DOCKET NO.: LLI-CV-15-6012655S	:	SUPERIOR COURT
ROBERT J. VICTOR	:	JUDICIAL DISTRICT OF LITCHFIELD
V.	:	AT LITCHFIELD
GUY T. POWELL, ET AL.	:	APRIL 27, 2016

MEMORANDUM OF DECISION RE: PLAINTIFF'S MOTION TO VACATE ORDER (# 135)

INTRODUCTION

On February 22, 2016, the plaintiff, Robert Victor, filed a motion to vacate this court's order granting the application of Attorney Kevin P. Conway to appear pro hac vice on behalf of the defendants, Guy Powell and Antonio Barretto. The defendants objected to this motion. After a hearing and following the submission of other documents, for the reasons set forth below, the court grants the plaintiff's motion to revoke Attorney Conway's privilege to be admitted pro hac vice in this case.

PROCEDURAL HISTORY

A. Background

On September 10, 2015, the plaintiff filed his complaint (# 100.31), in which he alleges the following relevant facts. The plaintiff is the general manager and the defendants are members of InteliClear, LLC (InteliClear or the company). The defendants have taken a series of unauthorized actions in an attempt to wrest control of the company from the plaintiff which have made it impossible for the plaintiff to do his job as general manager, have caused irreparable harm to the company, and have threatened the company's existence. The plaintiff

Copies mailed 4/27/16 to: Atty Conway
Stedronsky & Meter
Tinley Renchen & Post
Rep Defs. Atty.

135.00

seeks temporary and permanent injunctive relief pertaining to the plaintiff's and the defendants' roles as members of the company, as well as damages, attorney's fees, and costs.

In their answer, special defenses, and counterclaim (# 104), filed on October 9, 2015, the defendants deny virtually every allegation of the complaint. The defendants allege in their special defense that the plaintiff has not produced the company's books to the defendants, has converted company funds and assets to his own use, and has otherwise ignored written company procedure. In their counterclaim, the defendants restate the allegations of the special defense, and further claim that the plaintiff made fraudulent representations to the defendants in regard to the company's accounting, and that the plaintiff has committed conversion and statutory theft. In their counterclaim, the defendants seek injunctive relief pertaining to the company's books and records, compensatory damages of not less than $632,457, an order requiring the removal of the plaintiff as general manager, interests, costs, attorney's fees, and punitive damages.[1]

On October 20, 2015, local counsel for the defendants, H. James Stedronsky, moved for the admission of Attorney Keven P. Conway, a New York attorney, pro hac vice (# 105). In that motion, Attorney Stedronsky argued that good cause existed for the admission of Attorney Conway for the following reasons: (1) Attorney Conway had a preexisting relationship with the defendants; (2) prior to this action, Attorney Conway had been counseling the defendants with respect to alleged theft and fraud committed by the plaintiff; (3) the allegations of theft and fraud set forth in the special defense and the counterclaim had been "principally drafted" by Attorney Conway and his firm; (4) during the course of the aforementioned representation of the defendants, Attorney Conway had acquired specialized knowledge with respect to the facts and

[1] Although Count IX alleges that General Statutes § 52-564 "imposes treble damages for conversion," the prayer for relief does not include a claim for damages under this count.

the law involved in this case; and (5) Attorney Conway has specialized knowledge and extensive experience in cases involving commercial and corporate fraud. Attorney Stedronsky also argued that Attorney Conway had never previously appeared pro hac vice in Connecticut.

Attached to the defendants' motion was an affidavit from Attorney Conway (October 20, 2015 Affidavit). In his affidavit, Attorney Conway swore to the following facts: (1) he is admitted in and in good standing in the New York State Supreme Court, as well as in the federal courts of the Eastern District of New York, the Southern District of New York, and the Second Circuit Court of Appeals; (2) he has associated himself with Attorney Stedronsky of the Connecticut bar for purposes of this litigation, who shall serve as Connecticut counsel of record for this litigation; (3) he has paid the client security fee due for calendar year 2015; and (4) he has agreed to designate the chief clerk of the Litchfield judicial district as his agent for service of process and agreed to register with the Connecticut statewide grievance committee while appearing in this case and for two years after this case is completed. Attorney Conway's affidavit also certified the claims of good cause set forth in Attorney Stedronsky's motion.

Most importantly, to comply with the threshold requirements set forth in Practice Book §2-16 (1) (a), Attorney Conway swore that "I have no grievances pending against me in any jurisdiction; I have never been reprimanded, suspended, disbarred, or otherwise disciplined; and I have never resigned from the practice of law." October 20, 2015 Affidavit, para. 5.

This court, in an order dated December 7, 2015 (# 105.01), initially denied this motion without prejudice, because the movant had not yet filed an affidavit satisfying certain rules of practice for local counsel sponsoring an attorney for pro hac vice admission. Local counsel then

did so by means of an affirmation dated December 8, 2015 (# 109). This court granted the motion to permit Attorney Conway to appear pro hac vice on December 30, 2015 (# 105.02).

B. The Present Motion

On February 22, 2016, the plaintiff filed the present motion (# 135). In it, the plaintiff informed the court that, despite Attorney Conway's sworn statement that "I have never been reprimanded, suspended . . . or otherwise disciplined," Attorney Conway had, in fact, been suspended by the New York Appellate Division, First Judicial Department from November 20, 2013 to May 13, 2014. Additionally, the plaintiff stated that Attorney Conway had been sanctioned and formally admonished by a federal magistrate judge in 2003 for violating Rule 11 of the Federal Rules of Civil Procedure (Rule 11) by including a frivolous count in a complaint. The plaintiff argued that the Rule 11 sanction and formal admonishment constituted a "formal reprimand." Therefore, the plaintiff claimed that Attorney Conway's above-cited sworn statement was false because he had been reprimanded, suspended, and otherwise disciplined. The plaintiff argued that since Attorney Conway's misrepresentations comprise essential facts necessary to support Attorney Conway's application for, and ability to qualify for, pro hac vice status in Connecticut, the court should revoke Attorney's pro hac vice status in this matter.

