



IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

CASE NO. CR 13-2322

Plaintiff,

vs.

ANTHONY J. GARCIA,

Defendant.

#37 FILED IN DISTRICT COURT DOUGLAS COUNTY NEBRASKA APR 05 2016 JOHN M. FRIEND CLERK DISTRICT COURT

ORDER ON STATE'S MOTION FOR SANCTIONS AND DEFENDANT'S MOTION FOR ADMISSION PRO HAC VICE

This matter comes before the Court on State's Motion For Sanctions filed on March 30, 2016, and Defense's Motion for Pro Hac Vice Admission filed on March 31, 2016. The Court held a hearing on April 4, 2016. Defendant appeared personally and with counsel and the State was represented by counsel. Argument was heard, evidence adduced, and the Court took the matter under advisement. The Court received into evidence Exhibits 105-115 and 117 - 119. Being fully advised in the premises, this Court finds and orders the following:

FACTS

Defendant is charged with nine counts, including four counts of first-degree murder, in connection with a pair of double homicides and an attempted burglary that occurred in Omaha, Douglas County, Nebraska.

Three out-of-state attorneys, Alison Motta, Robert Motta, Jr., and Robert Motta, Sr. (sometimes referred to collectively as "the Mottas"), seek admission to represent Defendant in this case with the assistance of three local attorneys, Jeremy Jorgenson, David Reed, and James Owen. The Mottas have been involved in this case for more than 2 1/2 years as lead defense counsel in this matter, previously with assistance by local attorneys Daniel Stockman and Jeffrey Leuschen. On March 31, 2016, this Court granted attorneys Stockman and Leuschen's motion to withdraw from the case and thus found that, without a local attorney of record, the Mottas could not practice

law in the state of Nebraska. This rendered the State's Motion for Sanctions moot. The Mottas now move for admission *pro hac vice* with different local counsel. The State opposes the motion for the same reasons as it previously sought sanctions against the Mottas.

The State alleges that Robert Motta, Jr., Alison Motta, and Robert Motta, Sr., violated a Protective Order entered by this Court regarding the Joy Blanchard homicide (hereinafter the "Protective Order"), violated Neb. Ct. R. of Prof. Cond. § 3-503.6, served a fictitious subpoena, and have consistently made inappropriate, extrajudicial comments through social media. The Mottas argue that the Protective Order was never violated by the defense, that even if information disseminated by the defense was protected by the Protective Order, the recent arrest of a suspect in the Blanchard homicide rendered the Protective Order moot, and that any extrajudicial comment fall within the purview of Neb. Ct. R. of Prof. Cond. § 3-503.6(c).

The Court received into evidence screenshots of Alison Motta's Twitter account, Motta & Motta, LLC's Facebook account, Robert Motta, Jr.'s Twitter account, and various news articles and video clips. (See Exs. 108-15). The Mottas have been active in the media about this case since they were retained as defense counsel, but recent statements by Alison Motta are especially concerning given their timing and content.

The parties have vehemently litigated this case to this point, initially in front of Douglas County District Judge Duane C. Dougherty and more recently in this Court. Defense counsel has filed several substantial pretrial motions, including a motion to sever charges, a motion for change of venue and jury sequestration, and more than a dozen motions to quash search warrants issued in this case. One particular motion in this case has revolved around defense counsel's efforts to tie one of the sets of double homicides to the Blanchard homicide. After an in camera review, the

Court ordered discovery of investigative reports and information of the Blanchard homicide subject to the Protective Order.

On March 25, 2016, this Court held a hearing on an unrelated motion in this case. Two days prior, Defendant had filed a notice to introduce evidence of the Blanchard homicide during his trial, scheduled to begin April 4, 2016. On the March 25, 2016, hearing date, the Court and parties anticipated addressing the Protective Order, but timing did not allow. Either during the hearing or immediately after the hearing, Omaha police arrested a suspect in the Joy Blanchard homicide.

