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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN M. BOURDELAIS and
JMB COMMERCIAL PROPERTIES, LLC,

Plaintiffs,

v.

Civil Action No.: 15-C-431
Judge Gregory L. Howard

RICHARD J. BOLEN, CINDY D. McCARTY,
T. MATTHEW LOCKHART, JOHN H. MAHANEY,
DANIEL A. EARL, HUDDLESTON BOLEN, LLP; and
DINSMORE & SHOHL, LLP,

Defendants.

Consolidated with:

JOHN M. BOURDELAIS and
JMB COMMERCIAL PROPERTIES, LLC,

Plaintiffs,

v.

Civil Action No.: 17-C-303
Judge Gregory L. Howard

RICHARD J. BOLEN, CINDY D. McCARTY,
T. MATTHEW LOCKHART, JOHN H. MAHANEY,
DANIEL A. EARL, CHRISTOPHER J. PLYBON,
HUDDLESTON BOLEN, LLP; BRIAN S. SULLIVAN, and
DINSMORE & SHOHL, LLP,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CAUSES OF ACTION RELATING TO PRODUCTION OF THE "CLIENT FILE"

On February 15, 2019, Plaintiffs, John M. Bourdelais and JMB Commercial Properties, LLC, and Defendants, Richard J. Bolen, Cindy D. McCarty, T. Matthew Lockhart, John H. Mahaney, Daniel A. Earl, Christopher J. Plybon, Huddleston Bolen, LLP, Brian S. Sullivan, and

Dinsmore & Shohl, LLP, appeared by counsel[1] before the Court for a hearing regarding the Defendants' Motion for Summary Judgment on the Plaintiffs' Causes of Action Relating to Production of the "Client File." Prior to the hearing the Court reviewed Defendants' motion and memorandum of law in support of the motion, Plaintiffs' memorandum of law in response to the motion, and Defendants' memorandum of law in reply to Plaintiffs' response. At the hearing, the Court entertained oral argument from each party regarding their respective positions.[2]

Having carefully considered the Defendants' motion, Plaintiffs' response, Defendants' reply, the arguments of counsel, and being otherwise sufficiently advised, the Court **GRANTS** Defendants' Motion for Summary Judgment on Plaintiffs' Causes of Action Relating to Production of the "Client File." In reaching this determination, the Court makes the following findings of fact and conclusions of law:

The Underlying JMB/Valicor Litigation

1. All the claims in these consolidated cases have their genesis in a federal court action.

2. On November 18, 2010, Plaintiff herein John "Jack" M. Bourdelais, through his holding company, Plaintiff herein JMB Commercial Properties, LLC ("JMB"), executed a Real Estate Purchase Agreement to purchase the Huntington Industrial Center from the Huntington

[1] In addition, Plaintiff John M. Bourdelais and Defendants Daniel A. Earl and T. Matthew Lockhart appeared in person.

[2] During the hearing, counsel for Defendants provided the Court with a printout of a PowerPoint presentation that summarized the Defendants' arguments. While the PowerPoint was marked as an Exhibit and made a part of the record, it was not intended to constitute evidence and was not considered by this Court as evidence under Rule 56 of the West Virginia Rules of Civil Procedure.

Municipal Development Authority ("HMDA") for $3,510,000.00. Plaintiffs were represented by Dan Earl of Huddleston Bolen, LLP ("Huddleston"), and assisted by Chris Plybon of Huddleston.

3. Also in 2010, a company then known as United Waste Water Services ("United"), which eventually became known as Valicor Environmental Services, LLC ("Valicor"), was searching for property to lease in Huntington. United was interested in leasing property adjacent to the Huntington Industrial Center. This adjacent property was owned by Huntington Area Development Counsel ("HADCO"). Chris Plybon drafted a lease agreement for HADCO. United signed the agreement, but HADCO did not sign, and the purchase agreement fell through.

4. Thereafter, United communicated with HMDA about leasing the property JMB was purchasing. HMDA used the lease agreement Plybon had prepared for United and HADCO as the template for the lease between United and HMDA. Plybon himself made the changes to unconsummated lease agreement to accommodate the new arrangement between United and HMDA.

5. HMDA advised Bourdelais that, should HMDA and United enter into a lease agreement, the lease would be assigned to JMB upon purchase of the property. Prior its execution, the lease agreement was shared with Bourdelais by email for his approval. On February 1, 2011, HMDA and United executed the lease agreement.

