DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

THE BEATITUDES OF PROFESSIONAL CONDUCT

27TH ANNUAL RUBENSTEIN-WALSH SEMINAR ON ETHICS AND PROFESSIONALISM

DSBA WEBINAR VIA ZOOM

SPONSORED BY THE DELAWARE STATE BAR ASSOCIATION AND THE ST. THOMAS MORE SOCIETY

FRIDAY, FEBRUARY 11, 2022 | 8:30 A.M. – 12:45 P.M.

4.0 Hours CLE credit in Enhanced Ethics for Delaware and Pennsylvania Attorneys

ABOUT THE PROGRAM

This annual ethics seminar co-sponsored by DSBA and the St. Thomas More Society of Delaware presents speakers and topics which touch on many of the very important issues which attorneys must understand. Thomas More faced adversity and danger yet stood by the principles of his religion and the legal profession; this seminar seeks to help provide the tools to strengthen the legal profession and those who practice it.

CLE SCHEDULE

The Beatitudes of Professional Conduct

Moderators

The Honorable Mary M. Johnston
Superior Court of the State of Delaware

The Honorable Sherry R. Fallon
United States District Court for the District of Delaware

Matthew F. Boyer, Esquire
Connolly Gallagher LLP

8:25 a.m. – 8:30 a.m. | Welcome

8:30 a.m. – 9:30 a.m.

"Blessed are the Pure at Heart"

Staying Abreast of Developments in Legal Ethics

David A. White, Esquire
Chief Disciplinary Counsel

Kathleen M. Vavala, Esquire
Office of Disciplinary Counsel

Charles (Chip) Slanina, Esquire
Finger & Slanina LLC

9:30 a.m. – 10:30 a.m.

"Blessed are Those who Hunger and Thirst for Righteousness"

Protecting the Attorney-Client Privilege in Litigation

The Honorable Abigail M. LeGrow
Superior Court of the State of Delaware

The Honorable Lori W. Will
Court of Chancery of the State of Delaware

John D. Balaguer, Esquire
White and Williams LLP

10:30 – 10:45 a.m. | Break

10:45 a.m. – 11:30 a.m.

"Blessed are Those who Mourn"

Client Confidentiality in the World of Trusts and Estates

David Ferry, Esquire
Ferry Joseph P.A.

Denise Nordheimer, Esquire
The Law Offices of Denise D. Nordheimer, LLC

11:30 a.m. – 12:00 p.m.

"Blessed are the Geeks"

Ethical Issues in the Use of Technology

Ryan P. Newell, Esquire
Young Conaway Stargatt & Taylor LLP

Margaret (Molly) DiBianca, Esquire
Clark Hill PLC

12:00 p.m. – 12:45 p.m.

"Blessed are the Peacemakers"

The Role of Special Masters in Addressing Issues of Ethics and Professionalism

The Honorable Paul Wallace
Superior Court of the State of Delaware

The Honorable Andrea Rocanelli
Superior Court of the State of Delaware (retired)

Gregory B. Williams, Esquire
Fox Rothschild LLP

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Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

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Case Number 69,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARTER PAGE, an individual, Plaintiff-Below, Appellant, v. OATH INC., a corporation, Defendant-Below, Appellee.	No.: 69, 2021 Appeal from the Superior Court of the State of Delaware in C.A. No. S20C-07-030 CAK

ANSWERING BRIEF OF *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE OF THE SUPERIOR COURT'S MEMORANDUM OPINION AND ORDER DATED JANUARY 11, 2021

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Amicus Curiae

Dated: July 16, 2021

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IDENTITY OF AMICUS, INTEREST, AND AUTHORITY TO FILE

By Order dated May 6, 2021, the Court appointed the undersigned member of the Delaware Bar, Matthew F. Boyer, as *amicus curiae* to file an answering brief in opposition to the opening brief of counsel for plaintiff-below appellant.[1]

[1] Trans. I.D. 66578815.

NATURE AND STAGE OF THE PROCEEDINGS

The Nature and Stage of the Proceedings as set forth in Appellant's Amended Opening Brief is generally accurate, with two exceptions. First, while on January 6, 2021, Delaware counsel for L. Lin Wood, Jr., Esquire ("Wood") filed a Response to the Rule to Show Cause issued on December 18, 2021,[2] Wood did not respond "by affidavit."[3] Second, while Wood apparently attempted to file a motion for reargument on January 19, 2021, without Delaware counsel, such motion does not appear on the docket.[4] This is because he did not comply with the requirements set forth in Superior Court Rules of Civil Procedure 90.1(d) and 79.1(h).[5]

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[2] Appellant's Opening Appendix, at A9-68. References herein to the (Amended) Opening Brief are designated "OB at [page number]"; references to the Appendix to Appellant's Opening Brief are designated "A[page number]"; and references to the Appendix to Answering Brief of *Amicus Curiae* in Support of Affirmance are designated "AC[page number]."

[3] *Cf.* OB at 1.

[4] *See* OB at 2; A3-4.

[5] *See* A77.

SUMMARY OF ARGUMENT

1. Denied. Wood contends that the Superior Court abused its discretion in revoking his admission *pro hac vice* under Superior Court Civil Rule 90.1 ("Rule 90.1") because (i) the revocation was based on conduct unrelated to this case, (ii) courts in the jurisdictions where the conduct occurred had not ruled that he had violated the applicable rules of professional conduct, and (iii) Wood's conduct in this case did not violate the Delaware Lawyers' Rules of Professional Conduct ("DLRPC") or prejudice the fairness of the proceedings.[6] While each of these factual assertions is true, none of them suggests that the trial court misapplied Rule 90.1 or abused its discretion in revoking Wood's admission *pro hac vice*. The trial court applied Rule 90.1 as written and properly exercised its discretion in concluding that Wood's continued admission would be "inappropriate and inadvisable" based on his conduct in federal litigation in Georgia and Wisconsin contesting the 2020 presidential election, as addressed in the trial court's Memorandum Opinion and Order dated January 11, 2021 ("January 11 Order").[7] Wood's appeal should be denied and the January 11 Order affirmed.

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6 OB at 3.

7 A69-76.

STATEMENT OF FACTS

A. The Rule to Show Cause

On December 18, 2020, the court issued *sua sponte* a Rule to Show Cause "why the permission to practice in this case issued to L. Lin Wood, Jr., Esquire should not be revoked."[8] The Rule to Show Cause specifically identified numerous concerns regarding Wood's conduct in litigation in Georgia and Wisconsin following the initial granting of his admission *pro hac vice* by order dated August 18, 2021.[9] Both the Georgia and Wisconsin cases sought expedited injunctive relief related to the general election on November 3, 2020.

The Rule to Show Cause first addressed a decision issued by the U.S. District Court for the Northern District of Georgia in *Wood v. Rattensperger* on November 20, 2020.[10] Wood had challenged the constitutionality of the Georgia election process and filed a motion seeking a temporary restraining order enjoining certification of the United States general election results. In considering two factors relevant to the motion, *i.e.*, the balancing of the equities and the public interest, the *Wood* court found that "the threatened injury to Defendants as state officials and the

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8 A5.

9 A5-8.

10 501 F. Supp. 3d 1310 (N.D. Ga. Nov. 20, 2021), *aff'd,* 981 F.3d 1307 (11th Cir. 2020), *cert*. *denied*, 141 S. Ct. 1379 (2021).

public at large far outweigh any minimal burden on Wood."[11] As such, the court concluded that, "[v]iewed in comparison to the lack of any demonstrable harm to Wood, this Court finds no basis in fact or law to grant him the relief he seeks."[12] Quoting this language, the Rule to Show Cause reflected the court's concern that Wood's filing of a case without basis in fact or law may violate DLRPC 3.1, which states that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so . . . ."[13]

The Rule to Show Cause also reflected concern that Wood had "filed or caused to be filed" an affidavit in the Georgia litigation containing "materially false information."[14] Specifically, the affidavit "misidentif[ied] the counties as to which claimed fraudulent voting information occurred."[15] The Rule to Show Cause raised the issue of whether the filing of this false affidavit (had it occurred in Delaware) would violate certain provisions of the DLRPC.[16]

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11 501 F. Supp. 3d at 1331.

12 *Id.*

13 A7. The Rule to Show Cause clarified that it was raising concerns related to conduct "which, had it occurred in Delaware, would violate" the DLRPC. A5.

14 A7.

15 *Id*.

16 A5, A7 (Page 1 of the Rule to Show Cause appears as A5; page 2 appears as A7; and page 3 appears as A6). The Rule to Show Cause cited DLRPC 1.1 (Competence); 3.1 (Meritorious Claims and Contentions); 3.3 (Candor to the Tribunal); 4.1(a) (Truthfulness in Statements/False statement of Material Fact), and alluded to DLRPC 8.4(c) (Dishonesty and Deceit). A7.

The Rule to Show Cause also cited a decision issued by the U.S. District Court for the Eastern District of Wisconsin in *Feehan v. Wisconsin Elections Commission*, on December 9, 2020.[17] In that case Wood appeared as "one of the counsel of record."[18] The Rule to Show Cause raised numerous concerns related to the pleadings filed therein, including those addressed by the Wisconsin court in an order dated December 2, 2020.[19] Specifically, the Rule to Show Case states that it appeared that: (1) "[t]he suit was filed on behalf of a person who had not authorized it"[20]; (2) "[t]he Complaint and related papers had multiple deficiencies"[21]; and (3) in

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17 A6. The December 9 decision is reported at 506 F. Supp. 3d 596 (E.D. Wis. Dec. 9, 2020), *app. dismissed*, 2020 WL 9936901 (7th Cir. Dec. 21, 2020).

18 A6-7.

19 The December 2 order is attached hereto at AC7.

20 The unauthorized filing on behalf of an alleged co-plaintiff was not denied by Wood in this case and was reflected in later pleadings in the Wisconsin case. *See* Defendant Governor Evers's Brief in Support of His Petition for Attorneys' Fees and Sanctions (AC30). Wood's opposition to the defendant's motion for sanctions (AC60) does not deny that the complaint "named a co-plaintiff who reportedly had never consented to participating in this lawsuit" (AC32).

21 The deficiencies were first identified in the Wisconsin court's order dated December 2, 2020, which was discussed in the court's December 9, 2020 order. A6. The specific deficiencies identified in the December 2 order (and cited in the Rule to Show Cause) are as follows: (i) filings had been forwarded to defense counsel "at the following address" with no addresses listed (AC7-8); (ii) documents were allegedly filed under seal, but were not (AC8); (iii) while requesting a temporary restraining order, the complaint was not verified or supported by an appropriate affidavit, as required by court rules (AC8); (iv) the complaint contained no certification of efforts to notify the adverse parties, as required by court rules (AC8); (v) a motion for declaratory judgment was apparently filed in draft form (AC8); (vi) the papers asked for injunctive remedies but did not ask for a hearing (AC9); and

a response to defendant's motion to dismiss, a citation to a decision on a point of law "critical to the case," was found by the Wisconsin court "to be fictitious."[22] The Rule to Show Cause noted that the foregoing conduct would appear to violate the DLRPC, specifically Rules 1.1, 3.1, 3.3, 4.1(a), and 8.4(c).

In sum, the Rule to Show Cause advised Wood and his Delaware counsel that the conduct cited therein "gives the Court concerns as to the appropriateness of continuing the order granting Mr. Wood authorization to appear in this Court *pro hac vice.*"[23] The court gave both Wood and his Delaware counsel (as well as the defendant) until January 6, 2021 to respond to the Rule to Show Cause in writing, and indicated that counsel also would have an additional opportunity to address the Rule to Show Cause at a hearing on January13, 2021.[24]

B. The Response to the Rule to Show Cause

On January 6, 2021, Wood, through Delaware counsel, filed an eight-page Response to Rule to Show Cause (the "Response").[25] Therein, Wood stated that: (i) he was an attorney in good standing in the State of Georgia, including the federal

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(vii) while the pleadings requested an "expedited" injunction, nothing therein indicated whether the plaintiffs were asking the court "to act more quickly than normal or why (AC9). *See also* A6.

22 A6.

23 A8.

24 *Id*.

25 A9-16.

courts therein; and (ii) he had neither violated the DLRPC nor been cited for any performance deficiency, Rule 11 violation, or other violation of applicable rules, in this matter.[26] While contending that his conduct in Georgia (and presumably in Wisconsin) was "not properly before the Court," he addressed briefly the concerns raised in the Rule to Show Cause.[27] He then argued that the trial court had no jurisdiction to enforce the rules of professional conduct absent conduct that prejudicially disrupts the proceedings before it, and that it should not revoke his admission *pro hac vice* based on conduct in other jurisdictions.[28] In support of these contentions, Wood relied in part on the Declaration of Charles Slanina, who opined that "it would likely be determined to be inappropriate for a Delaware trial judge to impose attorney discipline . . . for conduct which did not occur during or otherwise affecting a proceeding before the trial court."[29]

With regard to the Georgia litigation, Wood claimed (incorrectly) that the court misapprehended that he was the plaintiff, not counsel, therein.[30] He also contended that the Georgia court determined only that there was an "insufficient basis to support the requested injunctive relief" and "did not criticize the merits of

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26 A10.

27 A11-12.

28 A12-13.

29 A68.

30 A11.

the underlying complaint."[31] He acknowledged that the expert affidavit filed on his behalf therein contained an error but asserted that the affidavit was filed by his counsel without any intent to mislead the court.[32]

With regard to the Wisconsin litigation, Wood contended that he was not the attorney of record but only "Counsel to be Noticed."[33] He also stated he had never formally appeared during the eight-day period between the filing of complaint on December 1, 2020 and the order dismissing the case on December 9, 2020.[34] Beyond these general disclaimers, however, Wood provided no specific support for his current contention that the trial court erred by focusing on "factors, many of which were not directly attributable to Wood."[35]

While Wood now contends that "it is unclear what, if any involvement he had in drafting the initial pleadings" in the Wisconsin case,[36] he surely knew of his own

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31 *Id*.

32 A11-12.

33 A12.

34 *Id*. The docket in the Wisconsin litigation shows that two Wisconsin attorneys, Daniel J. Eastman and Michael D. Dean, were designated as "*LEAD ATTORNEY*" and "*ATTORNEY TO BE NOTICED*," while Wood, along with six other non-Wisconsin attorneys, were designated as "*ATTORNEY TO BE NOTICED*." A49-50. Sidney Powell, whom Wood contended was the "attorney of record," is listed as an "*ATTORNEY TO BE NOTICED*" along with Wood. A12, A50.

35 OB at 5-6.

36 OB at 6.

involvement. Yet, in his Response, he did not provide an affidavit or other evidence as to why he should not be held responsible for the numerous deficiencies and errors that the trial court invited him to address. Instead, Wood offered to withdraw his appearance as counsel admitted *pro hac vice*.[37]

C. The Memorandum Opinion and Order Revoking Wood's Admission *Pro Hac Vice*

On January 11, 2021, the trial court issued a Memorandum Opinion and Order revoking its prior order granting Wood's admission *pro hac vice* in this case (the "January 11 Order" or "Order"). In so ruling, the court stressed that admission *pro hac vice* "is a privilege and not a right," and that it is the court's continuing obligation to "ensure the appropriate level of integrity and competence."[38]

The court noted in its Order that the Response (i) "focused primarily upon the fact that none of the conduct that [the trial judge] questioned occurred" in the court,[39] and (ii) argued that, "absent conduct that prejudicially disrupts the proceedings, trial judges have no independent jurisdiction to enforce the Rules of Professional Conduct."[40] The court did not dispute either the fact that the conduct in question occurred elsewhere, or the proposition regarding the court's limited jurisdiction to

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37 A14.

38 A72.

39 A71-72.

40 A72.

enforce the DLRPC. However, the court found that these contentions "misse[d] the point" because they "ignore[d] the clear language of Rule 90.1."[41]

Quoting Rule 90.1, the court pointed out that applicable standard required it to determine "if the continued admission would be inappropriate or inadvisable."[42] While the court agreed that it would be outside its authority to make a finding as to whether Wood violated the rules of professional conduct of Delaware or another State,[43] the court had no intention of doing so.[44] The court stressed that, while violations of the rules of professional conduct were "for other entities to judge based on an appropriate record," its role was "much more limited."[45] Under Rule 90.1, the

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41 *Id*. Wood mistakenly contends that the court's Order "ignored" the Declaration of Charles Slanina. OB at 6. In fact, the Order specifically addressed the Slanina Declaration, finding it "unhelpful" regarding the specific issue before it, *i.e.*, whether under Rule 90.1 it would be inappropriate or inadvisable to continue Wood's *pro hac vice* status. A72. The court also agreed with the Slanina Declaration insofar as it stated that it is "the province of authorities other than the Superior Court to make determinations respecting ethical violations." OB at 6; *see* A73 ("I have no intention to . . . make any findings[ ] as to whether or not Mr. Wood violated other States' Rules of Professional Conduct. I agree that is outside my authority. It is the province of the Delaware Office of Disciplinary Counsel, and ultimately the Delaware Supreme Court, or their counterparts in other jurisdictions, to make a factual determination as to whether Mr. Wood violated the Rules of Professional Conduct.").

42 A72.

43 A73.

44 *Id*.

45 A72-73.

court's role is to "ensure that those practicing before [it] are of sufficient character, and conduct themselves with sufficient civility and truthfulness."[46]

Turning to the specific concerns raised in the Rule to Show Cause, the court found unavailing Wood's contentions regarding his status as a party in the Georgia litigation and the errors in the affidavit filed therein.[47] Whether acting on his own or for clients, Wood had an obligation to file only cases that have a good faith basis in fact or law.[48] The finding of the Georgia court indicated instead that the Georgia litigation was "textbook frivolous litigation."[49] Similarly, the court did not find persuasive Wood's contention regarding the erroneous expert affidavit. The court stated that affidavits "must be reviewed in detail to ensure accuracy before filing" and that Wood's failure to conduct such a review was "either mendacious or incompetent."[50] The Order also rejected Wood's contentions relating to the Wisconsin proceeding, finding that the deficiencies therein went far beyond the "proof reading errors" that Wood acknowledged.[51]

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46 A73.

47 A74.

48 *Id*.

49 *Id*.

50 *Id*.

51 A74-75. The Trial Court also rejected Wood's contention that he was only "Counsel for Notice," finding that as he was one of the counsel of record, he was "fully responsible for the filing." A75 (footnote 1).

In all, the court found that "the conduct of Wood, albeit not in my jurisdiction, exhibited a toxic stew of mendacity, prevarication, and surprising incompetence."[52] The conduct reflected in the decisions of the courts in Georgia and Wisconsin satisfied the court that "it would be inappropriate and inadvisable to continue Wood's permission to practice before this Court."[53] While the court did not specifically address Wood's offer to withdraw in lieu of revocation, the Order recognized that other courts had accepted such offers while referring matters to disciplinary counsel, or raising that possibility, which the court stopped short of doing here.[54]

Finally, in its Memorandum Opinion and Order granting plaintiff's motion to dismiss, dated February 11, 2021 (the "February 11 Order"), the trial court noted that Wood had attempted to file a motion to reargue the January 11 Order, but had failed to comply with the court's rules in doing so.[55]

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52 A75.

53 *Id*.