After the Blanchard suspect's arrest, Alison Motta made numerous statements to news media related to the suspect in the Blanchard homicide and the defense's belief that that suspect was involved in two of the homicides which Defendant has been charged. News station WOWT quoted Alison Motta as saying "By cross-comparing the DNA evidence that they discovered at the Sherman/Hunter scene with the DNA evidence that they discovered at the Joy Blanchard scene, [the Blanchard suspect]'s DNA was at both scenes. I don't see how they're going to explain the cross-over in the DNA and the existence of both people at both crime scenes." (Exhibit 114). News Station KMTV quoted Alison Motta as saying "This evidence conclusively exonerates Anthony Garcia and shows that it cannot be a coincidence the two manners of killing being signature like and the crossover between the two scenes of the same two suspects." (Exhibit 112). Alison Motta also made statements that the defense was hopeful that the State would drop the charges stemming from those homicides.

The Court finds that Alison Motta's comments violated the Protective Order

The Protective Order entered June 26, 2015, states "[N]o information or knowledge obtained by [the State or Defendant] from the review may be used, disclosed, or referenced during

preparation for trial, during trial, or for any other matter in this prosecution.” The Protective Order further states, “This Protective Order shall not terminate upon the conclusion of this action but shall continue until further order of this Court or until the City of Omaha has waived confidentiality in writing.” This Court has not granted any motion to lift the Protective Order, and the Court finds the Protective Order is in full force and effect.

The Court finds that Alison Motta’s public dissemination of DNA results obtained from evidence in the Joy Blanchard homicide was a direct violation of the Protective Order. The defense counsel gained access to the Blanchard suspect’s DNA from discovery ordered turned over from the Blanchard case and subject to the Protective Order. The defense team utilized this DNA profile and hired a defense expert to compare the suspect’s DNA profile to DNA found at the scene of two of the homicides in this case. Alison Motta then disclosed the results of this report to the news media in clear violation of the Protective Order.

The Court finds that Alison Motta’s comments violated Rule 3-503.6

Nebraska Rule of Professional Conduct § 3-503.6 states: “A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” Comment 5 of the Rule list “certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to ... a criminal matter.” Three examples listed in the comment are helpful to analysis of this situation.

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial;

The Court finds that Alison Motta violated Rule 3-503.6 with her statements. Her statements specifically addressed at least two of the subjects specifically stated in Comment 5 of the Rule in that she commented on the results of DNA tests conducted in this case and commented on the innocence of her client. The Court had not yet ruled on the admissibility of the DNA evidence at issue, so the Court finds that Alison Motta made the statements without regard for whether they would be admissible at trial. These statements were made to two local news stations within a week of the scheduled beginning of Defendant's trial. Alison Motta knew or should have known of the effect these statements would have as defense counsel last year cited media coverage in its motion to change venue, which was overruled.

Attorney Jorgenson argues that Alison Motta's statements fall within the "safe harbor" allowed for in subsection (c) of the Rule, which allows a to make "a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." The Court finds that Alison Motta's statement cannot fall into the safe harbor provision. Attorney Jorgenson pointed to no particular alleged prejudicial comment that Alison Motta was responding to. Even if Alison Motta was responding to the State's comment that the Blanchard murder was not connected to the homicides committed in this case, the Court notes that the State has maintained that these crimes are not connected for months. Any comments the prosecutors made in this case related to that extent were a continuation of the State's argument that these crimes were not connected, which was not "recent" but months-old. Nonetheless, even if Alison Motta's comments were in response to some prejudicial comments from the State, the safe harbor requires that a lawyer's reactionary

comments “shall be limited to such information as is necessary to mitigate the recent adverse publicity.” The Court finds that Alison Motta’s statements were in no way limited, as she told multiple than one news outlet that the DNA evidence “completely exonerated” her client. In consideration of the evidence and arguments of counsel, the Court finds that Alison Motta’s comments violated Rule 3-503.6.

### ANALYSIS

Having found a violation of the Protective Order and the Nebraska Rules of Professional Conduct, the Court now must consider whether these violations prohibit the out-of-state attorneys from further participation in this matter. The Court finds that, balancing Defendant’s Sixth Amendment right to counsel of choice against the Court’s interest in ensuring the fair and ethical administration of justice in this case, Alison Motta’s Motion For Admission Pro Hac Vice is overruled, while the motions for Robert Motta, Sr., and Robert Motta, Jr., are sustained.

