

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOHN A. PARKINS, JR.
JUDGE

**NEW CASTLE COUNTY COURTHOUSE
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March 15, 2012

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**Re: Timothy Griffin and Julie Griffin, individually
and as co-administrators of the Estate of
Brett Griffin
v. The Sigma Alpha Mu Fraternity, individually
and t/a Delta Lambda Chapter at the
University of Delaware, et al.
C.A. 09C-04-067 JAP**

Dear Counsel:

Presently before the court is plaintiffs' *nunc pro tunc* motion to admit *pro hac vice* Joshua D. Sheffer, Esquire, a Michigan lawyer. Mr. Sheffer appeared in a deposition prior to being admitted *pro hac vice*. For their part, some of the defendants oppose Plaintiffs' motion and also seek a determination that Mr. Sheffer engaged in the unauthorized practice of law.

This case arises from the death of Brett Griffin, then a freshman at the University of Delaware. Plaintiffs, his parents, allege that their son died as a result of acute alcohol poisoning while attending a fraternity function at the university. They name the national fraternity, the local chapter and seven fraternity members as defendants. All nine defendants have separate representation.

The parties have taken numerous depositions, one in Colorado and the remainder in the northeast. Given the large number of attorneys, scheduling

of depositions has been difficult. On many occasions, at least some of the attorneys have participated by phone.

The instant dispute stems from the deposition of Anthony Lista, a non-party witness, which was noticed by Plaintiffs. The deposition, which was scheduled to be taken in New York, was originally set for December, 2011. At the last moment, Mr. Lista's counsel advised counsel in this case that Mr. Lista, who had previously been served with a New York subpoena, would not appear. Feverish attempts were made to reschedule Lista's deposition, and it was finally set for February 10, 2012, the last day reserved by counsel for non-party depositions.

Apparently Plaintiffs were represented at most, if not all, depositions by Douglas Fierberg, Esquire, an out-of-state attorney who was admitted *pro hac vice* at the outset of this case. Mr. Fierberg, who had earlier been granted court-ordered custody in another state of a minor refugee from the Yemen civil war, was required to appear before the Department of Homeland Security on the day of the Lista deposition. He could therefore not appear in person at the deposition so he designated his associate, Mr. Sheffer, to appear in his place. Mr. Fierberg, however, monitored the deposition remotely on Skype. It is undisputed that Mr. Sheffer conducted questioning on behalf of Plaintiffs.

It is settled law that out of state counsel may not conduct a deposition in a Delaware action unless, and until, counsel is admitted *pro hac vice*.¹ Because he had not yet been admitted *pro hac vice*, Mr. Sheffer was not permitted to question Mr. Lista during his deposition. Plaintiffs seek to justify Mr. Sheffer's participation by arguing he was under the "supervision" of Mr. Fierberg. The court has considerable doubt how Mr. Fierberg was in a position to "supervise" Mr. Sheffer. But even if it is assumed that Mr. Sheffer was being supervised, Plaintiffs' argument still fails. Neither the rules nor the case law of this court carves out an exception to the *pro hac vice* requirement for out-of-state attorneys who are simply supervised by a Delaware lawyer or an attorney who has been admitted *pro hac vice*.

The next question is the remedy to be applied by the court. The court has little doubt that if Mr. Sheffer had filed a timely motion for admission *pro hac vice*, it would have granted that motion. Moreover, Defendants have suffered no demonstrable prejudice from his participation. Although the record is unclear as to when Mr. Fierberg learned of his obligation to appear before the Department of Homeland Security, the court views that appearance, and the reasons therefore, as an extenuating circumstance. Thus the court sees no need for a Draconian remedy such as striking Mr. Sheffer's examination of Mr. Lista. On the other hand, the court cannot overlook what happened here and must impose a sanction which the court hopes will be sufficient to deter similar occurrences by other attorneys in the

¹ *Hoechst Celanese Corp. v. National Union Fire Insurance Co. of Pittsburgh*, 623 A.2d 1099 (Del. 1991); Del. Super. Civil Rule 90.1.

future. It has therefore decided to impose a five hundred dollar sanction on Mr. Fierberg. This sanction shall not be recouped, either directly or indirectly, from the Plaintiffs.

Finally, moving defendants urge the court to determine that Mr. Sheffer engaged in the unauthorized practice of law. That request is not properly addressed to this court. On the off chance counsel for any of the moving defendants wish to pursue this issue, they should file an appropriate complaint with the Office of Disciplinary Counsel.

SO ORDERED.

Very truly yours,

John A. Parkins, Jr.

oc: Prothonotary