54 A73. The court also noted certain additional conduct attributed to Wood since the filing of the Rule but made no finding with regard to it. On the contrary, the court stated that such conduct "does not form any part of the basis for [its] ruling," and reaffirmed its limited role. A76. With regard to its decision to issue the Order prior to the January 13 hearing, the court noted that Rule 90.1 requires "either a hearing on the issue or other meaningful opportunity to respond," and that Wood was afforded the latter. A76 (footnote 2).

55 A77 (footnote 1).

ARGUMENT

I. The Court Correctly Applied Rule 90.1 and Properly Exercised Its Discretion in Determining That Wood's Continued *Pro Hac Vice* Admission Would Be Inappropriate and Inadvisable.

A. The Question Presented

The question presented is whether the Superior Court abused its discretion in revoking the admission *pro hac vice* of an out-of-state attorney under Rule 90.1 in light of the concerns set forth in the court's Rule to Show Cause regarding the attorney's conduct in two litigations in other jurisdictions, after giving the attorney a meaningful opportunity to respond in writing to the court's concerns, and after concluding that continued admission *pro hac vice* would be inappropriate and inadvisable.[56]

[56] To the extent Wood seeks to raise a constitutional issue by referring to "procedural due process measures" (OB at 8), Wood did not raise that issue in the court below and so cannot raise it here for the first time. Supr. Ct. R. 8.

B. The Standard and Scope of Review

The Court reviews questions of law *de novo* and therefore independently determines what Rule 90.1 requires.[57] The trial court's exercise of discretion in determining whether to grant or revoke the *pro hac vice* admission of out-of-state counsel is reviewed for abuse of discretion. [58] Wood does not contest that the abuse of discretion standard applies to the revocation of his admission *pro hac vice*.[59]

In applying the abuse of discretion standard of review, the Court does not substitute its "own notions of what is right for those of the trial judge, if his [or her] judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness."[60] When the trial court "has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused."[61] "The question is not whether we agree with the court below, but rather if we believe 'that the judicial

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57 *See Crumplar v. Superior Ct. ex rel. New Castle Cnty.*, 56 A.3d 1000, 1005 (Del. 2012).

58 *Vrem v. Pitts*, 2012 WL 1622644, at *2 (Del. May 7, 2012). *Vrem* involved an analogous appeal of a decision to revoke multiple admissions *pro hac vice* after learning of the attorneys' firm's extensive activities in Delaware. Therein, the Court noted that "Rule 90.1(a) provides that the decision whether to admit an out-of-state attorney *pro hac vice* lies within the discretion of the Superior Court" and applied the abuse of discretion standard of review.

59 OB at 8-9.

60 *In re Asbestos Litig.*, 228 A.3d 676, 681 (Del. 2020).

61 *Id.*

mind in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made.'"[62]

62 *Id.*

C. The Merits of the Argument

The trial court's January 11 Order should be affirmed because the trial court complied with Rule 90.1 and properly exercised its discretion in determining that Wood's continued admission *pro hac vice* would be inappropriate and inadvisable under the circumstances. Wood's primary contention on appeal is that the court was required to apply, and effectively incorporate into Rule 90.1, case law that governs issues that arise in different contexts, in which a trial court purports to enforce the DLRPC (principally, *In re: Infotechnology, Inc.*[63]) or seeks to impose sanctions under Rule 11 (principally, *Crumplar v. Superior Court ex rel. New Castle County*[64]). Wood's contention fails because Rule 90.1 governs the unique issues that arise in the context of granting, and considering whether to continue, the admission *pro hac vice* of an out-of-state attorney. Wood's remaining contention, that the court abused its discretion in concluding his continued admission *pro hac vice* would be inappropriate and inadvisable in light of his conduct in the Georgia and Wisconsin litigations, is also without merit for the reasons discussed below.

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63 582 A.2d 215 (Del. 1990).

64 56 A.3d 1000 (Del. 2012).

1. The Trial Court Properly Applied Rule 90.1 in Addressing Whether Wood's Admission *Pro Hac Vice* Should Be Continued.

Rule 90.1 grants the trial court broad discretion to determine whether attorneys who are not members of the Delaware Bar should be permitted to appear, and to continue to participate, in a proceeding before the court. This discretion includes consideration of an attorney's conduct in other jurisdictions, whether before or after admission *pro hac vice*. Here, the trial court complied with Rule 90.1 by identifying its concerns with Wood's conduct in its December 18 Rule to Show Cause, by offering him a meaningful opportunity to respond, and by properly exercising its discretion in determining that his continued admission *pro hac vice* would be inappropriate and inadvisable under the circumstances.

The text of Rule 90.1, as adopted on March 1, 1987, provided that attorneys who are not members of the Delaware Bar may be admitted *pro hac vice* in the discretion of the court; however, no provision was made at that time for the revocation of an admission *pro hac vice*.[65] In 1992, the Court amended Rule 90.1 to fill that gap. Subpart (d), regarding withdrawal of attorneys admitted *pro hac vice*, was re-designated as subpart (e), and the following provision was added to subpart (e) to address revocation of a *pro hac vice* admission:

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[65] *See* Super. Ct. Civ. R. 90.1 (1987 Interim Supplement). The original version of the rule is included in the appendix to this brief at AC1-3.

> The Court may revoke a pro hac vice admission sua sponte or upon the motion of a party, if it determines, after a hearing or other meaningful opportunity to respond, the continued admission pro hac vice to be inappropriate or inadvisable.[66]

This provision remains the same today. Thus, under Rule 90.1(e), the court may revoke an admission *pro hac vice sua sponte* if it (1) provides the attorney "a hearing or other meaningful opportunity to respond," and then (2) determines within its discretion that the continued admission is "inappropriate or inadvisable."

Rule 90.1 does not require a hearing, as its directive to grant a "hearing *or other meaningful opportunity* to respond" makes clear. Rule 90.1(e) also does not require that the court find a violation of the DLRPC, or determine that conduct at issue threatens the fairness of the proceeding before it. Rather, the Rule authorizes the court to determine whether an admission *pro hac vice*, having been granted in the court's discretion as a privilege,[67] should be "continued" in the court's discretion,

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[66] *See* Super. Ct. Civ. R. 90.1 (1992 Supplement). The 1992 amendment rule is included in the appendix to this brief at AC4.

[67] *See, e.g.*, *Manning v. Vellardita*, 2012 WL 1072233, at *3 (Del. Ch. Mar. 28, 2012) ("[T]he appointment of an attorney admitted to the bar of a sister state to the Delaware bar *pro hac vice* is a privilege. Such admissions are typically granted as a matter of course, on the assumption that the prospective admittee has represented himself openly and honestly before the Court. Thus, to maintain the value to this Court of extending the privilege of *pro hac vice* admission to attorneys from other jurisdictions, it is necessary that those attorneys accorded this privilege are held to a high level of conduct including, importantly, candor with the Court.").

or whether continued admission would be "inappropriate or inadvisable" in light of information that comes to the court's attention following the initial admission.

The "inappropriate or inadvisable" standard is notably broad, as befits a decision entrusted to the court's discretion.[68] These terms give the court wide latitude to consider and determine the appropriateness and advisability of continuing (or not) the admission *pro hac vice* of out-of-state attorneys who have not been subject to the Court's application process for admission to the Delaware Bar. The trial court's delegated discretion under Rule 90.1(e) to consider the appropriateness and advisability of continued admission *pro hac vice* parallels its discretion under Rule 90.1(a), governing the initial admission *pro hac vice*.[69]

Rule 90.1 requires the court to consider a broad array of information in connection with a motion for admission *pro hac vice*, including the applicant attorney's conduct in other jurisdictions. Attorneys seeking such admission must

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[68] Continued admission is "inappropriate" if it would be "unsuitable." https://www.merriam-webster.com/dictionary/inappropriate. It is "inadvisable" if it would be "not wise or prudent. https://www.merriam-webster.com/dictionary/inadvisable. *See Wiggins v. State*, 227 A.3d 1062, 1077 (Del. 2020) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined [in a statute]," as they can "serve as helpful guides in determining the plain or commonly accepted meaning of a word.").

[69] Rule 90.1(a) states that out-of-state attorneys "may be admitted *pro hac vice* in the discretion of the Court." *See also* Rule 90.1(g) (noting that, in "exercising its discretion in ruling on a motion for admission *pro hac vice*," the court considers the nature and extent of the attorney's conduct in Delaware).

identify all states or other jurisdictions in which they have at any time been admitted generally, and they must certify whether they have "been disbarred or suspended or [are] the subject of pending disciplinary proceedings in any jurisdiction where [they have] been admitted generally, pro hac vice, or in any other way."[70] In addition, Delaware counsel must "certify that the Delaware attorney finds the applicant to be a reputable and competent attorney and is in a position to recommend the applicant's admission."[71] Thus, while an-out-of-state attorney is not subject to the full examination conducted by the Board of Bar Examiners, Rule 90.1(e) authorizes the trial court to perform an analogous function in assessing whether such an attorney should be admitted *pro hac vice*, and whether such admission should continue, in light of a range of factors that include the attorney's conduct in other jurisdictions.

Insofar as Wood is contending that the trial court must put on blinders as to an attorney's conduct in other jurisdictions following an initial admission *pro hac* vice, such a contention runs contrary to the purpose of Rule 90.1. Why would the court be required to consider conduct in other jurisdictions prior to admission *pro hac vice* but barred from considering such conduct afterwards? Why would it be required to ignore that attorney's subsequent disbarment by another jurisdiction?

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[70] Rule 90.1(b)(7). Thus, if Wood's admission had not been revoked, he would have been required to amend his certification to identify any pending disciplinary proceeding. *See* DLRPC 3.3(a)

[71] Rule 90.1(h).

Why would it be barred from considering serious misconduct in another jurisdiction that has not yet resulted in a sanction? Wood offers no explanation.

Here, the court properly applied Rule 90.1, as written, by giving Wood specific notice of its concerns, by affording him a meaningful opportunity to be heard on them, and by exercising its discretion to revoke upon finding that continued admission would be inappropriate or inadvisable. The approach was consistent with the court's precedent applying Rule 90.1 and its analog, Rule 63(e) of the Superior Court Rules of Criminal Procedure ("Criminal Rule 63(e)"). For example, in *State v. Grossberg*, then-President Judge Ridgely relied on Criminal Rule 63(e) in holding that the admission *pro hac vice* of a New York attorney "should be revoked as inappropriate and inadvisable" after that attorney violated a court order governing pre-trial publicity.[72] Similarly, in *State v. Mumford*, the court revoked the admission *pro hac vice* of a Maryland attorney who failed to take steps to stop his client's hostile and profane behavior at a deposition, finding the "continued admission of" such attorney to be "inappropriate and inadvisable."[73]

In *LendUS LLC v. Goede*, the Court of Chancery found the conduct of an attorney admitted *pro hac vice* at a deposition in the case sufficiently egregious to warrant a finding that "continued admission *pro hac vice* to be both inappropriate

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72 705 A.2d 608, 613 (Del. Super. Ct. 1997).

73 731 A.2d 831, 835-36 (Del. Super. Ct. 1999).

and inadvisable."[74] However, in light of the "potential for abuse" where disqualification motions are brought by opposing counsel, the court stated that the party seeking disqualification "must show, by clear and convincing evidence, that the behavior of the attorney in question 'is so extreme that it calls into question the fairness or efficiency of the administration of justice.'"[75] In lieu of revoking the attorney's admission *pro hac vice*, the *LendUS* court chose to award the moving party attorney's fees in connection with the motion for sanctions, to grant the attorney's motion to withdraw, and to refer the matter to the Office of Disciplinary Counsel.[76]

Wood's primary challenge to the trial court's Order is grounded on his contention that Rule 90.1 required the trial court to apply the same clear and convincing standard and fairness of the proceeding scope of review that the *LendUS* court applied in addressing a motion to revoke by an opposing party. That standard

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[74] 2018 WL 6498674, at *8-9 (Del. Ch. Dec. 10, 2018) (quoting Court of Chancery Rule 170(e), which tracks Rule 90.1).

[75] *Id.* (citing *Manning v. Vellardita*, 2012 WL 1072233, at *2 (Del. Ch. Mar. 28, 2012) (quoting *Dunlap v. State Farm Fire & Cas. Co. Disqualification of Counsel*, 2008 WL 2415043, at *1 (Del. May 6, 2008)). This standard is ultimately derived from the Court's decision in *In re: Infotechnology, Inc.*, 582 A.2d 215 (Del. 1990), discussed below.

[76] *Id.* at *9-10. The court also briefly discussed allegations regarding the attorney's conduct in Ohio and Florida, finding the record insufficiently developed to warrant a sanction but referring the matters to disciplinary authorities in those jurisdictions. *Id.* at *10.

and scope of review is ultimately drawn from this Court's seminal decision in *In re: Infotechnology, Inc.*, which defined the limited circumstances in which trial courts have jurisdiction to consider and rule on alleged violations of the DLRPC in the context of a motion to disqualify.[77] Specifically, Wood contends that the court was required to limit the scope of its review to whether his continued participation would threaten the fairness of the proceeding before it, and should have applied a clear and convincing standard of review.[78] This contention is without merit for the reasons discussed below.

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[77] 582 A.2d at 221.

[78] OB at 10 ("Where a party to litigation seeks the sanction of revocation of an out-of-state attorney's *pro hac vice* privileges, the moving party must demonstrate by clear and convincing evidence that the out-of-state attorney's behavior is sufficiently egregious to 'call into question the fairness or efficiency of the administration of justice.'"); OB at 22 (same); OB at 31 (same); OB at 32 ("The Superior Court made no finding by clear and convincing evidence that Wood's continued representation would prejudicially impact the fairness of the proceedings before it.").

2. *Infotechnology* Does Not Limit the Trial Court's Discretion under Rule 90.1 to Determine Whether Continued Admission *Pro Hac Vice* Is Inappropriate or Inadvisable in Light of Conduct in Other Jurisdictions.

For two reasons, the Court should reject Wood's contention that, in applying Rule 90.1, the trial court was required to (i) limit the scope of its review to conduct that prejudiced the proceeding before the court (and therefore be barred from considering Wood's conduct in other jurisdictions) and (ii) apply a "clear and convincing" standard of proof.

First, neither requirement appears in Rule 90.1, and both requirements conflict with its spirit if not its letter. As noted above, given that the court is required to consider an attorney's conduct in other jurisdictions in granting admission *pro hac vice* under Rule 90.1(a), the court may also consider such conduct in determining under Rule 90.1(e) whether such admission should continue. As to the proposed clear and convincing standard, Rule 90.1 repeatedly refers to the trial court's authority to exercise its discretion and sets forth an "inappropriate or inadvisable" standard, without suggesting the "clear and convincing" burden urged by Wood. In 1990, *Infotechnology* imposed on non-client litigants the burden to demonstrate by clear and convincing evidence how the conduct at issue would prejudice the fairness of the proceedings due to the "potential abuses of the [DLRPC] in litigation.[79] Had

[79] 582 A.2d at 221.

the Court intended to impose a "clear and convincing" burden of proof in the context of a determination as to whether admission *pro hac vice* should be granted, or should be discontinued as inappropriate or inadvisable, presumably it would have done so through the 1992 amendment to Rule 90.1.

Second, *Infotechnology* and Rule 90.1 address different concerns. *Infotechnology* limits the trial court's authority to enforce the DLRPC to circumstances in which misconduct "taints the fairness of judicial proceedings."[80] *Infotechnology* holds that:

> While we recognize and confirm a trial court's power to ensure the orderly and fair administration of justice in matters before it, including the conduct of counsel, the [DLRPC] may not be applied in extra-disciplinary proceedings solely to vindicate the legal profession's concerns in such affairs. Unless the challenged conduct prejudices the fairness of the proceedings, such that it adversely affects the fair and efficient administration of justice, only this Court has the power and responsibility to govern the Bar, and in pursuance of that authority to enforce the Rules for disciplinary purposes.[81]

Thus, *Infotechnology* sought to clarify that this Court alone has power to govern the Bar and to enforce the DLRPC for disciplinary purposes.[82]

Rule 90.1, by contrast, addresses the trial court's authority to act as a gatekeeper regarding out-of-state attorneys who wish to appear in Delaware

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80 *See id*.

81 *See id.* at 216-217.

82 *See id.* at 217.

proceedings. With respect to whether the admission *pro hac vice* of an attorney should continue, the question is whether continued appearance would be inappropriate or inadvisable in light of that attorney's conduct. If a court, in applying Rule 90.1, sought to enforce the DLRPC, it would be exceeding its jurisdiction under *Infotechnology* unless the conduct of such attorney called into question the fair or efficient administration of justice in the case before it.[83] But that is not what happened here. On the contrary, the trial court could not have been clearer in stating:

> I have no intention to . . . make any findings [ ] as to whether or not Mr. Wood violated other States' Rules of Professional Conduct. I agree that is outside my authority. It is the province of the Delaware Office of Disciplinary Counsel, and ultimately the Delaware Supreme Court, or their counterparts in other jurisdictions, to make a factual determination as to whether Mr. Wood violated the Rules of Professional Conduct.[84]

Wood's contention that the trial court erred in failing to apply a "clear and convincing" standard of proof[85] is also contrary to the spirit of Rule 90.1, especially with regard to the trial court's ability to consider *sua sponte* whether continued admission is warranted. *Infotechnology* directed that the clear and convincing standard be applied to discourage litigants from using motions to disqualify opposing counsel as procedural weapons.[86] Neither the text nor the purpose of Rule

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83 *Id.* at 221.

84 A73.

85 *See, e.g.*, OB at 22.

86 *See Infotechnology*, 582 A.2d at 221 ("Recognizing the potential abuses of the [DLRPC] in litigation, we conclude that the burden of proof must be on the non-

90.1 suggests that the trial judge must apply that standard either in considering a motion to admit an attorney *pro hac vice* or in considering whether to continue that admission. Wood's argument for restricting the trial court's discretion under Rule 90.1(e) is inconsistent with the broad language of the Rule instructing the court to consider whether continued admission is "inadvisable" or "inappropriate."

As Wood points out, some decisions have applied a "clear and convincing" standard in addressing *pro hac vice* issues. Where this occurs, however, the decisions sometimes apply an *Infotechnology* analysis without reference to Rule 90.1 or its analogs. For example, in *Crowhorn v. Nationwide Mutual Insurance Co.*,[87] involving a motion to revoke the admission *pro hac vice* of a Pennsylvania attorney, the Superior Court did not cite to Rule 90.1. Instead, the court relied solely on *Infotechnology* in requiring "clear and convincing evidence that the behavior of the attorney in question will "affect the fairness of the proceedings" in the case before it.[88] While the *Crowhorn* court would have been required to apply the *Infotechnology* standard if it intended to enforce the DLRPC, such an approach does

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client litigation to prove by clear and convincing evidence (1) the existence of a conflict and (2) to demonstrate how the conflict will prejudice the fairness of the proceeding.").

87 2002 WL 1274052 (Del. Super. Ct. May 6, 2002).

88 *Id.* at *4.

not suggest that the court in this case could not rely on Rule 90.1, particularly where it expressly disavowed any intent to find violations of rules of professional conduct.

Similarly, in a brief letter ruling in *Sequoia v. Presidential Yatch Group LLC v. FE Partners LLC*,[89] the Court of Chancery did not cite or apply the applicable *pro hac vice* rule (Court of Chancery Rule 170(e)) in deciding to defer a motion to revoke opposing counsel's admission *pro hac vice*. Rather, the court briefly stated that its "jurisdiction to police attorney behavior only extends to conduct which may prejudice the 'fair and efficient administration of justice."[90] As such, *Crowhorn* and *Sequoia* do not support Wood's contention that, in order for continued admission to be "inappropriate or inadvisable, the conduct must be prejudicial to the fundamental fairness of the proceeding before the court.[91] Rather, these cases suggest that, while *Infotechnology* is "top of mind," particularly where courts are asked to adjudicate the DLRPC, the rules governing admission *pro hac vice* are less so.

