STATE OF INDIANA	)	IN THE CARROLL CIRCUIT COURT
	)SS:	
COUNTY OF CARROLL	)	CAUSE NO. 08C01-2210-MR-000001
	)	
STATE OF INDIANA	)	
	)	
v.	)	
	)	
RICHARD ALLEN	)	

MEMORANDUM REGARDING POSSIBLE DISQUALIFICATION OR SANCTIONS

Any issues or concerns regarding representation should be focused on the 6th Amendment and Article 1 Section 13 rights of the Accused. Continuity of counsel is critical for adequate representation. Article 1 Section 12 of the Indiana Constitution must also be given consideration. Mr. Allen has developed a strong and trusting bond with Mr. Baldwin. Disqualification of either of his court appointed attorneys would greatly prejudice his right to counsel and a timely trial.

See Barham v. State, 641 N.E.2d 79 (Ind. App. 1994) involving an Accused's right to counsel of choice. Barham involved private counsel.

> The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense." U.S. Const., Amendment VI. The right to counsel of choice has been described as an "essential component" of the Sixth Amendment right to counsel, U.S. v. Nichols (1988), 10th Cir., 841 F.2d 1485, 1501

Id.

The authority to remove appointed counsel is limited and has resulted in reversals in other jurisdictions. *See McKinnon v. State*, 526 P.2d 18 (Alaska 1974); *Smith v. Superior Court of Los Angeles County,* 68 Cal.2d 547, 68 Cal.Rptr. 1, 440 P.2d 65 (1968); *Harling v. United States,* 387 A.2d 1101 (D.C.1978); *People v. Johnson*, 215 Mich.App. 658, 547 N.W.2d 65 (1996), appeal granted in part, 453 Mich. 901, 554 N.W.2d 321 (1996), appeal dismissed, 560 N.W.2d

638 (Mich.1997); *People v. Durfee*, 215 Mich.App. 677, 547 N.W.2d 344 (1996); *In Re Welfare of M.R.S.*, 400 N.W.2d 147 (Minn.App.1987).

> "A trial court may not remove a defendant's counsel merely over a disagreement regarding the conduct of defense counsel. *Harling v. United States*, 387 A.2d 1101, 1105 (D.C.App.1978)." …. "Accordingly, the trial court improperly removed court-appointed counsel with no authority to do so."

People v. Johnson, 215 Mich.App. 658, 547 N.W.2d 65 (Mich. App. 1996)

> A court may remove a defendant's attorney on the basis of gross incompetence, physical incapacity, or contumacious conduct. *People v. Arquette*, 202 Mich.App. 227, 231, 507 N.W.2d 824 (1993). In the present case, Judge Penzien did not remove Hess for gross incompetence, physical incapacity, or contumacious conduct. Rather, it appears from the order of July 9, 1993, that Hess was removed for conduct allegedly committed in other cases or outside the courtroom. As we concluded in People v. Johnson, 451 Mich. 115, 545 N.W.2d 637 (1996), Judge Penzien had no authority to remove defendant's court-appointed counsel.

People v. Durfee, 215 Mich.App. 677, 547 N.W.2d 344 (Mich. App. 1996)

Disqualification of counsel is an extreme remedy for any alleged or perceived violation of a court's order. Most if not all cases concerning disqualification of counsel involve conflicts of interest. There is no case allowing disqualification when an individual not part of the attorney's office or staff surreptitiously purloins information from the attorney and disseminates it without permission or the attorney's knowledge.

Furthermore, any sanction first requires proof of knowing, willful or intentional conduct, as do the Rules of Professional Conduct. Here the attorney's trust and office were violated without his knowledge. Rule 1.6, IRPC requires disclosure by an attorney, not someone that purloined information without the attorney's knowledge. Commentary 16 to that rule states: "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the

representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3." The disseminators, do not fit that definition.

Attorney Baldwin did nothing wrong. He was snookered and abused. *See Hanna v. State*, 714 N.E.2d 1162 (Ind. App. 1999) which reversed the conviction because the trial court erroneously disqualified counsel when the Accused had waived any perceived conflict.

> We note at the outset that defense counsel was disqualified in response to the State's motion and not in response to a defense request for substitute counsel. Where it is the government which moves to disqualify defense counsel, the burden is on the government to show that any infringement on the defendant's choice of counsel is justified. *United States v. Diozzi*, 807 F.2d 10, 16 (1st Cir.1986). Diozzi cited *Flanagan v. United States,* 465 U.S. 259, 268-69, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984), for the proposition that the Sixth Amendment right to counsel of choice reflects a constitutional protection of the defendant's free choice independent of the concern for the objective fairness of the proceedings.

Id.

> The trial court reconsidered its earlier ruling and granted a continuance. While it denied the defense attorneys' request to withdraw, it sua sponte removed them from the case because of the "insulting and absolutely improper" remarks about the court in their motion to reconsider. R. at 80. The court appointed two new attorneys to represent Jones and ordered that the removed attorneys turn over their case file to new counsel by April 13. The trial court also referred the motion to reconsider to the Disciplinary Commission.

State ex. Rel. Jones v. Knox Superior Court No. 1, 728 N.E.2d 133 (Ind. 2000).

The Knox Court also stated that"

> This Court is generally of the view that a trial court is limited in its authority to remove a criminal defendant's court-appointed counsel. However, the Court finds it unnecessary to explicate the parameters of that authority here. This is because Carnahan and Dillon here affirmatively requested that they be allowed to withdraw as Jones's counsel if the relief they sought was not provided. R. at 43.

State ex. Rel. Jones v. Knox Superior Court No. 1, 728 N.E.2d 133 (Ind. 2000).

The issue before the Court is a horrible tragedy created by persons not related to the defense of Mr. Allen. There were three disseminators, one of which committed suicide after the law enforcement investigation began.

It should be considered that nothing has been disclosed that won't be disclosed at trial or hearings. It should also be considered that there have been volumes of information disseminated by law enforcement and/or others not at all linked to the defense team.

Mr. Baldwin trusted a friend to respect his office space. He was betrayed. Since that transgression Mr. Baldwin has kept all Delphi-related items locked in a room or a locked fireproof file cabinet. Furthermore, defense counsel has put together a plan for curative action in which no items will be left unattended for even a second in any unlocked room. When any documents or item from the case is needed for preparing the case, the person using the documents or items will either (1) lock the door behind them when they leave, even for a lunch break or bathroom break; or (2) return those documents or items to the room dedicated to the Delphi case and lock the door.

As Mr. Rozzi indicated there are vast amounts of trial preparation materials and it would be a set back to the defense have to relocate them. Under these circumstances Mr. Baldwin has taken sufficient curative action.

Should the Court believe there should be some sanction the Court could order to 24 hours of representation without compensation.

Respectfully Submitted,

/s/David R. Hennessy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon all counsel of record at the time of filing.

/s/ DAVID R. HENNESSY

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