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JOHN J. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

RICHARD PHAY TU, M.D.,
THAO PHUONG DANG, M.D.,
LAN CHAU TU, M.D.,
NU THI DANG, D.D.S.,
and
TRAM BUI, RPh

Plaintiffs,

v.

Case No. 2009-18307

VIETNAMESE MEDICAL SOCIETY
OF NORTHEAST AMERICA,
VINH DUC NGUYEN, M.D.,
SANG VAN TRAN, M.D.,
LOC BICH NGUYEN, D.D.S.,
ANH HUU PHAM, D.D.S.,
and
TRUONG SON VAN, M.D.,
Defendants.

OPPOSITION TO PLAINTIFFS' MOTION FOR SUBSTITUTION OF COUNSEL AND
MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL DUE H. TRAN, ESQ.

COMES NOW the Defendant, Vietnamese Medical Society of Northeast America (the "VMSNA"), by counsel, and files this Opposition to Plaintiff's Motion for Substitution of Counsel and Motion to Disqualify Plaintiff's Counsel: Due Tran, Esq. and the firm DHTLAW, PLLC, due to an existing conflict of interest and ethical violations, and in support thereof, respectfully states as follows:

FACTUAL BACKGROUND

1. Plaintiffs made an oral Motion for Substitution of Counsel in open court during Defendant's demurrer hearing on August 13, 2010. (*see* Tr. at p. 2)
2. This Motion for Substitution was neither noticed nor docketed pursuant to local procedure.

3. An "Order for Substitution of Counsel" was presented to the Court for entry requesting that Due H. Tran, Esq. ("Mr. Tran") be allowed to substitute for Jason F. Zellman, Esq. ("Mr. Zellman") as counsel for Plaintiffs. (*see* Ex. 1) It appears that Mr. Tran filed only the first page of the order which he endorsed and only later presented the second page to the Court, which contained the signature lines for all other counsels, at the hearing on August 13, 2010. (*see* Tr. at p. 2 ¶ 7 and p. 5 ¶¶7-13)

4. No mention is made of Thomas E. Campbell, Esq who is currently an attorney of record for Plaintiffs. No provision was made for his endorsement of the order.

5. Defendant raised objections to the entry of said order on the grounds that Due H. Tran, Esq. was prohibited from representing Plaintiffs due to an existing conflict of interest and that his entry would violate certain ethical rules.

6. The Court declined to enter the Order for Substitution of Counsel and set a hearing on September 7, 2010 on which Plaintiffs' Motion for Substitution of Counsel could be heard.

7. On June 21, 2010, Mr. Tran telephoned counsel for Defendant, Richard H. Nguyen, Esq. ("Mr. Nguyen"). During the 19 minute and 30 second telephone conversation from telephone number (202)591-3239, Mr. Tran stated that he had been asked by one or more of the Plaintiffs to provide a consultation with respect to the case at hand. Mr. Tran stated that he wanted to discuss the matter with Mr. Nguyen to evaluate the case in the hopes of resolving it. (*see* Ex. 2 at pp.1-2)

8. Mr. Nguyen informed Mr. Tran that Mr. Zellman was counsel of record for Plaintiffs and that he was reluctant to discuss the matter but invited Mr. Tran to enter an appearance as counsel of record should he wish to discuss the matter.

9. Mr. Tran insisted on discussing the matter and knew substantial sensitive information regarding the Plaintiffs' case which was disclosed to Mr. Nguyen.

10. Mr. Nguyen, as a courtesy, listened to Mr. Tran who eventually proposed a solution in which the parties would agree to yet another amended complaint which would contain a defamation action by Plaintiff Thao P. Dang against one of the individual Defendants. However, it was disclosed by Mr. Tran that the one year statute of limitation on defamation had already expired. Mr. Tran suggested that this would be in the best interests of the Defendant corporation by reducing "infighting" in order to allow individuals to litigate a defamation case.

11. Due to the nature of the proposal, Mr. Nguyen reiterated that he was not comfortable with continuing the conversation for the fact that Mr. Tran was not counsel of record and that the discussion would likely lead to ethical issues later on especially in light of Mr. Zellman being counsel of record and the apparently sensitive nature of the disclosures made.

