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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

FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

APPELLANT'S REPLY BRIEF

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I. APPELLEE IMPROPERLY INTERPRETS THE SCOPE OF THE SUPERIOR COURT'S AUTHORITY UNDER RULE 90.1(e).

While Appellee correctly states that the Superior Court's responsibility is that of a gatekeeper with respect to admitting out of state attorneys to practice before it *pro hac vice*, it mischaracterizes the scope of the Superior Court's authority to revoke that admission. Though Rule 90.1(e) sets forth that the Superior Court may revoke the *pro hac vice* admission of an out of state attorney *sua sponte* under circumstances where continued admission is "inappropriate or inadvisable" upon notice and a "meaningful opportunity to respond", there is no defined boundary within the rule to guide the court in making this determination.[1] The Appellee's answering brief evades this discussion and further fails to define the boundaries of conduct which would make an out of state attorney's continued admission *pro hac vice* "inappropriate or inadvisable".[2]

There is no apparent authority from this Court with respect to proper procedures for a trial court to follow when revoking an out of state attorney's *pro hac vice* admission *sua sponte* pursuant to Superior Court Civil Rule 90.1(e), or its sister court's analogs. Thus, reliance upon this Court's prior decisions in *In re:*

[1] Del. Super. Ct. Civ. R. 90.1(e).
[2] See Answering Brief. References hereinafter to the Answering Brief will be designated "AB at [page number]".

Infotechnology, *Crumplar*, *Crowhorn*, *LendUS*, *Sequoia*, *Gotlieb*, and *Grossberg* is necessary to form the appropriate boundaries of a trial court's authority to revoke an out of state attorney's *pro hac vice* admission pursuant to Superior Court Civil Rule 90.1(e).[3]

A. The Appellee's characterization of the Superior Court's Rule to Show Cause as anything but an extra-judicial disciplinary proceeding is disingenuous.

In its Rule to Show Cause, the Superior Court specifically states that "[Wood] has engaged in conduct in other jurisdictions, which, had it occurred in Delaware, would violate the Delaware Lawyers' Rules of Professional Conduct ("DRPC")."[4] It goes on that the conduct in those jurisdictions is in violation of rules governing competence, meritorious claims and contentions, candor to the tribunal, truthfulness, and misconduct.[5] The court's later declaration that 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" is an unavailing

[3] See, e.g., *LendUS, LLC v. Goede*, 2018 WL 6498674 (Del. Ch. Dec. 10, 2018); *Sequoia v. Presidential Yacht Grp. LLC v. Fe Partners LLC*, 2013 WL 3362056 (Del. Ch. July 5, 2013); *Crumplar v. Superior Ct.*, 56 A.3d 1000 (Del. 2012); *Crowhorn v. Nationwide Mut. Ins. Co.*, 2002 WL 127052 (Del. Super Ct. May 6, 2002); *Gottlieb v. State*, 697 A.2d 400 (Del. 1997); *State v. Grossberg*, 705 A.2d 608 (Del. Super. Ct. 1997). *In re: Infotechnology*, 582 A. 2d 215 (Del. 1990).

[4] A0005; A0007 – A0008.

[5] Delaware Lawyers' Rules of Professional Conduct 1.1; 3.1; 3.3; 4.1; 8.4. Further reference to the Delaware Lawyers' Rules of Professional Conduct will be identified as DLRPC [rule number].

attempt to bring its extra-judicial attorney disciplinary proceeding within the ambit of Superior Court Civil Rule 90.1(e).[6]

The Superior Court's overreach in revoking Wood's *pro hac vice* admission *sua sponte* is further demonstrated by its haste in identifying Wood as a responsible party for missteps during the Wisconsin litigation. At no point in the docket is it reflected that Wood filed a Notice of Appearance on behalf of any party in interest.[7] Wood is listed merely as an "Attorney to be Noticed", not as "Lead Attorney".[8] Consequently, any errors in the pleadings cannot be attributed to Wood. Responsibility for those errors referred to in the Superior Court's Rule to Show Cause and later Order revoking Wood's *pro hac vice* admission rests with those attorneys identified as "Lead Attorney" on the docket.

