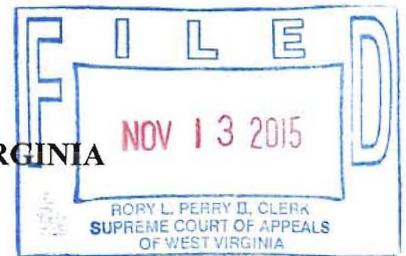


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15- 1100



STATE OF WEST VIRGINIA ex rel.,  
SCOTT H. KAMINSKI,

Petitioner,

v.

Circuit Court of Jackson County  
Civil Action No. 09-C-31

HONORABLE THOMAS C. EVANS, III,  
Judge of the Fifth Judicial Circuit of  
Jackson County, West Virginia;  
A.I.O. HOLDINGS, LLC; and  
THOMAS T. MARTIN,

Respondents.

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PETITION FOR WRIT OF PROHIBITION TO THE CIRCUIT COURT OF JACKSON  
COUNTY, WEST VIRGINIA, CIVIL ACTION NO. 09-C-31, THE HONORABLE  
THOMAS C. EVANS, III, PRESIDING

ORIGINAL PETITION FOR WRIT OF PROHIBITION ON BEHALF OF SCOTT H.  
KAMINSKI

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David K. Hendrickson, Esquire (#1678)(Lead Counsel)

Raj A. Shah, Esquire (#11269)

**HENDRICKSON & LONG, PLLC**

214 Capitol Street

Charleston, West Virginia 25301

(304) 346-5500; (304) 346-5515 (facsimile)

[dhendrickson@handl.com](mailto:dhendrickson@handl.com)

[rshah@handl.com](mailto:rshah@handl.com)

*Counsel for Petitioner Scott H. Kaminski*

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## **QUESTIONS PRESENTED**

Whether the trial court exceeded its authority by Ordering (App. 1-31) an attorney to disclose communications with his client that are subject to the attorney-client privilege?

## **STATEMENT OF THE CASE**

Scott H. Kaminski was retained in the underlying matter to represent defendant A.I.O. Holdings, LLC (AIO). On November 18, 2011, the trial court determined that Kaminski could no longer continue as counsel for AIO and permitted his withdrawal. (App. 32-34). Prior to that, and in part creating the reason Kaminski could no longer continue as counsel for AIO, Plaintiff filed a Motion for Sanctions against Kaminski. (App. 35-210). Kaminski also asserted a conflict of interest requiring his withdrawal when he learned in October of 2011 of an Operating Agreement (App. 214) which provided for mutual indemnification between AIO and 530 West Main Street Properties, LLC, an entity owned by another client of Kaminski, Martin Twist. The mutual indemnification language contained in the Operating Agreement caused the interests of AIO and Twist to be adverse requiring Kaminski's withdrawal. Plaintiff below has sought discovery related to the Motion for Sanctions.

In pursuit of that discovery, Kaminski was served a subpoena (App. 215-217) on or about January 24, 2013. The return date for the subpoena was 14 days from the date of service, or on or about February 6, 2013. However, prior to any production of documents responsive to the subpoena, if any, Kaminski was duty bound to assert attorney-client privilege and did so by filing a Motion to Quash. (App. 218-246). On October 29, 2105, the Court entered an Order denying Kaminski's Motion to Quash and requiring him to disclose his communications with his client. (App. 1-31).

## SUMMARY OF THE ARGUMENT

The Circuit Court exceeded its lawful authority by Ordering Attorney Kaminski to disclose communications between the attorney and his client that are confidential pursuant to the attorney-client privilege. The Circuit Court did so in support of improper discovery to support a Motion for Sanctions designed solely to disguise the malfeasance of Plaintiff's counsel, below. Plaintiff below contends that Kaminski improperly shielded the identity of his client. (App. 35). However, the original lease that is the subject of the matter below was entered into between Plaintiff below and Martin Twist Energy Company, LLC and signed by Lonny Armstrong on behalf of Martin Twist Energy Company, LLC. (App. 247-254). Production reports and checks were sent to Plaintiff below by 530 West Main Street Properties, LLC, which a search of the public records of the Kentucky Secretary of State's Office reveal was a Martin Twist-owned entity. All of that information was available to Plaintiff below prior to the institution of this civil action. Moreover, during discovery in this matter, Kaminski served discovery responses verified by Todd Pilcher on behalf of A.I.O. Holdings, LLC, that included the production reports and checks identifying 530 West Main Street Properties, LLC as a potential party to this matter. (App. 255-309). The simple truth is that Kaminski shielded nothing from Plaintiff below, rather his attorneys simply failed to make Martin Twist Energy Company, LLC; 530 West Main Street Properties, LLC or Martin Twist a party to this action, either in the original Complaint or by way of an Amended Complaint. To this day, they still have not done so.