Nebraska court rules leave admission of an out-of-state attorney to practice pro hac vice to the discretion of the court. Neb. R. Ct. § 3-122. But, because this is a criminal case, the Court must also consider Defendant’s Sixth Amendment right to counsel of choice. “[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 2561, 165 L. Ed. 2d 409 (2006). But, a Defendant’s right to counsel of choice is not absolute. The United States Supreme Court has recognized “a trial court’s wide latitude in balancing the right to counsel of choice against the needs of fairness.” *Id.* at 152, 126 S. Ct. at 2565-66. This Court has an “independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *Id.*

The State opposes the Motions For Admission Pro Hac Vice on the basis that the Motta & Motta firm has committed ethical violations and otherwise has disrupted the administration of justice in this case. Attorney Jorgenson, on the other hand, argued on behalf of the Mottas that this Court has no role in disciplining and remedying the alleged violations of the ethical rules. Jorgenson cites to the section addressing the scope of the rules that "violation of a Rule does not necessarily warrant ... disqualification of a lawyer in pending litigation." Neb. R. Prof. Cond. Scope. "Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." *Id.*

The Court agrees with Jorgenson that the state bar association and the Counsel for Discipline are the proper parties to determine whether an ethical rule has been violated and how to discipline an attorney. But, that does not foreclose this Court from conducting an analysis under the rules to determine whether a violation has occurred, whether an attorney's conduct that makes up an alleged violation of the ethical rules intervened in the administration of justice, and whether an attorney's past unethical conduct prevents the attorney from appearing in the case *pro hac vice*. The United States Supreme Court has stated that this Court has an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Therefore, the Court will consider Alison Motta's unethical conduct in determining whether she should be admitted to practice *pro hac vice* in this case.

Alternatively, even if this Court were to not find a violation of the Rule, the Court would nonetheless find that Alison Motta's comments delayed the administration of justice in this case. Although she surely intended her comments to be a defense to her client, the Court finds that the comments were so inflammatory, they prejudiced Defendant and damaged Defendant in the eyes

of the public. At the very least, Alison Motta's comments created more media attention after the defense team had complained of media attention in this case in its motion for a change of venue. Also, Alison Motta's comments led to the State's Motion For Sanctions, causing this Court to hear that issue two calendar days before Defendant's trial was scheduled to begin. And Alison Motta's comments led to Defendant's local counsel of record withdrawing from this case, which this Court granted, causing a continuance of Defendant's trial, indefinitely delaying Defendant's day in court.

The question before this Court is to what extent Defendant's Sixth Amendment right to counsel of his choice trumps the Court's authority to prevent Alison Motta from further violating ethical rules in this case or otherwise impeding the administration of justice in this case. Similar to a finding of a Connecticut court, this Court does not believe Defendant's Sixth Amendment rights trump this Court's authority to require ethical behavior in the courtroom. *See State v. Marciano*, No. CR140280165T, 2014 WL 7714326, at \*3 (Conn. Super. Ct. Dec. 17, 2014). Thus, the Court overrules Alison Motta's motion for admission *pro hac vice*.

The Court now considers whether it should allow the admission of the other two attorneys associated with the Motta firm. The State opposes the admission of Robert Motta, Sr., and Robert Motta, Jr., to the same extent that it opposes the admission of Alison Motta, arguing that the Mottas practice law together under the moniker of "Team Motta." In support of its opposition to the admission of all three attorneys as a group, the State admitted into evidence the Twitter feed of Robert Motta, Jr., and the Facebook postings of the Motta & Motta firm. Also, the State admitted into evidence the transcript of a pretrial hearing in this matter when Robert Motta, Jr., became angered and screamed at prosecutors over the phone, to the extent he had to be instructed by the judge to "Shut Up."