B. <u>The Rule to Show Cause and Appellee's Answering Brief improperly characterize Wood's role in the Georgia litigation.</u>

On November 13, 2020, Ray Stallings Smith, III filed suit against Brad Raffensperger et al, on behalf of Wood, challenging the outcome of the 2020 General Election.[9] Wood, as the plaintiff in that action, was seeking an injunction to bar Raffensperger from certifying the Georgia General Election results.[10] The Northern District of Georgia's order set forth that the relief sought was without basis in fact

[6] A0073.
[7] A0058 – A0065.
[8] A0049 – A0051.
[9] A0020.
[10] AB at 4.

or law.[11] This latter portion of the Superior Court's Rule to Show Cause and Order revoking Wood's *pro hac vice* admission focuses on this aspect of the court's opinion in the *Raffensperger* litigation. The Superior Court ignores entirely that Wood was procedurally barred from relief from the outset of that case for lack of standing.

The Superior Court seeks to characterize Wood's lawsuit in Georgia as "textbook frivolous litigation."[12] To make such a sweeping characterization in effect makes all unsuccessful litigation on a motion for a temporary restraining order frivolous. Where, as in Wood's case, a plaintiff seeks to protect constitutional or personal rights, a temporary restraining order is particularly appropriate.[13] Wood sought to vindicate his rights as a citizen.[14] That he was not able to meet the substantial evidentiary burden of obtaining the requested relief should not enter into the Superior Court's determination as to whether his continued admission *pro hac vice* was inappropriate or inadvisable.

Insofar as the Superior Court indicating that Wood's failure to comply with Delaware Superior Court Rules 79.1 with respect to his Motion for Reargument exemplifies further deviation from the Delaware Rules, such characterization is

[11] *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. Nov. 20, 2020).
[12] A0074.
[13] See, e.g., *Paulsen v. County of Nassau*, 925 F.2d 65 (2d Cir. 1991) (injunction issued to prohibit interference with free speech rights in a public forum);
[14] *Wood*, 501 F. Supp. 3d

patently unreasonable. Wood was no longer acting as counsel of record for any party in interest at the time his Motion for Reargument was filed with the Prothonotary. He was, for all intents and purposes, a *pro se* litigant and thus unable to meet the electronic filing requirements as set forth in Superior Court Rule of Civil Procedure 79.1. Thus Wood's paper filing was proper.

C. Though *In re: Infotechnology* and *Crowhorn* do not limit the trial court's discretion under Rule 90.1(e), they assist in defining the boundaries of when continued representation by counsel admitted *pro hac* vice being inappropriate or inadvisable.

The Superior Court openly acknowledges its lack of ability to adjudicate matters concerning attorney discipline in its opinion and order revoking Wood's admission *pro hac vice*.[15] The spirit of the Rule to Show Cause and subsequent Order of the Court revoking Wood's admission *pro hac vice* are clearly inapposite to that declaration, however. Both the Rule to Show Cause and subsequent Order identify specific conduct which occurred outside the presence of the court, in unrelated litigation, and specific DLRPC's that those actions *may* violate.[16] The Superior Court made no attempt at identifying how Wood's conduct in the Georgia litigation was prejudicial to the administration of justice in the case before it.[17] Instead, the Superior Court analyzed Wood's conduct in the unrelated matters under

[15] A0073.
[16] See e.g. *In re: Infotechnology*, 582 A.2d 215, 216-17 (Del. 1990).
[17] A0071 – A0076.

a lens tantamount to review of an attorney's fitness to practice in a disciplinary proceeding by *this* Court.[18]