12. Mr. Nguyen, as a courtesy, conveyed Mr. Tran's proposal to the Defendant, and it was immediately declined. This was conveyed to Mr. Tran in a 25 minute and 6 second telephone call to number (213)949-0443 shortly thereafter. (*see* Ex. 2 pp. 1-2)

13. Mr. Nguyen then asked Mr. Tran if he would be entering an appearance for the Plaintiffs in this case and Mr. Tran indicated that based on the discussion, he would not and did not wish to get involved due to the seemingly irreconcilable differences in the parties' positions. In closing, he stated words to the effect that: if Mr. Nguyen could come up with a resolution to resolve this case so the parties could "save face", then he should let Mr. Tran know.

14. On July 22, 2010, after the 1st Scheduling Conference was held, Mr. Nguyen disclosed the June 21 conversation with Mr. Tran to Mr. Zellman in an email. (Ex. 3)

15. On or about July 28, 2010, Mr. Tran, after learning about the email in Ex. 3, telephoned Mr. Nguyen to clarify that he did not represent the Plaintiffs in the June 21 telephone call and that he was only working in the hopes of settling the matter more or less as a neutral party. He stated that he did not represent the Plaintiffs on that date.

16. On July 28, 2010, Mr. Tran sent an email to Mr. Nguyen stating that:

“I stand firm that our discussion was merely a solicitation for an offer from your client so that the society as a whole would save face; doctors, as community leaders, should not be suing each other. Again, I did not represent any parties involved in the current court proceeding.”
(Ex. 4)

17. On August 3, 2010, Mr. Nguyen sent an email response to Mr. Tran confirming the receipt and understanding of his email. No subsequent response was received from Mr. Tran either confirming or rescinding his prior statements. (*see* Ex. 5)

18. On August 12, 2010, Mr. Nguyen received, via first class mail, a copy of the “Order of Substitution of Counsel” (endorsed only by Mr. Tran), “Plaintiff’s Opposition to Defendants’ Demurrer” and a “Praecipe.” No other correspondence was received from Mr. Tran since his July 28 email and he did not contact Mr. Nguyen at any point to request endorsement or consent to the Order for Substitution of Counsel. No motion accompanied the Order. (*see* Ex. 6)

19. Of note is the fact that all pleadings and orders mentioned in Ex.6 contain the heading: IN THE DISTRICT COURT FOR FAIRFAX COUNTY. However, none of the documents are date stamped. This calls into question if these were filed at all, and if so, with which division of the court.

20. Also of note is that the Certificates of Service on all pleadings and orders mentioned in Ex. 6 claim that copies were mailed to Mr. Nguyen on August 10, 2010, while the postmark on the envelope indicates “WED 11 AUG 2010 PM”. (*see* Ex. 6 at p. 1) They were received only via first class mail on August 12, 2010, the day before the demurrer hearing,

despite Mr. Tran having known Mr. Nguyen's fax number and email address. (see Ex. 4-5) This is especially troubling in light of the close proximity of Mr. Tran's office to a Post Office branch some 102 feet away. (see Ex. 2 at p.3) Mr. Tran's actions violate Virginia Supreme Court Rule 4:15 and the Order of August 6, 2010 (see Ex. 6 at p. 2) as none of the pleadings or Exhibits were timely served which prejudiced Defendant.

I. MR. TRAN'S PRIOR ROLE AS MEDIATOR BARS HIS ADVERSE REPRESENTATION

21. The Preamble to the Rules of Professional Conduct (the "Preamble") states that (emphasis added):

*"A lawyer is a **representative** of clients or a **neutral third party**, an officer of the legal system and a public citizen having special responsibility for the quality of justice.*

*A lawyer may perform various functions. As **advisor**, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As **advocate**, a lawyer zealously asserts the client's position under the rules of the adversary system. As **negotiator**, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As **intermediary** between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. As **third party neutral**, a lawyer **represents neither party, but helps the parties arrive at their own solution**. As **evaluator**, a lawyer examines a client's legal affairs and reports about them to the client or to others."* (Ex. 7)

22. Based on Mr. Tran's representations in his email of July 28, 2010 (Ex. 4) he was not a representative of clients during the July 21, 2010 settlement discussion. Therefore, under the Preamble he can only be a "neutral third party". Of the six defined functions of attorneys set forth in the Preamble, Mr. Tran's role on June 21, 2010 fits squarely into the "**third party neutral**" category in which he "**represents neither party**" but "**helps the parties arrive at their own solution**." This is again reflected by Mr. Tran's own statements. (see Ex. 4)

23. Further, Mr. Tran's own statements in open court at the August 13, 2010 Demurrer hearing regarding the July 21, 2010 conversation further reinforces his position as a