Wood's reliance on this Court's 1990 decision in *National Union Fire Insurance Company of Pittsburgh, Pa. v. Stauffer Chemical Co.*[92] is also misplaced. That decision, concerning misconduct by attorneys admitted *pro hac vice* in the case

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89 2013 WL 3362056, at *1 (Del. Ch. July 5, 2013).

90 *Id.*

91 OB at 31.

92 1990 WL 197859 (Del. Nov. 9, 1990).

before the trial court, held that the trial court had properly exercised its discretion in revoking their admissions.[93] In 1992, the Court effectively codified this delegation of discretion to the trial court via its amendment to Rule 90.1(e), without importing a prohibition against considering conduct in other jurisdictions or requiring application of a clear and convincing standard.[94]

In sum, *Infotechnology* does not conflict with, let alone override, the Court's 1992 amendment of Rule 90.1. *Infotechnology* bars a trial court from enforcing the DLRPC or issuing sanctions for violations thereof unless the conduct in question undermines the fairness of the proceeding before the court. Rule 90.1 does not authorize the trial court to enforce the DLRPC. Rather, Rule 90.1 delegates to the trial court the authority to exercise discretion to determine whether out-of-state attorneys should be admitted to practice *pro hac vice* and, as a corollary thereto, whether such privilege should continue in light of concerns that may render continued admission inappropriate or inadvisable. The restrictions imposed by *Infotechnology* on a trial court's jurisdiction to enforce the DLRPC do not apply where a court is not engaging in such an effort but is exercising its discretion over the admission *pro hac vice* of attorneys under the parameters set forth in Rule 90.1.

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93 *Id.*

94 *See* AC4-6 (Superior Court of Delaware Civil Rule 90.1, as amended in the 1992 Supplement); *compare with* AC1-3 (original version of Superior Court of Delaware Civil Rule 90.1).

3. *Crumplar* Does Not Nullify the Provision in Rule 90.1 Permitting the Trial Court to Provide a Hearing "or Other Meaningful Opportunity to Respond."

Based on this Court's decision in *Crumplar*, construing Rule 11, Wood also mistakenly contends that the trial court improperly failed (i) to grant Wood "an opportunity to present evidence and respond orally," and (ii) to apply an "objective standard" to determine whether the offending conduct warranted revocation.[95] Like his contentions based on *Infotechnology*, Wood's effort to fault the court for failing to incorporate the holdings in *Crumplar* into Rule 90.1 are without merit.

Wood's claimed right to "present evidence and respond orally"[96] fails for at least two reasons. First, in *Crumplar*, the Court was called upon to construe language in Rule 11(c) that allows the trial court to impose sanctions only "after notice and a reasonable opportunity to be heard."[97] Rule 90.1, by contrast, is more specific than Rule 11 in stating that the court must afford the attorney "a hearing *or other meaningful opportunity to be heard.*" Unlike Rule 11, Rule 90.1 expressly authorizes the court to offer a meaningful opportunity other than a hearing.

Second, the Court in *Crumplar* held that a "reasonable opportunity" included the ability to present evidence and be heard orally largely because Rule 11 sanctions

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95 OB at 20-21.

96 OB at 21, *see also Crumplar*, 56 A.3d at 1011-12.

97 56 A.3d at 1011.

include elements of a finding of criminal contempt, such as an intent to punish the attorney's past conduct.[98] By contrast, in Rule 90.1, an order that "continued admission" *pro hac vice* would in inappropriate removes a privilege to participate in a proceeding in the future but does not "punish" the attorney through a penalty, a financial sanction, or a finding of violation of the rules of professional conduct.

Recently, in *Hunt v. Court of Chancery*,[99] this Court extended its ruling in *Crumplar* to apply to a trial court's authority to impose monetary sanctions under its inherent power.[100] Because the Texas attorney in *Hunt* was not given advance notice that his opponent's sanctions request would be addressed at an upcoming hearing, was not given an opportunity to be heard at the sanctions hearing, and was not asked about his ability to pay the monetary sanction, the Court reversed the imposition of a fine of nearly $15,000.[101] In addition, the Court held that the insulting email in question did not affect the proceedings before the trial court so as to warrant its finding of a violation of 8.4(d) of the DLRPC.[102]

As with *Infotechnology* and *Crumplar*, *Hunt* does not bear on the trial court's application of Rule 90.1 to *pro hac vice* matters. Just as the trial court here eschewed

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98 *Id.* at 1011.

99 2021 WL 2418984, at *1 (Del. June 10, 2021).

100 *Id.* at *5.

101 *Id.* at *4-5.

102 *Id.* at *6.

any claim to enforce the DLRPC or any other rules of professional conduct, and declined to impose any monetary sanction under Rule 11, so also it declined to impose a sanction under its inherent power. Its only action was to revoke the privilege of continued admission *pro hac vice*, as Rule 90.1 authorized it to do.

Finally, Wood's "objective standard" argument fails because the trial court did in fact apply an objective standard in declining to accept as dispositive Wood's contentions as to his subjective intend. For example, the trial court declined to accept as dispositive Wood's denial of any "intent of the parties, including himself," to mislead the Georgia court by means of an inaccurate expert report.[103] Instead, the court relied on the objective facts of Wood's extensive experience, and his duty to ensure the accuracy of the report before filing, in concluding that his failure to do so was objectively "incompetent" if not subjectively "mendacious."[104] Similarly, with respect the Wisconsin case, the court did not accept Wood's subjective defense that, because he was not "the attorney of record," he was not personally responsible for the errors in the pleadings.[105] The court held that, as one of the counsel listed on the docket, he was fully responsible for the filing of the complaint.[106]

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103 A12.

104 A74.

105 A12.

106 A75.

4. The Court Properly Exercised Its Discretion in Determining That Continuing Wood's Admission *Pro Hac Vice* Would Be Inappropriate and Inadvisable Based on His Conduct in the Georgia and Wisconsin Cases.

Finally, the trial court acted within its discretion by (i) specifically identifying in the Rule to Show Cause the numerous concerns that Wood needed to address; (ii) providing Wood with a meaningful opportunity to respond to the Rule to Show Cause, and (iii) basing its decision "upon conscience and reason, as opposed to capriciousness or arbitrariness."[107]

Proper Notice. In its Rule to Show Cause, the court specifically itemized the findings and deficiencies that Wood needed to address. Wood does not contest that he was fairly put on notice of the conduct in the Georgia and Wisconsin cases that had raised concerns regarding the appropriateness of his continued admission *pro hac vice*.

Meaningful Opportunity to Respond. As discussed above, the court applied the plain language of Rule 90.1(e), which required that Wood be given "a hearing or other meaningful opportunity to respond." While the trial court originally intended to allow both a written submission from Wood and his Delaware counsel and an opportunity to be heard orally, the nature of the Response led the court to reconsider whether a hearing was warranted. As the court noted, the Response "focused

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107 *In re Asbestos Litig.*, 228 A.3d 676, 681 (Del. 2020).

primarily upon the fact that none of the conduct . . . questioned occurred in [the trial court]."[108] Wood relied on a legal argument, supported by a declaration from a legal ethics expert, that the court had no jurisdiction to enforce the DLRPC – a contention with which the court had "no disagreement."[109] This proposition missed the point of the Rule to Show Cause and ignored the clear language of Rule 90.1 that required the court determine whether his continued admission would be inappropriate or inadvisable in light of his conduct and not whether Wood had violated the rules of professional conduct. Because the strategy employed in the Response was "not helpful regarding the issue of the appropriateness and advisability of continuing admission *pro hac vice*,"[110] the court acted within the broad scope of its discretion in concluding that oral argument would not have been fruitful.

In addition, while Wood took issue with a few of the trial court's characterizations of the facts, he did not contest the facts as set forth in the Rule to Show Cause and as found by the courts in Georgia and Wisconsin. Wood chose not to provide a detailed response to the concerns raised by the trial court, and filed no affidavit presenting evidence in this defense. On the contrary, Wood requested that

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108 A72.

109 *Id*.

110 *Id*.

he be permitted to withdraw from the case.[111] Ultimately, the court found that continued admission would be inappropriate regardless of whether Wood's conduct was "mendacious" or merely "incompetent,"[112] so there was no reason to hold a hearing to assess Wood's credibility.

Wood claims that at "no point" was he given a meaningful opportunity to respond.[113] However, he does not explain why the opportunity to respond in writing was not meaningful or what he would have said at a hearing other than what he chose to argue in the Response. Rather, his concern appears to be, not that his opportunity was not meaningful, but that the court allegedly gave his Response "little weight."[114]

Wood also claims that if he had been given an opportunity to respond orally, "the allegations in the January 11 Opinion and Order could have been corrected and put in proper context."[115] This contention ignores the fact that the "allegations" were set forth in the Rule to Show Cause in order for him to correct them or put them in proper context in his Response. It is not enough for Wood to say, on appeal, that "[i]t is unclear what, if any involvement Wood had in drafting the initial pleadings"

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111 A14.

112 A74. *See also* A74-75 (commenting that the complaint in the Wisconsin case "would not survive a law school civil procedure class").

113 OB at 29.

114 *Id*.

115 OB at 32.

in the Wisconsin case.[116] It was Wood's obligation, in response to the Rule to Show Cause, to make clear the extent of his involvement and "show cause" why he should not be held responsible for those pleadings.

No Abuse of Discretion. Finally, the court's conclusion that Wood's continued admission would be "inappropriate and inadvisable" was based "upon conscience and reason, as opposed to capriciousness or arbitrariness."[117] With regard to the court's specific concerns as enumerated in the Rule to Show Cause, Wood offered nothing to show why such concerns did not render his continued admission inappropriate or inadvisable. For example, the court did not misapprehend Wood's involvement in the Georgia case as a litigant, as Wood claimed in his Response.[118] The court did not accept his litigant status as a defense, reasoning that, as an attorney, Wood has "an obligation, whether on his own or for clients, to file only cases which have a good faith basis in fact or law."[119] The *Wood* court's holding that there was "no basis in fact or law" to grant Wood the relief he sought also remained a concern, which Wood did nothing to negate by characterizing

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116 OB at 6; *see also* OB at 24 ("Wood's level of participation in the drafting and filing of the initial pleading in the Wisconsin litigation is unclear . . . .").

117 OB at 29.

118 A11. The Rule to Show Cause identified Wood as the "Plaintiff in the case of *L. Lin Wood Jr. v. Brad Rattensperger, et al*." A7.

119 A74.

the holding as "merely determin[ing] there was an insufficient basis to support to requested injunctive relief."[120] The court also remained justifiably troubled by the erroneous affidavit of an expert witness that was filed in support of Wood's case, despite Wood's denial of any intent to mislead.[121]

Similarly, the trial court acted within the scope of its discretion in rejecting Wood's contention that he was not responsible for the numerous errors in the Wisconsin pleadings. The court's review of the docket showed that he was counsel of record and therefore responsible for filings.[122] The trial court also acted within the scope of its discretion by rejecting Wood's attempt to minimize the many mistakes and deficiencies – including filing a complaint on behalf of someone who did not authorize that action – as "proof reading errors."[123]

In finding Wood's continued admission inappropriate and inadvisable, the January 11 Order properly noted the stark contrast between counsel who practice daily in a civil, ethical way before it, and the conduct that Wood engaged in as reflected in the decisions of the courts in Georgia and Wisconsin.[124] In light of that contrast, the court's conclusion that Wood's continued admission *pro hac vice* would

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120 A11

121 *Id*.

122 A75 (footnote 1).

123 A12; A74.

124 A75.

be inappropriate and inadvisable was well within its discretion. By way of further comparison, in *Mumford* and *LendUS*, Delaware trial courts found that the egregious behavior of an attorney admitted *pro hac vice* at a deposition (and, in *LendUS*, the attorney's lack of candor to the court about it) warranted revocation.[125] Here, Wood's conduct was comparably egregious, even if considered simply incompetent rather than mendacious, as it occurred repeatedly in two high profile litigations of great public import.

Finally, Wood argues that the January 11 Order "has been working considerable hardship" upon him.[126] In support of this contention, he cites a memorandum of law filed in the Eastern District of New York in support of a motion to revoke his admission *pro hac vice*, wherein the movant relied, "among other things," upon the January 11 Order.[127] The "other things" addressed in the memorandum include numerous other instances of misconduct – including his attacks on Chief Justice John Roberts, false and frivolous filings around the country, and false statements to the Eastern District of New York.[128] As just one matter among many, the January 11 Order cannot fairly be blamed for any loss of

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125 *See State v. Mumford*, 731 A.2d 831, 835-36 (Del. Super. Ct. 1999); *LendUS LLC v. Goede*, 2018 WL 6498674, at *9 (Del. Ch. Dec. 10, 2018).

126 OB at 29-30.

127 OB 29-30; A140-143.

128 *See* A136-37, 139-40, 143-48.

reputation.[129] Courts that consider the Order in connection with future motions for admission *pro hac vice* will exercise their own discretion, according to their own court rules and case law standards, as to the weight the Order should be given in relation to other considerations.

[129] Motions to disqualify and motions for sanctions against Wood have been filed in multiple jurisdictions. Two motions for sanctions were filed in *King v. Whitmer*, No. 20-cv-13134 (E.D. Mich. Dec. 22, 2020) (AC11, 23); a motion to disqualify and revoke appearance *pro hac vice* was filed in *La Liberte v. Joy Reid*, No. 18-cv-05398 (E.D.N.Y. Jan. 25, 2021) (AC25); and a motion for attorney fees and sanctions was filed in *Feehan v. Wis. Elections Comm'n*, No. 20-cv-1771 (E.D. Wis. Mar. 31, 2021) (AC27). Most recently, a motion for order to show cause why Wood should not be held in criminal contempt for violating local rules prohibiting recording and broadcasting of judicial proceedings was filed in *King*, 20-cv-13134 (E.D. Mich. Jul. 13, 2021) (AC85).

CONCLUSION

The Superior Court's January 11 Order revoking the admission *pro hac vice* of Wood should be affirmed because the court applied Rule 90.1 as written and properly acted within the scope of its discretion. Wood's contentions on appeal, drawn from case law addressing a trial court's jurisdiction to enforce the DLRPC and to impose monetary sanctions under Rule 11, lack merit because they are inconsistent with the language and purpose of Rule 90.1. Wood's proposal that the court should be barred from considering conduct in other jurisdictions after admission *pro hac vice* is inconsistent with provisions in Rule 90.1 requiring the court to consider such conduct prior to granting admission. Wood's proposal that a "clear and convincing" standard be imposed be is contrary to the existing broad "inappropriate or inadvisable" standard in Rule 90.1(e). Wood's argument for a mandatory opportunity to present evidence and respond orally is contrary to the plain language in Rule 90.1(e) permitting the court to provide a hearing "or other meaningful opportunity to be heard."

Where, as here, the trial court does not attempt to enforce the rules of professional conduct, and does not impose monetary sanctions (either under Rule 11 or its inherent powers), the trial court is entitled to rely on Rule 90.1 to guide its discretion in determining whether an admission *pro hac vice*, once granted, should be continued or revoked. For the reasons set forth above, the trial court properly

applied Rule 90.1(e) and acted within its discretion in revoking Wood's admission *pro hac vice*.

Respectfully submitted,

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Amicus Curiae

PROFESSIONAL RESPONSIBILITY AND LIMITS ON JUDICIAL POWER

by

Charles Slanina

The Delaware Supreme Court issued a ruling on January 19, 2022, which further limits the trial court's role in and authority for regulating the practice of law in Delaware. In doing so, the Court again made it clear that it has sole and exclusive authority in matters of attorney discipline.

Carter Page, an American petroleum industry consultant and former foreign-policy consultant to Donald Trump during his presidential election campaign, filed a defamation action in Superior Court against Oath, Inc. for published articles which allegedly falsely accused him of colluding with Russian agents to interfere with the 2016 presidential election. Mr. Page was represented in that suit by L. Lin Wood, Jr., who also had his own notoriety. Mr. Wood is a "celebrity lawyer" specializing in defamation cases. He formerly represented Richard Jewel, falsely accused of the 1996 Atlanta Olympics bombing, the family of JonBenet Ramsey, maligned in the press as possible suspects in her murder, and presidential candidate Herman Cain in the allegations that he sexually harassed female employees. Wood later became better known for his support of QAnon conspiracy theories. Mr. Wood was admitted *pro hac vice* by the Superior Court.

Mr. Wood was reported to be actively involved in a number of lawsuits in other states to challenge and overturn the results of the 2020 presidential election. In an apparent response to those press reports, the trial judge *sua sponte* issued a rule to show cause ("RTSC") directing Wood to show why his *pro hac vice* admission should not be revoked, citing conduct in other jurisdictions which, had it occurred in Delaware, would violate the Delaware Lawyers' Rules of Professional Conduct. The RTSC cited Wood's conduct in litigation in Georgia and Wisconsin as well as pleading irregularities in an action filed in the United States District Court for the Eastern District of Wisconsin as well as a complaint of "questionable merit" filed in the United States District Court for the Northern District of Georgia.

In his response to the RTSC, Wood denied that he violated any of the DLRPC or rules in any other jurisdiction, noting that he had not appeared as counsel in the Georgia litigation but was the plaintiff represented by counsel in that matter. His response also noted that there had

been no claim of sanctionable or disciplinary conduct against him in the Georgia litigation. As to the Wisconsin litigation, Wood pointed out that he was not the attorney of record in the matter and had never appeared in the case. In the interest of full disclosure, I provided an expert opinion on the Delaware professional conduct rules, which Mr. Wood included in his response to the RTSC. That opinion concluded that no DLRPC had been violated and that trial courts lack authority to impose a disciplinary sanction or a reciprocal disciplinary sanction, especially where another jurisdiction has not yet found such a violation to have occurred. In addition to filing a response to the RTSC, Mr. Wood asked to withdraw his application for *pro hac vice* admission.

The trial court issued a Memorandum Opinion and Order revoking Wood's *pro hac vice* admission and canceling the hearing on the RTSC two days before it was scheduled to occur. The Opinion stated that, "The conduct of Mr. Wood, albeit not in my jurisdiction, exhibited a toxic stew of mendacity, prevarication and surprising incompetence." The Order went on to cite a long list of deficiencies, errors and falsities in the Georgia and Wisconsin litigation. The trial judge stated that he wasn't making any determination about any specific violation of professional conduct but was ensuring that those practicing before him are of "sufficient character" and "conduct themselves with sufficient civility and truthfulness." The Court also cited tweets by Wood calling for the arrest and execution of former Vice President Mike Pence, finding that the tweets likely contributed to the incitement of the January 6 insurrection by Trump supporters who took over the U.S. Capitol.

On the same day that the Court dismissed Page's defamation suit, it issued an order vacating the trial court's revocation of Wood's *pro hac vice* admission. In a *per curiam* Order, the Supreme Court rejected the trial judge's assertion that he was making a determination under Superior Court Civil Rule 90.1(e) of the appropriateness and advisability of Wood's continued *pro hac vice* admission and was not engaging in lawyer discipline. The Court noted that the trial judge did not explain why Wood's request to withdraw his *pro hac vice* application and appearance did not adequately address the Court's putatively limited concerns. The Opinion was also critical of the revocation of the admission without affording Wood the opportunity to appear at the hearing while making factual findings adverse to Wood.