Due to, inter alia, the imminence of the plaintiff's deposition, the court scheduled an emergency hearing on the present motion on February 24, 2016. Immediately prior to the hearing, Attorney Conway submitted an affidavit in opposition to the plaintiff's motion to vacate an order granting the application of Attorney Kevin P. Conway to appear pro hac vice (February

23, 2016 Affidavit).[2] This affidavit provided the sworn testimony of Attorney Conway concerning the factual contexts of both the Rule 11 sanction and the claimed suspension, and presented argument as to why the court should deny the present motion.

In his February 23, 2016 affidavit, Attorney Conway first attempted to rebut the plaintiff's claim that Attorney Conway was "sanctioned and formally admonished" by a federal magistrate judge. In that case, *Dangerfield* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, United States District Court, Docket No. 02 Civ.2561 (KMW) (GWG) (S.D.N.Y.), per Attorney Conway, his firm had been hired as local counsel in 2002 by a Texas firm and an out-of-state plaintiff. Attorney Conway swore that his firm relied on his client's representations in bringing certain RICO allegations. After a while, a conflict arose between Attorney Conway's firm, on one hand, and the Texas firm and the plaintiff, on the other hand. As a result, Attorney Conway's firm moved to withdraw as counsel and the court granted that motion over the defendant's objection. The defendant filed a motion for sanctions against Attorney Conway under Rule 11 for improperly alleging violations of RICO. Attorney Conway swore that since the claims found in the motion for sanctions arose from one of the areas of conflict that his firm had with the plaintiff and with the Texas firm, he believed he was "taking appropriate action [in response to the motion for Rule 11 sanctions] in withdrawing our firm's representation."[3]

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[2] This affidavit was not filed with the court, but was accepted by the court during the hearing. To ensure that the record is complete, the court asked that this affidavit be filed; it now appears in the court file as # 137.50.

[3] This statement does not appear to be supported by the record in the federal case. In this regard, the court notes that the PACER docket report of this case reflects that the first notice of Attorney Conway's motion to withdraw as counsel was filed, with a supporting affidavit, on August 27, 2002. Notice of Motion for order pursuant to Rule 1.4, *Dangerfield* v. *Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, U.S. District Court, Docket No. 02 Civ.2561(KMW)(GWG) (S.D.N.Y. August 27, 2002), EFC Nos. 9 &10. The first notice of the defendant Merrill Lynch's motion for Rule 11 sanctions against, inter alia, Attorney Conway was filed on September 16, 2002, almost three weeks later. Notice of Motion for order pursuant to F.R.C.P. 11 (c) (1) (a), *Dangerfield* v.

February 23, 2016 Affidavit, para. 9. Attorney Conway further swore that "the Magistrate concluded that our reliance [on the client] was insufficient and admonished us to perform careful research for the legal basis underlying claims set forth in any future complaint. That was the full extent of the admonishment. There was no monetary or other sanction. Furthermore, the Court noted that this was merely an error on my behalf, clearly not worthy of a harsh sanction and that [Attorney Conway] had 'not compound[ed] [this error] by seeking to justify its inclusion in any subsequent filing with the Court.'" Id., para. 10.

Attorney Conway then addressed the claimed suspension in his affidavit. Revealingly, Attorney Conway never used the word "suspension." Rather, Attorney Conway swore that what he refers to as "the other instance" referred to by the plaintiff "occurred in 2013" and was "unknown to me at the time and until I received Plaintiff's current Motion. I had no knowledge that this action had been taken until now." Id., para. 13. Attorney Conway further swore that this "other instance" involved his failure to file a biennial registration statement with the court's administrative office and his failure to remit a registration fee. Attorney Conway affirmed additionally that "[a]t that time, I was unaware that I was delinquent or that any disciplinary action was going to be taken or had been taken against me." Id., para. 14. Attorney Conway further noted that as soon as he became aware of his obligation to file a registration statement and remit the fee, "I did so immediately and was immediately reinstated." Id., para. 15. Attorney Conway additionally affirmed that "[w]hen I filed my Application to be admitted pro

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Merrill Lynch, Pierce, Fenner, & Smith, Inc., U.S. District Court, Docket No. 02 Civ.2561(KMW)(GWG) (S.D.N.Y. August 27, 2002), ECM No. 14. When Attorney Conway's motion to withdraw was granted, on October 17, 2002, the court indicated that the granting of the motion to withdraw "shall not be deemed to preclude the dfts from seeking relief against Mr. Conway under FRCP 11 for any act (or failure to act) that took place prior to the instant date." Order granting motion to withdraw, *Dangerfield* v. *Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, U.S. District Court, Docket No. 02 Civ.2561(KMW)(GWG) (S.D.N.Y. August 27, 2002), ECM No. 29.

hac vice I believed the answers to all of the questions were accurate. Had I known differently I would have certainly provided the information as I have in this Affidavit." Id., para. 16.

Attorney Conway next swore that his appearance in this case is "crucial to its resolution, as I was brought onto the case well before the Plaintiff filed his Complaint," that he has served as "lead attorney on this case" for the defendants and that if he were not able to "appear pro hac vice in this matter, it would be severely detrimental to both my clients and the outcome of the case." Id., para. 18. In this affidavit, although the motives of the plaintiff's counsel are wholly irrelevant to the present motion, Attorney Conway swore that, "[i]n fact, I view Plaintiff's current Motion as a delay tactic, considering that the current case involves serious allegations of financial impropriety on the part of one of its Members, most notably the Plaintiff in this case." Id., para. 19.