6. On February 16, 2011, JMB purchased the property from HMDA, and the lease between HMDA and United was assigned to JMB. The assignment of the lease was drafted by Earl.

7. Thereafter, issues arose as to whether the property purchased by JMB and leased by United was suitable for United's needs. JMB and United also disputed their respective responsibilities under the lease. United refused to make rent payments.

8. On August 11, 2011, Plaintiffs retained Defendants herein, including Earl and Plybon, to file Civil Action No. 3:11-CB-00543 against Valicor (formerly United) in the United States District Court for the Southern District of West Virginia. This case was styled *JMB Commercial Properties, LLC v. Valicor Environmental Services, LLC.* Valicor filed a counterclaim.

9. During discovery in the JMB/Valicor litigation, Plaintiffs served a subpoena on HADCO seeking documents relating to the unconsummated lease between United and HADCO, which had been prepared by Plybon. HADCO hired counsel unaffiliated with Defendants to respond to the subpoena.

10. Eventually, the parties to the JMB/Valicor litigation reached a settlement agreement, whereby Valicor's monthly rent was reduced for a specified period of time. The case was dismissed on May 13, 2013.

11. Plaintiffs have asserted that they paid Defendants over $200,000.00 for services rendered in the JMB/Valicor litigation.

Request for Production of the Client File and Commencement of Civil Action No. 15-C-431

12. On April 10, 2015, Roy D. Baker, Jr., in his capacity as retained counsel for Plaintiffs, spoke with Renée N. Frymyer of the Laywer Disciplinary Counsel, concerning attorney work product and client files. This conversation was memorialize by two letters, both dated April 10, 2015.

13. In the first letter from Baker to Frymyer, Baker wrote:

> I have been retained to assist a gentleman who wishes to secure his complete file from a law firm which previously represented him in a litigation-related matter. . .

> . . . [M]y client wishes to secure his complete file, including all emails, text messages, and other forms of communications that his previous attorneys had with other attorneys or individuals within their law firm, as well as with attorneys or other individuals outside of their law firm.
>
> Based upon our telephone conversation this afternoon, it is my understanding that it is the opinion of the Office of Disciplinary Counsel that the aforementioned matters fall within the definition of "work product" under L.E.I. 92-02, and that the attorneys previously representing my client must provide him with a complete copy of all emails, text messages, and other forms of communications that they had with other attorneys or individuals within their law firm, as well as with attorneys or other individuals outside of their law firm. Your efforts to confirm my understanding in writing would be appreciated.

14. In the second letter addressed to Baker from Frymyer, Frymyer wrote:

> You have accurately memorized the advice I provided. I want to clarify that the "work product" that the client is entitled to is generally considered to be that which has been included in the client's file. The content of a client's file will vary, of course, depending upon the circumstances of the case and the nature of the relationship. It is generally understood today, however, that client "documents" do include electronic data and e-mail communications as well as papers and other tangible material.
>
> Pursuant to Rule 2.15 of the Rules of Lawyer Disciplinary Procedure, an informal advisory opinion is not binding on the Hearing Panel of the Lawyer Disciplinary Board or the Supreme Court, but shall be admissible in any subsequent disciplinary proceeding involving the requesting lawyer. An informal advisory opinion shall not be accorded the same weight in any subsequent disciplinary proceeding as a formal advisory opinion rendered pursuant to Rule 2.16.

15. On April 20, 2015, Baker, directed certified mail to five of the defendant attorneys—Cindy D. McCarty, J.H. Mahaney, T. Matthew Lockhart, Daniel A. Earl, and Richard J. Bolen—requesting the following:

> Please provide me with the complete originals of your respective files, as well as the complete original of the file(s) maintained by Huddleston Bolen, LLP, now known as Dinsmore,[3] including, but not limited to, all papers, documents, work product, other tangible materials, and electronic data, emails, text messages, and other forms of communications that you had with attorneys or other individuals within your firm that relate in any way whatsoever to Mr. Bourdelais or JMB Commercial Properties, LLC, as well as electronic data, emails, text messages, and other forms of communications that you had with attorneys or other individuals

[3] The law firms of Huddleston Bolen, LLP, and Dinsmore & Shohl, LLP, merged on February 1, 2015, and now operate as Dinsmore & Shohl, LLP.

> outside of your firm that relate in any way whatsoever to Mr. Bourdelais or JMB Commercial Properties, LLC.

