Filed 1/29/13 Retirement Housing Foundation v. Cain Bros. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RETIREMENT HOUSING FOUNDATION, et al., Plaintiffs and Appellants, v. CAIN BROTHERS & CO., Defendant and Respondent.	B235160 (Los Angeles County Super. Ct. No. BC404726)

APPEAL from an order of the Superior Court of Los Angeles County. William F. Highberger, Judge. Affirmed.

Reuben Raucher & Blum, Timothy D. Reuben, Stephen L. Raucher and Gregory P. Barchie for Plaintiffs and Appellants.

Caldwell Leslie & Proctor, David K. Willingham and Aron Ketchel; Arkin Kaplan Rice, Kaplan Rice and Howard J. Kaplan (*pro hac vice*) for Defendant and Respondent.

INTRODUCTION

This is an appeal from an order denying a motion for revocation of *pro hac vice* status. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Retirement Housing Foundation and several related entities (Retirement Housing) filed a complaint against Cain Brothers & Co., LLC (Cain Brothers) and others, for claims involving transactions in which Cain Brothers served as Retirement Housing's financial advisor.

In May 2010, the trial court granted Cain Brothers' unopposed applications for admission *pro hac vice* of New York attorneys Howard J. Kaplan and Lisa C. Solbakken of Arkin Kaplan Rice LLP (Arkin Kaplan).[1] Later, the trial court granted Cain Brothers' third application for admission *pro hac vice*, allowing Justin M. Garbaccio of Arkin Kaplan to appear in this matter as well.

On June 21, 2011, Cain Brothers' New York counsel sent a letter (on Arkin Kaplan letterhead signed by Kaplan with copies to Solbakken and Garbaccio) to Retirement Housing's counsel (Timothy D. Reuben of Reuben Raucher & Blum PC) via email. Retirement Housing's President (Laverne R. Joseph) received a substantially similar letter which was also dated June 21, 2011; this letter, on Cain Brothers letterhead and signed by Cain Brothers' Managing Director Scott D. Smith, was addressed to both

---

[1] "*Pro hac vice*" means "[f]or this occasion or particular purpose" and typically "refers to a lawyer who has not been admitted to practice in a particular jurisdiction but who is admitted there temporarily for the purpose of conducting a particular case." (Black's Law Dict. (7th ed. 1999) p. 1227, col. 2.) On October 11, 2012, the firm of Arkin Kaplan Rice LLP substituted out as counsel *pro hac vice* for Cain Brothers and Howard Kaplan, who was admitted *pro hac vice* May 9, 2012, substituted in as part of Kaplan Rice LLP.

Dr. Joseph and Donald W. King, Retirement Housing's Chairman of the Board and was sent via overnight delivery.[2]

Both letters bore the following heading (in bold and all capital letters): "**CONFIDENTIAL SETTLEMENT COMMUNICATION PURSUANT TO CAL. EVIDENCE CODE § 1152.**" Further, both letters contained a two-column chart with the following headings: "[Retirement Housing's] Allegation" and "Exemplar of Evidence Demonstrating the Falsity of [Retirement Housing's] Allegation." According to the letters, discovery demonstrated that both Retirement Housing and its counsel were aware of the facts "that undermine entirely" Retirement Housing's position, and Cain Brothers intended to file a "counterclaim" and seek sanctions unless Retirement Housing withdrew its claims against Cain Brothers. In addition, both letters asserted Retirement Housing's allegations triggered the indemnification and hold harmless provisions set forth in Section 10 of the parties' Certificate Purchase Agreement executed in 1998, and Cain Brothers would pursue all relief to which it was entitled, including but not limited to attorneys' fees. "This is an amount that grows with each day that passes, until this action is resolved."

One week later, Retirement Housing filed and served a motion for an order revoking the *pro hac vice* status of Kaplan, Solbakken and Garbaccio of Arkin Kaplan on the ground these Cain Brothers attorneys had engaged in ex parte indirect communication about the action with Retirement Housing officers and directors they knew to be represented by Reuben Raucher & Blum, in violation of Rule 2-100 of the California Rules of Professional Conduct. According to Retirement Housing's motion, Cain Brothers' continued representation by its New York attorneys would "improperly perpetuate the intimidation of [Retirement Housing], particularly since Cain seeks to depose letter recipient Dr. Laverne Joseph, along with other senior officers." Given the

---

[2] According to the Federal Express delivery confirmation, Smith's letter was sent from Cain Brothers' office in New York on June 21, 2011, and delivered to Retirement Housing's Long Beach office on June 22, 2011, at 8:00 a.m.