In October of 2011, Kaminski received for the first time a copy of an Operating Agreement (App. 214) that revealed two things. First, contrary to what Kaminski had been told, 530 West Main Street Properties, LLC had a contract to operate Plaintiff below's wells. Second, that the Operating Agreement contained mutual indemnification language requiring 530 West

Main Street Properties, LLC and A.I.O. Holdings, LLC, to indemnify and defend one another. Based upon the withheld information and the clear conflict of interest, after lengthy consultation with the West Virginia Office of Disciplinary Counsel, Kaminski withdrew as counsel and disavowed all previously made discovery responses. Kaminski did exactly what a lawyer must do when it has become apparent to them that they have been misled and that a conflict exists; he withdrew as counsel. However, he was also required to preserve the attorney-client privilege and that he has done and continues to do.

By this Motion for Sanctions and the Subpoena served in conjunction therewith, Plaintiff below seeks to punish Kaminski for the malfeasance of his own attorneys. In order to accomplish that feat, the Plaintiff below sought to invade the attorney-client privilege and the Circuit Court Ordered that Kaminski violate that sacrosanct privilege. In so doing, the Circuit Court adopted nearly verbatim the Order proposed by Plaintiff below (App. 316-342), which Order exceeds the Circuit Court's authority and is based on law and fact that are simply inaccurate. For instance, the Order indicates that "...Kaminski has not provided the actual identity of the entity or individual on whose behalf he is invoking the attorney-client privilege." (App. 10). This is simply untrue. Kaminski was ordered and provided an affidavit *in camera* in order to protect the attorney-client privilege in which affidavit Kaminski disclosed exactly who retained his services. (App. 343-360).

The Court, in part, based its Order on a finding that A.I.O. Holdings, LLC waived their attorney-client privilege, not only as to communications between it and Kaminski, but also with respect to communications between Kaminski and other entities "posing" as A.I.O., which would presumably include the indemnitor, 530 West Main Street Properties, LLC. (App. 7). However, A.I.O. Holdings, LLC subsequently objected to providing such communications between

Kaminski and other entities as beyond the scope of their agreement with Plaintiff below. (App. 235-244). Plaintiff below has never produced a written waiver of the attorney-client privilege as between Kaminski and any other entity.

The Court further based its Order on the assertion that Martin Twist had been indicted and pled guilty to creating companies to protect his assets. (App 21). However, Twist's criminal case in Federal Court has been sealed and neither the indictment nor his plea agreement is a matter of public record. News accounts indicate he pled guilty to one count of evading employment taxes. Neither the indictment nor plea agreement was ever made part of the record in the Circuit Court of Jackson County. Therefore, for the Circuit Court to have found that the crime-fraud exception to the attorney-client privilege applies exceeds the Court's authority by assuming facts not in evidence much less the public domain.

This civil action was filed in 2009. Kaminski withdrew in 2011. The mere fact that it continues unresolved in 2015 is clear and convincing evidence that Kaminski's conduct is not responsible for any undue delay and that he should not be sanctioned and his confidential communications with his client must not be disclosed. Rather, Plaintiff below should have long ago turned their attention to one or more of the other parties which may have responsibility.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Petitioner asserts that oral argument is necessary as the issue herein involves the application of the attorney-client privilege and therefore is of great importance and the decisional process would be significantly aided by oral argument.

## ARGUMENT

### **I. A Writ of Prohibition Must Issue Because The Trial Court Exceeded Its Authority When It Ordered Scott H. Kaminski to Disclose Communications Subject to Attorney-Client Privilege.**

#### **A. The Communications Ordered to be Disclosed are Subject to Attorney-Client Privilege Pursuant to the Rules of Professional Conduct**

The Circuit Court held that "...[T]he Rules of Professional Conduct do not apply to this case." (App. 27). However, everything that an attorney does in the representation of his client is subject to the Rules of Professional Conduct. In fact, the Preamble to the Rules of Professional Conduct is specific that "[T]he lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure." By Ordering disclosure, the Circuit Court has exceeded its authority and this fundamental principle of our judicial system.