The Supreme Court noted that neither the Georgia trial court nor the Eleventh Circuit Court of Appeals on appeal had made any findings that Wood's complaint was frivolous or filed in bad faith and that Georgia's determination that Wood's request for injunctive relief was

without factual or legal merit was not equivalent to a finding that his complaint was frivolous. The Court noted that, under the DLRPC, prohibiting a lawyer from asserting claims unless there is a basis in law for doing so implicitly recognizes that a claim ultimately found to lack a basis in law and fact can nonetheless be nonfrivolous. The Court was also troubled by the trial court's insinuation that Wood was at least partially responsible for the events that occurred at the U.S. Capitol on January 6, 2021, as that topic was not addressed in the RTSC.

Finally, the Supreme Court noted that both the tone and explicit language of the Superior Court's Memorandum Opinion and Order suggested that the Court's interest extended beyond the mere propriety and advisability of Wood's continued involvement in the case. While offering no opinion on the accuracy of those characterizations, the Court found no evidence in the record below to support them.

The Supreme Court opined that when a lawyer admitted *pro hac vice* in this state is accused of serious misconduct in another state, the admitting trial court is not powerless to act. But when those allegations of misconduct in another jurisdiction have not yet been adjudicated and there is no assertion that the alleged misconduct has disrupted or adversely affected the proceedings in this state, and the lawyer agrees to withdraw his appearance, it is an abuse of discretion to preclude the lawyer's motion to withdraw in favor of an involuntary revocation of the lawyer's admission.

Surprisingly, the Supreme Court did not cite previous opinions both defining and limiting the trial court's authority to regulate attorney conduct and misconduct. Notably absent was a reference to *Crumplar v. Superior Court*, 56 A.3d 1000 (Del. 2012), which was a successful appeal of a Superior Court judge's sanctions under Superior Court Civil Rule 11. In *Crumplar*, the Court extended *In re Infotechnology, Inc.*, 582 A.2d 215 (Del. 1990), which barred judges from sanctioning attorneys except where the attorney's conduct prejudicially disrupts the administration of justice in a particular case. In addition, the *Crumplar* decision made it clear that trial judges are required to conduct a hearing before imposing sanctions on their own motion.

There will be a panel discussion of the Wood decision at the February 11, 2022, Rubinstein-Walsh seminar featuring myself and Matt Boyer who provided an *amicus* brief in support of the lower court.

does it necessarily represent the opinion of the Delaware State Bar Association. Additional information about the author is available at www.delawgroup.com.

*** "Ethically Speaking" is available online. The columns of approximately the past two years are available on www.dsba.org.*

**** Charles Slanina is a partner in the firm of Finger & Slanina, LLC. His practice areas include disciplinary defense and consultations on professional responsibility issues. Additional information about the author is available at www.delawgroup.com.*

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Case Number 69,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARTER PAGE,	§	
	§	No. 69, 2021
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware
v.	§	
	§	C.A. No: S20C-07-030
OATH INC.,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: November 10, 2021
Decided: January 19, 2022

Before **SEITZ**, Chief Justice; **VALIHURA**, **VAUGHN**, **TRAYNOR**, and **MONTGOMERY-REEVES**, Justices, constituting the Court *en banc*.

PER CURIAM:

O R D E R

This 19th day of January, 2022, the Court has considered the parties' briefs, the record on appeal, and the argument of counsel, and it appears that:

(1) In July 2020, Carter Page filed a defamation action in the Superior Court against Oath, Inc., alleging that certain of Oath's subsidiaries had published articles falsely accusing him of colluding with Russian agents to interfere with the 2016 presidential election.

(2) Shortly after that, Page's Delaware counsel moved under Delaware Superior Court Civil Rule 90.1 for the admission *pro hac vice* of L. Lin Wood, a

lawyer licensed to practice in Georgia, so that he could appear as Page's attorney in Page's defamation action. The court granted the motion.

(3) After Page filed an amended complaint, Oath moved to dismiss it. The parties briefed the motion and, on December 16, 2020, the court notified counsel that the court would hear oral argument on the motion on January 13, 2021.

(4) Two days later, the Superior Court *sua sponte* issued a Rule to Show Cause directing Wood to show why his admission *pro hac vice* should not be revoked. According to the Rule, "[i]t appear[ed] to the Court that, since the granting of Mr. Wood's [*pro hac vice*] motion, he ha[d] engaged in conduct in other jurisdictions, which, had it occurred in Delaware, would violate the Delaware Lawyers' Rules of Professional Conduct. . . ."[1]

(5) The Rule identified specific concerns regarding Wood's conduct in litigation in Georgia and Wisconsin related to the recent 2020 presidential election on November 3, 2020. Specifically, the court pointed to several pleading irregularities in an action filed in the United States District Court for the Eastern District of Wisconsin. As far as we can tell, the pleadings in that case were not signed by Wood but named him as an "attorney to be noticed." The court also referred to a complaint of questionable merit filed in the United States District Court for the Northern District of Georgia, in which, the court suspected, "Wood filed or

[1] App. to Opening Br. at A5.

caused to be filed [an expert affidavit] . . . [,] which contained materially false information. . . ."[2] In the Georgia case, Wood was the named plaintiff and was represented by counsel.

(6) The court directed Wood and his Delaware counsel to respond to the Rule to Show Cause by January 6, 2021, and stated that it would "hear counsel on [January 13, 2021—the date set for oral argument on the pending motion to dismiss] in response to the Rule to Show Cause."[3] The court also invited Oath to state its position, if it had one, but Oath declined.

(7) In his response, Wood denied generally that he had violated "any of the Delaware Professional Conduct Rules or conduct rules in any other jurisdiction in connection with his involvement in the matters cited by the Court."[4] More specifically, he noted that he had not appeared as counsel in the Georgia litigation but was the plaintiff and represented by counsel in that matter. And he further stated that there had been "no claim of sanctionable or disciplinary conduct against [his counsel] or his firm and certainly none against Wood as plaintiff"[5] in the Georgia litigation. In connection with a questionable affidavit referred to in the Rule to Show

[2] App. to Opening Br. at A7.
[3] *Id.* at A8.
[4] *Id.*at A12.
[5] *Id.* at A11.

Cause, Wood "denied any intent of the parties, including himself, to mislead the Court."[6]

(8) As to the Wisconsin litigation, Wood pointed out that he was not the attorney of record in that matter and was merely listed as "Counsel to be Noticed"[7] on the court's docket sheet. He further stated that he "never appeared" in the case during the brief eight-day period between the filing date and the date of dismissal.

(9) Despite legal argument that revocation of his *pro hac vice* admission was not warranted, Wood "request[ed] to withdraw his application for *pro hac vice* admission and his appearance"[8] in this case.

(10) On January 11, 2021, two days before the hearing on the defendant's motion to dismiss and the court's Rule to Show Cause, the Superior Court issued a Memorandum Opinion and Order revoking its prior order admitting Wood *pro hac vice* and cancelling the January 13 argument on the motion to dismiss. As of that date, neither the Georgia nor the Wisconsin court had cited Wood for sanctionable conduct.

[6] *Id.* at A12.
[7] *Id.*
[8] *Id*. at A14.

(11) After Wood appealed to this Court, we appointed Matthew F. Boyer, Esquire as *amicus curiae* to file an answering brief in opposition to Wood's opening brief.[9]

(12) Superior Court Civil Rule 90.1(e) provides that "[t]he Court may revoke a pro hac vice admission sua sponte or upon the motion of a party, if it determines, after a hearing or other meaningful opportunity to respond, the continued admission pro hac vice to be inappropriate or inadvisable." We review a trial court's decision to revoke a lawyer's *pro hac vice* motion for abuse of discretion.[10]

(13) Despite the concerns expressed by the Superior Court in its Rule to Show Cause regarding whether Wood's conduct in the Georgia and Wisconsin case, had it occurred in Delaware, violated the Delaware Lawyers' Rule of Professional Conduct, it insisted in its opinion and order that it was not engaging in lawyer discipline. Instead, according to the court, it was merely making a determination under Superior Court Civil Rule 90.1(e) of the appropriateness and advisability of Wood's continued *pro hac vice* admission.

(14) The court did not explain, however, why Wood's request to withdraw his *pro hac vice* application and appearance did not adequately address the court's

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[9] We thank Mr. Boyer and his associate, Lauren P. DeLuca, for their assistance, which was professionally rendered in the best traditions of the Delaware Bar.

[10] *Vrem v. Pitts*, 44 A. 3d 923, 2012 WL 1622644, at *2 (Del. May 7, 2012) (TABLE) (noting that "the decision whether to admit an out-of-state attorney *pro hac vice* lies within the discretion of the Superior Court" and reviewing the trial court's revisiting and vacating of its prior order admitting attorney under abuse-of-discretion standard).

putatively limited concern. Instead, without affording Wood the opportunity to appear at the hearing that was scheduled two days hence, the stated purpose of which was to hear his response to the Rule to Show Cause, the court made factual findings adverse to Wood. For instance, the Court found that Wood's conduct in the Georgia and Wisconsin litigation, "albeit not in [the court's] jurisdiction, exhibited a toxic stew of mendacity, prevarication and surprising incompetence."[11]

(15) The Court also found that the Georgia court's conclusion that there was "no basis in fact or law to grant [Wood] the [injunctive] relief he [sought],"[12] "indicate[d] that the Georgia case was textbook frivolous litigation."[13] Yet neither the Georgia trial court nor the Eleventh Circuit Court of Appeals,[14] to which Wood appealed, made any findings that Wood's complaint was frivolous or filed in bad faith. As to this point, we do not view the Georgia court's determination that Wood's request for injunctive relief was without factual or legal merit as equivalent to a finding that his complaint was frivolous. To the contrary, our own ethical rules, by prohibiting a lawyer from asserting claims "unless there is a basis in law for doing so that is not frivolous,"[15] implicitly recognize that a claim ultimately found to lack a basis in law and fact can nonetheless be non-frivolous.

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[11] *Page v. Oath, Inc.*, 2021 WL 82383, at *2 (Del. Super. Ct. Jan. 11, 2021).
[12] 501 F. Supp. 3d at 1331.
[13] 2021 WL 82383 at *2.
[14] *See Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020).
[15] DPCR Rule 3.1.

(16) More questionable yet was the court's insinuation that Wood was at least partially responsible for the troubling events that occurred at the United States Capitol on January 6, 2021—a topic not addressed in the Rule to Show Cause.

(17) In reaching these conclusions, the Superior Court resolved factual issues raised in Wood's written response and did so on a paper record and in advance of a hearing that had been scheduled to address the matter. And though the court said that its decision was not influenced by its conjecture that Wood's conduct had precipitated the traumatic events of January 6, its willingness to pin that on Wood without any evidence or giving Wood an opportunity to respond is indicative of an unfair process.

(18) Both the tone and the explicit language of the Superior Court's memorandum opinion and order suggest that the court's interest extended beyond the mere propriety and advisability of Wood's continued involvement in the case before it. In fact, one cannot read the court's order without concluding that the court intended to cast aspersions on Wood's character, referring to him as "either mendacious or incompetent"[16] and determining that he was not "of sufficient character"[17] to practice in the courts of our State. We offer no opinion on the accuracy of these characterizations, but we see no evidence in the Superior Court's

[16] 2021 WL 82383 at *2.
[17] *Id.*

record that supports them. Similarly, the court's foray into the events of January 6 and its unequivocal finding that "[n]o doubt [Wood's] tweets . . . incited the [] riots,"[18] was not justified given the scope of the Rule to Show Cause and the record.

(19) Because the Superior Court's revocation order is based on factual findings for which there is no support in the record and because the court failed to explain why Wood's withdrawal would not moot the court's concerns about the appropriateness or advisability of Wood's continued admission, we find that the court's revocation order was an abuse of discretion.

(20) To be clear, when a lawyer admitted *pro hac vice* to practice in a trial court of this state is accused of serious misconduct in another state, the admitting trial court is not powerless to act. It might be appropriate to issue—as the court did in this case—a rule to show cause why the out-of-state lawyer's *pro hac vice* status should not be revoked, and to act upon that rule if cause is not shown. But when, as here, the allegations of misconduct in another state have not yet been adjudicated, there is no assertion that the alleged misconduct has disrupted or adversely affected the proceedings in this State, and the lawyer agrees to withdraw his appearance and *pro hac vice* admission, it is an abuse of discretion to preclude the lawyer's motion to withdraw in favor of an involuntary revocation of the lawyer's admission.

[18] *Id.*

NOW, THEREFORE, the Superior Court's January 11, 2021 Memorandum Opinion and Order revoking its August 18, 2020 Order granting Wood's application for admission to practice in this action *pro hac vice* is hereby VACATED.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CELLULAR TELEPHONE PARTNERSHIP LITIGATION	) COORDINATED) C.A. No. 6885-VCL

MEMORANDUM OPINION

Date Submitted: August 15, 2017
Date Decided: August 29, 2017

Lori W. Will, WILSON SONSINI GOODRICH & ROSATI, P.C., Wilmington, Delaware; *Attorney for Special Discovery Master*.

Marcus E. Montejo, John G. Day, PRICKET, JONES & ELLIOTT, P.A., Wilmington, Delaware; *Attorneys for Certain Plaintiffs*.

Norman M. Monhait, ROSENTHAL MONHAIT & GODDESS, P.A., Wilmington, Delaware; Thomas R. Ajamie, Dona Szak, David S. Siegel, Ryan van Steenis, AJAMIE LLP, Houston, Texas; Michael A. Pullara, Houston, Texas; *Attorneys for Certain Plaintiffs*.

Todd C. Schiltz, DRINKER BIDDLE & REATH LLP, Wilmington, Delaware; Maurice L. Brimmage, Jr., AKIN GUMP STRAUSS HAUER & FELD LLP; William M. Connoly, DRINKER BIDDLE & REATH LLP, Philadelphia, Pennsylvania; *Attorneys for Defendants*.

LASTER, V.C.

Special Discovery Master Jim Timmins is in the final stages of drafting a report that this court asked him to prepare. Before completing his report, he would like to review eight documents that the defendants (collectively, "AT&T") withheld as privileged. He believes, but is not certain, that the documents may be relevant to his analysis. He proposes to review the documents *in camera* to determine whether they are relevant. If they are not relevant, then he will not consider them further and the documents will not be produced. If they are, then AT&T has agreed to produce the documents to Timmins and the plaintiffs, subject to an order pursuant to Delaware Uniform Rule of Evidence 510(f) that preserves any applicable privileges for purposes other than this litigation.

The plaintiffs object to this approach. They insist that if Timmins looks at the documents *in camera*, privilege will be waived. They also object that if Timmins concludes that the documents are not relevant, then Timmins' decision will be final, even though he is a master whose decisions must be reviewed *de novo* by a constitutional judge.[1]

In my view, this court has the authority pursuant to Rule 510(f) to authorize the procedure that Timmins has proposed. Rule 510(f) states: "Notwithstanding anything in these rules to the contrary, a court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other proceeding." This subsection is a recent addition the Delaware Uniform Rules of Evidence, and there does not appear to be any Delaware

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[1] *See DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999).

state court authority interpreting it. The rule was modeled, however, on a comparable federal rule, so federal authorities interpreting the analogous rule are persuasive.[2]

Authorities addressing the federal analog—Federal Rule of Evidence 502(d)—teach that it was adopted to facilitate "cost reduction and predictability."[3] The advisory committee notes make clear that the drafters anticipated its inclusion in pre-discovery orders so that litigants could produce batches of information without having to engage in costly privilege reviews. But that was not the only possible use, and the drafters left the rule broad so that "a federal court may order that disclosure of privileged or protected information 'in connection with' a federal proceeding does not result in waiver."[4]

To date, the federal courts have deployed Rule 502(d) in creative ways to promote judicial economy. For example, courts have used it to allow parties to take a "quick peek" at allegedly privileged information to confirm the accuracy of privilege logs without the

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[2] *See Atkins v. State*, 523 A.2d 539, 542 (Del. 1987); *see also Perry v. Berkley*, 996 A.2d 1262, 1267 (Del. 2010).

[3] Edwin M. Buffmire, *The (Unappreciated) Multidimensional Benefits of Rule 502(d): Why and How Litigants Should Better Utilize the New Federal Rule of Evidence*, 79 Tenn. L. Rev. 141, 155 (2011); *see also* Fed. R. Evid. 502 advisory committee's notes.

[4] Fed. R. Evid. 502 advisory committee's notes; *see also Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, 2009 WL 464989, at *4 (N.D. Tex. Feb. 23, 2009) (noting the plain language of the Rule extends beyond inadvertent disclosure); Michael Correll, *The Troubling Ambition of Federal Rule of Evidence 502(d)*, 70 Mo. L. Rev. 1031, 1046 (2012) ("Congress failed to provide any guidance as to what boundaries, if any, circumscribe Rule 502(d).").

need for further judicial involvement.[5] At least one court relied on the rule when declining to stay an order compelling production of privileged documents pending appeal. The court reasoned that if the appellate court ultimately determined that some of the documents were privileged and should not have been produced, a Rule 502(d) order could be entered to remedy any potential harm.[6] In short, the plain language of the rule and its use to date suggest that courts can and should invoke Rule 510(f) to fashion solutions to otherwise difficult discovery problems.

One problem here is that AT&T does not want to waive privilege inadvertently, either by providing the documents to Timmins or by producing them to the plaintiffs. Rule 510(f) appears designed to solve precisely this problem. This court can and will enter an order pursuant to Rule 510(f) which provides that neither type of production will work a broader waiver of the privilege.

A second problem is the plaintiffs' concern that Timmins should not receive evidence from AT&T that they have not seen. But this problem is inherent in *in camera* review, which relies on a neutral decision maker, usually the court itself, to examine documents and make determinations. Timmins is a neutral decision maker who can conduct

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[5] *See, e.g., D'onofrio v. SFX Sports Gp., Inc.*, 2010 WL 3324964, at *3 (D.D.C. Aug. 24, 2010).

[6] *Jicarilla Apache Nation v. United States*, 91 Fed. Cl. 489, 493-94 (Fed. Cl. 2010).

in camera review in the first instance. Other discovery masters have conducted *in camera* reviews.[7] So can Timmins.

The final problem is the plaintiffs' concern that Timmins' decision on relevance will be unreviewable and hence a final determination that exceeds his powers as a special discovery master. This problem can be addressed by requiring Timmins to include in his report an explanation for his conclusion that documents were not relevant, should he indeed reach that outcome. His explanation should not go into so much detail as to reveal the substance of the documents themselves, but it should convey the substance of his analysis to a reviewing court. The plaintiffs can evaluate that explanation and decide whether to take exception to it, just as they can with other aspects of the report. If necessary, this court will examine the documents *in camera* as well.

Timmins' motion is granted, subject to the clarification that if Timmins determines that the documents are not relevant, he will include a brief explanation for that determination in his report.