The plaintiff submitted two exhibits in support of the present motion during the hearing. Plaintiff's exhibit 2 was a publically available, electronically accessible document from the New York State Unified Court System which evidences that Attorney Conway was suspended from November 20, 2013 until May 13, 2014. Plaintiff's exhibit 2. Plaintiff's exhibit 1 was an order from the Appellate Division of the Supreme Court of New York in the matter of *Departmental Disciplinary Committee for the First Judicial Department* v. *Conway*. This order granted Attorney Conway's motion to be reinstated from his suspension as an attorney. Specifically, this exhibit states that an "order of the court . . . entered on November 20, 2013 . . . suspending the above-named respondent [Attorney Conway] from practice as an attorney and counselor-at-law in the State of New York . . . for failure to comply with Judiciary Law §468-a" and that Attorney Conway "moved for an order granting reinstatement as an attorney and counselor-at-law." Plaintiff's exhibit 1. This order also indicated that Attorney Conway was reinstated on May 13,

2014. Id. The defendants submitted exhibit A, which was a copy of New York Judiciary Law § 468-a. New York Judiciary Law § 468-a requires every attorney in New York to file a biennial registration statement, to pay biennially a fee of $375, and posits that noncompliance by an attorney "shall constitute conduct prejudicial to the administration of justice and shall be referred to the appropriate appellate division of the supreme court for disciplinary action." Defendants' exhibit A.

During the hearing, the plaintiff presented two arguments. First, he claimed that Attorney Conway's February 23, 2016 affidavit, while perhaps providing factual context, didn't alter the fact that Attorney Conway's original affidavit was false in that it failed to disclose the suspension and the Rule 11 sanction. Second, the plaintiff argued that the February 23, 2016 affidavit was itself false in that Attorney Conway swore that the suspension "was unknown to me at the time and until I received Plaintiff's current Motion" and that he "had no knowledge that this action had been taken until now." February 23, 2016 Affidavit, para. 13. To buttress this argument, the plaintiff contended that plaintiff's exhibit 1 confirmed the fact that Attorney Conway was indeed suspended, filed for reinstatement, complied with the applicable statute, was reinstated, and received an order reinstating him. The plaintiff further argued that Attorney Conway's February 23, 2016 affidavit is internally inconsistent because while paragraph 13 claims that he did not know of the suspension until the plaintiff filed the present motion, paragraph 15 attests that as soon as Attorney Conway became aware of his obligation to register and pay the registration fee, he did so and "was immediately reinstated." Id., para. 15.

Upon examination, Attorney Conway agreed that he had moved for reinstatement. Attorney Conway testified that he "did whatever was required . . . I filled out whatever form was required to be filled out . . . . To be reinstated." Transcript, February 24, 2016, 17:20-23.

Attorney Conway, however, once again denied that he had been suspended. Id., 17:24-25. Instead, even in the face of evidence that the governing statute, New York Judiciary Law § 468-a, defendant's exhibit A, stated that noncompliance "shall constitute conduct prejudicial to the administration of justice" and shall be referred "for disciplinary action," Attorney Conway insisted that this issue was simply an "administrative matter,"transcript, February 24, 2016, 19:7-9, "an oversight on my part," albeit one that he took "responsibility for," id., 19:18-19, and refused to admit that his actions constituted "conduct prejudicial to the administration of justice and professional misconduct." Id, 19:23-27. Attorney Conway further testified that he continued to practice law in New York State between November 20, 2013 and May 13, 2014. Id., 18:13-16.

The plaintiff then questioned Attorney Conway about the Rule 11 sanctions issue. While Attorney Conway admitted that he was the subject of a "Rule 11 Sanction" under federal practice in the *Dangerfield* case, Attorney Conway pointed out that the court did not impose monetary sanctions, but only an admonition. Id, 21:4-8. Attorney Conway also reiterated that the Rule 11 issue arose from conflicts that Attorney Conway's firm had with his client and with the referring law firm. Id., 20:21-21:1. Attorney Conway then testified that he "had forgotten about [the Rule 11 sanction]" during the fourteen years since it was entered. Id., 20:9-21, 21:9-12. Notwithstanding the fact that the federal magistrate judge had found the RICO filing to be frivolous, Attorney Conway testified that "I don't believe it was frivolous . . . ." Id., 21:16.

This court then pursued a similar line of questioning with Attorney Conway. Upon examination by the court, Attorney Conway admitted that in his initial affidavit filed to be appointed pro hac vice he swore that he had "never been reprimanded, suspended or otherwise disciplined." Id., 21:25-22:3. Attorney Conway further testified that the only review he

performed before submitting this affidavit was "just general recollection," id., 22:4-7, that the Rule 11 sanction was the only time he understood that he had been reprimanded, and that he "didn't spend a lot of time thinking about it." Id., 22:7-9. Attorney Conway insisted that he "was unaware until I read in Attorney Tinley's affidavit that I had been suspended," id., 22:12-14; in fact, Attorney Conway testified that when he was preparing his most recent affidavit, he "was stunned to learn that I had been suspended." Id., 22:17-18. Attorney Conway's testimony attempted to support his argument that the suspension was actually just an administrative glitch. He testified that 500 lawyers in the First Department alone had been subject to action because of a failure to register, and that "my office contacted the First Department and said what do we got to do to take care of the problem, they told us what to do, I signed the form, and we sent it in with a check." Id., 22-23. Significantly, when the court asked Attorney Conway what he thought he was being reinstated from, Attorney Conway answered, "I didn't think I was suspended. I didn't think I was really being reinstated . . . . I thought I was being activated." Id., 23:9-19. Attorney Conway testified further that if one were to call the New York court administrator, and ask about the penalty imposed on an attorney who failed to comply with § 468-a, the answer would be "he's marked inactive." Id., 23:19-23.