Even after withdrawal, Kaminski is required by Rule 1.6 of the Rules of Professional Conduct to maintain client confidences. The Comments to the rule are instructive in this regard. "After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6."

The lawyer must invoke the privilege when applicable. Comments to Rule 1.6 of the Rules of Professional Conduct. However, the lawyer must also comply with final orders of a court of competent jurisdiction, exercising its lawful authority, requiring the lawyer to provide information about a client. Comments to Rule 1.6 of the Rules of Professional Conduct. Here, the Circuit Court properly reviewed Kaminski's affidavit *in camera* but then exceeded its authority in finding that the communications between Kaminski and his client are not privileged.

**B. A.I.O. Holdings, LLC Cannot Waive the Attorney-Client Privilege as to Communications Between the Attorney and Indemnitor.**

Here, Plaintiff alleges that he has struck an agreement with AIO to waive the attorney-client privilege, not only as to itself but also with respect to "...third-parties acting on AIO's behalf or posing as AIO." (App. 233). Said agreement appears to flow from a settlement agreement reached between Plaintiff and AIO as referenced in AIO's objections set forth in Responses of AIO Holdings, LLC to Plaintiff's Second Set of Interrogatories and Requests for Production of Documents. (App.234-244). In fact, AIO then objected to production of any "...documents that evidence communications between Mr. Kaminski and (1) AIO Holdings, LLC, (2) third parties acting on AIO's behalf; and (3) third parties posing as AIO." (App. 234-244). Accordingly, it is not even apparent that AIO has waived the attorney-client privilege as it may exist between Kaminski and other entities, even if it could.

The law prohibits AIO from waiving the attorney-client privilege as it may pertain to other entities, especially indemnitors. The case of *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 583 S.E.2d 80 (W.Va. 2003) is instructive here as this matter relates not only to attorney-client privilege, but also work product and quasi attorney-client privilege. *Recht* pertained to attempts to discover, among other things, communications between an insurer and counsel for its insured in a third-party bad faith claim. The insurer asserted privileges including attorney-client, work product and quasi attorney-client.

*Recht* recognized three elements for attorney-client privilege to exist. First, both parties must contemplate that an attorney-client relationship does or will exist. Consequently, in order to circumvent the privilege, it stands to reason that both parties must not contemplate such a relationship to exist. Here, Plaintiff below presents no evidence that the third-parties acting on

behalf of AIO did not so contemplate. Therefore, Kaminski cannot make any other assumption in the absence of evidence and is required to maintain the privilege. The indemnitor in this case is situated in exactly the same position as the insurer in *Recht*. Thus, the Circuit Court's Order is in direct contravention of *Recht*. Worse, it turns wily attorneys loose to file Motions for Sanctions and to subpoena communications between insurers/indemnitors and the attorney they have retained to defend their insured/indemnitee. Such perversion of the attorney-client privilege cannot be permitted to occur.

*Recht* goes on to note the second and third elements of the attorney-client privilege being that the advice must be sought from attorney in his capacity as a legal advisor and the communication must be intended to be confidential. *Recht* also notes intent relative to client's waiver of the privilege.

In *Recht*, the trial court ruled that only communications between attorney and insured were protected by the attorney-client privilege. However, the Supreme Court disagreed and issued a writ of prohibition finding that the privilege extends to communications between attorney and client even if shared with an insurer. This matter is similar to the extent that others may have acted on AIO's behalf pursuant to an Operating Agreement containing an indemnity provision. Pursuant to the indemnity provision between AIO and 530 West Main Street Properties, 530 West Main Street Properties was acting much like an insurance carrier does in communicating with counsel for its indemnitee, AIO.

*Recht* also addresses the applicability of the work product doctrine which exists to prevent one attorney from invading the files of another as this subpoena seeks to do. The critical inquiry with respect to work product is whether the document was prepared in anticipation of