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[7] *See, e.g.*, *Pontone v. Milso Indus. Corp.*, 2014 WL 2439973, at *17 (Del. Ch. May 29, 2014) (reviewing *de novo* a special master's determination of privilege after reviewing documents *in camera*); *King v. Deloitte LLP*, 2010 WL 3489735, at *5 (Del. Ch. Sept. 7, 2010) (suggesting "*in camera* review by the Court of a Special Master may be the most efficient solution" for discovery disputes); *NACCO, Indus., Inc. v. Applica Inc.*, 2010 WL 3220676, at *1 (Del. Ch. Aug. 10, 2010) (considering "appoint[ing] a Special Master to review some quantum of documents *in camera*"); *Darnielle v. Santa Fe Indus., Inc.*, 1980 WL 258074, at *1 (Del. Ch. Oct. 9, 1980) ("the most efficacious way to move this case forward is for a special master to be appointed to examine such documents in camera").

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating

to the representation of a client. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not

disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

[5] *Authorized disclosure.* — Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] *Disclosure adverse to client.* — Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Disclosure is not permitted under paragraph (b)(3) when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense if that lawyer's services were not used in the initial crime or fraud; disclosure would be permitted, however, if the lawyer's services are used to commit a further crime or fraud, such as the crime of obstructing justice. While applicable law may provide that a completed act is regarded for some purposes as a continuing offense, if commission of the initial act has already occurred without the use of the lawyer's services, the lawyer does not have discretion under this paragraph to use or disclose the client's information.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law. See, e.g., 29 DEL. CODE ANN. § 9007A(c) (which

provides that an attorney acting as guardian ad litem for a child in child welfare proceedings shall have the "duty of confidentiality to the child unless the disclosure is necessary to protect the child's best interests").

[13] Paragraph (b)(6) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a)

prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[15] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the

other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

[18] *Acting competently to preserve confidentiality.* — Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and 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 unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or it may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the

sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

[20] *Former client.* — The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

NOTES TO DECISIONS

Confidentiality.

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, violated the codefendant's attorney-client privilege; the disclosure constituted a violation of the professional conduct rules relating to the confidentiality of information and conduct that was prejudicial to the administration of justice. In re Lyle, 74 A.3d 654 (Del. 2013).

Although the plaintiff's counsel should not have given the plaintiff a juror's phone number after trial, sanctions were not imposed on counsel because no convincing evidence showed that counsel suggested that plaintiff contact the juror; plaintiff was not sanctioned because no authority barred plaintiff from contacting the juror. Baird v. Owczarek, 2013 Del. Super. LEXIS 377 (Del. Super. Ct. Aug. 29, 2013).

There was no bona fide condition for the court's recusal limited to the issue of counsel's withdrawal, because counsel could strictly limit disclosures to the court to preserve the client's confidentiality pursuant to counsel's professional conduct obligations. State v. Pardo, — A.3d —, 2015 Del. Super. LEXIS 548 (Del. Super. Ct. Oct. 27, 2015).

Conflicts of interest.

Because the defendant did not object to a law firm's representation of the plaintiff during the negotiations of a merger agreement, and failed to point to information or confidences obtained by the firm in its prior work for the defendant that would have a material influence on the proceedings, there was no basis to disqualify the firm. Rohm & Haas Co. v. Dow Chem. Co., 2009 Del. Ch. LEXIS 249 (Del. Ch. Feb. 12, 2009).

F.R.E. as adopted by Congress does not include any rules in article V except for a different Rule 501 and a different Rule 502. With limited exceptions, these rules, in effect, leave the rules of evidence as to privilege in federal courts as they existed prior to the adoption of the F.R.E. The draft of article V of the F.R.E. as prepared by the United States Supreme Court Advisory Committee and submitted to Congress contained 13 rules which were similar to article V of the U.R.E. and the rules adopted herein. These proposed but not adopted rules are referred to in these comments as "draft rules." The rationale of Congress in rejecting article V, as presented to it, was that federal law should not supersede the law of the states in the area of privilege. The Committee did not believe this rationale was pertinent as to a state and therefore article V, modeled on the U.R.E. article V, is recommended for adoption in Delaware. The article, as adopted, is consistent (except for minor refinements) with existing Delaware law.

This rule allows for the continuation of privileges or exceptions to privileges specifically provided by the Constitution, by rule or decision of court or by statutes, such as 16 Del. C. § 909 or 12 Del. C. § 3914 [repealed].

D.R.E. 501 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 501 was revised only as necessary to reflect the 2017 amendments and the current language of the Federal Rules of Evidence. There is no intent to change any result in ruling on evidence admissibility.

Rule 502. Lawyer-Client Privilege.

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer or corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer. For the purposes of this Rule, "client" shall include, without limitation, officers, directors, and employees of (a) any business entity that is organized under the laws of this State, and (b) any business entity organized under the laws of any nation other than the United States that owns or controls a business entity that is organized under the laws of this State.

(2) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance

of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation. For purposes of this Rule, "lawyer" shall include persons who are employed or engaged by a business entity, to serve as "in house" counsel to that entity and/or to any of its wholly owned or controlled affiliates.

(4) Omitted.

(5) A "representative of the lawyer" is one employed, or reasonably believed by the client to be employed, by the lawyer to assist the lawyer in the rendition of professional legal services.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client or the successor, trustee or similar representative of a deceased client or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence. A person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;
(4) Accusations against a lawyer. As to a communication necessary for a lawyer to defend in a legal proceeding an accusation that the lawyer assisted the client in criminal or fraudulent conduct;
(5) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
(6) Joint clients. As to a communication relevant to a matter of common interest between or among 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.
(7) Public officer or agency. [Omitted].

Comment

See comment to D.R.E. 501.

The subsections of D.R.E. 502(a) were reordered in 2001 to track U.R.E. 502(a). U.R.E. 502 was based on a draft of F.R.E. 503.

U.R.E. 502(a) (4) was not adopted in Delaware. It was believed that a definition of a representative of a client should be left to case law.

D.R.E. 502(b) tracks U.R.E. 502(b) except that the word "therein" and the words "party in a pending action and concerning" were deleted and the word "in" was inserted in lieu thereof in D.R.E. 502(b)(3). The purpose of this change was to make D.R.E. 502(b)(3) comply with the original draft of the F.R.E. prepared by the Supreme Court Advisory Committee and to make it clear that D.R.E. 502(b)(3) applies even if no litigation is actually pending.

D.R.E. 502(c) tracks U.R.E. 502(c).

D.R.E. 502(d)(1), (2), (3), (4), (5), and (6) track U.R.E. 502(d)(1), (2), (3), (4) (5), and (6). U.R.E. 502(d)(7) was not adopted. The 1980 Committee believed that the Delaware Freedom of Information Act (29 Del. C., Chapter 100) adequately covers the area of privilege as it relates to public officers of agencies. The 1980 Committee also believed that U.R.E. 502(d)(7) would impose too great a burden upon a governmental agency.

For prior Delaware cases illustrating the law covered by this D.R.E., see State Hwy. v. 62,662.47 Acres of Land, Del. Super., 193 A.2d 799 (1963); Texaco, Inc. v. Phoenix Steel Corp., Del. Ch., 264 A.2d 523 (1970); Wallace v. Wilmington & N.R. Co., Del. Super., 8 Houst. 529, 18 A. 818 (1889); Riggs Nat'l Bank v. Zimmer, Del. Ch., 355 A.2d 709 (1976); Phillips v. Delaware Power & Light Co., Del. Super., 194 A.2d 690 (1963); Valente v. Pepsico, 68 F.R.D. 361 (D. Del. 1975); Graham v. Allis-Chalmers Mfg. Co., Del. Supr., 188 A.2d 125 (1963); Wise v. Western Union Tel. Co., Del. Super., 178 A. 640 (1935); State v. Brown, Del. Oyer & Term., 36 A. 458 (1896).

D.R.E. 502 was amended in 2017 to clarify that the attorney-client privilege extends to foreign parent entities of Delaware subsidiaries and covers in-house counsel of foreign entities and controlled affiliates.

Rule 503. Mental Health Provider, Physician, and Psychotherapist-Patient Privilege.

(a) Definitions. As used in this rule:

(1) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination or interview, persons reasonably necessary for the transmission of the communication or persons who are participating in the diagnosis and treatment under the direction of the mental health provider, physician or psychotherapist, including members of the patient's family.

(2) A "mental health provider" is (A) a licensed professional counselor of mental health or licensed associate counselor as authorized under 24 Del. C. §§ 3001-19, or (B) a licensed clinical social worker as authorized under 24 Del. C. §§ 3901-13.

(3) A "patient" is a person who consults or is examined or interviewed by a physician or psychotherapist for treatment or diagnosis.

(4) A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(5) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications

2013 WL 1455827
Only the Westlaw citation is currently available.

Court of Chancery of Delaware,
New Castle County.

RE: In re COMVERGE, INC. SHAREHOLDERS LITIGATION.

Civil Action No. 7368–VCP.
|
Submitted Jan. 25, 2013.
|
Decided April 10, 2013.

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Opinion

DONALD F. PARSONS, JR., Vice Chancellor.

***1** Dear Counsel:
This matter is before me on the motion of Plaintiffs Gary K. Schultz, Saravanan Somlinga, and Adrienne Cohen ("Plaintiffs") to compel document production from Defendants Comverge, Inc. ("Comverge" or the "Company") and the Individual Defendants [1] (collectively, the "Comverge Defendants"). The Comverge Defendants have refused to produce certain requested documents on the grounds of attorney-client privilege.

[1] The Individual Defendants are members of the Company's board of directors (the "Board"): R. Blake Young, Nora M. Brownell, Alec G. Dreyer, Rudolf J. Hoefling, A. Laurence Jones, David R. Kuzma, John McCarter, James J. Moore, Joseph M. O'Donnell, and John Rego.

The documents at issue concern the Comverge Defendants' counsel's advice on the enforceability of a standstill provision contained in a November 15, 2011 Non–Disclosure Agreement (the "NDA") between Comverge and H.I.G. Capital, LLC, Peak Holding Corp., and Peak Merger Corp. (collectively, "HIG"). Plaintiffs allege that HIG breached the NDA by acquiring Comverge debt and other debt to gain an unfair negotiating advantage and to coerce the Board to agree to a buyout by HIG. In the underlying derivative action, Plaintiffs allege that the Individual Defendants breached their fiduciary duties to Comverge shareholders by failing to enforce the terms of a standstill provision in the NDA.

The Comverge Defendants contend that the documents requested are protected by attorney-client privilege and work product immunity. Plaintiffs, on the other hand, assert that the Comverge Defendants waived attorney-client privilege when they placed the communications "at issue" in this litigation. Specifically, Plaintiffs allege that at the preliminary injunction hearing and in their briefs opposing Plaintiffs' motion for a preliminary judgment, the Comverge Defendants sought to rely on the advice of counsel. The Comverge Defendants dispute that characterization and argue that they merely relied on the fact that they received legal advice rather than the substance of privileged communications to prove that the Board was fully informed.

Plaintiffs also seek the production of heavily redacted Board minutes and draft minutes that the Comverge Defendants contend either are not responsive or are protected by the attorney-client privilege.

For the reasons stated in this Letter Opinion, I deny Plaintiffs' motion to compel with a few limited exceptions.

I. ANALYSIS

A. The "At Issue" Exception

Pursuant to Court of Chancery Rule 26(b)(1), "[p]arties may obtain discovery regarding any matter, *not privileged,*

which is relevant to the subject matter involved in the pending action....”[2] A party asserting a privilege has the burden of proof to show that the privilege is applicable to a communication.[3]

2 Ct. Ch. R. 26(b)(1) (emphasis added).

3 *Moyer v. Moyer,* 602 A.2d 68, 72 (Del.1992).

Lawyer-client privilege is codified in Rule 502 of the Delaware Rules of Evidence. Pursuant to that Rule:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.[4]

4 D.R.E. 502(b).

***2** A communication is confidential if it is not “intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”[5] In other words, “[a] communication made in furtherance of the rendition of professional legal services to the client is a confidential communication unless the client intends the information to be disclosed to persons outside the circle of confidentiality.”[6]

5 *Id.* 502(a)(5).

6 *See* *Alaska Elec. Pension Fund v. Brown,* 988 A.2d 412, 419 (Del.2010); *Ramada Inns, Inc. v. Dow Jones & Co.,* 523 A.2d 968, 972 (Del.Super.1986).

Lawyer-client privilege, as reflected in D.R.E. 502, is not absolute and can be restricted or denied entirely when a party places an otherwise privileged communication “at issue” in the litigation.[7] “The at issue exception [to lawyer-client privilege] is based on principles of waiver and fairness intended to ensure the party holding the privilege cannot use it both offensively and defensively.”[8] A party places lawyer-client communications at issue and waives lawyer-client privilege when “(1) a party injects the privileged communications themselves into the litigation, or (2) a party injects an issue into the litigation, the truthful resolution of which requires an examination of confidential communications.”[9]

7 *Zirn v. VLI Corp.,* 621 A.2d 773, 781 (Del.1993).

8 *Princeton Ins. Co. v. Vergano,* 883 A.2d 44, 59 (Del. Ch.2005).

9 *Alaska Elec. Pension Fund,* 988 A.2d at 419.

Plaintiffs seek documents regarding NDA-related communications, including documents discussing how to interpret the NDA and how to respond to a potential breach of the NDA. Although the Comverge Defendants referenced those documents in their Privilege Log and Redaction Log as privileged, Plaintiffs contend that the Comverge Defendants waived attorney-client privilege by asserting in its briefs and arguments at the preliminary injunction stage that the Board did not breach its fiduciary duty because it relied on the advice of counsel in deciding not to pursue action against HIG.

Plaintiffs base their contentions on several assertions made by the Comverge Defendants. These assertions include that: (1) “[t]he Board discussed with its legal advisors what action, if any, it could and/or should take relative to HIG's actions”;[10] (2) “the Committee and Board were exceptionally active and

well informed.... The Board received advice throughout this period from five different teams of financial advisors, and the Committee received advice from three different financial advisors and three law firms"; [11] (3) "the Committee, the full Board, and management, with the advice of outside counsel, actively considered the question of whether to sue HIG for allegedly breaching the NDA"; [12] and (4) "[the Board] sought legal advice from board and company counsel on multiple occasions." [13]

10 The Comverge Defs.' Answering Br. in Opp'n to Pls.' Mot. for Prelim. Inj. ("Comverge Defs.' Opp'n Br. to PI") 17.

11 *Id.* at 30.

12 *Id.* at 37.

13 The Comverge Defs.' Opp'n to Pls.' Mot. to Compel ("Comverge Defs.' Opp'n Br.") Ex. A, Unredacted Tr. for Arg. on Pls.' Mot. for Prelim. Inj. ("PI Tr."), 35; *see also id.* at 38–39.

The Comverge Defendants, on the other hand, argue that those statements address the question of whether the Board sought and received legal advice, and not the substance of that advice or whether the Board relied on the advice. The Comverge Defendants further assert that it was Plaintiffs that first injected this issue into the litigation. For example, Plaintiffs' opening brief in support of their motion for preliminary injunction stated that "the Strategy Committee did not seek advice of legal counsel." [14] Similarly, at the argument on the motion for a preliminary injunction, Plaintiffs' counsel stated "[t]he board just made a decision We're not going to pursue legal action' without seeking even legal advice" and "[t]hey never sought legal counsel." [15]

14 Pls.' Opening Br. in Supp. of Mot. for Prelim. Inj. ("Pls.' Opening Br. for PI") 14.

15 PI Tr. 16; *see also id.* at 17, 28.

1. Prong 1: Injecting privileged communications into the litigation

***3** The first prong of the at issue exemption is whether the party injected privileged lawyer-client communications into the litigation. The first prong usually applies when a party asserts lawyer-client privilege to protect a communication and then later seeks to admit that same communication as evidence. [16]

16 *See* Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7.02[c][2][ii], at 7–35 to 36 (2012); *see also* *Baxter Int'l, Inc. v. Rhône–Poulenc Rorer, Inc.*, 2004 WL 2158051, at * 3 (Del. Ch. Sept. 17, 2004).

Here, the Comverge Defendants have not injected or sought to inject any specific attorney—client communications into the litigation. Questions regarding the existence or nonexistence of such communications were raised by Plaintiffs and not the Comverge Defendants. Therefore, the first prong of the "at issue" exemption does not apply to the circumstances of this case. The at issue exemption, however, still would apply if Plaintiffs prove the second prong.

2. Prong 2: Injecting an issue into the litigation, the truthful resolution of which requires an examination of confidential communications

The second prong of the "at issue" exemption is whether a party injects an issue into the litigation, the truthful resolution of which requires an examination of confidential privileged communications. "[A] party may not make bare factual assertions, the veracity of which are central to the resolution of the parties' dispute, and then assert the attorney-client privilege as a barrier to prevent a full understanding of the facts disclosed.' " [17] In other words, a party cannot raise an issue that the party can only prove by examining confidential communications, and then attempt to shield those communications from discovery as privileged. [18]

17 *In re Kent Cty. Adequate Pub. Facilities Ordinances Litig.*, 2008 WL 1851790, at *5 (Del. Ch. Apr. 18, 2008) (quoting *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del.1995)).

18 *See* Wolfe & Pittenger, *supra* note 16, § 7.02[c][1], at 7–34.

Plaintiffs assert that the Comverge Defendants injected the issue of relying on the advice of counsel into this litigation. Specifically, Plaintiffs point to statements by the Comverge Defendants in their opposition brief to Plaintiffs' motion for a preliminary injunction and at the preliminary injunction

hearing. [19] According to Plaintiffs, these statements indicate that the Board is relying on the advice of counsel as part of their defense.

19 *See supra* notes 10–13 and accompanying text.

The Comverge Defendants counter that: (1) Plaintiffs first raised the issue by averring that the Comverge Defendants failed to solicit legal advice; and (2) the Comverge Defendants have not asserted a defense based on reliance upon the substance of any communications between the Board and its counsel.

The Comverge Defendants are correct that it was Plaintiffs who first raised the issue of whether the Board solicited the advice of legal counsel. [20] Moreover, the examination of privileged communications is not required for the truthful resolution of this litigation because the Comverge Defendants merely seek to rely on the fact that they sought and obtained legal advice rather than that they relied on the substance of privileged communications to prove that the Board was fully informed. Thus, the Comverge Defendants did not "inequitably us[e] attorney-client privilege as a sword" or inject a privilege-laden issue into the litigation. [21]

20 *See supra* notes 14–15 and accompanying text.

21 *Baxter Int'l, Inc.*, 2004 WL 2158051, at * 3.

***4** Plaintiffs point to, for example, the Comverge Defendants' statement that "[the Board] sought legal advice from board and company counsel on multiple occasions." [22] That particular statement reflects the fact that the Comverge Defendants *sought* legal advice. It does not reflect reliance on that advice, however. Nor does it inject the substance of any specific advice into this case. Indeed, at oral argument, the Comverge Defendants reaffirmed that "we have always maintained that we are not relying on an advice-of-counsel defense. All we are saying is that ... we sought legal counsel." [23]

22 PI Tr. 38–39.

23 Mot. to Compel Tr. 30.

In that regard, a number of cases have held that it is the existence of legal advice that is material to the question of whether the board acted with due care, not the substance of that advice. For example, in *Hollinger International, Inc. v. Black,* [24] the Court dismissed a breach of fiduciary duty claimed because the defendants adequately had informed themselves by seeking the advice of counsel. The Court, however, made clear that it did not rely on the content of that advice, stating:

24 844 A.2d 1022 (Del. Ch.2004), *aff'd,* 872 A.2d 559 (Del.2005).

