

IN THE SUPREME COURT OF THE STATE OF NEVADA

TODD MCGRATH; AND PIZZA HUT OF
AMERICA, INC., A FOREIGN CORPORATION
DOING BUSINESS IN NEVADA,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF CLARK; AND THE
HONORABLE JESSIE ELIZABETH WALSH,
DISTRICT JUDGE,
Respondents,
and
JEREMY DAMERY,
Real Party in Interest.

No. 61527

FILED

AUG 29 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus challenging a district court order revoking the pro hac vice admission of petitioners' counsel during trial.

“A writ of mandamus is available to compel performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion.” Millen v. Dist. Ct., 122 Nev. 1245, 1250, 148 P.3d 694, 698 (2006); see NRS 34.160. The writ may issue only when no plain, speedy and adequate legal remedy exists, NRS 34.170, and the grant or denial of writ relief is discretionary with this court. Millen, 122 Nev. at 1251, 148 P.3d at 698. “[A] petition for mandamus relief generally is an appropriate means to challenge district court orders regarding attorney disqualification.” Liapis v. Dist. Ct., 128 Nev. ___, ___ P.3d ___ (Adv. Op. No. 39, August 9, 2012); Brown v. Dist. Ct., 116 Nev. 1200, 1206, 14 p.3d 1266, 1271 (2000). As in Liapis and Brown, we conclude that writ review is appropriate in this attorney disqualification matter.

The underlying action seeks damages for personal injuries sustained in a collision between a motorcycle and a delivery car. Petitioners, the defendants below, retained John Fitzpatrick, an out-of-state attorney, as their lead trial counsel; he was admitted some time ago under SCR 42 to appear pro hac vice in this case. After trial began, during Fitzpatrick's opening statement, real party in interest filed a motion to revoke Fitzpatrick's pro hac vice admission. The district court heard the motion the next day and granted it. A written order followed.

The district court premised its order revoking Fitzpatrick's admission on the legal proposition that "[p]ermission to a nonresident attorney to appear pro hac vice in a case is not a right but a privilege, the granting and revoking of which is a matter of grace resting in the sound discretion of the presiding judge." The order lists a series of several court rules and orders in limine that the district court has found Fitzpatrick to have violated. Finally, the order concludes that, because petitioners have more than one lawyer, the prejudice associated with loss of their lead trial counsel pales in comparison to the prejudice real party in interest will suffer if the motion is denied.

Petitioners moved for a stay and/or a mistrial, which the district court denied. They then filed the petition for a writ of mandamus now before this court, together with an emergency motion for a stay, which the real party in interest opposed. After considering the petition, stay motion, and opposition, this court entered an order staying trial of the underlying matter and directing an answer and reply on an expedited basis. As directed, real party in interest has filed an answer, and petitioners have filed a reply.

In their petition, petitioners challenge the factual and legal bases for the district court's order revoking Fitzpatrick's pro hac vice

admission. They maintain that many of the cited bases for the district court's order were not contemporaneously objected to and that, when tested against the record, none justify the extreme sanction imposed. They also contend that attorneys are not fungible and that the removal of their lead trial counsel, with trial already underway, will cause them extreme prejudice and deprive them of a meaningful opportunity to present their defense.¹

Real party in interest counters that Fitzpatrick violated both local rules and district court orders in limine and that the violations were repeated, pervasive, and prejudicial. Under these circumstances, the district court did not abuse its discretion in revoking Fitzpatrick's pro hac vice admission. Real party in interest further contends that Fitzpatrick's actions have prejudiced his right to a fair trial, while petitioners will not suffer prejudice based on the revocation of Fitzpatrick's pro hac vice admission because Fitzpatrick's co-counsel are experienced trial attorneys who can try the case without him.

Supreme Court Rule 42 governs the pro hac vice admission of out-of-state attorneys to appear in Nevada courts without taking and passing the Nevada bar. An out-of-state lawyer who meets SCR 42's requirements—which include provision of a certificate of good standing from the lawyer's home state and association of Nevada counsel—may be

¹In their reply, petitioners also ask this court to grant them a mistrial and direct that the case be reassigned to another district court judge. Because these requests are raised for the first time in their reply, we do not consider them in resolving this petition. Francis v. Wynn Las Vegas, 127 Nev. ___, ___ n.7, 262 P.3d 705, 715 n.7 (2011) (“[A]rguments raised for the first time in an appellant’s reply brief need not be considered.”) (citing Weaver v. State, Dep’t of Motor Vehicles, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005)).

admitted to appear pro hac vice. SCR 42(6). Under Nevada law, attorneys admitted to practice pro hac vice are subject to the same professional and ethical rules as regularly admitted attorneys. SCR 42(13) (providing that “[o]ut-of-state counsel appearing under [SCR 42] shall be subject to the jurisdiction of the courts and disciplinary boards of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of Nevada”).