The parties continued to submit documents after the hearing.

The plaintiff filed a supplemental memorandum in support of his motion and a request for judicial notice of certain documents (# 139) on February 25, 2016. The defendants did not object to the court taking judicial notice of these documents and the court finds that it would be appropriate to take judicial notice of them. The plaintiff submitted these documents, exhibits A—D, inclusive, taken from official New York state court sources, as attachments to his memorandum, to rebut and impeach Attorney Conway's testimony at the hearing. Plaintiff's

exhibit A, comprising copies of court rules 22 N.Y.C.R.R. § 603.13 and § 603.14, sets forth, first, restrictions placed on, and notice requirements mandated of, suspended attorneys and, second, the manner in which a suspended attorney may apply for reinstatement. Plaintiff's exhibit B provides instructions and a sample form for such a notice of a motion for reinstatement and its supporting affidavit. Plaintiff's exhibit C sets forth the registration and fee requirements, refers to the lists of lawyers who have not complied with these requirements as the "Suspension Lists," and includes a link to attorneys suspended within certain time periods. Plaintiff's exhibit D is a page from such a suspension list listing Attorney Conway as having been suspended in 2013. In the plaintiff's supplemental memorandum and request for judicial notice, the plaintiff took issue with Attorney Conway's testimony in two regards: (1) that he could not recall the procedure he followed to be reinstated and (2) that he was not suspended.

The defendants filed a memorandum in opposition to the present motion (# 140) on March 1, 2016. The defendants argued that Attorney Conway had played an integral part in preparing the defendants' counterclaim and defense since long before the present case began. The defendants then claimed that the present motion was part of the plaintiff's strategy to postpone the plaintiff's deposition, a deposition the defendants termed "the most important part of the prosecution of the case before trial." The defendants contended that the timing of the filing of this motion was strategic: "it was impeccably timed to be filed two days before the Plaintiff's second, court ordered deposition date. It has been very successful in delaying the Plaintiff's deposition." Id., 1-3.

Later in their brief, the defendants returned to these issues. They argued, drawing upon Attorney Conway's experience in cases such as this, and his deep involvement in this case, that that they would be severely prejudiced were Attorney Conway's pro hac vice status to be

revoked. They contended, citing an unpublished Delaware trial court case, that the plaintiff must sustain a heightened burden of demonstrating that the behavior of the out of state lawyer "will affect the fairness of the proceedings . . . ." Id., 8—10, citing *Crowhorn* v. *Nationwide Mutual Ins. Co.*, Del. Superior, Docket No. 00C-06-010WLW (July 10, 2002). Additionally, the defendants reiterated that: "[I]f there is conduct of any attorneys calling into question the fairness of the proceeding, it is that of Plaintiff's counsel. If the character and conduct of Attorney Conway were ever a concern of Plaintiff's counsel, this Motion could have been filed at least three months ago. The wonderful timing of this motion makes it clear that the purpose of the present Motion was not to protect the integrity of the proceedings before the Court, but to put up one more roadblock to the deposition of the Plaintiff." Defendants' Memorandum of law in opposition to plaintiff's motion to vacate order granting application of Attorney Kevin P. Conway to appear pro hac vice, March 1, 2016, 10.

The defendants further contended that neither the Rule 11 sanction nor the registration issue "had come to Attorney Conway's mind when he had signed the affidavit" and termed his failure to disclose these disciplinary sanctions "two oversights." Id., 2-3. Citing a Connecticut Supreme Court case, *Herrmann* v. *Summer Plaza Corp.*, 201 Conn. 263, 269, 513 A.2d 1211 (1986), the defendants also argued that the court must, in considering this motion, consider the "facts or circumstances affecting the personal or financial welfare of the client[s]" and that a party's "request to be represented by counsel of his choice, when freely made, should be respected by the court, unless some legitimate state interest is thwarted by admission of the out-of-state attorney." (Internal quotation marks omitted). Id. 4.

Further, the defendants claimed that Attorney Conway did not violate any of the Rules of Professional Conduct. In this regard, the defendants argued that two rules which the plaintiff

might argue had been violated, rule 3.3 (a) (1) and rule 4.1 (1) of the Rules of Professional Conduct require a lawyer to "knowingly" make a false statement of fact or law and that Attorney Conway did not believe his statements to be false at the time he executed the initial affidavit. Id., 5. To support this argument, the defendants claimed that Attorney Conway had assumed that his failure to comply with New York's attorney registration requirements resulted in him having been placed on inactive status, rather than being suspended. The defendants further attempted to rebut the plaintiff's claim that Attorney Conway must have known that he was suspended because he moved for reinstatement by arguing that all Attorney Conway did was sign documents someone placed before him and pay the fees due. Id., 6. The defendants claimed in this regard that it is equally reasonable to infer that one could be reinstated from inactive status as it is to infer that he was reinstated from a suspension.

The defendants then addressed the Rule 11 sanctions ruling by minimizing the severity of the sanction imposed, categorizing it as a "short admonishment." Id., 7. Further, the defendants pointed out, this sanction had "nothing to do with making a false statement" and, being so minor "[i]t is hardly expected that one would remember such a happening as a formal admonishment or sanction, especially one as minor as the one mentioned by the Plaintiff." Id. The defendants then contrasted what they advocate happened in this case with two cases involving what the defendants believe was much more serious conduct, one which resulted in a reprimand based upon a previous history of no discipline and one that resulted in a six month suspension of an attorney in his home state for failing to disclose past discipline in a pro hac vice application affidavit in Connecticut.