> I begin with a preliminary observation about the CRC's level of care. For perfectly understandable reasons given Black?s conduct, International has not waived the attorney-client privilege. As a result, *I do not have testimony about the legal advice given the CRC regarding the operation of the Rights Plan.* The defendants seized on this and delighted in asking the independent directors detailed questions about the operation of the Rights Plan. I am not convinced by these quizzes that the independent directors did not inform themselves sufficiently before adopting the Rights Plan. [25]

25 *Id.* at 1084–85 (emphasis added).

Similarly, in *Baxter International, Inc. v. Rhône–Poulenc Rorer Inc.,* [26] the Court noted that "while the subject matter of the emails may be at issue (as is often the case with privileged material), the communications themselves are not." [27]

26 2004 WL 2158051 (Del. Ch. Sept. 17, 2004).

27 *Id.* at * 3.

Nonetheless, Plaintiffs contend that three cases, namely, *In re ML–Lee Acquisition Fund II, L.P.,* [28] *In re Unitrin, Inc. Shareholders Litigation,* [29] and *Tenneco Automotive Inc. v. El Paso Corp.,* [30] compel a different result here. *ML–Lee Acquisition* is distinguishable because the underlying claim in that case arose under Section 57 of the Investment Company Act of 1940 (the "1940 Act") and the defendants relied upon the advice of counsel to justify the transaction in issue. [31] Indeed, the defendants answered the complaint by stating that they "believed in good faith that the ... transactions challenged in the Complaint were lawful ... in reliance upon review of the transactions by counsel with respect to the requirements of Section 57 of the 1940 Act." [32] Moreover, the Court explicitly disagreed with the assertion "that the Lee Defend ants' denials [were] simple, or lack substantive content." [33] Thus, unlike

the situation in this case, the party claiming privilege in *ML–Lee Acquisition* sought to rely on the substance of the advice from counsel.

28 859 F.Supp. 765 (D.Del.1994).

29 1994 WL 507859 (Del. Ch. Sept. 7, 1994).

30 2001 WL 1456487 (Del. Ch. Nov. 7, 2001).

31 15 U.S.C. § 80a–56.

32 *In re ML–Lee Acq. Fund II, L.P.,* 859 F.Supp. 765, 767 (D.Del.1994).

33 *Id.* at 768.

***5** Plaintiffs' reliance on *Unitrin* is also misplaced because the defendants in that case partially disclosed **privileged** communications and sought to use the advice received from counsel as both a **sword** and a **shield**. [34] Here, Plaintiffs have not alleged that the Comverge Defendants partially disclosed confidential communications.

34 *In re Unitrin, Inc. S'holders Litig.,* 1994 WL 507859, at *2 (Del. Ch. Sept. 7, 1994) ("By disclosing some of the privileged communications between the board and its counsel, argue plaintiffs, defendants have waived the remainder of the communications which relate to the same subject matter.").

Finally, *Tenneco* is distinguishable because there the plaintiffs' complaint raised the issue of whether the defendants had provided appropriate notice of certain insurance settlements. [35] By so doing, the plaintiffs injected the state of their own knowledge into the litigation. The Court concluded that confidential information and privileged communications concerning what the plaintiffs knew and when they acquired that knowledge should be disclosed because it could not "be reliably obtained from another source" and that "there is no acceptable substitute for intrusion into otherwise confidential communications." [36] Unlike the plaintiffs in *Tenneco,* however, the Comverge Defendants did not inject an issue into this case that requires examination of the substance of any privileged communications or of the Comverge Defendants' state of mind. [37]

35 *Tenneco Auto. Inc. v. El Paso Corp.,* 2001 WL 1456487, at *3 (Del. Ch. Nov. 7, 2001).

36 *Id.* at * 4.

37 *See supra* notes 14–21 and accompanying text.

In sum, the cases relied on by Plaintiffs dealt with situations where the party claiming privilege either injected an issue into the litigation, the truthful resolution of which required an examination of confidential communications, or partially disclosed the confidential communications. In contrast, the Comverge Defendants have not injected a privilege-laden issue into this litigation, attempted to rely on the substance of a privileged communication, or partially disclosed such a communication. Indeed, a close examination of the Comverge Defendants' statements reveals that they have adhered fairly assiduously to assertions that the Board sought, obtained, received, or considered the advice of counsel. [38] Those statements, however, do not go as far as to say that the Comverge Defendants acted in accordance with the legal advice they received or that those Defendants cannot be liable because they relied on some specific advice of legal counsel. [39] Instead, the information the Comverge Defendants have disclosed in this action regarding any privileged communications is summary in nature and comparable to what would be disclosed in a privilege log. I therefore reject Plaintiffs' argument that the Comverge Defendants waived the attorney-client privilege through the at issue exception.

38 *See supra* notes 10–13 and accompanying text; *see also* PI Tr. 44 ("In trying to decide whether to take ... legal action or not, we considered legal advice around the enforceability of the document, any facts that we had relative to [the] evidence of confidentiality being breached, which we had none, about the expense that would be associated with taking action, about the disruption to management given where—given the task at hand of addressing liquidity questions. And after an active dialogue at the board level, as defined here, we decided not to take legal action.").

39 At argument on the preliminary injunction motion, for example, the Comverge Defendants' counsel stated that the strategic committee received "legal advice about what does the NDA mean, what are the rights under the NDA." PI Tr. 41. In

response to a deposition question from Plaintiffs' counsel regarding whether the committee or the Board received legal advice "with respect to whether HIG used confidential information in connection with its purchase of the PFG note," the chairman of the strategic committee responded, "[w]e asked the lawyers about the document, the enforceability of the document, and that was what [the] discussion with [our] lawyers was about." *Id.* at 44 (alterations in original). Thus, the Comverge Defendants acknowledge that the committee and the Board did consider legal issues. Indeed, Jones evidently testified that they obtained advice as to whether there had been a violation of the securities laws. *Id.* at 45.

B. The March 1, 2012 Minutes

At argument, I strongly suggested, if not ordered, the production of the March 1, 2012 draft Board minutes.[40] I hereby confirm that my previous comments were intended as an order. That order, however, was limited in scope and did not address the issue of whether all drafts of Board minutes would have to be produced going forward.[41]

40 Tr. 38.39 ("I would prefer to have [the March 1 draft minutes] produced."); *see also id.* at 43 ("I would like the document with the statement about what the audit committee knew or didn.t know and the draft produced.").

41 *Id.* at 39 ("I am not prejudging the issue of whether all drafts have to be produced.").

C. The March 24, 2012 Minutes

I consider next whether the Comverge Defendants should be compelled to produce an unredacted version of the minutes of the March 24, 2012 Board meeting (the "March 24 Minutes"). Plaintiffs argue that the Comverge Defendants' redactions of the March 24 Minutes are overbroad and cover counsel's recital of business facts that are not protected by attorney-client privilege. At argument, I agreed to conduct an in camera review to determine whether those redactions were overbroad.

***6** "[T]he presence of a lawyer at a business meeting called to consider a problem that has legal implications does not itself shield the communications that occur at that meeting from discovery."[42] Rather, it is "communications to a lawyer by or on behalf of a client for the purpose of the rendition of legal services or lawyer statements constituting legal service" that are protected.[43] Moreover, "attorney-client privilege protects legal advice, as opposed to business or personal advice."[44] "[C]ommunications that contain an inseparable combination of business and legal advice may be protected by the attorneyclient privilege."[45] "Where it is a close call whether a communication reflected in a document and pertaining to a mixture of legal-related and business-related matters is more closely related to legal advice as opposed to business advice, the party asserting the privilege will be given the benefit of the doubt."[46]

42 *SICPA Hldgs. S.A. v. Optical Coating Lab., Inc.*, 1996 WL 577143, at * 2 (Del. Ch. Sept. 23, 1996).

43 *Id.*

44 *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2009 WL 2031793, at *2 (Del. Ch. July 10, 2009) (citing *Lee v. Engle*, 1995 WL 761222, at *1 (Del. Ch. Dec. 15, 1995)).

45 *Id.* (citing *Sealy Mattress Co. of N.J. v. Sealy Inc.*, 1987 WL 12500, at * 3 (Del. Ch. June 19, 1987)).

46 *Id.* (citing *SICPA Hldgs. S.A.*, 1996 WL 577143, at *6).

Apart from an Appendix consisting primarily of the resolutions the Board actually adopted, the March 24 Minutes are twenty-four pages in length. Perhaps understandably, Plaintiffs complain that, with the exception of numerous headings and subheadings, almost seventeen of those pages were entirely redacted. In response to Plaintiffs' Motion to Compel, the Court has reviewed all of the redactions in the March 24 Minutes. Except for the few minor excerpts identified below, the redactions the Comverge Defendants made are appropriate.

The exceptions are as follows:

1. On page 2, the first redacted paragraph, which appears directly under the heading "Review of the HIG Transaction," is factual in nature, relates to a business matter, and does not contain or reflect confidential legal advice. Therefore, it should be produced.

2. On page 4, under the subheading "*Negotiation Process/ Deal Structure,*" the first three sentences should be un redacted. Those sentences state:

> Mr. Hanley [Board Counsel] then provided an overview of the negotiation and deliberative process in which the Strategy Committee engaged. He discussed that the HIG offer is at $1.75 per share. In addition, since the Company had issues of being a standalone company, the Transaction will also include bridge financing of up to $12 million. He explained that this Transaction is a typical cash buyout transaction and will be conducted in a two-step process where existing shareholders will be bought out. [47]

47 COMV00002585.

Although these statements were attributed to a lawyer, Thomas Hanley, none of the sentences reflects the communication of confidential information for the purpose of facilitating the rendition of legal services. Rather, these sentences reflect background facts or relate to purely business aspects of the transaction.

3. On page 15, four lines from the bottom, the following statement by Comverge's Chief Financial Officer should be unredacted: "Mr. David Mathieson reviewed the current covenants under all loans and stated that if the business performs, the Company can meet the covenants in the short term, however, the multiple covenants would be difficult to meet over the duration of the loan." [48] This statement is not privileged for two reasons: (1) the communication concerns business advice; and (2) the statement does not disclose any communication to a lawyer by or on behalf of a client for the purpose of the rendition of legal services.

48 COMV00002596.

***7** 4. On page 23, the last sentence under the heading "Communications Package Discussions" should be unredacted.

II. CONCLUSION

For the foregoing reasons, I deny Plaintiffs' Motion to Compel as it relates to the at issue exemption. I grant in part and deny in part the Motion to Compel as it relates to the March 24 Minutes. Specifically, I order the Comverge Defendants to produce within five business days a modified version of the redacted March 24 Minutes consistent with the rulings in this Letter Opinion. In all other respects, the motion is denied.

IT IS SO ORDERED.

All Citations

Not Reported in A.3d, 2013 WL 1455827

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THEODORE DRACHMAN and DIANA KNIGHT, derivatively on behalf of BIODELIVERY SCIENCES INTERNATIONAL, INC., and individually and on behalf of themselves and all other similarly situated stockholders of BIODELIVERY SCIENCES INTERNATIONAL, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2019-0728-LWW
HERM CUKIER, TODD C. DAVIS, PETER S. GREENLEAF, KEVIN KOTLER, FRANCIS E. O'DONNELL JR., MARK A. SIRGO, and WILLIAM MARK WATSON,	)	
Defendants,	)	
and	)	
BIODELIVERY SCIENCES INTERNATIONAL, INC., a Delaware Corporation,	)	
Nominal Defendant.	)	

STIPULATION AND [PROPOSED] ORDER PURSUANT TO DELAWARE RULE OF EVIDENCE 510(f)

WHEREAS, the parties to the above-captioned litigation (the "Litigation") have agreed to supplement the Stipulation and Order for the Production and Exchange of Confidential Information entered by the Court on February 3, 2021 (the "Confidentiality Stipulation"), by entering into this Stipulation and [Proposed]

Order regarding the exchange of certain discovery that may otherwise be protected by an applicable privilege pursuant to Delaware Rule of Evidence ("DRE") 510(f);

WHEREAS, nominal defendant BioDelivery Sciences International, Inc. (the "Company") and/or the individual defendants Herm Cukier, Todd C. Davis, Peter S. Greenleaf, Kevin Jotler, Francis E. O'Donnell Jr., Mark A. Sirgo, and William Mark Watson (collectively, together with the Company, "Defendants") will produce responsive documents (the "Rule 510 Materials") listed on their privilege log (following good-faith negotiations with Plaintiffs), and not object on the grounds of the attorney-client privilege to questioning and testimony, regarding the outcome of the stockholder vote on the resolutions proposed to the Company's stockholders at the Company's 2018 Annual Meeting and the litigation demand sent by Plaintiffs to the Company on July 31, 2019 (the "Privileged Topics") that the Defendants contend would otherwise be protected by the attorney-client privilege and/or work product protection;

WHEREAS, the parties have agreed, subject to the Court's approval, that it is desirable to have a mechanism to allow for the production, review, and use in this Litigation of the Rule 510 Materials without waiving in this or any other proceeding or litigation any claim under the attorney-client privilege, work product doctrine, or any other applicable privilege or immunity as to such Rule 510 Materials;

WHEREAS, the parties believe that the entry of this Stipulation and [Proposed] Order Pursuant to Delaware Rule of Evidence 510(f) (the "Rule 510 Order") will promote a fair and efficient adjudication of the Litigation;

IT IS HEREBY STIPULATED AND AGREED, by and among the parties, and subject to the approval of the Court, as follows:

1. This Rule 510 Order, together with the Confidentiality Stipulation [Trans. ID 66305938], shall govern the treatment, use, and effect of documents and testimony produced or provided under this Rule 510 Order.

2. The Rule 510 Materials shall be produced for review and use in this Litigation pursuant and subject to the provisions of this Rule 510 Order by designating such documents as "Rule 510 Discovery Material."

3. Rule 510 Discovery Material produced in accordance with Paragraph 2 of this Rule 510 Order shall be designated as "Confidential" pursuant to the Confidentiality Stipulation. To the extent any party objects to the designation of any of the Rule 510 Discovery Material as "Confidential," the objecting party shall invoke the procedures set forth in Paragraph 15 of Confidentiality Stipulation to vacate such designation.

4. Consistent with the Confidentiality Stipulation, the parties may utilize the Rule 510 Discovery Material for any purpose in this Litigation. The Defendants will not prohibit any witness from answering questions about the Privileged Topics

on the basis of the attorney-client privilege.

5. Entry into this Rule 510 Order shall not constitute a waiver of, or estoppel as to, any claim of attorney-client privilege, work product doctrine, common interest doctrine, or other applicable privilege or immunity as to the Rule 510 Materials; nonetheless, as set forth in Paragraph 4, Plaintiffs are permitted to use the Rule 510 Materials in this Litigation.

6. All Rule 510 Materials remain subject to the terms and provisions of the Confidentiality Stipulation except that the Rule 510 Materials may not be subsequently clawed-back in this Litigation by an assertion of attorney-client privilege regarding the Privileged Topics.

7. This Rule 510 Order may be amended by order of the Court for good cause shown.

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Dated: October 20, 2021

SO ORDERED this ___ day of _____, 2021.

_____
Vice Chancellor Lori W. Will

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Lori W. Will
File & Serve Transaction ID:	67030640
Current Date:	Oct 22, 2021
Case Number:	2019-0728-LWW
Case Name:	CONF ORD ON DISC - Theodore Drachman v. Herm Cukier, et.al. & BioDelivery Sciences International, Inc., Nominal Defendant
Court Authorizer:	Lori W. Will

/s/ Judge Lori W. Will

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BGC PARTNERS, INC. DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 2018-0722-AGB

STIPULATION AND [PROPOSED] ORDER
PURSUANT TO DELAWARE RULE OF EVIDENCE 510(F)

WHEREAS, Plaintiffs have requested the production of certain documents redacted and/or withheld by Defendants Howard Lutnick, CF Group Management, Inc., and Cantor Fitzgerald, L.P. (the "Cantor Defendants") on the basis of the attorney-client privilege and common interest privilege;

WHEREAS, the Cantor Defendants have redacted and/or withheld Discovery Material[1] between the Cantor Defendants and Nominal Defendant BGC Partners, Inc. relating to prospective deal financing of the Berkeley Point transaction that pre-date the signing of the Berkeley Point transaction (the "Deal Financing Material");

WHEREAS, the parties hereto wish to avoid burdening the Court with this discovery dispute and have agreed, subject to the approval of the Court, that it is desirable to have a mechanism to allow for the production of the Deal Financing Material in this Litigation without waiving any claim of attorney-client privilege, common interest

[1] Unless otherwise defined, capitalized terms herein have the meanings ascribed to them in the Stipulation and Order Governing the Production and Exchange of Confidential and Highly Confidential Information entered by the Court on January 2, 2020 (Dkt. #96) (the "Confidentiality Order").

privilege, work product doctrine, and/or other applicable privilege or immunity as to any document in this Litigation or any other proceeding;

WHEREAS, the Cantor Defendants do not intend to waive any claim of attorney-client privilege, common interest privilege, work product doctrine, and/or other applicable privilege or immunity;

WHEREAS, the Cantor Defendants continue to dispute Plaintiffs' challenges to the assertions of attorney-client privilege and common interest privilege over the Deal Financing Material;

WHEREAS, Plaintiffs continue to dispute the Cantor Defendants' assertions of attorney-client privilege and common interest privilege with respect to the Deal Financing Materials;

WHEREAS, the parties hereto believe that the entry of this proposed order (the "Non-Waiver Order") will promote the efficient adjudication of this Litigation;

IT IS HEREBY STIPULATED AND AGREED by the parties hereto, subject to the approval of the Court, that:

1. This Non-Waiver Order, together with the Confidentiality Order, shall govern the treatment, use, and effect of any Deal Financing Material produced or otherwise disclosed under this Non-Waiver Order.

2. The Cantor Defendants may designate any Deal Financing Material as "Confidential – Non-Waiver" or "Highly Confidential – Non-Waiver."

3. Pursuant to Delaware Rule of Evidence 510(f), production of Deal Financing Material designated as "Confidential – Non-Waiver" or "Highly Confidential – Non-Waiver" shall not constitute a waiver or forfeiture of, or estoppel as to, any claim of attorney-client privilege, common interest privilege, work product doctrine or any other applicable privilege or immunity with respect to that Deal Financing Material, any related testimony about the Deal Financing Material, and/or their subject matter or any other documents, any related testimony, and/or their subject matter in this Litigation or any other proceeding.

4. For purposes of the Confidentiality Order, Deal Financing Material designated as "Confidential – Non-Waiver" or "Highly Confidential – Non-Waiver" shall be treated as Confidential Discovery Material or Highly Confidential Discovery Material, respectively, and remain subject to the terms and provisions of the Confidentiality Order.

5. The disclosure of the Deal Financing Material designated as "Confidential – Non-Waiver" or "Highly Confidential – Non-Waiver" through document production, testimony or otherwise shall not waive any objection to their admissibility or other use at trial.

6. Nothing herein shall prevent a party from challenging a claim of attorney-client privilege, common interest privilege, work product doctrine or any other applicable privilege or immunity, in this Litigation or any other proceeding, with respect to Deal

Financing Material designated as "Confidential – Non-Waiver" or "Highly Confidential – Non-Waiver." A challenging party shall not, however, base its challenge to the claim of privilege or immunity on a claim of waiver by reason of the production or disclosure of the Deal Financing Material.

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Attorneys for Defendants Howard Lutnick, CF Group Management, Inc., and Cantor Fitzgerald, L.P.

