

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
OKLAHOMA

DR. RACHEL TUDOR,)	
)	
Plaintiff,)	
)	
v.)	Case No. 5:15-CV-00324-C
)	
SOUTHEASTERN OKLAHOMA)	
STATE UNIVERSITY,)	
)	
and)	
)	
THE REGIONAL UNIVERSITY)	
SYSTEM OF OKLAHOMA,)	
)	
)	
Defendants.)	

AMENDED MEMORANDUM OF LAW BY
JILLIAN T. WEISS, ESQ. IN OPPOSITION
TO MOTION FOR SANCTIONS

The motion requesting sanctions filed by Mr. Young and Ms. Novotny (herein referred to as “former counsel”) was not properly filed, as Mr. Young and Ms. Novotny are not litigants in this action and are not representing any litigants in this action. As the Court noted in its recent Order of December 28, 2021 (Dkt No. 391), the Court’s prior Order of February 10, 2020 (Dkt. No. 352) permitted Mr. Young and Ms. Novotny to withdraw and participate in any future attorneys’ fees proceedings. (Dkt No. 391 at 3) Plaintiff notes that it did not provide any basis for motions on other subjects to be filed in

this action by Mr. Young and Ms. Novotny. The Court further noted that “reliance on that Order is misplaced, as at the time it was entered, Plaintiff had not made clear that Young and Novotny were not authorized to seek fees on her behalf.”

Dr. Tudor specifically objects to former counsel overstepping the permission granted them, insinuating themselves into this action and attempting to remove her counsel of choice. See Tudor Amended Declaration In Opposition to Motion for Sanctions, filed herewith, at ¶6. For these reasons, the motion should be denied. There are, however, other grounds for denying the motion.

The motion was not served as required by Fed. R. Civ. P. 11. As set forth in the motion, they served a letter containing their allegations, but they did not serve the motion. Young Motion at 1. This defect renders the motion improper pursuant to Rule 11. Service of the actual motion to be filed is required; warning letters are insufficient. *Rusk v. Fid. Brokerage Servs.*, 850 F. App'x 657, 659 (10th Cir. 2021), cert. dismissed, No. 21-5331, 2021 WL 4822783 (U.S. 2021), citing *Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006). For this reason, the motion must be denied.

Should the Court wish to have a further response to the allegations of former counsels, counsel will set them forth here.¹ The motion alleges that counsel sought to

¹ The motion is remarkably vituperative, aggressive and disrespectful. Dr. Tudor feels likewise. Tudor Decl. ¶ 5 Counsel admits to not having seen its like in her 35 years of practice. The Oklahoma Rules of Professional Conduct, adopted by this court in LCvR 83.6(b), require that lawyers demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. Preamble [5]. The Oklahoma Bar Association Standard of Professionalism 4.9(a) also cautions against unfairly attacking other counsel and questioning their morals and integrity. There is an exception where such characteristics are “directly and necessarily at issue” in the proceeding. This does not apply

“disentitle” former counsel to fees and costs. Young Motion at 2. However, the response filed by counsel on behalf of Dr. Tudor does not state that they are not entitled to fees, only that the motion for fees and costs should be brought by Dr. Tudor at the end of the proceedings. ECF 369 at 6. No claim is made that Dr. Tudor was unaware of former counsel’s intent to withdraw, but rather, as she stated, it was used as a threat to coerce her to give in to their demands. *Id.* at 4.

Counsel faults present counsel on three counts regarding former counsel’s retainer agreements.

1. Mr. Young contends that counsel should have referred to Mr. Young’s retainer agreement in Dr. Tudor’s response. Young Motion at 8. That retainer agreement, however, is irrelevant to the question of who is authorized to file the motion for fees and costs. Nonetheless, Mr. Young was able to and did show the retainer agreement to the Court in his Reply, rendering the omission harmless.
2. Mr. Young contends that counsel “made false representations” by making an argument that his retainer is governed by Oklahoma law. *Id.* The choice of law governing the retainer agreement is not a fact, particularly since the agreement contains no choice of law clause, but a conclusion of law. Under Oklahoma law, a contract is generally to be interpreted according to the law and usage of the place where it is to be performed. Okla. Stat. Ann. tit. 15, § 162 (West) There is no

here because a motion for sanctions inquires into whether counsel’s actions have an objectively reasonable basis, not whether she committed “flagrant ethics violations” or told “outlandish untruths” or made “bizarre representations.” In this motion, counsel will stick to the facts and the law, and will not respond in kind.

showing that such an argument is unwarranted by existing law, as required by Fed. R. Civ. P. 11(b)(2).