Although the district court in this case deemed Fitzpatrick’s status “a privilege” and a “matter of grace,” this is not the law, at least not once a lawyer has been admitted to appear, and is appearing, pro hac vice on behalf of a client in a case pending in a Nevada state court. “While pro hac vice status was ‘at one time considered to be granted and held at the grace of the court,’ such an approach does not accord with the modern practice of law.” Belue v. Leventhal, 640 F.3d 567, 576-77 (4th Cir. 2011) (quoting Johnson v. Trueblood, 629 F.2d 302, 303 (3d Cir. 1980)); see Martens v. Thomann, 273 F.3d 159, 177 n.11 (2d Cir. 2001) (“the grounds for revoking pro hac vice status should not diverge significantly from the grounds for disqualifying admitted counsel”); Sheller v. Superior Court, 71 Cal. Rptr. 3d 207, 220 (Ct. App. 2008) (recognizing that the California Rules of Court provide that attorneys admitted pro hac vice are subject to the jurisdiction of the state’s courts with respect to state laws governing the conduct of attorneys to the same extent as a member of the State Bar of California, that trial courts have the inherent power to disqualify attorneys, and that revocation of pro hac vice admission is, in effect, a disqualification of an out-of-state attorney in concluding that pro hac vice admission can be revoked by California trial courts for conduct that would warrant disqualifying a California attorney, although also noting that pro hac vice status may also be revoked under other circumstances, but

declining to identify the precise limits of this authority). When a district court is deciding whether to grant a motion to revoke a pro hac vice attorney's admission for asserted misconduct in a case, the district court should analyze the matter as it would any other attorney disqualification. In short, the district court must apply the same considerations that it would weigh when deciding whether to disqualify a Nevada attorney.

“When considering whether to disqualify counsel, the district court must balance the prejudices that will inure to the parties as a result of its decision.” Brown, 116 Nev. at 1205, 14 P.3d at 1270. To prevail on such a motion, the moving party must establish a reasonable possibility that some specific impropriety occurred, as well as the likelihood that “public suspicion or obloquy outweighs the social interests which will be served by a lawyer’s continued participation in a particular case.” Id. (citing Cronin v. District Court, 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989) (quoting Shelton v. Hess, 599 F. Supp. 905, 909 (S.D. Tex. 1984))). In other words, an impropriety must be so exceptional as to call into question the public trust and confidence in the judicial system. Brown, 116 Nev. at 1205, 14 P.3d at 1270. Where, as here, the motion to disqualify comes during trial we also recognize, as other courts have, the substantial tactical motivation that may exist to seek disqualification of an opponent’s trial attorney of choice. See Liberty Nat’l Enter., L.P. v. Chicago Title Ins. Co., 123 Cal. Rptr. 3d 498, 504 (Ct. App. 2011) (“[t]he stage of litigation at which the disqualification is made” is a factor to be considered in assessing prejudice; the later disqualification is sought, “the more difficult it is to replace counsel”).

As noted, the district court’s written order references a number of bases for revoking Fitzpatrick’s pro hac vice admission. We have reviewed the record with care and conclude that, fairly read, it does

not support counsel's disqualification. Several of the grounds cited were not even mentioned in the motion to revoke, cf. Martens v. Thomann, 273 F.3d at 177 n.11 (due process requires specification of bases for disqualification), while others, such as Fitzpatrick's associate's appearance in his stead at a pretrial conference, do not amount to clear rule violations and went unobjected to at the time they occurred. Much is made of the PowerPoint slides that Fitzpatrick provided counsel for real party in interest as a preview of opening statement that assertedly would have violated one or more orders in limine if they had been shown to the jury. However, our review of the record demonstrates that the exchange predated the final order in limine, which had evolved over the preceding days. The objectionable slides were either not used or, having been reviewed prior to use, were not objected to by real party in interest. The other asserted violations do not, singly or in combination, merit disqualification during trial of a party's counsel of choice. Certainly, if the disqualification order had been entered against a Nevada lawyer on this record, it would be unsustainable. No different standard applies to a lawyer who has been admitted and is participating as a lawyer on a pro hac vice basis during trial.

On this record, and for the reasons outlined above, we conclude that the district court manifestly abused its discretion when it granted the motion revoking Fitzpatrick's pro hac vice admission in this case. See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (recognizing that a petition for mandamus will not be granted to control a district court's exercise of discretion, unless the court has manifestly abused its discretion or exercised it arbitrarily or capriciously). Accordingly, we conclude that the petition should be granted. The clerk of this court shall issue a writ of mandamus directing

the district court to vacate its order granting the motion to revoke petitioners' counsel's pro hac vice admission. The writ shall further direct the district court to enter an order denying that motion.

Finally, we note that this petition marks the second time in less than a month that an interlocutory issue arising from the underlying case has been brought before us on a petition for extraordinary relief. See McGrath v. Dist. Ct. (Damery), Docket No. 61464 (Order Denying Petition for Writ of Mandamus, August 14, 2012). Given that trial of the underlying action is underway and, having resolved the instant petition, we are confident that the parties and the district court can successfully resolve any further issues that arise below and bring the case to a conclusion in a timely fashion.

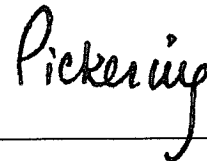
It is so ORDERED.²



_____, J.
Douglas



_____, J.
Saitta



_____, J.
Pickering

cc: Hon. Jessie Elizabeth Walsh, District Judge
Fennemore Craig Jones Vargas/Las Vegas
Thorndal Armstrong Delk Balkenbush & Eisinger/Las Vegas
Wheeler Trigg & O'Donnell LLP
Hutchison & Steffen, LLC
Emerson & Manke, LLP
Prince & Keating, LLP
Schuetze & McGaha, P.C.
Eglet Wall
Eighth District Court Clerk

²In light of this order, we vacate our August 22, 2012, stay.