litigation. Here, communications between Kaminski and third-parties acting on behalf of AIO, if any, would have been prepared in anticipation of the ongoing litigation between AIO and Plaintiff. Thus, they would fall under the umbrella of work product. The Court distinguishes between fact work product and opinion work product, the latter being entitled to much greater protection. Here, communications between Kaminski and third-parties acting on behalf of AIO, if any, would likely contain opinion work product and thus be entitled to heightened protection. Opinion work product immunity is near absolute. *Recht*, citing *State ex rel. United Hosp. v. Bedell*, 199 W.Va. at 328, 484 S.E.2d at 211, quoting *Republican Party of North Carolina v. Martin*, 136 F.R.D. 421, 429 (E.D.N.C.1991), *aff'd in part, rev'd in part and remanded on other grounds*, 980 F.2d 943 (4<sup>th</sup> Cir. 1992) (quoting *In re Doe*, 662 F.2d 1073, 1080 (4<sup>th</sup> Cir. 1981). The work product protection is not negated simply because documents were reviewed or received by an insurer, per *Recht*. Similarly, here, the work product protection of Kaminski's mental impressions, conclusions, opinions or legal theories, even if shared with a third-party acting on behalf of AIO, if at all, are subject to work product protection.

**C. The Crime/Fraud Exception is Inapplicable.**

Plaintiffs below have made the leap that a crime or fraud has been committed here and have convinced the Circuit Court of the same, without any evidence to support such theory. Rather, Plaintiffs below have simply failed to pursue the proper parties with whom they signed a lease and who produced checks and production reports prior to the institution of this litigation. Plaintiffs below chose to sue AIO knowing that they signed a lease with Martin Twist Energy Company, LLC and that they were receiving checks and production reports from 530 West Main Street Properties, LLC. Plaintiffs below then failed to amend their Complaint when these checks and production reports were produced during discovery. Then, in 2011, it was discovered that

530 West Main Street Properties, LLC, had an Operating Agreement with AIO, yet to date, 530 West Main Properties, LLC has not been made a party. Kaminski withdrew as counsel upon learning of the Operating Agreement. 530 West Main Street Properties, LLC was not engaged in a crime or fraud that has been proven here, rather it was indemnifying AIO as required by the Operating Agreement. 530 West Main Street Properties, LLC simply didn't tell its attorney about the Operating Agreement. Where there is no crime or fraud, there is no crime/fraud exception to the attorney-client privilege.

As stated by Justice Davis in her concurring opinion in *Recht*, “[a] client who consults an attorney for advice that will serve him in the commission of a [crime or] fraud will have no help from the law.” *Recht* at 95, citing *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933). Kaminski was consulted to defend what amounts to a breach of contract claim under an indemnity agreement. Plaintiffs below assume nefarious conduct due to the involvement of a convicted felon, but in order for the exception to apply, Plaintiffs below must prove there was a crime or fraud here. They have not.

Moreover, now that the indemnitor is known, less intrusive means exist for Plaintiffs below to pursue any claim they may have against indemnitor than seeking to invade the sacrosanct attorney-client privilege. Plaintiffs below can sue the indemnitor and seek discovery from it without invading the attorney-client privilege.

The party seeking to invoke the crime/fraud exception must prove by non-privileged evidence a factual basis to support a good faith belief that the exception applies. *State ex. rel. Allstate Insurance Company v. Madden*, 601 S.E.2d 25 (W.Va. 2004) citing *Recht* and *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed. 469 (1989). Here, there has been

absolutely no such showing by any evidence other than the frustration of Plaintiffs below with their inability to identify a potential party despite the evidence being in their hands.

Rule 1.2(d) of the Rules of Professional Conduct prohibits a lawyer from assisting a client in conduct that the lawyer knows is criminal or fraudulent. While a lawyer must not assist a client in conduct that is fraudulent or criminal, the lawyer may have been innocently involved in past conduct that may have been criminal or fraudulent. “In such a situation, the lawyer has not violated Rule 1.2(d) because to ‘counsel or assist’ criminal or fraudulent conduct requires knowing that the conduct is of that character.” Comments to Rule 1.6 of the Rules of Professional Conduct. When it is alleged, as here, that the lawyer is complicit in the client’s conduct, then the lawyer’s right to respond arises. Comments to Rule 1.6 of the Rules of Professional Conduct.

A lawyer *may* reveal confidential information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of a client.  
(emphasis added).

The rule makes disclosures under these circumstances optional rather than mandatory by use of the word “may” rather than “shall.” With respect to disputes concerning the lawyer’s conduct such as this, the comments caution that “...the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.” The comments further state that

“[T]he lawyer’s right to respond arises when an assertion of such complicity is made.” Here, while the motion is only made as to Kaminski, the complicity of his conduct with one or more of his clients is asserted in the body of the motion, if not overtly, then certainly impliedly.