(footnote added). The letter also requested, among other things, Huddleston's written policies concerning conflicts of interest.

16. By letter dated May 20, 2015, Brian S. Sullivan, General Counsel to Dinsmore & Shohl, LLP ("Dinsmore"), responded on behalf of the five defendant attorneys and the merged law firms. Sullivan wrote, "Until we understand from you what this is all about, we will not provide some of the information you seek." He continued:

> We will, however, provide along with this letter, 12 twelve boxes of documents constituting the file of Mr. Bourdelais and JMB Commercial Properties, LLC for the matter captioned *JMB Commercial Properties, LLC v. Valicor Environmental Services, LLC* which you reference in your correspondence. . . . As to the request for electronic data, including emails, given the transition from [Huddleston] to [Dinsmore], that request cannot be fulfilled as easily as you might expect. We are in the process of reviewing the electronic system so that we capture the emails and other electronic data involving [Plaintiffs] in the case you identified. Those will be provided to you separately and you I [sic] can arrange whether you want those put on a disk or provided to you in a hard copy.

17. By letter dated June 3, 2015, Bourdelais advised Defendants that "Mr. Baker has my full and complete authority to request all of the information of you as my former counsel in his correspondence dated April 20, 2015 . . . ."

18. On June 17, 2015, Plaintiffs filed a Complaint, commencing Civil Action No. 15-C-431.[4] Plaintiffs filed an Amended Complaint on June 23, 2015. Plaintiffs filed a Second Amended Complaint on September 13, 2018. The Second Amended Complaint set forth six claims: (I) breach of contract, (II) breach of fiduciary duty, (III) civil conspiracy, (IV) legal malpractice, (V) fraud, and (VI) fraudulent misrepresentation. Each of these claims is premised on

[4] The Honorable Jane F. Hustead presided over Civil Action No. 15-C-431 until her retirement in December 2016.

Defendants'[5] "refusal . . . to provide the full and complete original of [Plaintiffs'] files to Plaintiffs as mandated by the West Virginia Rules of Professional Conduct." Through the action, Plaintiffs seek production of the "full and complete original of their file," along with money damages, attorney fees, and sanctions.

19. Later in the litigation, on September 23, 2015, Plaintiffs filed the Affidavit of John M. Bourdelais explaining Plaintiffs' sought the client file to "determine whether [their] former counsel protected [their] legal and fiduciary rights [in the JMB/Valicor litigation], as they were required to do pursuant to the West Virginia Rules of Professional Conduct."

20. On June 29, 2015, Sullivan sent a second letter to Baker, detailing the process by which Defendants had attempted to recover the emails that are part of Plaintiffs' client file:

> I also write to follow up and explain to you the process that we have gone through to retrieve and provide you the email communications that are part of the file for JMB Commercial Properties, LLC. After Huddleston Bolen LLP merged into Dinsmore & Shohl LLP, and upon receipt of your April 20, 2015 letter, we preserved the entire email systems that were then available for the lawyers you identified. We first exported their email into containers called PST files,[6] one PST file per lawyer identified, which we intake into our search system. None of these PST files would load due to file errors so we had to run a Microsoft repair utility called ScanPST on each of them. It takes days to run the "Scan PST" software through the various PST files when there is a massive amount of email in them, as there was here. These PST files averaged 27gb each, whereas the industry norm is an average of 1.3gb. It should be noted that we ran ScanPST on multiple machines in order [to] finish the file repair more quickly.
>
> Unfortunately, Scan PST did not fix all the PST files so we had to use different versions of Outlook to try to capture all of the email communications. Without unduly complicating matters, this involved using multiple hard drives and different versions of Outlook. Without disclosing the identity or the information of any particular emails, we did have to reach out to LexisNexis, the vendor who makes our software for indexing and searching, to seek assistance in work with the problem PST files. We then ultimately had to use another piece of repair software

[5] Christopher J. Plybon and Brian S. Sullivan were not named as defendants in Civil Action No. 15-C-431.

[6] A PST (Personal Storage Table) file format is used to store copies of messages, calendar events and other items within programs using Microsoft Exchange, including Microsoft Outlook.

from the vendor Kernel. The first attempt to export the emails failed because the PST file was too large. This required us to export smaller pieces to prevent the error message. Unfortunately, one of the outcomes of this process was the intake of overlapping PST files which required us to re-examine them, remove the duplicates, and then make them available for the next step.