The plaintiff replied (# 141) on March 2, 2015. The plaintiff appended to his reply memorandum, as exhibit A, Attorney Conway's March 11, 2014 Notice of Motion for

Reinstatement, moving for "an Order of Reinstatement from the suspension of movant from the practice of law for violation of Judiciary Law Section 468-a" and Attorney Conway's March 25, 2014 affidavit in support of same. Plaintiff's reply, March 2, 2016, Plaintiff's reply exhibit A. Attorney Conway's March 25, 2014 affidavit swore to the following facts, among others:

"3. On or around September 11, 2013, the Appellate Division, First Department, issued an order of suspension of my license to practice law in the State of New York, for violation of Judiciary Law 468-a.

4. I did not file my bi-annual registration or pay the attendant fees for the period 2006-2013 . . . .

7. As of the date of this affidavit, I am in full compliance with the suspension order and with Judiciary Law §468-a . . . .

9. I affirm the foregoing under penalty of perjury."

The plaintiff pointed out that, notwithstanding Attorney Conway's sworn testimony during the hearing on the present motion that he was rendered "inactive," plaintiff's reply exhibit A demonstrates convincingly that Attorney Conway moved for reinstatement "from suspension . . . from the practice of law." The plaintiff further observed that Attorney Conway's sworn March 25, 2014 affidavit reflects that Attorney Conway had failed to comply with § 468-a for seven years, knew that he had been suspended, and claimed to have been in "full compliance with the suspension order," although full compliance with suspension in New York state, as documented in the plaintiff's previous filings, would have included refraining from practicing law while suspended, which, as Attorney Conway testified during the hearing on the present motion, he did not do. Id., 2-5.

The defendants filed a sur reply in opposition (# 142) on March 3, 2016, in which they contend that the plaintiff's recent filing raised nothing new, and that Attorney Conway was not "mindful" of what he termed an "administrative matter" to which he "gave . . . no further thought until it was presented to him by Plaintiff's Motion filed two days before the court's second ordered deposition of the Plaintiff." The defendants further claim that the plaintiff had raised "no allegation of Attorney Conway's misconduct in his defense and prosecution of this case." Defendants' Sur Reply Re: Plaintiff's motion to vacate, 1.

In an order issued on March 2, 2016 (# 143), the court ordered Attorney Conway to confirm or deny, under oath, the authenticity of plaintiff's reply exhibit A. This order specifically required Attorney Conway to swear "as to whether or not Exhibit A to # 141 is a fair and accurate copy of documents that Attorney Conway filed with the appropriate authorities in New York to be reinstated from his suspension from the practice of law." Attorney Conway partially complied by means of an affidavit dated March 3, 2016 (# 144). In his March 3, 2016 affidavit, Attorney Conway inaccurately re-cast the court's order as requiring him to swear as to whether or not plaintiff's reply exhibit A was a fair and accurate copy of documents he filed "to be reinstated following my failure to pay my biennial registration fees". March 3, 2016 Affidavit, para. 1. Attorney Conway then affirmed that "the documents contained in Exhibit A of Plaintiff's Reply are a fair and accurate copy of the documents that I filed with the Supreme Court of the State of New York, Appellate Division: First Department on March 11, 2014," id., para. 2, never admitting that he filed these documents to be reinstated from a suspension.

After careful consideration of Attorney Conway's testimony, both in his oral testimony and in his sundry affidavits he has filed in relation to the pro hac vice application and the present

motion, the court grants the plaintiff's motion to revoke Attorney Conway's privilege to be admitted pro hac vice in this case.

LEGAL ANALYSIS AND DISCUSSION

Our Supreme Court has commented at length about the standards a trial court must employ when considering an application for pro hac vice admission. Motions to revoke the pro hac vice status of an out-of-state attorney should be subject to the same analysis. See *Yale Literary Magazine* v. *Yale University*, 202 Conn. 672, 675, 522 A.2d 818 (1987) ("[t]he interest of a litigant affected by the denial of a motion pro hac vice and the granting of a disqualification of an attorney are identical." [Internal quotation marks omitted.]); see, e.g., *Massad* v. *Greaves*, Superior Court, judicial district of New London, Docket No. CV-06-5001419-S, (October 25, 2007, *Devine, J.*).

"[S]tate courts possess the inherent power to regulate admission to the bar . . . . Included within the general regulatory power is the right to establish guidelines for determining when an out-of-state attorney should be admitted pro hac vice . . . . Practice Book § 24 [now §2-16] sets out the guidelines for Connecticut judges to follow when reviewing an application for admission pro hac vice. The application must be sponsored by an attorney licensed to practice in this state, who will assume full responsibility for the applicant's conduct. The applicant must be an attorney in 'good standing' at the bar of another state,' and there must be good cause shown for admission. The decision to grant or deny an application to appear pro hac vice rests within the sound discretion of the court . . . . The court must not abuse its discretionary powers, however, and reject the petition without giving due consideration to the petitioner's request. The right to have counsel of one's own choice, although not absolute, is important enough to require a

legitimate state interest before a person can be deprived of that right . . . . Practice Book § 24 embodies this constitutional mandate, requiring the court to consider the facts or circumstances affecting the personal or financial welfare of the client, when reviewing the application. This limited scope of inquiry strikes the balance between the state's interest in regulating attorneys seeking to be admitted pro hac vice and the litigant's interest in obtaining counsel of his own choice . . . . [A] court should reluctantly deny an application to appear pro hac vice. A litigant's request to be represented by counsel of his choice, when freely made, should be respected by the court, unless some legitimate state interest is thwarted by admission of the out-of-state attorney." (Citations omitted; internal quotation marks omitted.) *Herrmann* v. *Summer Plaza Corp.*, supra, 201 Conn. 268-69.