"obvious substantial similarities" between the two letters, as well as the "liberal use of legal jargon and analysis," Retirement Housing asserted, "it is clear that the letter to [Retirement Housing] was 'directed by' Cain's New York counsel," and "the clear intent of this tactic is to intimidate [Retirement Housing] and undermine its relationship with its attorneys . . . ." If the court failed to take action, Retirement Housing urged, "[its] perception of the Court will be permanently undermined."

The motion was supported by Joseph's brief declaration, attaching the letter signed by Smith on Cain Brothers' letterhead as an exhibit, and stating: "Upon receipt of the letter signed by Mr. Smith, [Retirement Housing] forwarded same to its counsel, Reuben Raucher & Blum." Retirement Housing's counsel (Timothy Reuben) also submitted a declaration, attaching the letter from Kaplan to him, and stating: "I did not learn of Mr. Smith's June 21, 2011 letter to [Retirement Housing] until [Retirement Housing] notified me of their [sic] receipt of said letter. Neither I nor any attorney at Reuben Raucher & Blum authorized or consented to such communication from Arkin Kaplan Rice LLP to [Retirement Housing]." (In addition, Reuben attached to his declaration a Word Perfect "Document Compare Summary" of the two letters at issue, the original *pro hac vice* applications of Cain Brothers' New York counsel and pages of Smith's June 2, 2011 deposition transcript in which he testified to his educational background (a bachelor's degree in accounting).[3]

---

[3] The deposition transcript pages attached to Reuben's declaration also reflected an exchange between Reuben and Kaplan in which Kaplan referred to a "comment earlier today" and said Reuben's failure to ask any questions on the statute of limitations was "outrageous." Reuben responded, "I don't want to waste my time arguing with you. You want to make an argument, make it to the judge, [d]on't make it to me, because I don't believe anything you said." Kaplan then told Reuben: "[T]his is going to result in a sanctions motion. I'm telling you right now, we're going to be making a sanctions motion in connection with our statute of limitations arguments. And, I'm telling you that very clearly, because I want you to understand that you've wasted a day, and it's sanctionable, and it's going to go before a motion. . . ." (According to Cain Brothers, the following week (on June 8, 2011), the trial court sustained without leave to amend Cain

At the same time (on June 28), in a cover letter enclosed with service copies of its motion to revoke *pro hac vice* status and citing the motion as justification, Retirement Housing notified all counsel: "[W]e are taking all scheduled depositions off calendar[,]" including Dr. Joseph's previously scheduled deposition. "We will not be producing any witnesses and we will not be taking any depositions until the motion has been resolved."[4]

Cain Brothers filed opposition to Retirement Housing's motion to revoke, supported by identical declarations from Smith (Cain Brothers' Managing Director and Executive Committee member who signed the June 21, 2011 letter to Retirement Housing) as well as Rhett D. Thurman (also a Cain Brothers' managing Director and its Chief Financial Officer). According to Smith and Thurman, "the idea of undertaking the principal-to-principal communication originated with Cain Brothers. The content of our letter was derived from a communication our lawyers had prepared and directed to counsel for [Retirement Housing]."

According to both Smith and Thurman, "Our lawyers did not, at any time, encourage, request or direct that we send any communication to [Retirement Housing;] Cain Brothers was acting on our own behalf (and not on behalf of our lawyers) in connection with this communication. [¶] Cain Brothers' letter was meant to convey a sincere bilateral settlement offer in an effort to resolve this litigation. [¶] Cain Brothers'

Brothers' demurrer to Retirement Housing's contract claims and ordered the parties to proceed with discovery on the remaining claims.)

[4] Another defendant (ACA Financial Guaranty Corp.) filed an ex parte application for an order compelling Retirement Housing's adherence to the deposition schedule already in place. At that time, Kaplan presented a declaration from Thurman and represented to the trial court that, "Our client, Cain Brothers, as clients do sometimes, undertook and decided to send a [settlement] communication on their own, not caused by us, to [Retirement Housing]. [¶] Their view was that it would be taken more seriously. It's true that principally the factual information in that letter was taken from a letter we had previously sent to Mr. R[e]uben. But this is not something that was initiated by my firm or me. It's not something that originated with us, and it was wholly our client's doing."

letter explained that it was willing to forgo claims and remedies to which it believes it is entitled as a result of the positions taken by [Retirement Housing] in this case in exchange for [Retirement Housing's] agreement to do the same. [¶] Cain Brothers' letter does not seek from [Retirement Housing] the disclosure of any information at all, much less confidential information, pertaining to the subject of this litigation. Nor was the letter intended to accomplish the same."