The Superior Court's findings with respect to the Wisconsin litigation also failed to determine whether Wood had engaged in conduct prejudicial to the administration of justice making his continued admission *pro hac vice* inappropriate or inadvisable. The Superior Court instead stated only that "[a]n attorney as experienced as Mr. Wood knows expert affidavits must be reviewed in detail to ensure accuracy before filing."[19] This broad sweeping statement is simply a thinly veiled allegation that Wood violated the duty of competent representation under the DLRPCs.[20] The Superior Court's statement ignores that Wood was not counsel of record in that matter, and thus not ultimately responsible for the preparation and submission of the expert affidavit in question.[21]

This Court in *Crowhorn* makes clear that trial courts lack authority to conduct attorney disciplinary proceedings.[22] Instead, trial courts' authority to disqualify an attorney are limited to incidents where the attorney engages in unethical conduct

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[18] A0074 ("Mr. Wood has an obligation [. . .] to file only cases which have a good faith basis in fact or law. The Court's finding in Georgia otherwise indicates that the Georgia case was textbook frivolous ligitation"); compare with DLRPC 3.1 ("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 that is not frivolous [. . .]".

[19] A0074.

[20] DLRPC 1.1.

[21] A0020 (Docket listing of *Wood v. Raffensperger, et al*, listing Wood as the plaintiff and counsel of record as Ray Stallings Smith, III, Esq.).

[22] *Crowhorn v. Nationwide Mut. Ins. Co.*, 2002 WL 1274052 (Del. Super. Ct. May 6, 2002).

committed in the proceedings *before it*.[23] Here, the record is devoid of any instance where Wood engaged in unprofessional, let alone unethical conduct. Instead, the alleged transgressions occurred in other jurisdictions, in entirely unrelated proceedings, and the attorney behavior addressed by the Superior Court was the result of counsel of record in those two matters. Assuming, *arguendo*, that the conduct complained of by the Superior Court had been the product of Wood's actions as counsel of record, there is no evidence that those actions detrimentally affected the fairness of the proceedings before it.

Wood's conduct before the Superior Court was never challenged in that court's Rule to Show Cause or subsequent order revoking Wood's *pro hac vice* admission. At no time did opposing counsel allege that Wood's conduct hindered the underlying litigation, nor that he behaved in an unprofessional manner toward opposing counsel or the opposing party. Wood's *pro hac vice* application was not challenged and was subsequently granted by the Superior Court.

Against this backdrop, the Superior Court never expounds upon why Wood's continued admission *pro hac vice* would be inappropriate or inadvisable. Per the Answering Brief's rationale, a trial court may revoke an out of state attorney's admission *pro hac vice* by invocation of Rule 90.1(e) even where the basis of that revocation is not founded upon circumstances prejudicial to the case before it which

[23] *Id.*

would make continued admission inappropriate and inadvisable. This result runs counter to the intent of Superior Court Rule 90.1. Rule 90.1 is intended to ensure that a litigant's right to the counsel of their choosing is not interfered with in an unreasonable or arbitrary manner.[24]

D. It cannot be fairly argued that Wood was given a meaningful opportunity to respond to the Superior Court's Rule to Show Cause.

While it is true that the Superior Court specifically identified behavior that it deemed unprofessional in its Rule to Show Cause, it did not give Wood an adequate opportunity to respond. Wood was permitted to make a written submission via local counsel and to submit an affidavit. Though true that Wood did not specify every ground to justify his continued admission *pro hac vice*, he was also relying on the Superior Court's representation that a hearing would be held. Rather than holding a hearing, however, the Superior Court decided *sua sponte* that a hearing would be of no value and thus did not give Wood an opportunity to make an oral presentation to the court. What is further problematic is the Superior Court's inclusion in its order revoking Wood's admission *pro hac vice* of conduct that was not included in the original Rule to Show Cause and thus not able to be answered to by Wood. In sum, the Superior Court failed to give Wood adequate due process in revoking his *pro hac vice* status.

[24] See, e.g., *LendUS, LLC v. Goede*, 2018 WL 6498674 at *8 (Del. Ch. Dec. 10, 2018).