All of this was occurring when I wrote to you on May 15 to advise you of the status of our efforts.

Once the PST files were loaded into our search system, we identified those documents without text and converted them to Tiff images. From there, we ran another process called OCR (Optical Character Recognition) to generate text from the images. The Tiff and OCR processes can each be run in parallel (many machines working at one time) but not with each other. This essentially means we had multiple machines running the Tiff process until it was completed, and then many machines running the OCR process. This entire process yielded more than 1.7 million documents which then had to be indexed and searched. This occurred at the end of May and the search parameters yielded thousands of documents that were related to JMB Commercial Properties, LLC. We then reviewed the emails generated in the search to locate documents responsive to your request, yet eliminate documents that were not part of the file. All of this has been done at our cost and expense.

All of this culminated in the generation of a disk which are the emails we were able to retrieve, identify and preserve for JMB Commercial Properties, LLC. I enclose this for you as part of the file we committed to produce to you in my letter of May 20, 2015.

(footnote added).

21. In addition to searching the email systems of the five Defendants named in Civil Action No. 15-C-431, the email systems of a paralegal involved in the JMB/Valicor litigation[7] and of Christopher J. Plybon were electronically searched.

22. Search parameters were established to retrieve all emails related to the JMB/Valicor litigation. The search terms used were JMB, Valicor, UWW, United Waste, Stachler, Shawn w/3 Young, Bourdelais, HADCO, HMDA, Caprewest, jackbour1@comcast.net, TStachler@pinalesstachler.com, SYoung@pinalesstachler.com, smylaw@yahoo.com, tstachler@cinci.rr.com, tlstachler@strasstroy.com, smyoung@strausstroy.com,

[7] Jill Francisco is the paralegal whose files were searched. She had been assigned to the JMB/Valicor litigation.

jbarker@level1fasteners.com, and MMStephenson@strausstroy.com.

23. All electronic files of the paralegal and six attorneys with dates from January 2010 through December 2013 were searched using these terms. This four-year period encompassed the span of time running from nearly six months before Bourdelais first made an offer to purchase the Huntington Industrial Center from HMDA on July 14, 2010, through the conclusion of the JMB/Valicor litigation in May 2013, when the settlement was reached.

24. As noted in Sullivan's June 29, 2015 letter, the universe of email files searched contained 1.7 million files. This universe of emails comprised *every* email stored in the email systems of the six attorneys and one paralegal whose email systems were searched, including not only the email communications relevant to the JMB/Valicor litigation, but also all emails concerning every other client matter for any client handled by the attorneys involved and personal, non-legal email communications to family and friends.[8]

[8] During discovery, on May 6, 2016, Plaintiffs served on Defendants Plaintiffs' Request for Inspection and Copying on Behalf of John M. Bourdelais and JMB Commercial Properties, LLC. In this document, Plaintiffs requested Defendants produce for inspection the "more than 1.7 million documents which then had to be indexed and searched" as referred to on page 2 of Brian S. Sullivan's correspondence to Roy D. Baker, Jr., Esquire, dated June 29, 2015 . . . ." On August 31, 2016, Defendants filed *Defendants' Motion for Protection Order regarding Plaintiffs' Request for Inspection and Copying*. Defendants' motion was addressed during the hearing on February 15, 2019 and granted in a separate Order. In their January 7, 2019 Motion for Summary Judgment on the Issue of the "Client File," Defendants succinctly explain why such a request was unreasonable:

> Obviously, to permit such access would violate the attorney client privilege with regard to other clients of Huddleston Bolen and would improperly disclose attorney work product performed for other clients by the attorneys involved. By analogy, it would be as if in the pre-computer days, a client requested a copy of his client file from an attorney, a search would be made in the attorney's file room for the file, the file was located and given to the client, and the client then demanded to search every single file folder in the file room himself to make sure nothing had been misfiled or left out of the file. This type of search would never be allowed because it would give the client unlimited access to all other client files of the attorney in

25. The search of the universe of emails resulted in 14,191 "hits", meaning that 14,191 emails, some with attachments and some without attachments, contained one or more of the search terms used to identify emails relating to the JMB/Valicor litigation. These 14,191 email files were then personally reviewed by Defendant McCarty to identify which files related to the JMB/Valicor litigation.