Retirement Housing filed a reply along with supplemental declarations from Joseph and Reuben. In his supplemental declaration, Joseph said he was an ordained minister in the Church of Christ and had been President and CEO of Retirement Housing for 23 years. When he received Cain Brothers' letter on June 22, 2011, Joseph said, he "felt surprised, shocked, troubled and offended. Based on [his] previous experience and dealings with Mr. Smith, Cain Brothers . . . and the language of the letter, [he] knew immediately that the letter was not written by him nor [sic] anyone else at Cain, and that this was a letter written by a lawyer." Furthermore, Joseph said, "I do not wish to deal in any manner with attorneys who act unethically as in the instant case. Under the circumstances, it would shake my faith and confidence in the Court if Cain's New York counsel were allowed to continue their representation of Cain [Brothers], particularly if any of these attorneys took any part in my deposition. These attorneys targeted me personally, and I feel they will continue to target me as a method of harassment. [¶] I know our Chairman of the Board feels the same as I do on this subject."

According to Reuben, the email attached as an exhibit to his declaration established that Solbakken transmitted the Arkin Kaplan letter from New York at 4:12 p.m. EDT on June 21, 2011, while the FedEx Shipment Travel History of the Smith letter (also an exhibit) demonstrated that the Smith letter was sent to FedEx at 3:57 p.m. New York time—before Solbakken sent the Arkin Kaplan letter to Reuben.

Cain Brothers filed objections to the Joseph and Reuben supplemental declarations filed as "new evidence" in support of Retirement Housing's reply and filed its own sur-reply.

It its tentative ruling, the trial court stated as follows: "The motion does not present a close question. To grant it would be manifest error and an extreme overreaction to the alleged misconduct on which the motion is premised.

"Whether proven unethical conduct by litigation counsel deserves disqualification (or here[,] revocation of pro hac [vice] admission status) is a matter left to the Court's prudent exercise of discretion, based primarily on an analysis of whether there will be an adverse continuing effect on the proceedings from the past misconduct. The Court's only legitimate goal is remedial action, not punitive reaction, which is properly left to the cognizant disciplinary authorities. [(]*Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 607; Vapnek, Tuft, et al., Cal[.] Practice Guide: Professional Responsibility (The Rutter Group [(2011)]) ¶ 8:412[, p. 8-70.4,] and authorities cited there; [1] Witkin, Cal[.] Procedure[(5th ed. 2010)]Attorneys[,] § 537.[)]

"The Court finds that moving party has not made a sufficient showing in the moving papers of continuing effect even if the offending letter was knowingly sent at the direction of defense counsel. Plaintiffs continue to use their original litigation counsel of record, and there is no indication that these events have damaged that relationship. The parties recently had a full and fair opportunity to meet with each other in the presence of their chosen counsel to try to resolve the case through a court-ordered Mandatory Settlement Conference, and there was no settlement, so it does not appear that these events have intimidated the plaintiffs' executives and directors. A party does not get to pick its adversary's attorney, including the attorney who takes an oral deposition under oath. This is the inherent nature of contested litigation.

"The Court is also not persuaded by the timing to conclude that Cain Brothers' counsel in fact knowingly directed their client to send the letter directly to their adversaries' principals. Maybe, maybe not. The simultaneous nature of the two communications does not automatically prove attorney direction. The court does not, in any case, need to make any final resolution of the factual quandary given the clear lack of

continuing adverse effect even assuming that Arkin Kaplan Rice LLP knowingly caused the client to client letter to be sent.

"There is no need to spend scarce judicial resources conducting a live evidentiary hearing.

"The new matters raised by [Retirement Housing] in its reply papers are irrelevant and not considered in ruling on the merits.

"Court's Sua Sponte Order in Response to Motion:

"As an alternative remedy, however, the Court directs all parties to communicate with their adversaries (on any topic whatsoever during the continued pendency of this case) exclusively through their respective counsel of record going forward unless some party, for good cause show, persuades this Court in advance by noticed ex parte application or motion on regular notice why direct principal to principal contact is necessary and appropriate. There is no current ongoing business relationship which requires such direct contact—about this litigation or otherwise."

At the hearing, in response to the tentative ruling, Retirement Housing argued revocation of an out-of-state attorney's *pro hac vice* status does not require a showing of continued effect on the underlying proceedings—only a showing of unethical conduct of sufficient gravity. Even if so, the trial court concluded, the court's ruling would be the same, reiterating: "[I]t was an excessive overreaction and purely an effort [at] a tactical or strategic advantage that is not warranted by what's brought before the court."

Retirement Housing filed objections to Cain Brothers' proposed order.