Dated: August 13, 2020

SO ORDERED this ___ day of _____, 2020.

The Honorable Andre G. Bouchard

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Andre G Bouchard
File & Serve Transaction ID:	65847530
Current Date:	Aug 15, 2020
Case Number:	2018-0722-AGB
Case Name:	CONF ORD - CONS W/ 2018-0805-AGB - IN RE BGC PARTNERS, INC. DERIVATIVE LITIGATION
Court Authorizer:	Andre G Bouchard

/s/ Judge Andre G Bouchard

"Blessed are Those who Hunger and Thirst for Righteousness"

Protecting the Attorney-Client Privilege in Litigation

The Honorable Abigail M. LeGrow
Superior Court of the State of Delaware

The Honorable Lori W. Will
Court of Chancery of the State of Delaware

John D. Balaguer, Esquire
White and Williams LLP

Judge Abigail M. LeGrow

The Honorable Abigail M. LeGrow was appointed to the Superior Court by Governor Jack A. Markell and began serving on February 15, 2016.

Judge LeGrow received her J.D., *summa cum laude*, from the Pennsylvania State University Dickinson School of Law and her B.A. in Political Science, *summa cum laude*, from Susquehanna University. While in law school, Judge LeGrow was an editor of the Penn State Law Review and a recipient of the Walter Harrison Hitchler Award and the American Bankruptcy Law Journal Prize.

After graduating from law school, Judge LeGrow served as a law clerk to the Honorable Jack B. Jacobs of the Delaware Supreme Court. Upon completing her clerkship, she practiced law at Potter Anderson & Corroon LLP, where she specialized in corporate and commercial litigation. In 2011, she was appointed by then-Chancellor Leo E. Strine, Jr. to serve as Master in Chancery on the Delaware Court of Chancery, a position she held until her appointment to the Superior Court. In 2018, Judge LeGrow was appointed to the Superior Court's Complex Commercial Litigation Division ("CCLD"), and in January 2022, she was appointed as the Civil Administrative Judge for Superior Court in New Castle County.

Judge LeGrow presently serves as President of the Richard S. Rodney Inn of Court. She is a member of the American College of Business Court Judges and the National Association of Women Judges.

Judge LeGrow's present term ends February 15, 2028.

"Blessed are Those who Mourn"
Client Confidentiality in the World of Trusts and Estates

David Ferry, Esquire
Ferry Joseph P.A.

Denise Nordheimer, Esquire
The Law Offices of Denise D. Nordheimer, LLC

"Why Am I In the Waiting Room?" And other Complaints When We Try to Enforce the Rules of Professional Conduct in Estate Planning

by

Denise D. Nordheimer, Esquire

Many times, during the course of a week our receptionist gets phone calls from adult children of a potential client wanting to make an appointment for their elderly parent. After clearing conflict check, she will send some information we request their parent bring to the meeting and make the appointment as requested. In the course of further assisting their parent, many times an older client driven to the appointment by their adult child and escorted into our offices. Frequently, more than one child will also come. None have been invited by us. Additionally, with Zoom meetings, anyone who could not previously make the trip because of distance or work schedules is also now available and possibly eager to participate in their parent's estate planning meeting along with the "tech support" child or grandchild that is ostensibly just there to babysit the IPad.

Ethically, it is clear to us who the client is, but when it is time to meet alone with our client, there can be some resistance. This is not a situation that is specific to my practice and I was very grateful to learn years ago that the American Bar Association published a pamphlet called Why Am I Left in the Waiting Room? for just these situations. The pamphlet outlines the "Four C's" of elder law ethics that lawyers are required to follow for lay people. For our purposes, I have expanded it and included the Rules of Professional Conduct that relate to each aspect of the representation:

Client Identification: In the waiting room (or on the Zoom call) I generally open with "I am glad to see that my client has so much support. Thank you for coming but now, I need to meet with your mom/dad alone." I go on: "this is so that I can be sure of their wishes, but also to protect you. I never want anyone to be able to say that you tried to influence our meeting." Once you raise the shadow of "you could be sued at some future date," I find everyone is glad to leave me alone with the client.

Conflicts of Interest: Client identification and conflicts of interest go hand in hand. In estate planning, Conflict of Interest is usually brought up in the context of a lawyer representing both spouses when drafting their estate plan. This is easily handled by a provision in the fee agreement that explains joint representation and puts the client on notice about how the attorney must view information provided to them by either client. Between parents and adult children there

is also sometimes a conflict of interest. If we have an older wealthier client who wishes to leave the bulk of their estate other than to their adult children (as is their right), this can raise a potential or actual conflict of interest if the child is also our client. At that point, we would need to meet with the parties and discuss a waiver or declining the representation. When there is no conflict, just the potential disappointment regarding an estate plan, I encourage the client to discuss their plan with their children in order to adjust their expectations and to be able to address their questions directly. If they are unwilling to do this, I make copious contemporaneous notes to the file and hope for the best. I am just the drafter, not the architect.

Rule 1.7. Conflict of Interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction;

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For

purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigations, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Confidentiality: For me, next to competency, confidentiality is the most important rule. A lawyer must keep information and communications between her clients and her confidential. I and also importantly no one in my office, can share any information with family members unless we have the express permission of the client. This includes if the child is agent under a Power of Attorney that is contingent. In that case, we request a doctor's note indicating that the client cannot manage their affairs and the agent should act. *It is very important to train support staff in this rule*,

as the caller will usually try and get the information well before they get to the attorney. Remember, the rules extend to those we supervise as well.

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
> (6) to comply with other law or a court order.

Rule 5.3. Responsibilities regarding non-lawyer assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

> (a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> > (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
> > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Competency: Other than a doctor's note, the only way for an attorney to determine the mental status of a client is to interview them alone. Often, an adult child will want to come into the interview on the pretext of "helping," either with understanding or communicating important

information. Assessing a client's capacity is essential to determining if the representation can move forward and cannot be done in the presence of family members. At the conclusion of a meeting, after we have had the substantive interview, I will often invite the exiled party(ies) back in, to conclude the meeting and help to make the client more comfortable. At that point, if the client has expressly instructed me to share our plan, I am glad to do so. In some cases, we might determine that a client lacks the capacity to work with us. In these instances, I politely adjourn the meeting and ask for a doctor's note regarding competency to engage in estate planning before we continue. In some instances, an attorney may need to consult with Rule 1.14 ("Client with diminished capacity") for guidance.

Rule 1.14. Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Like many of you who work with families in their practices, this is a small sampling of the ethical challenges I and other estate planning attorneys encounter. I know that estate planning can seem like a fairly low-stress practice area, but when you have the overlay of family dynamics, it can become a minefield for the optimistic or the unwary.

27th ANNUAL RUBENSTEIN-WALSH SEMINAR ON PROFESSIONAL ETHICS AND PROFESSIONALISM 2022

February 11, 2022

Client Confidentiality in the World of Trusts and Estates

David J. Ferry, Jr., Esquire

Trusts, estates, and fiduciary matters have significant confidentiality and ethical issues to address. This presentation will address confidentiality issues and ethical issues in this area of practice and will include comments relating to the Delaware Lawyers' Rules of Professional Conduct ("DLRPC").

1. Who Is the Client?

Practitioners in this practice area are frequently faced with the question of who is the client. Whether you represent the person who is acting as the trustee, the executor, the guardian, the agent under power of attorney, or the person who is signing estate planning documents, it is important to clarify at the outset who the attorney represents and the obligations that are involved in representing a fiduciary. Attorneys are often contacted by family members who are seeking to become agent under a power of attorney or guardian of a person who may need assistance with the handling of their affairs or who may need a legal guardian to handle their affairs or persons who wish to prepare wills or trusts. When a client asks you to prepare a power of attorney or other documents for a family member,

you need to clarify at the outset if you are representing the family member who is appointing the power of attorney or other fiduciary or if you are representing the person who is seeking to be appointed power of attorney or fiduciary. One must be extra careful in circumstances when asked to represent both parties. It is necessary to explain your role, who you represent, and that the party who is being asked to sign a power of attorney or other documents is competent and capable to do so. Counsel must inform the parties of the potential conflict of interest that will arise in a joint representation.

In representing a fiduciary, the attorney must confirm the nature and scope of the representation. Delaware law states that a Delaware attorney who represents an "estate" or a "trust" represents the executor or the trustee. The attorney must insure that the executor or trustee is aware of their fiduciary obligation towards beneficiaries. The fact that the fiduciary client has an obligation to the beneficiaries does not impose parallel obligations on the lawyer or otherwise expand or supersede the lawyer's responsibility under the Model Rule of Professional Conduct. The Delaware attorney represents only the client and does not represent other beneficiaries or otherwise owe duties to them under the DLRPC other than the duties that lawyers owe to all third parties.

In the context of representing executors and trustees, it is often the case that

the executor or trustee is also a beneficiary of the estate and/or trust. When the attorney represents the executor or trustee who is also a beneficiary of the estate or trust, they must counsel their client and remain conscious of this potential for conflict of interest. The executor or trustee should be regularly reminded that their decisions must be made as if they were a neutral party and the decisions must be based on what is in the best interest of ALL of the beneficiaries. The practitioner should be extra careful to keep the beneficiaries notified of important issues regarding the estate and/or trust and be extra careful to document notifications to beneficiaries.

It has been my practice to always notify beneficiaries of an estate or trust at the outset of my representation of the executor or trustee by sending a written communication notifying the beneficiaries of the existence of the will and/or trust, sending them copies of the relevant documents, telling them what beneficial interest they have in the estate and/or trust, and ensuring that they clearly understand that I am representing the fiduciary and not the individual beneficiaries. I always make it a point to let the beneficiaries know that my client and I will keep them informed of the progress of the administration of the estate and trust, but that I do not represent the beneficiaries and if they require any legal advice, they must seek advice from their own legal counsel.

2. **Dealing With Pro Se Parties.**

DLRPC 4.3 makes clear how attorneys should deal with unrepresented parties. Because the great majority of estate and trust beneficiaries are unrepresented, attorneys must be cautious when representing a fiduciary and handling communications with beneficiaries.

3. **Disclosure.**

Providing information to beneficiaries when you represent the fiduciary is very important. Telling the beneficiaries to seek their own legal counsel if they require legal advice is strongly recommended. Providing periodic updates to the beneficiaries about the estate or trust is highly recommended. It is also important to note the attorney's duties towards third persons which includes beneficiaries. This duty is required by DLRPC 1.6. If the fiduciary client has used the attorney's services in furtherance of wrongful conduct and the attorney reasonably believes that disclosure of the information is necessary to prevent, mitigate, or rectify substantial injury that is reasonably certain to result or has resulted from the conduct, the lawyer should disclose that conduct to beneficiaries.

4. **Termination of Representation.**

There are circumstances where an attorney must disclose information related to representation to the extent necessary to enable the affected persons to

prevent or mitigate reasonably certain losses or attempt to recoup their losses. (Rule 1.6 cmt. #8). This disclosure is necessary when a lawyer learns of a client's commission of a crime or fraud after it has been consummated.

Rule 1.16 sets forth requirements that may require withdrawal in certain circumstances. For example, if an attorney loses confidence that the client is behaving in a ethical way, the DLRPC gives the attorney broad discretion to withdraw from the representation. Mandatory withdrawal under Rule 1.16(a) is required where "the representation will result in violation of rules of professional conduct or other law." Rule 1.16(b) also permits counsel to withdraw under a variety of other circumstances. An attorney may withdraw if withdrawal can be accomplished without material adverse effect on the interest of the client. Attorneys may also withdraw if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent. Also, a lawyer may withdraw if the client insists upon taking action the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

If an attorney is representing a client in a matter pending in a court or other tribunal, the lawyer must comply with all requirements including obtaining permission from the court or tribunal to withdraw as counsel. In securing that permission, the attorney may not disclose client information unless the attorney

does so in a manner that complies with Rule 1.6. For example, in filing the motion to withdraw as counsel, the attorney can simply state that representation has become unreasonably difficult and the lawyer must withdraw without specifically disclosing client confidences or the substance of the issues that create the fundamental disagreement between lawyer and client.

Del. Rules of Prof'l Conduct 1.16

This document is current through January 17, 2022.

DE - Delaware Local, State & Federal Court Rules > The Delaware Lawyers' Rules of Professional Conduct

Rule 1.16. Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's service to perpetrate a crime or fraud;

(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of

other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Annotations

Commentary

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

[2] *Mandatory Withdrawal.* — A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

[4] *Discharge.* — A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort

Del. Rules of Profl Conduct 1.6

This document is current through January 17, 2022.

DE - Delaware Local, State & Federal Court Rules > The Delaware Lawyers' Rules of Professional Conduct

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

History

Amended, effective Mar. 1, 2013.

Annotations

Notes

Effect of amendments.—

The 2013 amendment, effective Mar. 1, 2013, added (b)(7) and (c).

Commentary

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations,deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

[5] *Authorized disclosure.* — Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] *Disclosure adverse to client.* — Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be

prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Disclosure is not permitted under paragraph (b)(3) when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense if that lawyer's services were not used in the initial crime or fraud; disclosure would be permitted, however, if the lawyer's services are used to commit a further crime or fraud, such as the crime of obstructing justice. While applicable law may provide that a completed act is regarded for some purposes as a continuing offense, if commission of the initial act has already occurred without the use of the lawyer's services, the lawyer does not have discretion under this paragraph to use or disclose the client's information.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law. See, e.g., *29 DEL. CODE ANN. § 9007A(c)* (which provides that an attorney acting as guardian ad litem for a child in child welfare proceedings shall have the "duty of confidentiality to the child unless the disclosure is necessary to protect the child's best interests").

"Blessed are the Geeks"
Ethical Issues in the Use of Technology

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Ryan Newell is a litigator who represents clients faced with a variety of business law issues. Even though his clients are confronted with litigation, Ryan keeps their business concerns and priorities in mind.

Ryan has represented parties in corporate and commercial litigation in the Delaware Court of Chancery, the Delaware Superior Court, the Delaware Supreme Court, and the District of Delaware. He has also represented parties as Delaware counsel in intellectual property litigation in the District of Delaware.

While the bulk of his practice is focused on these types of commercial litigations, Ryan has experience representing government entities and parties in trust litigations. In particular, he was part of a team that successfully defended the State of Delaware before the United States Supreme Court in an original jurisdiction action brought by New Jersey that challenged Delaware's sovereignty over the Delaware River within its historic Twelve Mile Circle.

Ryan is also frequently appointed by the Court of Chancery and Superior Court to serve as a special discovery master or discovery facilitator in high stakes litigations. He is a Delaware Superior Court certified mediator and has completed The Sedona Conference's eDiscovery Negotiation Training program, a prestigious invitation only program.

Ryan is ranked among Delaware's leading Chancery practitioners according to *Chambers USA: Guide to America's Leading Lawyers for Business*. Sources praise Ryan for his "productive and cordial demeanor." In addition to *Chambers USA*, Ryan has been honored by *Super Lawyers*® and *The Best Lawyers in America*® and he has been voted by his peers as one of the state's "Top Lawyers" as identified in *Delaware Today* magazine. Ryan has received an AV® Preeminent™ Peer Review certification, which is Martindale-Hubbell's highest rating for lawyers.

Ryan was elected as a Fellow of Litigation Counsel of America, an honorary society for trial attorneys. He is part of The Fellows of the American Bar Foundation, a global honorary society comprised of attorneys, judges, law faculty and legal scholars whose careers demonstrate an outstanding dedication to the legal profession.

Ryan attended the Dickinson School of Law of the Pennsylvania State University on a Dean's Scholarship. He was the Casenote Editor for the Penn State Law Review and served as a law clerk to the Honorable Kevin A. Hess in the Cumberland County (Pennsylvania) Court of Common Pleas. As an undergraduate, Ryan graduated

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from the University of Notre Dame and its Mendoza College of Business, and he currently serves as president of the Notre Dame Club of Delaware.

Practices

- Expedited Litigation

Bar Admissions

- Delaware, 2005
- Pennsylvania, 2008
- New Jersey, 2008

Clerkships

- Law Clerk to The Honorable Kevin A. Hess, Cumberland County, Pennsylvania Court of Common Pleas, 2004

Distinctions

- Litigation Counsel of America, Fellow
- American Bar Foundation, Fellow
- AV® Preeminent™ Peer Review Rating by Martindale-Hubbell
- *The Best Lawyers in America*®, recognized since 2017
- *Delaware Today* Top Lawyers, 2015, 2016 and 2021
- *Chambers USA: Guide to America's Leading Lawyers for Business*, 2015
- Irish Echo: 40 Under 40 Honoree, 2015
- Delaware *Super Lawyers*®, 2014 – 2018
- Delaware *Super Lawyers*® – Rising Star, 2013
- Delaware State Bar Association's New Lawyers Distinguished Service Award, 2010

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MJMM, Inc. v. TranDotCom Solutions, LLC, C.A. No. 14-526-GMS

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Hospira, Inc. v. Amneal Pharm. LLC, C.A. No. 15-697-RGA

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CallWave Commc'ns LLC v. T-Mobile USA Inc., et al., C.A. No. 12-1703-RGA

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June 9, 2020
Naughty or Nice? Instead of Coal, I Got ... ESI?!***

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July 1, 2019
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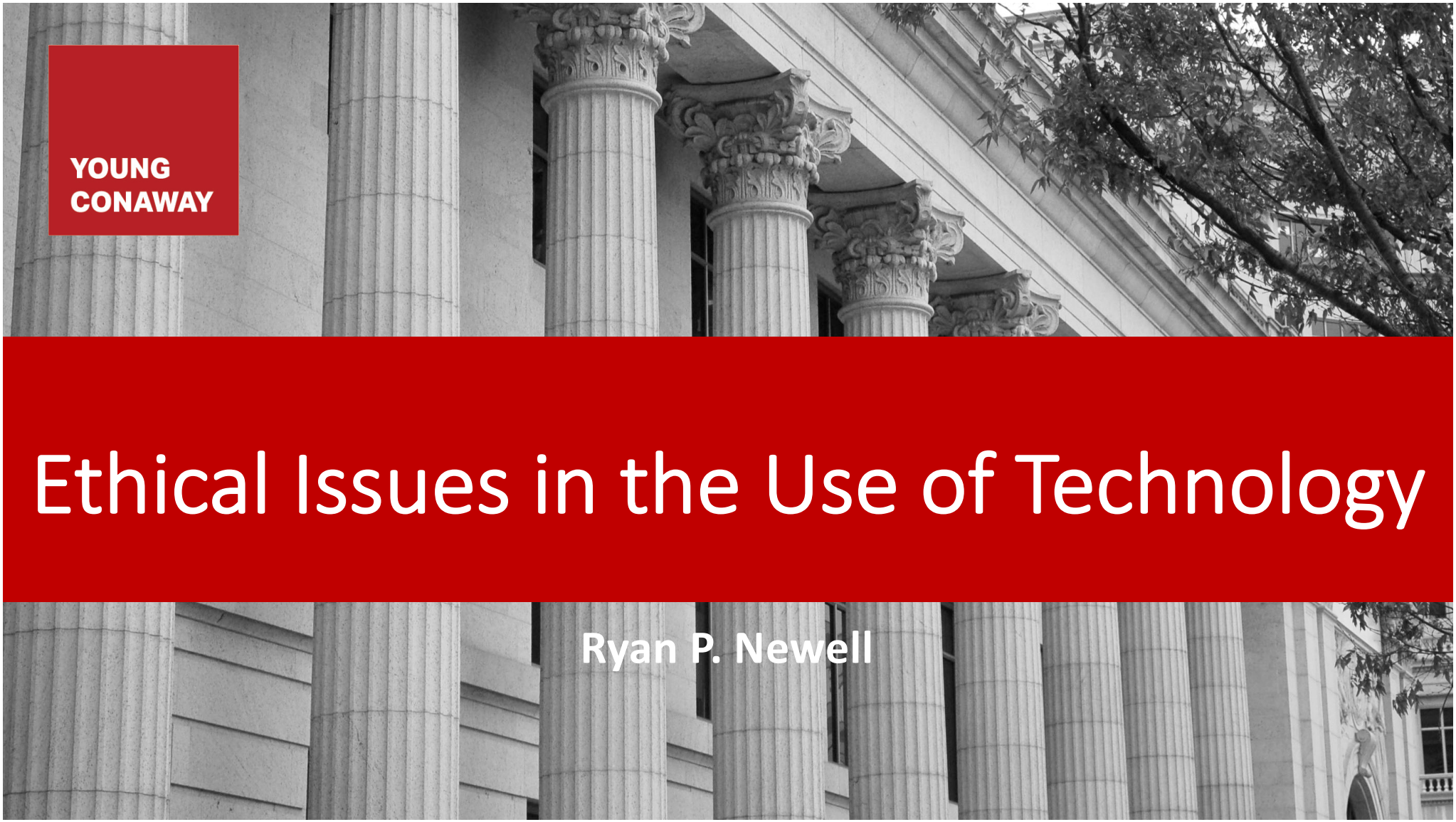

Ethical Issues in the Use of Technology

Ryan P. Newell

Competence

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Competence

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Competence

[8] *Maintaining competence.* — To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Discovery Plans

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Define what constitutes "ESI" for your case

D. "ESI" means electronically stored information.

1. Electronically stored information shall include, but is not limited to, all web-based communications, email and other electronic communications, electronically stored documents, records, images, graphics, recordings, calendars, system usage logs, contact manager information, telephone logs, internet usage files, deleted files, cache files, user information, voice mails, drafts, reports, presentations, recordings, text messages, other digitized documents, and electronic files of any kind pertaining to the issues relevant to this case.

