

the information indicated by asterisk (*) as required by Judge J. McFarland's Procedures for the 133rd Civil District Court, when motioning to substitute counsel. Furthermore, the "motion" filed was not signed or filed by the attorney of record Mr. Richard A. Battaglia (See Exhibit 1), nor was it supported by an affidavit from the Centra 417 Defendants, and therefore, Mackie Wolf had no *locus standi* to make and file such a "motion" on behalf of the Centra 417 Defendants. Therefore, Mackie Wolf is seeking to deceive this court by calling their request to substitute counsel a "motion" by the Centra 417 Defendants.

II. The Facts Preceding the Filing of the Mackie Wolf "Motion."

On September 11, 2024, paralegals and then attorneys from Mackie Wolf sought to engage the plaintiffs' counsel in email discussions regarding whether or not their proposed "motion" to replace Mr. Richard Battaglia, as the counsel of record for the 417 Centra Defendants would be opposed. Considering that they are not the attorneys of record for the Centra 417 Defendants, this was a gross violation of the professional conduct rules and was an attempt to put at risk the confidentiality that plaintiffs' attorney Charles Whittier owes to his clients. When Mr. Whittier explicitly informed Mackie Wolf's representatives that he was not interested in engaging with them on any matters related to this case, until they were appointed the attorneys of record pursuant to Tex R. Civ. P. 10, they went ahead anyway and filed the present "motion."

Prior to their filing, in his return email, Mr. Whittier warned Ms. Crystal G. Gibson of Mackie Wolf, not to try and color their "motion" with legitimacy by filing a Certificate of Conference indicating that Mr. Whittier was either opposed or consented to their proposed "motion," because it is the plaintiffs position that Mackie Wolf not being the attorneys for the

Centra 417 Defendants, have no *locus standi* to be filing any motions in the first place. (See **Exhibit 2**)

The Mackie Wolf “motion” is wholly inadequate and does not comport with any of the requirements of Tex R. Civ. P. 10, as it contains no explanation of why the “motion” is for “good cause shown,” not for the purpose of delay, or how it is in the interests of justice. It is also not filed or supported by the present counsel for the Centra 417 Defendants, Mr. Richard A. Battaglia, and does not request an oral hearing in the matter, or provide the information indicated by asterisk (*) as required by Judge J. McFarland’s Procedures for the 133rd Civil District Court, when motioning to substitute counsel.

It appears also that Brian Womac, counsel for Defendant Robert A. Slinger, did not feel obligated to speak with Mackie Wolf since he did not do so, and he too was counted as being opposed to this “motion.”

And notably, Mr. Battaglia, the attorney for the Centra 417 Defendants, did not file an affidavit in support of the Mackie Wolf “motion” and did not confer with plaintiffs’ counsel Mr. Whittier regarding his removal as the attorney of record, contrary to the requirements of Tex R. Civ. P. 10, and the Harris County Civil District Court Trial rule 3.3.6, and Judge McFarland’s rules requiring the filing of a Certificate of Conference by an attorney of record in the case and mandatory oral hearing for motions to substitute counsel.

Therefore, this “motion” filed by Mackie Wolf is in contravention of Tex R. Civ. P. 10, and several rules of the Texas Rules of Professional Conduct for attorneys. It is also unfair and prejudicial to the plaintiffs as it causes delay and confusion in the conduct of the case and may be prejudicial to the interests of the 417 Defendants. This “motion,” therefore, should be denied and

Mackie Wolf should be admonished and ordered to reimburse plaintiffs' attorneys fees, for filing such pleadings.

II. LEGAL ARGUMENTS

A. The Mackie Wolf "Motion" Does Not Comply With Tex R. Civ. P. 10

Tex R. Civ. P. 10, requires that counsel can only withdraw as the attorney of record upon written motion and for "good cause" shown.

The Mackie Wolf "motion" is wholly inadequate (a one page, 2 paragraph request) and it does not comply with any of the requirements of Tex R. Civ. P. 10, as it contains no explanation of why the "motion" is for "good cause shown," and not for the purpose of delay, or how it is in the interests of justice.

This court would be on very unsafe legal ground if it were to grant the relief requested in the Mackie Wolf "motion" as case law is legion showing that it is an "abuse of judicial discretion," for a court to allow an attorney to withdraw or be substituted into a case except by strict adherence to Rule 10¹. (See, *Gillie v. Boulas*, 65 S.W.3d 219, 221 [Tex. App. – Dallas 2001]; and *Elder v. Tex Dep't of Family Services*, 2011 Tex. App. LEXIS 7610; and *Guerrero v. Mem'l Turk. Creek, Ltd.*, 2011 Tex. App. – LEXIS 6869.

