5).

⁴ In the alternative, respondent requests the court to convene a status call to discuss these issues.

⁵ The OAP consists of a large group of petitions alleging that certain childhood vaccinations cause or contribute to the development of a serious neurodevelopmental disorder known as "autism spectrum disorder" or "autism." For complete information concerning the autism proceedings, please see <http://www.uscfc.uscourts.gov/omnibus-autism-proceeding>.

B. Petitioner's Position.

In light of the test case decisions in the OAP,⁶ many petitioners' counsel see no basis to continue to pursue these cases. However, petitioners, who continue to believe vaccines are responsible for their children's injuries, insist that their cases go forward. This case is typical of that conflict. Petitioner's counsel asserts that, in his view, there is no reasonable basis for petitioner to continue her claim. P's Reply at 10. Petitioner's counsel indicates that petitioner has been advised of counsel's opinion but that petitioner disagrees with counsel. *Id.* Petitioner's counsel argues that it actually would be "unethical, unprofessional, and a disservice to the Program" for counsel to continue to represent petitioner given their differing views. *Id.* at 11. Petitioner's counsel further submits that "counsel's continued participation, rather than withdrawal, would clearly have an adverse effect on the petitioner's expressed interests." *Id.* Petitioner's counsel concludes that petitioner should be permitted to seek other counsel and present her claim to the court. *Id.*

C. Analysis.

The request to withdraw by petitioner's counsel meets the procedural requirements established in this court's rules. As set forth in Rules of the Court of Federal Claims ("RCFC"), an attorney "may not withdraw the attorney's appearance except by leave of the court on motion and after notice is served on the attorney's client." RCFC 83.1(c)(5). Evidence that petitioner was informed of her attorney's intent to withdraw was a certificate of service indicating a copy of the Motion to Withdraw was sent to petitioner by U.S. mail. This is sufficient to ensure that that petitioner was informed of her attorney's request.

I agree with respondent that the decision to grant an attorney's motion to withdraw clearly is within the discretion of the court. See R's Resp at 2 (citing *Whiting v. Lacara*, 187 F.3d 317, 320 (2nd Cir. 1999); *LaGrand v. Stewart*, 133 F.3d 1259, 1269 (9th Cir. 1998); *Fleming v. Harris*, 39 F.3d 905, 908 (8th Cir. 1994); *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1087 (7th Cir. 1982)). Respondent correctly discusses the factors a court should consider when determining whether to grant an attorney's motion to withdraw. See R's Resp at 2-3. When deciding whether to grant a motion to withdraw, "the court must consider the potential prejudice to **all parties** involved and the potential disruption to the administration of justice." *Abbott v. Gordon*, 2010 WL 4183334, at *3 (D. Md. Oct. 25, 2010) (emphasis added); *accord. Robinson*, 2010 WL 3259384, at *2. Courts have often considered whether the case would be "disrupted by the withdrawal of counsel." *Whiting*, 187 F.3d at 321 (citing *Brown v. National Survival Games, Inc.*, 1994 WL 660533, at *3 (N.D.N.Y. Nov. 18, 1994)).

Rule 11 under both the Federal Rules of Civil Procedure ("Fed. R. Civil Proc.") and the RCFC requires the attorney of record to sign any document filed with the court and to attest that the claims in the document are warranted under existing law and supported by the evidence. Both rules contain sanctions for an attorney who violates

⁶ The OAP test case decisions can be found at <http://www.uscfc.uscourts.gov/node/5026>.

Rule 11(b). See Fed. R. Civ. Proc. 11(c); RCFC 11(c). It is well established that an attorney may not file or continue to pursue a case when there is no reasonable basis for doing so.⁷

In addition, the MRPC provide guidance on when withdrawal is ethically required and when it is simply permissible.⁸ An attorney must withdraw if representing a client would “result in violation of the rules of professional conduct or other law.” MRPC 1.16(a)(1). The MRPC allow an attorney to withdraw if, as respondent noted, “withdrawal can be accomplished without material adverse effect on the interests of the client.” MRPC 1.16(b)(1). However, an attorney also may withdraw from representing a client if the attorney and client have a fundamental disagreement. See MRPC 1.16(b)(4). The fact that representation has been rendered unreasonably difficult by the client is also a valid reason for an attorney to withdraw. See MRPC 1.16(b)(6). Finally, the MRPC allow an attorney to withdraw from representing a client if any “other good cause for withdrawal exists”. MRPC 1.16(b)(7).

Under the MRPC, petitioner’s counsel has both a duty to his client and a duty to the court. See, e.g., MRPC 1.3; MRPC 3.3. Moreover, the MRPC specifically state that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” MRPC 3.1. An action is considered frivolous “if the lawyer is unable either to make a good faith argument on the merits ... or support the action taken by a good faith argument for an extension, modification or reversal of existing law.” MRPC 3.1 cmt 2. Like Rule 11, the MRPC 3.1 prevents petitioner’s counsel from assisting petitioner further in her claim.