Ultimately, the trial court's tentative ruling denying Retirement Housing's motion was "adopted in full with the following additional alternative findings:

"a) Even if the Court adopted [Retirement Housing's] proposed standard that unethical conduct alone is sufficient to justify disqualification of counsel, the Court finds that [Retirement Housing] failed to establish any such conduct and the Court would therefore still deny the Motion; and

"b) Even if the Court did not consider the participation in or outcome of the court-ordered Mandatory Settlement Conference, the Court would still deny the Motion."

Retirement Housing appeals.

DISCUSSION

Retirement Housing contends (1) the trial court erred in applying the standard applicable to a motion to disqualify counsel (whether the alleged misconduct will have a continuing effect on the proceeding) to a motion to revoke *pro hac vice* status, arguing that in the case of an attorney granted *pro hac vice* status, revocation is proper whenever the conduct of an out-of-state attorney impacts the administration of justice; (2) the trial court erred in finding no violation of rule 2-100 of the Rules of Professional Conduct or, at a minimum, in refusing to conduct a "reasonable inquiry" and (3) assuming the disqualification standard applies, the trial court erred in finding no continuing effect.

Applicable Law

Rule 2-100 of the Rules of Professional Conduct

"Rule 2-100 Communication With a Represented Party

"(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

"(B) For purposes of this rule, a 'party' includes:

"(1) An officer, director, or managing agent of a corporation or association . . . ." (Rules Prof. Conduct, rule 2-100(A) & (B)(1) [all further rule references are to the Rules of Professional Conduct unless otherwise indicated].)

"Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents an attorney from advising the client that the communication can be made." (1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, § 423, p. 537, citing discussion to rule 2-100; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter

Group 2011), ¶¶ 1:471.5 to 1:471.6, pp. 1-108.13 to 1-108.14, citing *Abeles v. State Bar of California* (1973) 9 Cal.3d 603, 607 [improper indirect effort to use client to induce opposing party to meet with attorney without opposing counsel's consent] and discussion following Rule 2-100 ["It is improper for an attorney to use the client to 'lure' the opposing party into a conference with the attorney behind opposing counsel's back (e.g., 'Ask him to meet you at my office to work this thing out')[,]" but "Rule 2-100 does *not* prevent the *parties themselves* from communicating with each other[, n]or does it prevent a lawyer from *advising* the client to do so. (E.g., 'Why don't you talk to him directly and ask what he will take to settle the case?')"].)

As our Supreme Court explained in addressing the predecessor to rule 2-100 (and resulting *discipline by the State Bar* as a result), "This rule is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice . . . . It shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. (*Mitton v. State Bar of California* (1969) 71 Cal.2d 525, 534.) "The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist. Consequently, before any direct communication is made with the opposing party, consent of the opposing attorney is required." (*Ibid.*)

Disqualification of Counsel for Violation of Rule 2-100

Violation of rule 2-100 may expose counsel to disciplinary charges.[5] (Bus. & Prof. Code, §§ 6077 [State Bar has power to discipline members for willful breach of

---

[5] "The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar. [¶] For a wilful breach of any of these rules, the board has power to discipline members of the State Bar by

rules of professional conduct], 6078; *Crane v. State Bar of California* (1981) 30 Cal.3d 117.) However, whether an attorney is to be disqualified from representing the client in a pending case rests within the trial court's discretion. (*Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 607-608.) As the *Chronometrics* court commented, "We detect a common theme in the cases relating to disqualification of attorneys by trial courts. If the status or misconduct which is urged as a ground for disqualification will have a *continuing effect* on the judicial proceedings which are before the court, it is justified in refusing to permit the lawyer to participate in such proceedings. . . . If, on the other hand, the court's purpose is to *punish* a transgression which has no substantial continuing effect on the judicial proceedings to occur in the future, neither the court's inherent power to control its proceedings nor Code of Civil Procedure section 128 can be stretched to support the disqualification." (*Id.* at p. 607, italics added.)

In the *Chronometrics* case, the trial court found the attorney had communicated with the opposing party regarding the subject matter of the controversy, knowing the party was represented by counsel but without the consent of that counsel, in violation of the predecessor to rule 2-100, *and improperly obtained information from the opposing party as a result*. (*Id.* at pp. 603, 607-608.) Under such circumstances, the *Chronometrics* court found, "It was not an abuse of the court's discretion to refuse to permit the wrongfully obtained information to be used by [the attorney] directly in the proceedings before the court. The extension of the disqualification beyond [the attorney] personally to his law firm has, however, no purpose but a punitive one.[ ] As we have

---

reproval, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of members of the State Bar." (Bus. & Prof. Code, § 6077.)

"After a hearing for any of the causes set forth in the laws of the State of California warranting disbarment, suspension or other discipline, the board has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproval, public or private, without such recommendation. [¶] The board may pass upon all petitions for reinstatement." (Bus. & Prof. Code, § 6078.)

indicated, such purposes should be accomplished through established disciplinary proceedings." (*Id*. at p. 608, fn. omitted.)