3. Counsel's argument that the retainer agreement bars former counsel's direct participation based on its ¶ 24, which addresses discharged counsel, is likewise not a "false representation," but an argument of law. Mr. Young argues that his Firm "terminate[d] the client," and thus ¶ 24 does not apply, but he is not permitted to withdraw representation without leave of this Court. Therefore, he could not have terminated his representation of Dr. Tudor.² For this reason, his contention that a phone call or email suggesting that he wished to withdraw is equivalent to withdrawing is equally unavailing. In any event, Rule 11 is not designed to conflict with the primary duty of an attorney to represent her client zealously. "Forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way." *Newsome v. Gallacher*, No. 11-CV-140-GKF-PJC, 2014 WL 4199616, at *4 (N.D. Okla. Aug. 25, 2014). Counsel believes this argument is well within the "innovative though sensible" rule, as are the arguments set forth below.

Mr. Young complains about several other items beyond the retainer agreement. He states that "Dr. Tudor stated that former counsel noticed Tudor via email that she could not seek legal services from Weiss in 2019. No such email exists, as evidenced by Weiss'

² Mr. Young suggests in the motion's footnote 1 that counsel did not draft this retainer agreement or carefully read it, but this is incorrect. Mr. Young's retainer agreement is derived from counsel's standard retainer agreement, first drafted in 2012, and counsel's retainer with Dr. Tudor, entered into in 2014, and counsel's later versions. Mr. Young also states that Tudor is obliged to include the Firm's petitions for fees and costs in her own filings, and with this, Dr. Tudor agrees. This is the thrust of Dr. Tudor's response to former counsel's motion for fees and costs.

failure to file it in support of her false allegations.” Young Motion at 9. This mischaracterizes what Dr. Tudor stated. In ¶ 9 of her Declaration [ECF 372], she stated “Rather, they told me that they “quit,” sent an email threatening me with withdrawal, and stated convincingly that no other attorneys would want to take my case, including Ms. Weiss.” There are three separate actions occurring in this sentence, 1) being told they quit, 2) sending an email threatening withdrawal, and 3) making a statement about other attorneys. The third action, the statement, is not said to have been part of an email. There are emails referencing such conduct, culminating in the discharge notices found at ECF 372-3. Those notices explicitly state in ¶ 14 of each one that:

You made repeated and continuing threats to file a public “cause” motion to withdraw from my case that would scare away any other attorney from representing me. You did so in order to force me to ignore your improper conduct, follow your improper demands, and to retain you as my attorney.

Mr. Young is free to disagree with this contention, but it is hardly the basis for sanctions, as there is evidentiary support cited in Dr. Tudor’s response.

Mr. Young states that counsel lied to the Court by claiming that Mr. Young made false billing entries. Young Motion at 9. It is correct that Dr. Tudor questions the veracity of some of the charges, and she filed a declaration stating her reasons for believing so. ECF 372 at ¶ 7(a) and ¶ 15-16. Thus, there is evidentiary support for raising questions about the veracity of the billing entries.

Mr. Young states that counsel has wantonly misrepresented the meaning of cases and statutes. The issue under Rule 11(b)(2) is whether the claims are “warranted.” He disagrees with counsel’s argument by analogy from Okla. Stat. Ann. Tit. 5 §4. That section

discusses the right of an attorney to receive money on behalf of the client in satisfaction of a claim. While the present case obviously does not involve satisfaction of a claim, it recognizes the material distinction between current counsel and discharged counsel, which is an issue with regard to the retainer agreement. This argument could have been made more artfully, but it is not unwarranted to point out that Oklahoma statutes recognize and discuss the distinction. With regard to the *Keesee* case, counsel stated “The Tenth Circuit has cited these cases to hold that a discharged attorney may not intervene to collect an attorney fee. *Keesee v. Orr*, 816 F.2d 545, 547–48 (10th Cir. 1987). And so it has.

In the recent case of *Evans v. Jeff*, 475 U.S. 717, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986), the Supreme Court held that the legislative intent and public policy considerations underlying 42 U.S.C. § 1988 do not prevent a party from waiving eligibility for attorney's fees, nor do they preclude settlement negotiations which are expressly conditioned on the waiver of statutory eligibility for attorney's fees. It is implicit in this holding that the right to an award of attorney's fees in civil rights cases lies with the client rather than the attorney. See, *Id.* 106 S.Ct. 1531, 1539 n. 19.