Petitioner’s counsel believes there is no reasonable basis to continue this claim. Therefore, he is ethically constrained from filing an amended petition alleging a theory of causation he believes to be without merit. Because petitioner has been ordered to file such an amended petition if she wishes to continue with her claim, petitioner’s counsel is unable to assist petitioner further. See Order, filed June 8, 2011. Under these circumstances, the MRPC 3.1 and 1.16(a)(1) require petitioner’s counsel to withdraw.

⁷ See *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. United States*, 16 Cl. Ct. 158, 165 (1989) (discussing that Claims Court Rule 11 is a continuing obligation and prohibits counsel to continue proceedings when they lack a reasonable basis to do so).

⁸ I note that the United States Court of Federal Claims no longer lists a violation of the MRPC as misconduct under the RCFC. Compare RCFC 83.2 (as amended through November 3, 2008) (Rule 83.2(b)(1) explicitly lists a violation of the MRPC as a basis for disciplinary action) with RCFC 83.2 (as amended through July 15, 2011) (Rule 83.2(c) simply lists disbarment or suspension from another court as a basis for disciplinary action). Still, many state bar associations have incorporated large portions of the MRPC into their rules of professional conduct. See, e.g., Massachusetts Rules of Professional Conduct (“Mass. RPC”) 1.16 (which adopts an almost verbatim version of the MRPC 1.16). Counsel must follow the rules of professional conduct for their individual state bar association and RCFC 83.2(c) will treat disbarment or suspension from another court as grounds for discipline.

Even if not mandated by MRPC 3.1 and 1.16(a)(1), petitioner's counsel may chose to withdraw from representing petitioner under MRPC 1.16(b). Petitioner and her attorney have a fundamental disagreement concerning the merits of her case. MRPC 1.16(b)(4). Furthermore, MRPC 1.16(b)(1), which is cited by respondent indicates that petitioner's counsel should be allowed to withdraw if the "withdrawal can be accomplished without material adverse effect on the interests of the client." Under the circumstances presented in this case, a denial of the Motion to Withdraw would adversely affect petitioner's interests.

Petitioner has informed counsel that she has a theory of causation that she wishes to present to the court. See P's Reply at 10. Petitioner's counsel does not believe the theory has a reasonable basis. See *id.* Petitioner disagrees, and may find other counsel who shares her views. Principles of fundamental fairness require this court to give petitioner the opportunity to present her theory or to locate counsel who is willing to represent her in this effort. Not allowing petitioner this opportunity would have a material adverse effect on petitioner's interests and cause harm to both petitioner and the administration of justice.

The case will not be disrupted by granting counsel's Motion to Withdraw. If this case is to go forward, petitioner (or any attorney representing her) will be required to explain the theory of causation to the court, file medical records, and file an expert opinion causally relating vaccinations to the injury claimed. We are not at the stage where a planned hearing or other time consuming event must be cancelled due to counsel's withdrawal. Respondent will have to take the same steps to defend this case with a *pro se* petitioner that it would have to take with one represented by counsel.

Vaccine Rule 14(a)(2) specifically allows for *pro se* petitioners. The special masters and respondent's counsel have experience working with *pro se* petitioners. Although the court and respondent's counsel may need to expend more time and effort on certain tasks, there is no evidence that granting counsel's Motion to Withdraw would cause a disruption in this case. Even if more time is required to allow petitioner to obtain new counsel or present her theory of causation, the potential harm to petitioner and the administration of justice if counsel's Motion to Withdraw is not granted outweighs any inconvenience caused by a delay.

D. Order.

Petitioner's Motion to Withdraw is **GRANTED**.

The clerk shall convert this case from electronic filing to paper filing and shall send a copy of this Order to petitioner by regular U.S. mail at the following address:

Cynthia Peters-Longo
402 Telia Pt.
Cary, NC 27513

Petitioner, Cynthia Peters, shall contact chambers by no later than April 30, 2012, to schedule a telephonic status conference. This status conference will provide an opportunity for me to explain to petitioner the next steps in this case, now that she is no longer represented by an attorney. Petitioner may reach chambers by calling my law clerk, Adriana Teitel at (202) 357-6363.

The court reminds petitioner that she has an obligation to comply with court orders. Failure to follow court orders **will result in dismissal of petitioner's claim.** *Tsekouras v. Sec'y, HHS*, 26 Cl. Ct. 439 (1992), 991 F.2d 810 (Fed. Cir. 1993) *aff'd per curiam without opin.*; *Sapharas v. Sec'y, HHS*, 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b). Absent full compliance with this order, I will dismiss this case.

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master