"Rule 2-100 is intended to preserve the attorney-client relationship." (*McMillan v. Shadow Ridge at Oak Park Homeowner's Association* (2008) 165 Cal.App.4th 960, 967 (*McMillan*).) "'"Trial courts in civil cases have the power to order disqualification of counsel when necessary for the furtherance of justice. [Citations.] *Exercise of that power requires a cautious balancing of competing interests*. The court must weigh the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel . . . ."'" (*McMillan, supra,* 165 Cal.App.4th at p. 965, original italics, citation omitted.)

Therefore, the *McMillan* court observed, even if a communication is deemed to be within the ambit of rule 2-100, a trial court's denial of a motion to disqualify counsel is properly upheld where the trial court finds "nothing occurred in the conversation that would 'have any effect on either the outcome of the litigation or on the way in which the litigation is going to proceed.'" (*Id.* at p. 968.) "'The court's goal is not to impose a *penalty*, as the propriety of punishment for violation of the Rules of Professional Conduct is a matter within the purview of the State Bar, not of a court presiding over the affected case. (See Bus. & Prof. Code, § 6077; *Noble v. Sears, Roebuck & Co*. (1973) 33 Cal.App.3d 654, 658–659 [109 Cal. Rptr. 269].) Instead, what the court must do is focus on identifying an appropriate remedy for whatever improper effect the attorney's misconduct may have had in the case before it.'" (*McMillan, supra,* 165 Cal.App.4th at p. 968, original italics, further citation omitted.)

Pro Hac Vice *Admission and Revocation*

Although no such right is guaranteed by the federal Constitution, "[m]ost, if not all, states allow an out-of-state attorney to appear *pro hac vice*. (*Sheller v. Superior*

Court (2008) 158 Cal.App.4th 1697, 1712, citation omitted (*Sheller*).) "California Rules of Court, rule 9.40 governs the admission of attorneys *pro hac vice* in California." (*Ibid.*) In some jurisdictions, the State Bar has no power to discipline attorneys appearing *pro hac vice*, but "an attorney appearing *pro hac vice* in California is 'subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of such appearance.' (Cal. Rules of Court, rule 9.40(f); see also *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 130 [70 Cal. Rptr. 2d 304, 949 P.2d 1]; Cal. Rules of Prof. Conduct, rule 1-100(D)(2).) Additionally, once permitted to appear *pro hac vice*, a foreign attorney in California 'is subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California.'[] (Cal. Rules of Court, rule 9.40(f).)" (*Sheller, supra*, 158 Cal.App.4th at p. 1713, fn. omitted.)

The *Sheller* court considered "whether a trial court has the inherent authority to revoke an attorney's *pro hac vice* status." (*Sheller*, *supra*, 158 Cal.App.4th at p. 1709.) "No case in California has yet addressed whether a trial court has the authority to revoke an attorney's *pro hac vice* status. Numerous other courts, however, have considered the issue, and determined that trial courts possess that authority." (*Id.* at pp. 1713-1714, citation omitted.) However, "jurisdictions differ on the conduct of the *pro hac vice* attorney that will be sufficient to justify revocation of *pro hac vice* status." (*Id.* at p. 1714.) "California has no express provision granting trial courts the right to revoke an attorney's *pro hac vice* status," but "California trial courts do possess the inherent power to regulate practice before them and protect the integrity of their proceedings." (*Id.* at p. 1716.)

"Given that a California trial court's inherent power includes the authority to disqualify a California attorney, and that revocation of an out-of-state attorney's *pro hac vice* status is, in effect, a disqualification of the out-of-state attorney," the *Sheller* court concluded, "a California trial court's inherent powers include the authority to revoke an

attorney's *pro hac vice* status when that attorney has engaged in conduct that would be sufficient to disqualify a California attorney. *While it may be that a California trial court has the authority to revoke an attorney's pro hac vice status under other circumstances as well, we need not reach the issue of the precise limits of a trial court's authority in this appeal*." (*Id.* at p. 1716, italics added.)

Standard of Review

Relying on the italicized language in the preceding quotation from *Sheller, supra,* 158 Cal.App.4th at p. 1716, Retirement Housing says "these 'precise limits'" are the subject of its appeal and therefore the appropriate standard of review is de novo. To the extent Retirement Housing suggests there is no place for the trial court's exercise of discretion in this case, we disagree.