One example of a legitimate state interest that may be thwarted by a pro hac vice admission is an ethical issue or issues presented by allowing an out-of-state lawyer to appear in this state. *Yale Literary Magazine* v. *Yale University,* 4 Conn. App. 592, 605, 496 A.2d 201 (1985), aff'd, 202 Conn. 672, 522 A.2d 818 (1987). Two cases discussing the legitimate state interest issue, cited with approval by our Supreme Court in *Enquire Printing & Publishing Co.* v. *O'Reilly,* 193 Conn. 370, 374-75, 477 A.2d 648 (1984), "concerned possible violations of the Disciplinary Rules of the Code of Professional Responsibility [the predecessor to the Rules of Professional Conduct]." *Yale Literary Magazine*, supra. A court may deny a motion for pro hac vice appointment otherwise acceptable to avoid "ethical problems that the out-of-state attorney's appearance would cause." *UHY, LLP* v. *Master-Halco, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-10-6013402-S, (February 26, 2014, *Nazzaro, J.*) (57 Conn. L. Rptr. 668, 669). "An attorney admitted pro hac vice is governed by the Code of Professional Responsibility and the decisions of this court." *Enquire Printing & Publishing Co.* v. *O'Reilly*,

supra, 376. Our trial courts frequently reinforce this axiom by including in an order admitting attorneys pro hac vice a provision that such attorneys "will be subject to all rules of the court and non-compliance with any rule will subject them personally and/or collectively to termination to this limited admission to appear before the court in this case." *Zogaj* v. *Kaczmerek*, Superior Court, judicial district of Waterbury, Docket No. CV-07-5004755-S (November 27, 2007, *Agati, J.*) (44 Conn. L. Rptr. 565, 567); *Stamford Wrecking Co.* v. *New Haven,* Superior Court, judicial district of Fairfield, Docket No. CV-07-5013102-S (September 23, 2008, *Bellis, J.*) (46 Conn. L. Rptr. 350, 352).

Rule 3.7 of the Rules of Professional Conduct, the rule generally proscribing an attorney from serving as a witness at a case he is trying, has often served as the basis for the court to deny or revoke pro hac vice status. For example the trial court in *Massad* v. *Greaves*, supra, Superior Court, Docket No. CV-06-5001419-S, vacated an order granting pro hac vice admission under Rule 3.7 of the Rules of Professional Conduct because the out-of-state lawyer was likely to be called as a witness at trial. In another Connecticut Superior Court case, the court denied a motion to appear pro hac vice because the out-of-state attorney was going to testify in a dissolution proceeding in violation of Rule 3.7 of the Rules of Professional Conduct. *Marino* v. *Marino*, Superior Court, judicial district of Hartford, Docket No. FA-10-4052184 (December 23, 2010, *Adelman, J.*). The cases cited above instruct that, although Rule 3.7 of the Rules of Professional Conduct has often been used to deny or revoke pro hac vice status, the court's consideration of ethical issues pertaining to pro hace vice privilege is certainly not limited to that individual Rule of Professional Conduct.

This conclusion is supported by cases from other jurisdictions in which courts have revoked an attorney's pro hac vice privileges for such actions as making false representations

about the preparation of evidentiary documents, engaging in the unauthorized practice of law by representing a client in a prior to being admitted pro hac vice there, *Kentucky Bar Association* v. *Yokum*, 294 S.W.3d 437, 440-41 (Ken. 2009), initiating inappropriate ex parte contact with the expert witness of another party, *Sisk* v. *Transylvania Community Hospital, Inc.*, 364 N.C. 172, 179-84, 695 S.E. 2d 429, reh'g denied, 364 N.C. 442, 702 S.E.2d 65 (2010), and falsely representing to the court that the attorney had not had a "meeting" with his clients when he, in fact had briefly met with his clients at a motel. *In re Fletcher*, 694 N.E.2d 1143, 1145-48 (Ind. 1998) (court trying to ascertain where attorney's clients were when service was being attempted.).

A Kansas Supreme Court case contains facts quite similar to those in the present motion. In that case, an attorney had been admitted to practice in Kansas pro hac vice based in part on an affidavit in which he swore that "I have been the subject of prior public discipline, but not suspension or disbarment, in any jurisdiction," when, in fact, he had been "sanctioned by the State Bar of Texas by a partially probated suspension."[4] (Internal quotation marks omitted.) *In re Riebschlager*, 303 Kan. 373, 374 361 P.3d 499 (Kan. 2015). Because the Texas authorities had informed the applicant that he did not have to disclose the partially probated suspension, the Kansas Supreme Court upheld the lower court's decision that the applicant had not knowingly violated Rule of Professional Conduct 8.1 (a), which provided that "a lawyer in connection with a bar admission application . . . shall not: (a) knowingly make a false statement of material fact . . . ." Id., 376. The Kansas Supreme Court, however, also upheld the lower court's decision that the applicant's failure to inform the court of the mistake in his affidavit violated, even under the

[4] A "partially probated suspension" is, in Texas, "a combination of an active suspension [from the practice of law], followed by a period of probated suspension and is public." Id., 375.

exacting standard of clear and convincing evidence, Rule 8.1 (b)[5] which prohibits an attorney applying for bar admission to "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter . . . ." Id. The Kansas Supreme Court further upheld the trial court's decision both to disqualify the applicant in the individual matter in which he had been admitted pro hac vice, and also to prohibit him indefinitely from appearing pro hac vice before any Kansas court, tribunal or agency. Id., 379.