If this court were not to strictly follow the requirements for a written motion from the attorney of record, the court's order would be ripe for appeal, not only by the plaintiffs and the 417 Centra Defendants, but also Mr. Battaglia himself.

Since Mr. Battaglia is not represented in the present "motion" this court has no idea if he is even aware of this attempt to have him removed as the counsel of record. And without his

¹ Tex R. Civ. P. 10

written motion the court has no idea whether Mr. Battaglia has informed his clients of the current situation of this case, the state of pending motions or impending deadlines.

Therefore, it would be unsafe, unsound and an abuse of judicial discretion to grant the substitution requested in the Mackie Wolf “motion” until this court knew what the reasons for withdrawal are from Mr. Battaglia himself, and how it will affect the Centra 417 Defendants defense, therefore, this court must strictly adhere to Tex R. Civ. P. 10.

B. The Mackie Wolf “Motion” Is In Contravention of the Texas Rules of Professional Conduct.

Tex. R. Prof Conduct rule 1.15, sets out the circumstances and requirements an attorney must follow regarding the declining or termination of that attorneys legal representation of a client. The Mackie Wolf “motion” thoroughly fails to adhere to these requirements.

Without a motion authored by Mr. Battaglia or supported by affidavit from the Centra 417 Defendants, this court has no way of knowing if Tex. R. Prof Conduct rule 1.15 is being adhered to by Mr. Battaglia or Mackie Wolf.

Specifically, Mackie Wolf’s “motion” does not inform this court if granting the withdrawal and substitution of counsel as they request, would be in violation of Tex. R. Prof Conduct rule 1.15(b)(1) [the substitution having a materially adverse effect on client]; or the other specific requirements and/or restrictions in Tex. R. Prof. Conduct rules 1.15(b)(2)--(7) that apply, including “for good cause shown” (Tex. R. Prof. Conduct rules 1.15(b)(7); or the asterisk (*) information required under Judge McFarland’s rules when motioning to substitute counsel.

Then there is the question of Mr. Battaglia’s fees. Would Mackie Wolf’s request for change of attorney result in fees being owed to Mr. Battaglia by the Centra 417 Defendants, that if not

paid would allow him to retain his case file and thereby prejudice his clients' defense; or would a substitution of attorney outside of the requirements of Tex R. Civ. P. 10, allow Mr. Battaglia's clients to avoid paying for services already rendered by him, in any event?

Also, there is the question of conflicts of interest. The Mackie Wolf "motion" to be substituted in as attorneys does not inform this court as to whether or not such a move would create a conflict of interest as defined in Tex. R. Prof Conduct rules 1.06 -1.09; and if such a conflict were to be shown to have existed at the time the Mackie Wolf relief was granted, it would be further grounds for appeal and perhaps claims for damages against Mackie Wolf.

Therefore, the obvious breaches of the Texas Rules of Professional Conduct outlined above, that would or could be effected by the relief sought by the Mackie Wolf "motion," further illustrates that such relief should definitely not be granted by this court.

C. The Mackie Wolf "Motion" Offends Against the Civil Procedure Rules of the State of Texas, Harris County Civil District Courts, and the local rules of Judge J. McFarland.

The present "motion" filed by Mackie Wolf is in contravention of Tex R. Civ. P. 10, and several rules of the Texas Rules of Professional Conduct for attorneys; as well as being frivolous, unfair and prejudicial to the plaintiffs as it causes delay and confusion in the conduct of the case and may also be prejudicial to the interests of the Centra 417 Defendants.

This "motion," therefore, should be denied and Mackie Wolf should be admonished for filing such pleadings having been aware of the requirements of Tex R. Civ. P. 10, and the Harris County Civil District Court Trial rule 3.3.6, and Judge McFarland's rules requiring the filing of a Certificate of Conference by an attorney of record in the case, all of which Mackie Wolf has willfully violated.

Additionally, Mackie Wolf has not requested an oral hearing in the matter, or provided the information indicated by asterisk (*) as required by Judge J. McFarland's Procedures for the 133rd Civil District Court, when motioning to substitute counsel.

It should be noted, that there is currently a plaintiffs' motion before this court, alleging with strong evidentiary support, that Mr. Battaglia has also violated the civil rules of procedure outlined above, and it appears that Mackie Wolf intends to follow in that tradition, thus providing added reason for their "motion" to be denied.

D. The Mackie Wolf "Motion" is a Frivolous Pleading Willfully Meant to Harass and Delay Plaintiffs and Warrants Admonishment by the Court and Sanctions and/or Attorney's Fees.