2. Electronically stored information shall not include information that is not reasonably accessible. The parties have agreed that the following specific categories of information are not reasonably accessible:

a. [LIST]

Agree to case-specific definitions

II. CASE-SPECIFIC DEFINITIONS

A. When serving and responding to discovery, parties routinely generate lists of defined terms that are specific to a given case. Although parties often use the same or similar terms in their respective discovery requests, parties also routinely object to those definitions when used by their opponents.

B. To streamline discovery, the parties have agreed upon the following list of case-specific defined terms that will be used in all discovery requests and responses.

Set limits for written discovery

C. Requests for Production

1. Absent leave of court for good cause shown, each party may make up to ____ requests for production, including subparts.

2. Absent leave of court for good cause shown, no requests for production may be served after ____.

3. In lieu of the number of days allocated by Court of Chancery Rule 34, the parties shall provide written responses and objections to requests for production within ___ days of service.

Provide transparency on preservation

V. LITIGATION HOLDS AND DOCUMENT RETENTION

A. ABC

1. ABC issued a litigation hold on [DATE] to the following: [List or description of recipients].

2. In the ordinary course of business, before implementing the litigation hold, ABC's document retention policy was as follows: [DESCRIBE or ATTACH POLICY]

Clarify the scope of production

- Define the “Retention Period”
- Identify:
  - Custodians
  - Hard copy sources
  - Email sources
  - Portable media
  - Cloud-based storage
  - Mobile devices

Describe the search methodology

D. Search Terms

1. If search terms are used, within _____ days of the execution of this Discovery Plan, the parties shall exchange proposed search terms and strategies that each producing party proposes to use to identify responsive ESI.

2. If a producing party has reason to believe that responsive Documents are in a language other than English, the party shall include in its proposed search terms any translated search terms it proposes to use.

3. Within _____ days of the parties' exchange of proposed search terms, the parties shall meet and confer to agree on search terms. A representative of each party's Discovery Vendor shall attend the meet and confer session and shall answer questions regarding the feasibility of particular queries or search technologies.

4. In the event that any party issues additional requests for production after the meet and confer described in this Subsection, the parties shall meet and confer within _____ days of such requests to discuss the need for supplemental search terms and to identify supplemental search terms if any. A representative of each party's Discovery Vendor shall attend the meet and confer session and shall answer questions regarding the feasibility of particular queries or search technologies.

5. Upon request of a party, any party using search terms shall divulge hit reports or any other reasonably available case analytic to the parties.

6. Each search term or query returning more than _____ unique hits is presumptively overbroad and must be narrowed by the requesting party before any Documents in response to the search term or query need to be reviewed for production.

E. Technology Assisted Review

1. If technology assisted review is used, within _____ days of the execution of this Discovery Plan, the parties shall exchange technology assisted review protocols that each producing party proposes to use to identify responsive ESI.

Protect your client's data

XV. SECURITY

A. Any media on which Documents are produced may be encrypted by the producing party. In such cases, the producing party shall transmit the encryption key or password to the requesting party under separate cover upon service of the encrypted media.

B. To the extent a party has concerns regarding the abilities of other parties to protect the confidential nature Documents produced by the party in this action, the party shall promptly identify for the parties what security measures it would deem appropriate. The failure to address security concerns within ten days of the filing of the Discovery Plan shall preclude a party from withholding Documents requested in discovery on the basis of security concerns.

Minimize the need for deficiency letters

XVIII. STATUS REPORTS

A. The parties shall file monthly joint status reports beginning on _____ and continuing until the completion of discovery pursuant to this Discovery Plan.

B. Each status report shall take the form of a joint letter, double-spaced, in Times New Roman 13-point typeface, and shall address: (1) each party and non-party's compliance with any discovery requests that another party has served; (2) any issues that may impede compliance with the Written Discovery Deadline.

Contact Information

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YOUNG CONAWAY

"Blessed are the Peacemakers"
The Role of Special Masters in Addressing Issues of Ethics and Professionalism

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The Honorable Paul Wallace
Superior Court of the State of Delaware

The Honorable Andrea Rocanelli
Superior Court of the State of Delaware (retired)

Gregory B. Williams, Esquire
Fox Rothschild LLP

PAUL R. WALLACE
Judge
Superior Court of State of Delaware
500 N. King Street, Tenth Floor
Wilmington, Delaware 19801

Paul R. Wallace was appointed to the Superior Court of Delaware by Governor Jack A. Markell and began serving in January 2013.

Judge Wallace received his undergraduate degree in Criminology from University of Maryland and his Juris Doctorate from the Columbus School of Law of the Catholic University of America.

Before taking the bench, Judge Wallace served almost a quarter century with Delaware's Department of Justice, handling cases at every level—state and federal, trial and appellate. Judge Wallace served as Delaware's Chief of Appeals from 2008 until his appointment to the Superior Court. In that role, he was the State's principal courtroom advocate before the Delaware Supreme Court and the federal appellate courts.

Prior to taking up a full-time appellate practice, Judge Wallace served as the Chief Prosecutor for New Castle County and was a trial prosecutor handling a wide variety of criminal matters. During his tenure with the Department of Justice, he also served as legislative counsel to the Attorney General.

In 2012, Judge Wallace was awarded the National Appellate Advocacy Award by the Association of Government Attorneys in Capital Litigation.

In addition to his adjunct and visiting duties at Delaware Law School of Widener University and the University of Delaware, Judge Wallace is also a regular speaker and author for local, state, and national educational institutions, professional associations, and publications; his works focus primarily on matters relating to criminal law and procedure, trial and appellate advocacy, business law, and ethics and professional responsibility.

Judge Wallace joined the judges' panel of the Delaware Superior Court's Complex Commercial Litigation Division in 2015.

Fox Rothschild LLP
ATTORNEYS AT LAW

Gregory B. Williams

Partner

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Philadelphia, PA

Greg has a diverse practice focused on commercial, intellectual property and other business litigation.

He advises and represents a wide range of corporate clients, including technology companies, manufacturers, financial institutions, energy companies, health care and pharmaceutical companies, retailers, government entities, colleges and universities and faith-based organizations. Greg's experience in federal and state courts in Delaware, Pennsylvania and New Jersey encompasses:

- Patent infringement, trademark and trade dress infringement, misappropriation of trade secrets and other intellectual property disputes
- Antitrust and unfair competition issues
- Contractual disputes, business torts and toxic tort matters (including asbestos and benzene)
- Corporate governance, directors' and officers' liability, and other fiduciary matters
- Eminent domain and other real estate related matters
- Products liability

Greg's clients have included:

- Bristol-Myers Squibb Company
- Delaware Supermarkets Inc.
- Illinois Tool Works Inc.
- Wilsonart International, Inc.
- ITT Corporation and ITT Manufacturing Enterprises, Inc.
- ING Bank, fsb
- Delaware Department of Transportation
- Delaware College Preparatory Academy
- Haldex Brake Products Corporation
- Macy's, Inc.
- Pfizer Inc.
- Sanofi-Aventis U.S., LLC
- The Kenny Family Shoprites
- Walmart

Greg is a former Co-Chair of the firm's Diversity Committee and former Managing Partner of the Wilmington office.

Services

- Litigation
- IP Litigation
- Directors' & Officers' Liability & Corporate Governance
- Eminent Domain/Condemnation
- Appellate Practice

Beyond Fox Rothschild

Greg is a former President of the Delaware State Bar Association. He serves as a member of the Attorney Advisory Committee for the United States District Court for the District of Delaware, co-chairs its Technology Committee and serves as a member of the Local Rules Committee, which works with the Court to revise the Local Rules. Greg also served as Chair of the Judicial Nominating Commission for the State of Delaware, having been appointed by Governor Jack Markell.

He previously served as Chair of the U.S. Magistrate Judge Merit Selection Panel that investigates and interviews candidates for vacant U.S. Magistrate Judge positions. Greg has also served on the Hearing Committee for the Disciplinary Board of the Supreme Court of Pennsylvania, and is a past President of the Barristers' Association of Philadelphia, Inc.

Greg's various bar affiliation activities have included:

- Former President, Delaware State Bar Association
- Former Treasurer, Delaware State Bar Association
- Former chair, Multicultural Judges and Lawyers Section, Delaware State Bar Association
- Member, Nominations Committee, Delaware State Bar Association
- Member, Awards Committee, Delaware State Bar Association
- Former Philadelphia Delegate, Pennsylvania Bar Association's House of Delegates
- Former co-chair, Minority Attorney Committee, Pennsylvania Bar Association
- Former president, Barristers' Association of Philadelphia, Inc.
- Former member, Commission on Judicial Selection and Retention, Philadelphia Bar Association
- Former chair, Brennan Award Committee, Philadelphia Bar Association
- Greg was a founding member and is a past President of the Villanova University School of Law Minority Alumni Society Leadership Board.

Client Resources

Delaware Intellectual Property Litigation Blog
Greg explores the decisions issued by the U.S. District Court of Delaware in the areas of antitrust and intellectual property law in the firm's Delaware Intellectual Property Litigation blog.
View Blog

Bar Admissions

- Pennsylvania
- Delaware
- New Jersey

Court Admissions

- U.S. Supreme Court
- U.S. Court of Appeals, Third Circuit
- U.S. District Court, District of Delaware
- U.S. District Court, Eastern District of Pennsylvania
- U.S. District Court, District of New Jersey

Education

- Villanova University School of Law (J.D., 1995)
- Millersville University (B.A., B.S., 1990)

Memberships

- American Bar Association
- Barristers' Association of Philadelphia, Inc. (Past President)
- Delaware State Bar Association (Past President)
- National Bar Association
- Pennsylvania Bar Association
- Philadelphia Bar Association
- Access to Justice Commission of State of Delaware (Co-chair)

Board of Directors

- Legal Services Corporation of Delaware, Inc.

Publications

June 28, 2020
INSIGHT: Adjudicating Business Disputes in Delaware's Complex Commercial Division
Bloomberg Law

June 10, 2020
Obtaining Temporary Restraining Orders and Preliminary Injunctions in Chancery Court
Delaware Business Court Insider

May 8, 2020
High Court TM Profit Ruling May Not Wreak Havoc On 3rd Circ.
Law360

February 24, 2016
Judge Andrews Denies Motion For Attorneys' Fees Of Prevailing Party But Awards Costs
IPFrontline

September 2013
George Zimmerman Verdict: Right, Wrong, or Just Another Example of the Imperfect Nature of the Law?
The Journal of the Delaware State Bar Association

March 14, 2007
Medimmune v. Genentech: Patent Licensees Score Big Win
Delaware Law Weekly

Events

May 15, 2015
2015 Bench and Bar Conference
Chase Center on the Riverfront

January 14, 2007
Community Crossfire: Martin Luther King Day Legal Clinic

News

February 14, 2020
Fox Rothschild Partner Appointed to Special Masters Panel

February 6, 2020
Gregory Williams Appointed Special Master for U.S. District Court for the District of Delaware

July 24, 2018
Three Fox Attorneys Named to 'Most Influential Black Lawyers' List by Savoy Magazine

September 28, 2017
Gregory Williams Recognized by Delaware Barristers Association

September 18, 2017
Delaware Report Shows Limited Legal Help for Low Income Residents

June 28, 2017
Stark Upholds Instant Removal of Dozens of Products Cases

May 9, 2017
Judge Grants TuffStuff's Motion To Transfer Venue in Patent Infringement Lawsuit

February 22, 2017
Lawsuit: Third-Party Candidates Should Be Judges, Too

January 25, 2017
Gregory B. Williams Appointed to Board of Directors of Highmark Blue Cross Blue Shield Delaware

August 17, 2016
Judicial Mission Accomplished

March 9, 2016
Chandler Steps Down as Chairman Of Judicial Nominating Commission

March 1, 2016
Fox's Gregory B. Williams Appointed Chair of the State of Delaware Judicial Nominating Commission

November 2, 2015
Gregory Williams Named to Delaware Today's Top Lawyers List

October 19, 2015
The Criminal Justice System Highlights Growing Racial Disparities in Delaware

October 9, 2015
Committee targeting Racial Disparities to Hold Hearings

March 10, 2015
Darrell D. Miller and Gregory B. Williams Named to Savoy Magazine's 2015 Most Influential Black Lawyers List

February 3, 2015
Fox Rothschild Named a "Go-To Law Firm" in Annual Survey of Fortune 500 Companies

January 7, 2015
Access to Justice Commission Gets Underway

January 6, 2015
Fox's Gregory Williams Appointed Co-Chair of Delaware-Based Access to Justice Commission

December 16, 2014
Call for Justice Brings Action, Planning to Delaware

July 22, 2014
People in the News

July 7, 2014
Prince Thomas Named New Co-Chair of Fox Rothschild's Diversity Committee

November 1, 2013
Leading Counsel

September 11, 2013
Steele's Early Departure Sparks Strine Succession Buzz

June 10, 2013
Gregory B. Williams Elected President of Delaware State Bar Association

January 23, 2013
Fox Rothschild Sponsors 13th Annual Charting Your Own Course Career Conference

October 3, 2012
Risk News: Conflicts, Ethical Screens & Disqualification Attempts

September 27, 2012
Judge bars Latham from patent case, citing conflict dating back 17 years

August 31, 2011
Pipeline, Mentoring Programs Models for Success

July 8, 2011
Fox Rothschild LLP Hosts MBA Diversity Committee Summer 1L Program Meeting

February 13, 2011
Delaware Achievers

February 3, 2011
Gregory B. Williams of Fox Rothschild Appointed Chair of the U.S. Magistrate Judge Merit Selection Panel

February 3, 2011
People in the News

February 1, 2011
Gregory B. Williams of Fox Rothschild Appointed Chair of the U.S. Magistrate Judge Merit Selection Panel

December 3, 2010
Fox Rothschild LLP Hosts Inaugural Firm Diverse Attorney Retreat

November 1, 2010
Top Lawyers 2010

September 5, 2010
Delaware Business Achievers

July 1, 2010
Fox Rothschild's Gregory B. Williams Honored With Judge Layton Award

July 1, 2010
Fox Rothschild Attorney Gregory B. Williams Elected as Treasurer for Delaware State Bar Association

June 28, 2010
Best in Law Blogs: Judge Stark Grants Facebook's Motion to Amend in Part and Denies It in Part

February 12, 2010
New Blogs Joining the LexBlog Network for the Week of 2/8-2/12

October 26, 2009
Fox Rothschild Receives Leadership Award for Pro Bono Services From Delaware State Bar Association

March 31, 2009
Noted in Business People

March 30, 2009
Gregory B. Williams of Fox Rothschild LLP Appointed to the Judicial Nominating Committee for the State of Delaware

October 29, 2007
Fox Rothschild's Business Litigation Practice Capitalizes on Growth, Talent and Value

October 12, 2007
Fox Rothschild Supports PLAN's MLK Summer Internship & Fellowship Program

May 16, 2007
Williams a "First" for Fox Rothschild and Wilmington

April 16, 2007
Fox Rothschild Elects New Office Managing Partner of its Wilmington Office

Awards and Honors

- **Awarded The Thurgood Marshall Award by the Delaware Barristers Association at Annual Louis L. Redding Benefit (2017)**

- **Selected to the list of the "Most Influential Black Lawyers" by *Savoy Magazine* (2015, 2018)**
  This award is conferred by Savoy Magazine. A description of the methodology is available here. No aspect of this advertisement has been approved by the New Jersey Supreme Court.

- **Awarded The Judge Layton Award for Service by the Judges of the United States District Court for the District of Delaware in recognition of service to the Court and its Bar**

- **Selected to the list of "Top Lawyers" by *Delaware Today* (2015)**
  This award is conferred by Delaware Today. A description of the methodology is available here. No aspect of this

advertisement has been approved by the New Jersey Supreme Court.

- **Selected to the "Super Lawyers" list for Business Litigation in Pennsylvania (2005-2008, 2010-2017)**
  This award is conferred by Thomson Reuters. A description of the selection methodology is available here. No aspect of this advertisement has been approved by the New Jersey Supreme Court.

- **Selected to the "Super Lawyers - Business Edition" list for Business Litigation in Pennsylvania (2013)**
  This award is conferred by Thomson Reuters. A description of the selection methodology is available here. No aspect of this advertisement has been approved by the New Jersey Supreme Court.

- **Named to the "Top Black Lawyers in the Tri-State Area" list by *The Network Journal***
  This award is conferred by the Network Journal. A description of the selection methodology is available here. *No aspect of this advertisement has been approved by the New Jersey Supreme Court.*

- **Selected to the "Distinguished Under 40 Award" list by the Barristers' Association of Philadelphia, Inc.**
  This award is conferred by the Philadelphia Barristers' Association. A description of the selection methodology is available here. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

- **Selected to the list of "40 Under 40" by the *Philadelphia Business Journal (2013)***
  This award is conferred by the Philadelphia Business Journal. A description of the selection methodology is available here. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

- **Selected to the list of "30 Leaders Under 30" by *Ebony Magazine***
  This award is conferred by the Ebony Magazine. A description of the selection methodology is available here. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

- **Selected to the "Top African American Lawyers in Philadelphia" Barristers' list by *Tribune Magazine* (2011)**
  This award is conferred by the Tribune Magazine. A description of the selection methodology is available here. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.