In the present case, the court holds, for the reasons stated below, that Attorney Conway has violated, several times over, rule 3.3 (a) (1) of the Rules of Professional Conduct, Candor Toward the Tribunal.

Rule 3.3 (a) (1) of the Rules of Professional Conduct provides that "[a] lawyer shall not knowingly (1) [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. The use of the word "shall" in the Rules of Professional Conduct is imperative, defining "proper conduct for purposes of professional discipline." Rules of Professional Conduct, Scope. "Knowingly . . . denotes actual knowledge of the fact in question," but "a person's knowledge may be inferred from circumstances." Rules of Professional Conduct 1.0 (g), Terminology. "Candor" means much more than the absence of untruth. Merriam-Webster defines "candor" as "unreserved, honest, or sincere expression: forthrightness." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). "Forthrightness" is the quality of being "honest and direct," of "providing answers or information in a very clear and direct way," and of being "free from ambiguity or evasiveness; going straight to the point." Id.

[5] Connecticut's version of Rules 8.1 (a) and (b) are rules 8.1 (1) and (2) of the Rules of Professional Conduct.

Even when they are not under oath, "[a]ttorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." (Internal quotation marks omitted.) *State* v. *Webb,* 238 Conn. 389, 420, 680 A.2d 147 (1996); Rules of Professional Conduct 3.3.

Not surprisingly however, a lawyer's obligations as witness are even more rigorous than those of a lawyer as advocate. As our Supreme Court has held, " During the . . . hearing, [when] the plaintiff [attorney] was under oath... his representations to the trial court comprised testimonial evidence so that he was obligated, both as a witness and as an attorney and officer of the court, to make truthful representations to the tribunal. See Rules of Professional Conduct 3.3." *Daniels* v. *Alander*, 268 Conn. 320, 332, 844 A.2d 182 (2004).

The Commentary to rule 3.3 of the Rules of Professional Conduct draws the distinction between lawyer as advocate and lawyer as witness quite clearly: "[a]n advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer . . . may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." Rules of Professional Conduct 3.3, commentary.[6]

[6] The court understands that the "Commentary accompanying each Rule explains and illustrates the meaning and purpose of the Rule . . . . The Commentaries are intended as guides to interpretation, but the text of each Rule is authoritative. Commentaries do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." Rules of Professional Conduct, Scope. The court also notes however, that despite this limiting language,

Attorney Conway's conduct, as set forth below, includes making untrue representations to this court under oath and otherwise, repeatedly declining to correct such untrue representations, and the failing to have made a reasonably diligent inquiry.

In the initial affidavit he submitted in support of his pro hac vice motion, Attorney Conway swore, "I have never been reprimanded, suspended . . . or otherwise disciplined . . . ." The facts demonstrate clearly, however, that each of these statements is not true. Attorney Conway was reprimanded in the Rule 11 case and suspended in the fall of 2013. Even assuming, arguendo, that Attorney Conway believed that the New York bar authorities did not suspend him, but merely placed him on an inactive list, such an action would fall within the category of being "otherwise disciplined." The next question for the court is whether these statements were "knowingly" false within the meaning of rule 3.3 of the Rules of Professional Conduct. Attorney Conway argues strenuously that he did not actually know that he was suspended and forgot when he filed the initial affidavit that he had been reprimanded. As mentioned above, however, under the Rules of Professional Conduct, a "person's knowledge may be inferred from circumstances." Rules of Professional Conduct 1.0 (g), Terminology. The surrounding circumstances convince the court that the false statements in the initial affidavit were made knowingly.

The evidence martialed by the plaintiff displays unequivocally that the Appellate Division, First Department of New York suspended Attorney Conway on November 20, 2013. The order reinstating Attorney Conway on May 13, 2014, less than two years ago, from this suspension itself, as well as a recent printout from the "Attorney Directory—Attorney Details"

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the Commentary to Rule 3.3 of the Rules of Professional Conduct was cited by our Appellate Court when construing that portion of Rule 3.3 that pertains to a lawyer making a knowingly false representation of law to the court in argument. *O'Brien* v. *Superior Court* 105 Conn. App. 774, 788, 939 A.2d 1223, cert. denied, 287 Conn. 901, 947 A.2d 342 (2008).

page of the New York State Unified Court System, evidencing the suspension, were introduced as exhibits at the hearing on this motion. Moreover, the plaintiff additionally filed in the present case the affidavit that Attorney Conway lodged with the New York courts to move for his reinstatement from this suspension. In this affidavit, Attorney Conway acknowledged that he had been suspended and that he had complied with his suspension order. It is simply not believable that Attorney Conway did not know that he was suspended in late 2013 and that he would not remember a suspension from which he was reinstated less than two years ago.

This conclusion is buttressed by Attorney Conway's many disingenuous and evasive sworn statements pertaining to the suspension, made to this court since the plaintiff filed the present motion. By means of these statements, Attorney Conway has compounded his original sin. In an affidavit filed in opposition to this motion (# 137.50), Attorney Conway does not admit that he was suspended, referring to the suspension as "the other instance." Moreover, Attorney Conway swore that he was unaware that any disciplinary action had been taken against him. This statement, of course, runs counter to Attorney Conway's sworn claim that he had been placed on inactive status. Further, while testifying at the hearing of the present motion, Attorney Conway denied that he had been suspended, and downplayed the suspension as "an oversight" and an "administrative matter." Attorney Conway also testified that he "was unaware until I read in Attorney Tinley's affidavit that [he] had been suspended." The coup de grace occurred when this court ordered that Attorney Conway admit or deny under oath that Exhibit A to # 141was a "fair and accurate copy of documents that [he] filed with the appropriate authorities in New York to be reinstated from his suspension from the practice of law" and Attorney Conway, jesuitically affirmed merely that these documents were filed to secure reinstatement "following my failure to

pay my biennial registration" and that they were a "fair and accurate copy of the documents that I filed," never mentioning or admitting the suspension.