This Court's holding in *Crumplar* sets forth that a meaningful opportunity to be heard requires more than just one responsive pleading.[25] *Crumplar* addressed the trial court's *sua sponte* imposition of Rule 11 sanctions.[26] Revocation of an out of state attorney's *pro hac vice* admission must be entail procedural safeguards at least equivalent to those that attach to a trial court's *sua sponte* imposition of Rule 11 sanctions, as revocation of admission *pro hac vice* is the gravest sanction that may be imposed upon an out of state attorney.[27]

In the case *sub judice*, Wood was permitted only to respond with one written pleading.[28] In looking at the Superior Court's Rule to Show Cause, it was reasonable for Wood to anticipate that he'd have an opportunity to respond to the court's concerns more fully during a hearing dedicated to that issue.[29] Following Wood's written response, however, the Superior Court arbitrarily elected to forego an oral hearing pertaining to its Rule to Show Cause.[30]

Had the Superior Court held the hearing on the Rule to Show Cause as indicated, Wood could have answered additional questions of the court, presented additional arguments, and admitted into evidence support for why his *pro hac vice* admission should not be revoked. Rather than allow Wood that opportunity,

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[25] *Crumplar v. Superior Court*, 56 A.3d 1000, 1003 (Del. 2012).
[26] *Id*. at 1000.
[27] *LendUS, LLC v. Goede*, 2018 WL 6498674 at *9 (Del. Ch. Dec. 10, 2018).
[28] A0069 – A0076.
[29] A0008.
[30] A0076.

however, the Superior Court short-circuited Wood's ability to make a full and fair presentation to the court on the Rule to Show Cause by cancelling the hearing.[31] Additionally, the Superior Court took the opportunity to address social media posts by Wood that it deemed unfavorable in its Memorandum Order revoking Wood's admission *pro hac vice*.[32] Wood was given *no* opportunity to respond to the Superior Court with respect to the allegations inherent in its comments about his social media posts.

E. The Superior Court is ill-guided in its discharge of its Rule 90.1(e) discretionary authority as lack of defined boundaries for conduct making an out of state attorney's continued admission *pro hac vice* "inappropriate or inadvisable" generates substantial risk of arbitrary revocation.

The rejection of Wood's offer to withdraw as counsel *pro hac vice* demonstrates the need for better defined boundaries with respect to the Superior Court's authority to revoke an out of state attorney's *pro hac vice* admission *sua sponte* under Rule 90.1(e). Rather than permit Wood to withdraw as counsel *pro hac vice*, the Superior Court elected to prosecute an extra-judicial disciplinary proceeding. Indeed, the Superior Court's revocation of Wood's *pro hac vice* admission was punitive rather than prophylactic in nature. Nothing about the

[31] A0076.
[32] A0075 – A0076.

Superior Court's Rule to Show Cause and subsequent Memorandum Order was to "ensure the appropriate level of integrity and competence."[33]

Amicus Curiae spend significant time arguing whether Wood violated any ethics tenets in foreign jurisdictions. This is a ruse. Wood's alleged conduct in the foreign litigation identified in the Rule to Show Cause did nothing to prejudice the swift and fair administration of justice in the litigation before the Superior Court. The Superior Court's discretion under Rule 90.1 in determining whether continued admission *pro hac vice* is "inappropriate or inadvisable" must meet a defined, objective standard. The absence of a defined, objective standard in Rule 90.1(e) threatens to permit trial judges to abuse their discretion under color of authority granted by the Rule.

In its Answering Brief, *Amicus Curiae* ignore that there were no disciplinary proceedings brought against Wood in Georgia nor Wisconsin. It is further ignored that the Superior Court's Memorandum Order which revoked Wood's *pro hac vice* admission supplanted the disciplinary processes in those jurisdictions. Neither the Answering Brief, nor the Superior Court identified the manner in which Wood's continued *pro hac vice* representation would taint the fairness of judicial proceedings. *Amicus Curiae* fail to identify authority which defines "inadvisable"

[33] A0072.

or "in appropriate" standards. The Rule 90.1(e) "inappropriate or inadvisable" standard, as presented in the Answering Brief, therefore, is ripe for abuse.