Here, exception number one to Rule 1.6 does not apply since the alleged crime or fraud had already been committed. Exception two does not apply because this is not a dispute between a lawyer and his client, but rather a dispute between a third-party and opposing counsel. Further, to the extent the second exception might apply, Kaminski only *may* reveal confidential communications and only then, to the extent necessary to exonerate himself, rather than to reveal all communications as required by the Circuit Court’s Order. Moreover, no criminal charge or civil claim has been made against Kaminski. The better practice here would have been for the Circuit Court, having reviewed Kaminski’s Affidavit, to deny the Motion for Sanctions. Then, Plaintiffs below could have made any claim they might deem appropriate against 530 West Main Street Properties, LLC or any other person or entity, and then seek Kaminski’s communications, if any, with those entities or their representatives. That way, the party possessing the privilege and alleged to have committed the crime or fraud upon which the exception to the attorney-client privilege is claimed, would be a party to the proceedings below, presumably represented by counsel, and therefore, able to invoke the privilege for itself, or waive it if deemed appropriate. Then, Kaminski could be compelled to produce some or all of his communications without having to simultaneously defend himself against a Motion for Sanctions and invoke the attorney-client privilege for a person or entity who is not even a party to this action nor represented by counsel herein.

**D. The West Virginia Rules of Civil Procedure Do Not Permit Discovery Relative to a Rule 11 Motion.**

Rule 26(b)(1) of the West Virginia Rules of Civil Procedure dictates what matters are subject to discovery. Specifically, “[P]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the **claim or defense** of the party seeking discovery or to the **claim or defense** of any **other party...**” (emphasis added). Kaminski is not a party to this matter. Therefore, he has neither a claim nor defense with respect to the matters set forth in the Complaint or Answer herein. Accordingly, discovery by way of a subpoena served pursuant to WVRCP 45 does not fall within the purview of permissible discovery as contemplated by WVRCP 26(B)(1). Therefore, the Circuit Court has exceeded its authority in Ordering Kaminski to produce his communications pursuant to the subpoena.

Plaintiffs’ Motion for Sanctions is filed pursuant to WVRCP 11. Kaminski’s Motion to Quash raised the issue as to whether discovery under WVRCP 26 is even permissible on a Rule 11 motion. Very little case law is available regarding WVRCP 11 and especially the availability of discovery. However, FRCP 11 is virtually identical to its West Virginia counterpart and there is plenty of case law pertaining to the issue of whether discovery is available relative to a Motion for Sanctions under FRCP 11. The overwhelming answer is “No” and said authority, though not mandatory upon this Court, is certainly highly persuasive given the identical nature of the Rules involved, especially as to their substance.

“The advisory committee’s notes to Rule 11 ‘expressly caution against getting bogged down in ‘satellite litigation’ in administering the new rule.’” *Rodgers v. Lincoln Towing Service, Inc.* 596 F. Supp. 13, 28 (N.D.Ill. 1984). The advisory committee’s notes further urged courts to

“limit the scope of sanction proceedings to the record.” FRCP 11 advisory committee notes, cited by *Rodgers*.

In another federal decision, the party moving for sanctions had to admit that it could find no cases allowing discovery in connection with a Rule 11 motion. *Borowski v. DePuy, Inc.*, 876 F.2d 1339 (7<sup>th</sup> Cir. 1989). A party is not entitled to discovery on the issue of attorney’s fees. *Indianapolis Colts v. Mayor and City Council of Baltimore*, 775 F.2d 177 (7<sup>th</sup> Cir. 1985). Allowing discovery on a Motion for Sanctions has been deemed to unduly prolong already protracted litigation. Nothing could be further from the truth in this instance.

Sanctions litigation should not turn into satellite litigation. The D.C. Circuit has stated:

“[T]he court must to the extent possible *limit the scope of sanction proceedings to the record*,” and allow discovery “*only in extraordinary circumstances*”... [as] these practices help to “assure that the efficiencies achieved through more effective operation of the pleadings regimen will not be offset by the cost of satellite litigation over the imposition of sanctions.

*McLaughlin v. Bradlee*, 803 F.2d 1197 (D.C.Cir. 1986) quoting Advisory Committee Note (1983) to FRCP 11, cited by *Robertson v. Cartinhour*, 883 F.Supp.2d 121 (D.C.Cir. 2012) and *Holloway v. Holloway Sportswear, Inc.*, 971 N.E.2d 1001 (Ohio Ct. App. 2012) (emphasis added). Federal courts have adopted this attitude towards discovery in Rule 11 matters almost without exception. *Bringing and Resisting Rule 11 Sanctions*, 47 Am. Jur. Trials 521 (1993).