While this evidence evinces a troubling and maybe somewhat lackadaisical adherence to the ethical rules relating to trial publicity, the Court does not find that the actions of Robert Motta, Sr., and Robert Motta, Jr., have interfered with the administration of justice to the same extent as Alison Motta's actions have. In general, Robert Motta, Jr.'s Twitter feed evinces posting of updates on the proceedings in Defendant's case and the Motta Facebook feed has similar postings, along with at least one posting of another high profile murder case pending in Douglas County. The most troubling post on Robert Motta, Jr.'s, Twitter feed and the Motta firm's Facebook feed is the posting of an Internet link to a story about police finding a gun along the interstate that authorities believe is a piece of the murder weapon used in the second set of homicides. Along with the link to the news article, provides the comment "Something's fishy in Omaha." (Exhibit 110). While these postings are at the very least unprofessional for a defense attorney involved in a murder case, the Court finds that they did not cause interference with the administration of justice as did Alison Motta's statements. Unlike Alison Motta's tweet relating to "weak" and "nonexistent" DNA evidence (Exhibit 108), these posts did not directly comment upon prosecution evidence. Furthermore, the State admitted no evidence that these social media postings resulted in media publicity of this case, unlike Alison Motta's tweets that the State attempted to continue a previous setting of Defendant's trial in order to impose the death penalty after conviction. (Exhibit 117). Robert Motta, Jr., did attempt to contact a key prosecution witness via Twitter (Exhibit 110), but there is no evidence this prejudiced Defendant or interfered with the administration of justice. As the Court recalls, the State's motion for sanctions related to defense counsel contacting that witness, which has been withdrawn, focused on Alison Motta's conduct, not Robert Motta, Jr.'s.

Again, the Court does not condone Robert Motta, Jr.'s activity, but distinguishes it from the conduct of Alison Motta and will allow Robert Motta, Jr., to continue in this case in order to

vindicate Defendant's Sixth Amendment right to counsel of his choice. Whereas a pending complaint exists against Alison Motta at the Counsel for Discipline of the Nebraska State Bar for her most recent extrajudicial comments, no similar complaint has been opened against either Robert Motta, Jr., or Robert Motta, Sr. Frankly, the State offered no evidence of any alleged ethical violation committed by Robert Motta, Sr. The Court finds that Defendant's Sixth Amendment right to counsel outweighs the Court's interest in remedying the unprofessional conduct of Robert Motta, Jr. The State provides no authority to impute an ethical violation and conduct that has interfered with the administration of justice by one attorney to other attorneys within that firm. In upholding the Defendant's clearly established Sixth Amendment right to counsel of choice, the Court declines to impute Alison Motta's conduct to Robert Motta, Sr., and Robert Motta, Jr. The Court hopes that the events that have unfolded in the past two weeks will cause defense counsel to be particularly mindful of their extrajudicial conduct in this case moving forward. The Court considers this the last chance for the defense attorneys to conduct themselves in the manner in which this case and this Court demand.

### CONCLUSION

The Court finds that Alison Motta's recent comments violated ethical rules and interfered with the administration of justice in this case. This is a relevant concern for this Court to consider upon the Mottas reapplication to appear *pro hac vice*.

In balancing the Defendant's Sixth Amendment right to counsel of choice against this Court's interest to ensure the fairness of an upcoming trial in this manner, the Court determines that Alison Motta can no longer participate as a counsel of record in this manner. Alison Motta may assist in the defense to the extent any other non-lawyer could, but the Court will not permit her to have a speaking role at trial or sit at defense table. But the Court declines to impute Alison

Motta's unethical conduct which has disrupted the proceedings in this manner to her colleagues Robert Motta, Sr., and Robert Motta, Jr.

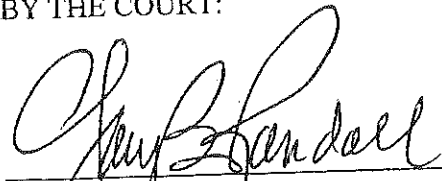
Therefore, the Motions for Admission Pro Hac Vice are sustained as to Robert Motta, Sr., and Robert Motta, Jr. The Court believes this vindicates its interest in the fair administrative justice in this case while affording Defendant his Sixth Amendment right to counsel of choice.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED**, that Alison Motta's Motion For Admission Pro Hac Vice is overruled. The Motions for Admission Pro Hac Vice for Robert Motta, Sr., and Robert Motta, Jr., are sustained. The Court will set a new trial date and dates to hear pending motions in a future order.

DATED this 5 day of April, 2016.

FILED IN MARIOLA  
APR 5 2016

BY THE COURT:

  
GARY B. RANDALL  
DISTRICT COURT JUDGE