"[I]n the consideration of an appeal from an order made upon [declarations under penalty of perjury (or affidavits under Code of Civil Procedure section 2015.5)] involving the decision of a question of fact, an appellate court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established." (*Chronometrics, supra,* 110 Cal.App.3d at p. 603 and fn. 2.) "A trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citation.] The judgment of the trial court is presumed correct, all intendments and presumptions are indulged to support the judgment, conflicts in the declarations must be resolved in favor of the prevailing party, and the trial court's resolution of any factual disputes arising from the evidence is conclusive." (*McMillan, supra,* 165 Cal.App.4th at pp. 964-965, citations omitted.) We accept as correct all of its express or implied findings supported by substantial evidence, and where the trial court has drawn reasonable inferences, we have no power to draw different inferences, even though different inferences may also be reasonable. (*City Nat. Bank v. Adams* (2002) 96 Cal.App.4th 315, 322.) "We will reverse the trial court's ruling only where there is no reasonable basis for its action. However, we must also ensure that the trial court has

made a reasoned judgment *that complies with the applicable legal standard*." (*Ibid.*, italics added, citation omitted.)

The Trial Court Did Not Abuse Its Discretion in Denying Retirement Housing's Motion to Revoke Pro Hac Vice *Status of Cain Brothers' New York Counsel.*

According to Retirement Housing, because *pro hac vice* status is a privilege and not a right, revocation of *pro hac vice* status is appropriate as a matter of public policy "whenever it appears that misconduct by *pro hac vice* counsel could adversely impact the administration of justice, whether or not there is a sufficient showing of an actual ethical violation." In Retirement Housing's view, such adverse impact on the administration of justice occurred in this case and the trial court erred because it erroneously applied the same standard applicable to a motion to disqualify California counsel—that is, a continuing effect on the judicial proceedings before the court. We disagree.

First, in its own moving papers filed in the trial court, Retirement Housing said "revocation of an out-of-state attorney's *pro hac vice* status is, in effect, a disqualification" and argued the conduct of Cain Brothers' New York counsel was "grounds for disqualification because the communication will have a *continuing effect* on the judicial proceedings before the court."[6] (Italics added.) At the hearing, however, in response to the trial court's ruling that Retirement Housing had not made a sufficient showing of continuing effect, Retirement Housing's counsel said, "We contend that the law does not require such a showing, and that the contrary is the case." The trial court asked, "What do you state to be the standard then? Just whether you've shown unethical conduct of sufficient gravity?" "Correct," counsel answered. The trial court then stated, "I'll apply that standard and make the same ruling." "[A]pplying the standards you invoke, I would not find the showing adequate."

---

6 In its reply, Retirement Housing reiterated that revocation of *pro hac vice* status was "necessary to prevent continuing adverse effects on the proceedings before the court."

In other words, by failing to argue any standard other than a "continuing effect" on the proceedings before the court, Retirement Housing would have waived any other argument for purposes of appeal. Nevertheless, though untimely, the trial court did consider the standard of "unethical conduct of sufficient gravity" Retirement Housing proposed at the hearing. Based on the record presented, however, the trial court expressly determined—even under "that standard," Retirement Housing's "showing [was in]adequate." Consequently, Retirement Housing's argument that the trial court erred because it erroneously applied the same "continuing effect" standard applicable to a motion to disqualify a California attorney to a motion to revoke *pro hac vice* status is both disingenuous and unavailing.

In any event, the trial court did not abuse its discretion in ruling as it did. In *Sheller, supra,* 158 Cal.App.4th 1697, the court recognized "jurisdictions differ on the conduct of the *pro hac vice* attorney that will be sufficient to justify revocation of *pro hac vice* status." (*Id.* at p. 1714.) In some jurisdictions, the trial court may revoke an out-of-state attorney's *pro hac vice* status for any conduct which "'adversely impacts the administration of justice'"; in some jurisdictions, "violation of an established disciplinary standard" justifies revocation; other jurisdictions require "bad faith"; still others grant trial courts "very broad discretion" to include "reasons which do not amount to misconduct" for revocation; in some, the courts have not established "outer limits" of trial court authority but "at the least, conduct which would support disqualification of a local attorney" is sufficient; and elsewhere, *pro hac vice* status may be revoked for "conduct that constitutes contempt, adversely affects the conduct of the litigation, or violates the code of professional responsibility." (*Id.* at pp. 1714-1715, citations omitted.)

