

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CHERI SMITH,)
Plaintiff,)
v.) Chancery No. 53360
WESLEY C. SMITH,)
Defendant)

#66 – REPLY TO VARDY MOTION TO QUASH

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COMES NOW the Defendant, Wesley C. Smith, and makes this reply to the MOTION to quash the witness subpoena of Loretta Vardy. The Defendant states as follows:

1. Ms. Vardy claims: “it could be a violation of client confidentiality under Rule 1.6a of the Virginia Professional Rules of Conduct as well as a conflict of interest for Ms. Vardy to testify on the Defendant's behalf.” However Rule 1.6(a) does allow exceptions and in fact Rule 1.6(c)(2) Actually requires Ms.

Vardy to provide information: “information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal”

2. So Rule 1.6 does not prevent Loretta Vardy from testifying it only restricts her testimony to non-privileged or fraudulent topics. The Defendant does wish her to testify about fraud.

3. As the Defendant wishes Ms. Vardy to testify about knowledge she obtained that is not covered by attorney/client, information she obtained as an eyewitness, and written statements she shared with the Defendant’s previous attorney, Rule 1.6 clearly does not apply to that type of testimony.

4. For example the Defendant wishes to question Ms. Vardy about a letter she wrote to Mr. Whitbeck where she make certain specific statements as to the conduct of her client as well as that of the Defendant. The Defendant has already submitted this to the court as Exhibit D of #64 - Motion To Strike GAL Report. Certainly as Ms. Vardy has shared that information with the opposition she can hardly claim it is protected.

5. Also it is wrong for Ms. Vardy to argue privilege in this motion as the courts have ruled that:

“Nor is privilege a proper ground to quash a subpoena since the claim of privilege can only be asserted after the witness takes the stand and is asked questions regarding a

privileged matter.” People v Slochowsky, 116 Misc 2d 1069, 456 NYS2d 1018

6. Ms. Vardy goes on to claim that about issues relating to withdrawing as counsel at “this late date”. However this again is an unacceptable excuse. Ms. Vardy was notified in writing in Feb 2004, in the Defendant’s response to her interrogatories that she would be called as a witness. The answer even specified events she would be questioned about:

On or about October 2, 2002 Ms. Vardy participated in the abduction of the Child by the Wife. Ms. Vardy appeared at the Child’s school and was verbally abusive while advising and helping the Wife take the Child to the Days’ residence where the Husband had no access to him due to a no-trespassing notice.

On or about February 23, 2003. Ms. Vardy appeared at marital residence to get involved in the Wife calling police because the Child was in the Husband’s room. Ms. Vardy observed the Wife ignoring the Child and the Husband playing with him.

7. Clearly the rules are meant to protect confidential communications between client and attorney and not to protect eyewitness testimony that the attorney went out of her way to observe. If Ms. Vardy did not wish to testify about these incidents she should have chosen not to attend them and to get involved in them outside of the role of an attorney.

8. Ms. Vardy has had over two years in order to withdraw and for her client to hire another attorney if that is necessary. Any misconduct by Ms. Vardy in not addressing the matter in a timely fashion does not justify punishing the Defendant, nor the court violating the law by refusing to consider relevant evidence.

9. As Ms. Vardy has had a habit of testifying against the Defendant at hearings without taking the witness stand and without being sworn in and has given testimony in violation of law and rule, without giving him an opportunity to cross-examine her. The Defendant requests that she be ordered to cease this conduct and only testify from the witness stand, after being sworn in and at no other time.

WHEREFORE the Defendant moves this court to deny the motion to quash and to compel Ms. Vardy to take the stand and testify when called and to not testify at any other time.

**Respectfully Submitted,
Wesley C. Smith**

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