Courts have gone on to note that “...discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.” *McIntyre’s Mini Computer Sales Group, Inc. v. Creative Synergy Corp.*, 664 F.Supp. 589 (USDC EDMI 1986) citing the Advisory Committee Notes. Here, Plaintiffs below have leapt into discovery nearly two years after filing their Motion for Sanctions and over four years since the filing of the underlying action without

so much as even asking the Circuit Court for leave to conduct the same. As such, Plaintiffs below have not asserted any “extraordinary circumstances” that would warrant discovery, and the Circuit Court has exceeded its authority in so Ordering.

In short, courts have not only discouraged, but largely prohibited discovery relative to Rule 11 motions as requested by Plaintiffs below here. The underlying litigation in this matter has gone on for over six years without final resolution. The satellite matter as to sanctions has existed for over four years, during which time Plaintiffs below have been unable to conclude the underlying matter. Sanctions motions should be decided upon the record rather than provide opportunity for a witch hunt into an attorney’s files and communications. The slippery slope is obvious; in any case that a party is frustrated in resolving, they simply move for sanctions against opposing counsel and seek discovery into counsel’s communications with a client in litigation that is ongoing. Here, Plaintiffs below continue to maintain an unresolved claim against AIO. Further, Plaintiffs below may have as yet unfiled claims against other parties involved in the Operating Agreement. Permitting the requested, or any, discovery will chill lawyer’s abilities to communicate with their clients for fear that opposing counsel will simply file a motion for sanctions requiring that attorney to disclose confidential information, thus dooming the adversarial process which has worked more successfully than any other judicial system known to human history. Indeed, Plaintiffs below have already violated Rule 11’s ban on discovery by, without seeking leave of the Court, propounding Requests for Production of Documents to AIO designed solely to discover communications between AIO and Kaminski in furtherance of Plaintiffs’ Motion for Sanctions as opposed to any of the issues in the underlying matter, which was thought to have been settled at the time of said discovery requests. It is

noteworthy that said discovery from Plaintiffs below to AIO was filed after the Motion for Sanctions was filed but was not served on Kaminski or his counsel.

In the unlikely event that this Court deems discovery appropriate in this matter, then Kaminski, in order to fully assert his defense, reserves the right to discovery of his own, including, but not limited to, discovery depositions of Plaintiffs below as well as their counsel, and any and all other individuals with knowledge of the matter herein. Obviously, such discovery will be expensive and time consuming to all concerned and cause this satellite litigation to remain on the Court's docket for many years to come. Rule 11 does not contemplate such discovery, but if Plaintiffs below are permitted discovery, then due process requires that Kaminski be permitted fair opportunity to defend himself.

**E. A Privilege Log is not Required Where All Communications are Claimed as Privileged.**

The Circuit Court concluded that a privilege log was required of Kaminski and that the failure to produce a privilege log acted to waive the attorney-client privilege. This finding is not based in law and thus the Circuit Court has exceeded its authority.

First, the remedy for an attorney failing to provide a privilege log is not to find a waiver of the privilege that belongs to the client, but rather to order the attorney to provide a privilege log. The Circuit Court has never made such order here. Moreover, the remedy ordered by the Circuit Court is unnecessarily harsh to a client that has never been made a party to this action nor given the opportunity to assert the attorney-client privilege in its own right.

The proper procedure is that any party asserting the privilege to **any specific documents** requested shall file a privilege log. *State ex. rel. Nationwide Insurance Company v. Kaufman*, 658 S.E.2d 728 (W.Va. 2008). Here, Kaminski is not invoking the attorney-client privilege as to

only specific documents, but rather as to all communications between the attorney and his client. There has been no partial disclosure made (other than to the Circuit Court *in camera*) by Kaminski of any of his communications as he is duty bound to protect the privilege despite having withdrawn as counsel.

This is not a case where the Circuit Court was asked to decide whether one communication versus another is privileged. The subpoena sought all communications and Kaminski is duty bound to protect all communications. Thus, a privilege log would have been of no benefit and was not required.