In the context of "this admittedly nonuniform state of the law" (*Sheller, supra*, 158 Cal.App.4th at p. 1715), the *Sheller* court "look[ed] at the language of the governing court rule" in California. (*Id.* at p. 1716.) Pursuant to rule 9.40, "[a]n attorney appearing *pro hac vice* submits to the 'jurisdiction of the courts of this state with respect to the law

of this state governing the conduct of attorneys to the *same* extent as a member of the State Bar of California.'"[7] (*Id.* at p. 1717, quoting rule 9.40(f), italics added.) Reasoning that the attorney appearing *pro hac vice* does not submit to the disciplinary jurisdiction of the California courts to a *greater* extent than California attorneys, the *Sheller* court found the trial court had erred in sanctioning the out-of-state attorney by ordering him to pay the opposing party's attorney fees when the court would have had no jurisdiction to impose such a sanction on a California attorney.[8] (*Id.* at pp. 1716-1717.) "The attorney appearing *pro hac vice* does not submit to the disciplinary jurisdiction of the California courts to a *greater* extent than California attorneys." (*Id.* at p. 1717, original italics.) Accordingly, the *Sheller* court remanded the matter to the trial court for consideration of whether the attorney's conduct was worthy of the sanction of revocation of his *pro hac vice* status or any other permissible sanction. (*Ibid.*) "Attorney Sheller's status as a *pro hac vice* attorney does not permit the trial court to sanction him in a manner that a California attorney could not be sanctioned . . . ." (*Ibid.*)

---

[7] The full text of rule 9.40(f) is as follows: "A person permitted to appear as counsel *pro hac vice* under this rule is subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California. The counsel *pro hac vice* must familiarize himself or herself and comply with the standards of professional conduct required of members of the State Bar of California and will be subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of such appearance. Article 5, chapter 4, division III of the Business and Professions Code and the Rules of Procedure of the State Bar govern in any investigation or proceeding conducted by the State Bar under this rule."

[8] In *Sheller, supra,* 158 Cal.App.4th 1697, the attorney granted *pro hac vice* status to represent plaintiffs in a class action mailed an advertising flyer to prospective class members containing at least one "completely false" statement (that, regardless of the outcome, they would be paid for their time in an amount set by the judge) and then provided "contradictory" explanations and "wholly inadequate" purported justifications for his conduct. (*Id.* at p. 1717.)

In this case, as evidence in support of its motion to revoke *pro hac vice* status, Retirement Housing presented two virtually identical letters—one on Cain Brothers' New York counsel's letterhead addressed and sent to Retirement Housing's counsel, the other on Cain Brothers' own letterhead addressed and sent directly to Retirement Housing's officers (forwarded upon receipt to counsel). According to Smith (author of the Cain Brothers' letter) and Thurman, although the letter's content was "derived" from their attorneys' letter, it was Cain Brothers' idea to undertake the "principal-to-principal" communication "in an effort to resolve the litigation."

Noting opinions of ethics committees in California are "not binding" but "should be consulted by members for guidance on proper professional conduct" under rule 1-100, Retirement Housing quotes Formal Opinion 1993-131 of the State Bar of California Standing Committee on Professional Responsibility and Conduct as follows: "When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by rule 2-100. Thus, an attorney is prohibited from drafting documents, correspondence, or other written materials, to be delivered to an opposing party represented by counsel even if they are prepared at the request of the client, are conveyed by the client and appear to be from the client rather than the attorney. An attorney is also prohibited from sending the opposing party materials and simultaneously sending copies to the party's counsel. Providing copies to opposing counsel does not diminish the prohibited nature of the communications with the opposing party. An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney."

Retirement Housing emphasizes the fact the Cain Brothers letter was presented for overnight delivery minutes before the letter on attorney letterhead was emailed to Retirement Housing's counsel, but the trial court was "not persuaded by the timing to conclude Cain Brothers' counsel in fact knowingly directed their client to send the letter

directly to their adversaries' principals." (Of course, Cain Brothers' counsel may well have transmitted the text to its letter addressed to counsel for Retirement Housing for review and Cain Brothers, in turn, could then have substituted its own letterhead and signatures along with Retirement Housing's contact information before Cain Brothers' counsel emailed its final draft to Retirement Housing's counsel.) Such factual determinations are for the trial court in its exercise of discretion. (*Baugh v. Garl* (2006) 137 Cal.App.4th 737, 744.)

More importantly, even if the trial court had found a violation of rule 2-100, it would not compel revocation of New York counsel's *pro hac vice* status. As Retirement Housing recognized, "[R]evocation of an out-of-state attorney's *pro hac vice* status is, in effect, a disqualification of the out-of-state attorney." (*Sheller, supra,* 158 Cal.App.4th at p. 1716.) "'Motions to disqualify counsel present competing policy considerations. On the one hand, a court must not hesitate to disqualify an attorney when it is satisfactorily established that he or she *wrongfully acquired an unfair advantage that undermines the integrity of the judicial process and will have a continuing effect on the proceedings* before the court. [Citations.] On the other hand, it must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement. A client deprived of the attorney of his choice suffers a particularly heavy penalty where, as appears to be the case here, his attorney is highly skilled in the relevant area of the law.'" (*La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court* (2004) 121 Cal.App.4th 773, 791, italics added, citations omitted.)