F. This Court's recent decision in *Hunt v. Court of Chancery* further demonstrates the need for an out of state attorney to have an opportunity to be heard orally prior to revocation of their admission *pro hac vice*.

Subsequent to the filing of the Wood's Opening Brief in the instant appeal, this Court decided *Hunt v. Court of Chancery*.[34] In *Hunt*, an out of state attorney admitted *pro hac vice* in the Court of Chancery sent an "unprofessional" email to opposing counsel.[35] That email prompted opposing counsel to request that the Court of Chancery revoke the out of state attorney's *pro hac vice* admission.[36] The court scheduled a teleconference to rule on the motion to revoke the out of state Attorney's *pro hac vice* admission.[37] At the conclusion of the teleconference, the court discussed the out of state attorney's *pro hac vice* status and ruled that while his admission would stand, he would be fined $14,989.00 as a sanction for his email.[38] The out of state attorney appealed the Court of Chancery's sanction arguing that his due process rights had been violated since there was no indication that monetary sanctions would be considered during the teleconference.[39]

[34] 2021 WL 2418984 (Del. Jun. 10, 2021).
[35] *Id*. at *2.
[36] *Id*.
[37] *Id*.
[38] *Id*. This amount represents the opposing party's fees and sanctions in bringing the "unprofessional" email to the court's attention and prosecuting the motion for revocation of *pro hac vice* admission.
[39] *Id*.

In deciding *Hunt*, this Court reiterated that it alone has responsibility for all matters affecting governance of the bar, and "[we have] exclusive power to supervise the practice of law in Delaware and to enforce the Delaware Lawyers' Rules of Professional Conduct."[40] This Court further reiterated that due to trial courts' lack of authority to adjudicate the Rules of Professional Conduct, their concerns with troublesome attorney behavior is best directed to the Office of Disciplinary Counsel where the facts dictate such action.[41] A trial court's authority to address problematic attorney conduct, thus is limited to that conduct which adversely affects the fair and efficient administration of justice.

Hunt also held that prior to the imposition of Rule 11 sanctions, trial courts "should afford the affected party *heightened* procedural protections where the court raises Rule 11 concerns on its own motion and "a reasonable opportunity to respond" includes an ability to fully and fairly present evidence and respond orally prior to the imposition of sanctions.[42] Finally, a hearing should be provided, even if not requested.

In accordance with *In re: Infotechnology*, *Crumplar*, and *Hunt*, procedural notice and hearing requirements are not dependent on any distinction between rule-based sanctions or those invoking a court's inherent power. A party must be given

[40] *Id*. at 9, quoting *Crumplar*, 56 A.3d at 1009.
[41] *Crumplar*, 56 A.3d at 1009.
[42] *Hunt*, WL 2418984 at *4 - *5

clear advanced notice that a sanctions request will be heard at an upcoming hearing, and an opportunity for that party to be heard is not discretionary, but mandatory.

Like the Court of Chancery in *Hunt*, the Superior Court erred in the case at bar when it revoked Wood's *pro hac vice* admission without providing an opportunity to be heard orally. In the case *sub judice*, there is no evidence or indication that Wood's behavior during the litigation was in any manner untoward, let alone prejudicial to the fair administration of justice. The Superior Court thus stepped beyond the scope of its authority in revoking Wood's *pro hac vice* admission.

CONCLUSION

The Superior Court erroneously acted without proper authority to take remedial actions based upon unproven accusations in other jurisdictions. The lower court's authority to conduct attorney discipline is limited to wrongful conduct before it. There is no dispute that Appellant's conduct before the lower court was improper in any fashion. For the reasons set forth herein and in his Opening Brief, Appellant L. Lin Wood, Esq. respectfully requests that this Honorable Court reverse the order of the Superior Court revoking his admission to practice *pro hac vice* before that court with directions that the Court permit Wood to voluntarily withdraw his admission *pro hac vice*.

Respectfully submitted,

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