26. Of the 14,191 files, Defendant McCarty found 3,003 that were related in some manner to the JMB/Valicor litigation.[9] Of those 3,003 files, 1,278 were internal email correspondence by and between the attorneys and staff of Huddleston. These internal email communications were originally withheld from production to the plaintiffs based on the defendants' interpretation of existing law on the subject of what does and does not constitute a client's file.

27. In the June 29, 2015 letter, Sullivan explained why certain emails and documents had not been produced:

> One of the things I did not intend to confuse you with was your apparent misunderstanding that we refused to produce the file. That is not the case. We have produced the file of JMB Commercial Properties, LLC with both the hard copy and now the electronic documents provided here. There are other emails constituting internal communications among and between staff and lawyers in the firm. These documents are not part of the file and have not been produced. As to the hard copies produced to you some time ago, I was not aware of any dissatisfaction of that production until I read your complaint that seemingly indicates that the hard copy is nothing more than expert reports, pleadings and other matters. I am not sure what you expected, but that is what is normally part of any client's file.
>
> There are some other issues which I did not raise in my May 20 correspondence which I continue to raise here. As you know, you asked for information relating to document retention policies, conflict of interest policies and

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violation of the attorney client privilege and would disclose attorney work product performed by the attorney for other clients.

[9] Irrelevant hits occurred for various reasons. For instance, Huddleston employed a secretary whose initials were "JMB," and files associated with the secretary that were not associated with Plaintiffs' client file were part of the 14,191 files produced.

other matters. I indicated then as I reiterate here before we would produce that information to you we would want to know some basis for JMB Commercial Properties, LLC's request.

28. Of the 3,003 files that were related in some manner to the JMB/Valicor litigation, 1,725 were determined to be part of the client file. Electronic copies of these 1,725 files were provided to Plaintiffs in PDF format[10] with Sullivan's June 29, 2015 letter.

29. Printed copies of the 1,278 internal firm email communications originally withheld from production were produced, over objection by the Defendants, to Plaintiffs' counsel on April 22, 2016. Copies of the email attachments, along with another copy of the email communications to which they were attached, were provided to Plaintiffs' counsel on June 6, 2016. These productions were made subject to the provisions of a Protective Order entered by the Court.

30. Since the request for the client file was first made, Plaintiffs have received 50,912 pages of documents from the Defendants regarding the JMB/Valicor litigation, either in the form of paper copies or on disk in electronic PDF format.

31. Since discovery in this case commenced, Plaintiffs have sought to obtain what they have argued constitutes their client file through various discovery requests and motions to compel. The Court notes that recovery of the client file is part of the relief sought through the Second Amended Complaint.

Commencement of Civil Action No. 17-C-303 and the Alleged Conflict of Interest

32. On May 17, 2017, Plaintiffs commenced Civil Action No. 17-C-303. Plaintiffs filed

[10] "'Portable Document Format (PDF) is a file format used to present documents in a manner independent of application software, hardware, and operating systems. Each PDF file encapsulates a complete description of a fixed-layout flat document, including the text, fonts, graphics, and other information needed to display it." *Ysasi v. Brown*, CIV 13-0183 JB/CG, 2015 WL 403930 (D.N.M January 7, 2015) (citation omitted).

an Amended Complaint in this second action on September 14, 2017. The Amended Complaint named as defendants the same Defendants named in Civil Action No. 15-C-431 and two additional defendants: Christopher J. Plybon and Brian S. Sullivan.

33. In Civil Action No. 17-C-303, Plaintiffs have asserted claims for (I) legal malpractice; (II) breach of contract; (III) breach of fiduciary duty; (IV) unjust enrichment; (V) fraud, concealment and misrepresentation; and (VI) civil conspiracy.

34. The Amended Complaint in Civil Action 17-C-303, Plaintiffs allege, "Throughout the course of Discovery in [Civil Action No. 15-C-431], the Defendants therein and their counsel have vigorously resisted and refused to provide the Plaintiffs with the full and complete original of their Client File by contending that certain 'internal emails' were not part of the Plaintiffs' Client File . . . ." Plaintiffs further state:

> Following his review of the emails that were finally turned over to him by the Defendants and their counsel, Mr. Bourdelais learned for the first time, upon information and belief that on May 17, 2012, Daniel A. Earl, Esquire, Richard J. Bolen, Esquire, T. Matthew Lockhart, Esquire, John H. Mahaney, Esquire, Christopher J. Plybon, Esquire, and possibly others exchanged email communications and entered into an agreement whereby they would intentionally and fraudulently conceal and withhold from Mr. Bourdelais certain documents that were being subpoenaed on his behalf from another client represented by [Huddleston], in regard to the Discovery that he was paying his attorneys from [Huddleston] to conduct on his behalf in regard to the [JMB/Valicor litigation]. Upon information and belief, these actions, and possibly others, . . . constitute fraud and concealment of a conflict of interest that compromised and damaged their representation of [Plaintiffs] . . . .