In Texas, courts are authorized to admonish lawyers for filing frivolous pleadings under several rules and statutes. The primary rule is Texas Rule of Civil Procedure 13, which allows a trial court to impose sanctions against an attorney or a represented party if a pleading is found to be groundless and brought in bad faith or for the purpose of harassment. "Groundless" is defined as having no basis in law or fact and not warranted by a good faith argument for the extension, modification or reversal of existing law. (See *Gomer v. Davis*, 419 S.W.3d 470 [Tx. Ct. App. Houston]; *Bloodworth v. Aden*, 2007 Tex. App. LEXIS 5041; *Di Sibio v. Parish*, 2008 Tex. App. LEXIS 217)

Additionally, Chapter 10 of the Texas Civil Practice and Remedies Code provides another basis for sanctions. Under Section 10.001, the signing of a pleading or motion certifies that it is not being presented for any improper purpose, such as to harass or cause unnecessary delay, and that each claim or defense is warranted by existing law or a non-frivolous argument for the

extension, modification or reversal of existing law. (See *Bitgood v. Harkness*, 2022 Tex. App. LEXIS 2562; *Bloodworth*, Id.; Tx. R. Civ. P., Sections 10.001 and 10.004)

Sanctions under Chapter 10 can include directives to perform or refrain from certain acts, payment of penalties into court, and payment of reasonable expenses incurred by the other party, including attorney's fees.²

In the instant case, Mackie Wolf was well aware of the requirements for the substitution of counsel as laid out in Tex R. Civ. P. 10, because plaintiffs' attorney Mr. Whittier directed their attention to it, in his email (**See Exhibit 2**). Mr. Whittier's warning was legally correct, cogent and unequivocal, and Mackie Wolf knew that no responsible attorney could refrain from opposing their motion for the reasons outlined above, thus causing attorney Whittier to have to spend client's time and money responding to Mackie Wolf's frivolous "motion" because it was not a "motion" which was not supported by existing law under Tex R. Civ. P. 10, and which did not seek a modification or reversal of existing law.³ Mackie Wolf also knows that because it does not represent any parties in the case (**See Exhibit 1**) it has no right to file any motions in this case.

However, Mackie Wolf, for reasons only known to themselves, decided to sign and file their "motion" for substitution even though it breached the most basic tenants of law and professional conduct.

The plaintiffs also make these assertions and request remuneration of attorney's fees, because the Mackie Wolf "motion" was completely unnecessary, as Mr. Battaglia was free and competent to file the motion himself. Which begs the question "Why did he not"? Mr. Battaglia has repeatedly refused to confer with plaintiffs' counsel Mr. Whittier and this behavior continues. Is Mr. Battaglia ill, or incapacitated, or is he blissfully on vacation and completely unaware of

² Tx. R. Civ. P., Sections 10.004.

³ Id., *Bitgood v. Harkness*

what Mackie Wolf is trying to do? These are questions to which this court deserves answers, and which Tex R. Civ. P. 10 is designed to provide.

The frivolous nature of Mackie Wolf's "motion" is also a danger to the clients they are seeking to represent as it fails to ensure that the Centra 417 Defendants have been properly appraised of the state of their case from Mr. Battaglia himself, and that their newly sought attorneys have Mr. Battaglia's complete file in the case. All issues that a properly filed motion under Tex R. Civ. P. 10, would remedy.

IN CONCLUSION

Considering the premises, this "motion" filed by Mackie Wolf is in contravention of Tex R. Civ. P. 10, and several rules of the Texas Rules of Professional Conduct for attorneys. It is unfair and prejudicial to the plaintiffs as it causes delay and confusion in the conduct of this case and may also be prejudicial to the interests of the Centra 417 Defendants. This "motion," therefore, should be denied and Mackie Wolf should be admonished. In addition, Mackie Wolf should be ordered to reimburse the plaintiffs' attorneys fees to oppose this "motion" in an amount no less than \$5000.00 and their wrongly filed "motion" to substitute as attorneys for the Centra 417 Defendants should be removed from the court's docket.

Houston, Texas
September 13, 2024

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Plaintiffs' Response in Opposition to the Mackie Wolf Request to Substitute Attorney has been forwarded to all parties in interest, pursuant to TRCP 21a via Texas eFile, and to the law firm of Mackie Wolf Zientz & Mann, on this 13th day of September 2024.

Respectfully submitted,



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Charles Whittier on behalf of Charles Whittier

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charles@whittierlaw.international

Envelope ID: 92008657

Filing Code Description: Answer/ Response / Waiver

Filing Description: Plaintiffs' Response in Opposition to Mackie Wolf's

Frivolous "Motion" to be Substituted in as Counsel for the Contra 417

Defendants

Status as of 9/13/2024 3:32 PM CST

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