“third party neutral” in this matter as evidenced by the Transcript of the proceedings. (see Tr. at pp. 2-5)

24. Based on the foregoing facts and application of the Preamble, Rule 2.11 applies, which states:

RULE 2.11 Mediator

(a) A lawyer-mediator is a third party neutral (See Rule 2.10) who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute...
(Ex. 8)

25. With respect to subsequent representation by mediators, the Committee

Commentary to Rule 2.11 references Legal Ethics Opinion 590 (1985) which states:

“It is improper for an attorney, who has served as a mediator between the parties, to represent either of said parties in the subject matter of the mediation”
(Ex. 9)

26. Legal Ethics Opinion 849 (1986) confirms the exact same principle:

“It is improper for an attorney, who has served as a mediator between the parties, to represent either of said parties in the subject matter of the mediation”
(Ex. 10)

27. Ethical Consideration 5-20 further confirms that:

“...After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute of any of the parties involved.”
(Ex. 11)

28. It is clear from the foregoing facts, when viewed in light of the applicable Rules of Professional Conduct, the Legal Ethics Opinions and the Ethical Considerations that Mr. Tran’s entry as counsel for Plaintiffs is improper in that it is in violation of the ethical rules and principles set forth by the Virginia State Bar governing lawyers who have previously served as mediators between parties to a litigation.

29. It does not appear that such a conflict can be waived, and even if it were waivable, the conflict has not and will not be waived by the Defendant as any information gained by Mr. Tran during the mediation will prejudice the Defendants if he is allowed to represent Plaintiffs.

II. MR. TRAN HAS COMMITTED NUMEROUS VIOLATIONS OF VA. CODE § 8.01-271.1 AND IS IN VIOLATION OF RULE 3.4 OF THE VIRGINIA RULES OF PROFESSIONAL CONDUCT

30. Va. Code § 8.01-271.1 requires that:

“...every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name...”

31. On August 10, 2010, Mr. Tran signed and filed three pleadings with this court with the full knowledge that he was not an “attorney of record”. (*see* Ex. 6)

32. On August 13, 2010, Mr. Nguyen informed Plaintiffs’ attorney of record Mr. Zellman of these facts and requested that he withdraw or that he request that Mr. Tran withdraw the pleadings in violation of § 8.01-271.1. (*see* Ex. 12) Mr. Zellman conveyed this request to Mr. Tran (*see* Ex. 13).

33. Despite the August 13, 2010 notice, the instructions of this Court (*see* Tr. at pp. 6-7), the Order entered on August 13, 2010 (*see* Ex. 6 at p. 2) with the full knowledge that he was not an “attorney of record”, Mr. Tran has filed and signed no less than four additional pleadings with the Court including an “Entry of Appearance of Counsel” on August 25, 2010. (*see* Ex. 14)

34. To date, Mr. Tran has not withdrawn any of his pleadings despite sufficient notice from Mr. Nguyen, Mr. Zellman and the Court. (*see* Ex. 15)

35. Rule 3.4 of the Virginia Rules of Professional Conduct provides (emphasis added):

*“RULE 3.4 Fairness To Opposing Party And Counsel
A lawyer shall not:*

... (g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings...

... (j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another...”

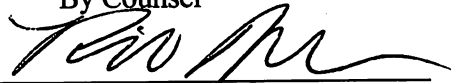
(Ex. 16)

36. Defendant contends that Mr. Tran's intentional and habitual violation of the rule of procedure set forth in Va. Code § 8.01-271.1 is in violation of Rule 3.4(g) and (j) and further supports his disqualification as counsel for Plaintiffs due to the potential additional ethical violations and further delay of the Defendant's demurrer, filed on June 7, 2010, (see Ex. 17) that was already continued once due to Mr. Tran's mishandling of his entry of appearance and will likely be continued once again on September 7, 2010. (see Tr. at pp. 5-6)

WHEREFORE the Defendant, having fully set forth the grounds for its motion, prays that this court enter an order disqualifying Due H. Tran, Esq. and his firm DHTLAW, PLLC from representing the Plaintiffs in this matter.

Respectfully Submitted,
VIETNAMESE MEDICAL SOCIETY OF
NORTHEAST AMERICA

By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this the 31st day of August, 2010, a true and accurate copy of the foregoing Opposition to Plaintiffs' Motion for Substitution of Counsel and Motion to Disqualify Plaintiff's Counsel Due H. Tran was sent via facsimile and email to:

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