"'It must be remembered . . . that disqualification is a drastic course of action that should not be taken simply out of hypersensitivity to ethical nuances or the appearance of impropriety.' [Citation.] 'The purpose of disqualification is not to punish a transgression of professional ethics. [Citation.] Disqualification is only justified where the misconduct will have a "continuing effect" on judicial proceedings.'" (*Sheller, supra,* 158 Cal.App.4th at p. 1711, citing *Baugh v. Garl, supra*, 137 Cal.App.4th at p. 744.) "'The

court's goal is not to impose a *penalty*, as the propriety of punishment for violation of the Rules of Professional Conduct is a matter within the purview of the State Bar, not of a court presiding over the affected case. (See Bus. & Prof. Code, § 6077; *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 658–659 [109 Cal. Rptr. 269].) Instead, what the court must do is focus on identifying an appropriate remedy for whatever *improper effect* the attorney's misconduct may have had in the case before it.'" (*McMillan, supra,* 165 Cal.App.4th at p. 968, original italics, citation omitted.)

The trial court in this case found nothing about the duplicative settlement letter sent from Cain Brothers to Retirement Housing that would have any continuing effect on the litigation (or would satisfy Retirement Housing's belatedly urged additional standard). In fact, the trial court expressly stated that it found Retirement Housing's filing of its motion for revocation (accompanied by its refusal to proceed with previously scheduled depositions among other actions) was "an excessive overreaction and purely an effort [to gain] a tactical or strategic advantage that is not warranted by what's brought before the court." There was no evidence of any improperly obtained information or any other indication that the communication created an unfair advantage or otherwise had any continuing effect on the proceedings.[9] On this record, Retirement Housing has failed to demonstrate any abuse of the trial court's discretion in this regard. (*McMillan, supra,* 165 Cal.App.4th at p. 968; *Chronometrics, supra,* 110 Cal.App.3d at p. 607 [if the court's purpose is to punish a transgression which has no substantial continuing effect on the judicial proceedings to occur in the future, neither the court's inherent power to control its proceedings nor Code of Civil Procedure section 128 can be stretched to support the disqualification"].)

---

[9] In addition, although the trial court found no indication the communication would have a continuing effect on the litigation, the court directed the parties to communicate with their adversaries exclusively through their respective counsel in the future unless good cause for direct communication was shown.

Because revocation of *pro hac vice* status is, in effect, a disqualification of the out-of-state attorney (*Sheller, supra,* 158 Cal.App.4th at p. 1716, citation omitted), and an attorney appearing *pro hac vice* submits to the "jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California" (rule 9.40(f)), we conclude the trial court properly applied the "continuing effect" test applicable to a motion to disqualify counsel to Retirement Housing's motion for revocation. (Even if Retirement Housing's alternative higher standard applied, Retirement Housing could not demonstrate prejudicial error because the trial court reached the same conclusion (that Retirement Housing's showing was inadequate) under Retirement Housing's proposed standard.)

On the evidence presented, the trial court did not err in finding no violation of rule 2-100 for the reasons we have explained, and we reject Retirement Housing's argument the trial court erred in refusing to conduct an evidentiary hearing. (*Baugh v. Garl, supra,* 137 Cal.App.4th at p. 744 [no error where trial court refused to hold special hearing to determine veracity regarding alleged violation of rule 2-100 and decision based on what was said and not said in declarations; no evidence of receipt of confidential information or of continuing effect on outcome of litigation or likelihood of prejudice]; and see *Chronometrics, supra,* 110 Cal.App.3d at p. 603 [in consideration of appeal from an order made upon declarations, we are bound by same rule that controls where oral testimony is presented; facts in favor of prevailing party must be taken as true and considered established].) Moreover, even if a violation of rule 2-100 had been established, it was still not enough in the absence of a "continuing effect" on the proceedings. (*Baugh v. Garl, supra,* 137 Cal.App.4th at p. 744 [even if the trial court had believed a violation of rule 2-100 had occurred, it would not compel disqualification which is only justified where misconduct will have a "continuing effect" on judicial proceedings]; *McMillan, supra,* 165 Cal.App.4th at pp. 967-968; and see *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 111, fn. 5, citation omitted ["the

'business' of the court is to dispose of 'litigation' and not to oversee the ethics of those that practice before it unless the behavior 'taints' the trial"].)

DISPOSITION

The order is affirmed. Cain Brothers is entitled to its costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**