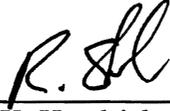
### **CONCLUSION**

The ruling of the Circuit Court exceeds its authority and vitiates the attorney-client privilege. Accordingly, Prohibition is an appropriate and necessary remedy to maintain that privilege which is sacrosanct. Without it, our judicial system crumbles. Orders compelling disclosure of attorney-client communications should be subject to the strictest of scrutiny and only upheld in the most extreme circumstance. Such circumstances are not present here. Based upon these reasons and those set forth more fully above, this Court should grant the Petition for Writ of Prohibition.

**Respectfully Submitted,**

**SCOTT H. KAMINSKI**

**By Counsel.**



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David K. Hendrickson, Esquire (#1678)

Raj A. Shah, Esquire (#11269)

**HENDRICKSON & LONG, PLLC**

214 Capitol Street

Charleston, West Virginia 25301

(304) 346-5500; (304) 346-5515 (facsimile)

[dhendrickson@handl.com](mailto:dhendrickson@handl.com)

[rshah@handl.com](mailto:rshah@handl.com)

***Counsel for Petitioner Scott H. Kaminski***

**VERIFICATION**

**STATE OF WEST VIRGINIA;**

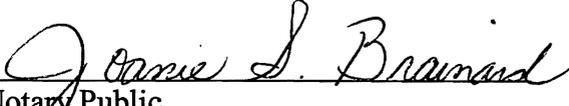
**COUNTY OF KANAWHA, to-wit:**

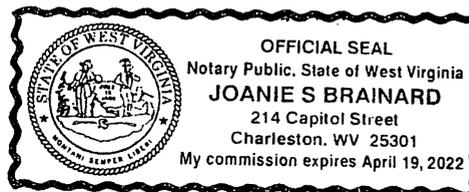
I, Raj. A. Shah, after first being duly sworn upon oath, state that I have read the foregoing **“PETITION FOR WRIT OF PROHIBITION TO THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA, CIVIL ACTION NO. 09-C-31, THE HONORABLE THOMAS C. EVANS, III, PRESIDING”**, along with the attached **“APPENDIX – CONTAINS CONFIDENTIAL MATERIALS”**, and that the facts and allegations therein contained are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

  
\_\_\_\_\_  
Raj A. Shah, Esquire (#11269)

Taken, sworn to and subscribed before me, a Notary Public in and for Fayette County, West Virginia, this 13th day of November 2015.

My commission expires: April 19, 2022.

  
\_\_\_\_\_  
Notary Public



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 15-**

**STATE OF WEST VIRGINIA ex rel.,  
SCOTT H. KAMINSKI,**

**Petitioner,**

**v.**

**Circuit Court of Jackson County  
Civil Action No. 09-C-31**

**HONORABLE THOMAS C. EVANS, III,  
Judge of the Fifth Judicial Circuit of  
Jackson County, West Virginia;  
A.I.O. HOLDINGS, LLC; and  
THOMAS T. MARTIN,**

**Respondents.**

**CERTIFICATE OF SERVICE**

I, Raj A. Shah, counsel for Petitioner Scott H. Kaminski, do hereby certify that on the **13<sup>th</sup> day of November, 2015**, I have served true and exact copies of the foregoing **“PETITION FOR WRIT OF PROHIBITION TO THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA, CIVIL ACTION NO. 09-C-31, THE HONORABLE THOMAS C. EVANS, III, PRESIDING”** and **“APPENDIX”** thereto upon the parties and counsel of record listed below, by placing the same in the United States mail, postage prepaid, addressed as follows:

Nicholas S. Preservati, Esquire  
**Preservati Law Offices, PLLC**  
Post Office Box 1431  
Charleston, WV 25325

The Honorable Thomas C. Evans, III  
Fifth Judicial Circuit  
P.O. Box 800  
Ripley, WV 25271  
***Respondent***

Robert L. Greer, Esquire  
D. Luke Thomas, Esquire  
**Greer Law Offices, PLLC**  
P.O. Box 4338  
Clarksburg, WV 26302-4338



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David K. Hendrickson, Esquire (#1678)  
Raj A. Shah, Esquire (#11269)  
**HENDRICKSON & LONG, PLLC**  
214 Capitol Street  
Charleston, West Virginia 25301  
(304) 346-5500; (304) 346-5515 (facsimile)  
[dhendrickson@handl.com](mailto:dhendrickson@handl.com)  
[rshah@handl.com](mailto:rshah@handl.com)  
*Counsel for Petitioner Scott H. Kaminski*