Keesee, 816 F.2d at 547. *Gisbrecht* is not mentioned in *Keesee*, but the principle is cited by the Tenth Circuit in this context in other cases. See *D.A. Osguthorpe Fam. P'ship v. ASC Utah, Inc.*, 576 F. App'x 759, 766 (10th Cir. 2014) (“Ideally, of course, litigants will settle the amount of a fee).

Obviously, the present case does not involve an actual intervention motion under Fed. R. Civ. P. 24. The Court has stated “In light of the attorneys’ lien filed by Mr. Young and Ms. Novotny, they will be permitted to participate in any future proceedings pertaining to attorneys’ fees.” This does not provide explicit permission to be filing motions and telling the Court they will agree to a stay if certain conditions are met, as in ECF 385 (“We

do not oppose a stay under two conditions.”) Former counsel’s actions are akin to intervention, as they have inserted themselves into the case and are attempting to control its progress, to the detriment of Dr. Tudor. It should be noted that, as set forth in ECF 372-3, Dr. Tudor has made very serious allegations against Mr. Young and Ms. Novotny about the inappropriate physical and emotional control they arrogated to themselves during the course of this litigation. As a victim of abuse at the hands of former counsel, Dr. Tudor is naturally loath to think about them, let alone have to argue against them in the conduct of her own case or to potentially sit in a room with them. See Tudor Declaration In Opposition to Motion for Sanctions, filed herewith. Far from “participating,” they are making themselves parties in their own right, so the analogy to intervention is perhaps more apt than Mr. Young believes.

Mr. Young raises the “refusal” to follow Court rules. It is true that counsel filed documents as “sealed ex parte” documents on this Court’s docket [ECF No. 370] without first seeking leave to do so, as is required by this Court. See W.D. Okla. ECF Manual at III-A (p. 25). This was an unfortunate error. Counsel realized that the disclosure of confidential Oklahoma Bar Documents of Ms. Novotny to Mr. Young would be improper without Ms. Novotny’s consent. Counsel felt bound by the confidentiality provisions of rule 5.7 of the Rules Governing the Conduct of Disciplinary Proceedings, Title 5 O.S., App.1-A to not file publicly.³ Therefore, it could not be filed under seal, which would be

³ That section is titled “Confidentiality of Disciplinary Investigations and Results.” It states: “Investigations by the General Counsel and the Commission shall be confidential and the results thereof shall not be made public until authorized by the Supreme Court or as provided in Rule 6.1. However, when no formal complaint is filed in the Supreme Court, at the option of the respondent, the final disposition of a grievance by the Professional Responsibility

available to all attorneys, but it had to be filed *ex parte*, so that Ms. Novotny's Oklahoma Bar admonishment would not be available to a third party not entitled to view it, i.e., Mr. Young. Counsel was not aware until later that Ms. Novotny had voluntarily disclosed the information to Mr. Young. After research, and discussions with local counsel Jerry Colclazier, neither of us could find information on sealing motions. It was located in the ECF manual, but counsel inadvertently and unintentionally missed it. Counsel regrets the error and apologizes to the Court for the failure to conform to the rules. When attempting to file the document, counsel received instructions to email the Court, which she did.

Mr. Young raised this point in his papers and attached the heretofore confidential documents. At this point, moving to seal the documents would be inappropriate, since there was no longer a reason to seal them. Counsel asked Mr. Young if he would oppose the filing of the unredacted documents, given that they had now been revealed. Counsel thought this made the most sense to address the error. The reply to counsel's request was that they opposed doing so, and they advised that attempting to fix the issue was bad faith and an attempt to circumvent the Court's rules. See Exhibit 4 to Former Counsel's motion. This confounding reply suggested that perhaps the best thing, rather than trying to file a confusing motion, and engaging hostile and antagonistic former counsel, was to wait and let the matter be sorted out in the appropriate time. Counsel would be pleased to receive any guidance the Court prefers to provide.

Commission may be made public. In all cases the person who filed a grievance and the respondent shall be notified of the final disposition thereof.

Mr. Young next asserts that Dr. Tudor's position regarding her right to control the conduct of her own litigation is directly against the law of this Circuit, citing an unpublished opinion and cases arising under a different statute entirely. He is certainly entitled to make the argument, but to assert that any contrary argument is sanctionable is clearly incorrect.