These allegations form the basis of each of the six claims in Civil Action No. 17-C-303.

35. By Order entered September 7, 2018, Civil Action No. 15-C-431 and Civil Action No. 17-C-303 were consolidated.

Defendants' Motion for Summary Judgment on the Issue of the "Client File"

36. When compared to the other civil actions pending before this Court, these consolidated cases have proceeded in a radically different manner. Communication between the parties has been slow and stilted.[11] Discovery has been protracted and contentious. More than fifty motions and supplemental motions have been filed in these cases as of the date of this Order, along with corresponding responses and replies.[12]

37. Although the extensive record in this case might suggest otherwise, this case and Defendants' Motion for Summary Judgment on the Issue of the "Client File" require the Court to examine two straightforward issues: Whether Plaintiffs have received their entire client file, and if so, when.

38. Whether Plaintiffs have received their entire client file depends on two things: (A) Whether Defendants' internal email correspondence by and between the attorneys and staff of Huddleston regarding the JMB/Valicor litigation is part of Plaintiffs' client file and (B) Whether Plaintiffs are entitled to the electronic portions of their client file in a specific electronic format.

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[11] From the outset of the litigation, Bourdelais instructed his counsel to communicate with Defendants and Defendants' counsel in writing exclusively. *See* November 13, 2015 Tr. 31:6–8. Defendants' counsel explained his frustrations with regard to communicating in this manner:

> Your Honor, it's not like -- as you know from the first hearing in this case, it's not like any other case we've dealt -- or I've dealt with for the last 30 years. I can't pick up the phone and call Mr. Baker. I'm not allowed in this case. He's not allowed to have any oral communications with anyone on behalf of the defendants. So we have to do it by letter.

Id. at 30:11–17.

[12] The file for these consolidated cases is presently the largest of any active case in the Cabell County Circuit Clerk's Office, consisting of 29 volumes and measuring a total of 5'3". A case that commenced in 2003 involving a complex contract dispute arising from the construction of a shopping center has the second largest file, measuring about 1' shorter.

39. After years of discovery, pursuant to an Order entered August 17, 2018, the discovery phase of these cases ended on December 11, 2018.

40. On January 7, 2019, Defendants filed Defendants' Motion for Summary Judgment on the Issue of the 'Client File' and Memorandum of Law in Support of Motion. On February 4, 2019, Plaintiffs filed Plaintiffs' Responses to Defendants' Motion for Summary Judgment on the Issue of the "Client File" and the Plaintiff's Motion to Certify Questions of Law to the West Virginia Supreme Court. Defendants filed a Reply on February 11, 2019.

41. Defendants' position is that Plaintiffs have received their entire client file, and Defendants have complied with the legal and ethical requirements imposed upon them with regard to the production of the client file. Defendants claim that the client file was produced by Sullivan to Plaintiffs' counsel in the twelve (12) boxes containing the original paper files on May 20, 2015 and in the production of the disk containing PDF copies of the external email files on June 29, 2015. Defendants assert that the documents produced constitute the entirety of the JMB/Valicor litigation client file.

42. Based on their assertion that they timely produced Plaintiffs' client file, Defendants argue they are entitled to summary judgment on all claims against them premised on the production of the client file.

43. Plaintiffs argue that genuine issues of fact exist regarding the production of the client file and Defendants' refusal to provide Plaintiffs with the electronic portion of their client file in its "original or native format."[13]

[13] Although West Virginia has no case law defining "native format," the term is understood in other jurisdictions to refer to "the default format of a file, or the form in which it was created on a particular software program." *Chapman v. Gen. Bd. of Pension & Health Benefits of the United Methodist Church, Inc.*, No. 09C3474, 2010 WL 2679961, at *1 n.1 (N.D. Ill. July 6, 2010).