Even assuming, arguendo, that the untruths made in the pro hac vice application affidavit were made only in reckless disregard of the truth, and not "knowingly" under rule 3.3 of the Rules of Professional Conduct, the sworn statements cited in the previous paragraph constitute repeated and abject failure to "correct a false statement of material fact . . . previously made to the tribunal by the lawyer," an equally damaging violation of rule 3.3 (a) (1) of the Rules of Professional Conduct.

Many of the same problems arise from the way in which Attorney Conway deals with and tries to rationalize his Rule 11 sanction.

First of all, for all intents and purposes, an admonition is a reprimand or, even if not, falls within the definition of being "otherwise disciplined." Attorney Conway's sworn statement in the affidavit supporting the pro hac vice application that he had never been reprimanded or otherwise disciplined is, even based solely on the Rule 11 sanction, untrue. To give him credit, Attorney Conway correctly points out that the federal magistrate judge did not levy monetary sanctions, but only a verbal admonition. He then claims. however, that the Rule 11 problem arose from a conflict he had with his out-of-state client and the Texas firm that hired him as New York counsel, and that he thought that withdrawing from representation of his client was the appropriate way to respond to the Rule 11 motion. Unfortunately for Attorney Conway, the timing of his firm's motion to withdraw vis a vis the filing of the Rule 11 motion against him, as reviewed on PACER and as set forth in footnote 1, supra, do not support this claim. Additionally, although Attorney Conway soft-pedals the Rule 11 order as simply an admonishment to carefully research the bases for pleadings, there was more to it than that. The

court also issued a permanent standing order directing Attorney Conway, if he is ever the subject of a Rule 11 motion again, to "disclose the existence of this Opinion and Order either to the court hearing the motion or to this adversary." *Dangerfield* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, U.S. District Court, S.D.N.Y., 2003 WL 22227956. During the course of the proceedings pertaining to the present motion, Attorney Conway, although claiming that he never was otherwise disciplined, contended that he had forgotten about this admonition. It is hard for the court to believe that an attorney who has an otherwise spotless record would forget the one disciplinary blot on that record.[7]

Additionally, as mentioned above, the Commentary to rule 3.3 of the Rules of Professional Conduct, cited by our Appellate Court as authority, states that when a lawyer provides an affidavit to the court, the affidavit may be made only when the lawyer knows it to be true or believes it to be true based on a "reasonably diligent inquiry." Rules of Professional Conduct 3.3, commentary. Even assuming, once again, and only for argument's sake, that the statements in the original affidavit were not knowingly false under rule 3.3 of the Rules of Professional Conduct, Attorney Conway did not make a "reasonably diligent inquiry" before he swore to them. In the hearing on the present motion, Attorney Conway testified, in response to a question by this court, that the only review he performed before submitting this affidavit was "just general recollection." This kind of review is miserably inadequate when one considers that the information concerning both Attorney Conway's suspension and his Rule 11 sanction is available almost instantly upon the entry of a few keystrokes.

[7] When asked to credit the testimony of a witness who claimed that he "couldn't remember" being expelled from the United States Naval Academy for lying under oath, the Hon. T. Emmet Clarie, U.S. District Court, D. Conn., once said, incisively, "Counsel, there are some things we never forget."

Moreover although rule 3.3 of the Rules of Professional Conduct requires "candor" before the tribunal, the disingenuous and evasive statements cited above relating both to the suspension and the Rule 11 sanction comprise the antithesis of being "honest and direct," of "providing answers or information in a very clear and direct way," and of being "free from ambiguity or evasiveness; going straight to the point."

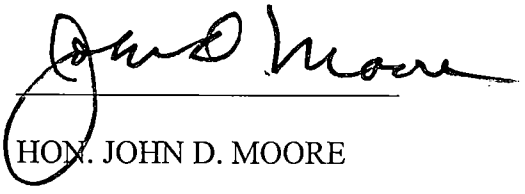
Finally, Attorney Conway's attempts to blame the plaintiff for filing the present motion strategically and solely for delay purposes only serve to persuade this court of the rectitude of its decision on the present motion.

In sum, the circumstances demonstrate that Attorney Conway knowingly made false statements under oath when he applied for pro hac vice status, and that, although he was presented with numerous opportunities to correct these false statements to the court, he chose rather to continue to propagate the false statements, and to make other evasive and disingenuous statements that served to compound his lack of candor to the court. When faced with the simple and obvious truth that he had been suspended, Attorney Conway could never admit to the truth of that fact. When cornered, Attorney Conway thought it would be persuasive to impugn the motives and ethics of the movant's counsel. Attorney Conway was incorrect in this assumption. Although the court is not insensitive to the significant right of the defendants in this case to pick their attorney, the court is also cognizant of the fact that, in granting to an out-of–state attorney the privilege of practicing pro hac vice in Connecticut, the court must insure that said attorney complies with all the Rules of Professional Conduct. In the present case, Attorney Conway has not complied with rule 3.3 of the Rules of Professional Conduct.

For all of the reasons stated above, the court grants the plaintiff's motion to revoke the pro hac vice status of Attorney Conway.

So ordered.

BY THE COURT,



HON. JOHN D. MOORE