The next argument is that counsel "made a mockery of this Court and these proceedings" by falsely alleging that Dr. Tudor was physically assaulted by Mr. Young. He asserts that the allegation is that this occurred in open court. No allegation has been made that it was in open court. In any event, counsel was not there and is not a fact witness. It is not counsel who is alleging that Mr. Young did these aggressive, injurious things, but Dr. Tudor, who gave a declaration to the Court stating these allegations.

Mr. Young alleges that counsel "suborned perjury" because counsel demanded that her client sign a declaration under penalty of perjury which alleges that the undersigned committed misconduct without any factual or evidentiary support and knowing full well that those allegations had already been adjudicated as meritless by grievance tribunals in both Oklahoma and New York

Mr. Young does not allege that he has any personal knowledge of such a demand, and provides no evidence of it. These are facts that are not part of the record, and may not be used in a motion for sanctions. *Tribal Council of Cheyenne & Arapaho Tribes of Oklahoma v. Foster*, 2019 WL 1852414, at *2 (W.D. Okla. 2019). Dr. Tudor stands by her statements. See Tudor Amended Declaration In Opposition to Motion for Sanctions, filed herewith, ¶ 3-4.

Mr. Young accuses counsel of “abuse of process.” Young Motion at 5. The claim for sanctions here is that counsel seeks to “wrongfully inflict financial and reputational harm on former counsel,” and that no colorable arguments were made regarding the issue of timeliness. *Id.* at 5-6. There is no proof that counsel seeks to inflict anything on former counsel. There is, however, significant evidence that Dr. Tudor seeks to raise her legitimate concerns about former counsel, and it appears to be this that upsets Mr. Young. The timeliness issue was raised at ECF 369 at 2-3 (discussing the timing of Fed. R. Civ. P. 54 and LR 54.2). Mr. Young complains that counsel seeks to strike evidence he filed. This is clearly incorrect, for no motion to strike has been filed. At most, counsel argues that such evidence has been misconstrued by Mr. Young, but even had such a motion been filed, it would not be sanctionable simply because Mr. Young considers it proper evidence.

Mr. Young raises concerns about filings by counsel in 2018, but those filings were discussed with former counsel at the time, who refused to include other attorneys’ fees in Plaintiff’s petition. He includes a long substantive discussion about the propriety of the fees claimed, which would not seem to properly belong in a motion for sanctions for violation of the Court’s rules.

Former counsel asks the Court to suspend counsel’s pro hac vice privileges in this Court and to refer her for further discipline to New York State’s Third Judicial Department’s Attorney Grievance Committee. None of the alleged misdeeds cited by Mr. Young merit such serious sanctions, or would merit the deprivation of Dr. Tudor’s choice of counsel. Counsel respectfully requests that the Court deny the motion of former counsel in its entirety.

Respectfully submitted,

February 2, 2022

/s/ Jillian T. Weiss

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SYSTEM OF OKLAHOMA,)
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Defendants.)

AMENDED DECLARATION OF DR. RACHEL TUDOR
IN OPPOSITION TO MOTION FOR SANCTIONS

I, Dr. Rachel Tudor, declare as follows:

1. I submit this Amended Declaration in opposition to the motion for sanctions.
2. I withdraw my previous declaration, and request that it be removed from the record.
3. Movants accuse me of perjury and my attorney of suborning perjury by “making” me sign a declaration attesting to certain facts regarding the conduct of Mr. Young and Ms. Novotny.

4. In fact, I told my attorney the facts to present in the declaration, and I attested to the truth of all of them. I stand by that attestation.
5. I reviewed the sanctions motion. The level of hostility and anger is extremely upsetting. It is consistent with the hostility and anger that I experienced from Mr. Young.
6. Now that I have Ms. Weiss to turn to, they seek to strip away my choice of counsel. She has for many years been considered one of the premier legal experts on gender identity issues in the law. She co-authored this year the first law school casebook on the subject. She trained Mr. Young to litigate these cases starting in 2014. She took my case at a time when Department of Justice policy prohibited interpreting Title VII to cover gender identity. She also advised me that reinstatement was possible as a remedy. I object to my former counsel's attempt to take my counsel of choice from me.
7. The motion for sanctions appears to be an attempt to harm both myself and Ms. Weiss, and I oppose it.

I declare under penalty of perjury that the foregoing is true and correct.

January 31, 2022

Rachel Tudor

Dr. Rachel Tudor

TITLE	Amended Declaration of Dr Rachel Tudor in opposition to...
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