44. Plaintiffs contend that *all* of the internal firm correspondence by and between the attorneys and staff of Huddleston regarding the JMB/Valicor litigation is part of Plaintiffs' client file. The parties have not made any arguments regarding the specific content of the internal firm communications.

45. Further, Plaintiffs assert that, because the internal firm correspondence has not been produced for Plaintiffs in native format, Plaintiffs' client file has not been produced.

46. With regard to the production of electronic documents, Plaintiffs assert:

> Defendants undertook the circuitous journey of printing out documents from the Plaintiffs' Electronic Client File, and then rescanning such documents into PDF format before providing copies of such matters to the Plaintiffs, a task that not only created unnecessary work for the Defendants, but has created serious credibility issues as to the completeness of the emails and other documents that the Defendants have produced in formats other than original or native.

47. Plaintiffs aver that the conversion of the electronic portion of Plaintiffs' client file into formats other than the native format, e.g. PDF format, has eliminated certain electronic "header" information and that this header information is part of the client file. Plaintiffs claim that without this header information, they cannot authenticate or trace the emails that have been produced, nor can they verify the integrity of the email messages. Plaintiffs also desire email headers to conduct "electronic processing and searching."

48. The Court observes that through this motion for summary judgment, the Court is not being asked to determine whether Defendants have complied with their obligations in discovery[14]; the Court's inquiry is limited to determining whether Plaintiffs have received their

[14] To the extent "native electronic format" files were requested to be produced during discovery, Rule 34 of the West Virginia Rules of Civil Procedure provides that "[a] party who produces documents for inspection shall reproduce them as they are kept in the usual course of business **or** shall organize and label them to correspond with the categories in the request." There is no requirement in Rule 34 that documents be produced in discovery in their "native electronic" format. Rule 34(b) specifically provides that a party may produce documents which are organized

entire client file and, if so, when.

Summary Judgment Standard

49. Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996) (quoting W. Va. R. Civ. P. 56(c)). "Summary judgment is not a remedy to be exercised at the Circuit Court's option: it must be granted when there is no genuine disputed issue of material fact." *Id.*

50. In West Virginia, a party moving for summary judgment "must make a preliminary showing that no genuine issue of material fact exists." *Id.* at 698–99, 474 S.E.2d at 878–79. "The movant does not need to negate the elements of the claims on which the non-moving party will bear the burden at trial." *Id.* at 699, 474 S.E.2d at 879 (citation omitted). Rather "the movant's burden is only [to] point to the absence of evidence supporting the non-moving party's case." (internal quotation omitted). *Id.* If the moving party meets this burden, "the nonmovant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a 'trialworthy' issue." *Id.* "To meet the burden, the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims." *Id.* A party opposing a motion for summary judgment may not rest on the allegations of his or her unsworn pleadings,

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and labeled to correspond to the categories in the request. The original paper litigation file was produced as it was kept in the regular course of business. The email files were organized into internal and external email files, labeled and produced in that fashion. Defendants have complied with the requirements of Rule 34.

instead the nonmovant is required to come forth with *evidence* of a genuine factual dispute. *Id.* at 698 n.10, 474 S.E.2d at 878 n.10.

51. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts of a case is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963); *accord* syl. pt. 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992); syl. pt. 2, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994); syl. pt. 1, *Jack v. Fritts*, 193 W. Va. 494, 457 S.E.2d 431 (1995).

52. When reviewing a motion for summary judgment the question to be decided is whether a genuine issue of fact exists and not how that issue should be determined. *See* syl. pt. 5, *Aetna Cas. & Sur. Co.*, 148 W. Va. 160, 133 S.E.2d 770. Therefore, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, *Painter*, 192 W. Va. 189, 451 S.E.2d 755. If there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, summary judgment should be granted. *See* syl. pt. 4, *Aetna Cas. & Sur. Co.*, 148 W. Va. 160, 133 S.E.2d 770.

53. The party opposing the grant of a motion for summary judgment "must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in the nonmoving party's favor. *Painter*, 192 W. Va. at 192-93, 451 S.E.2d at 758-59. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 4, *Painter*, 192 W. Va. 189, 451 S.E.2d 755; *accord* syl. pt. 2, *Jack*, 193

W.Va. 494, 457 S.E.2d 431. "[B]ald assertions are insufficient to overcome summary judgment as 'evidence illustrating the factual controversy cannot be conjectural[.]" *Banh v. Doan*, No. 16-1049, 2017 WL 4772881, *4 (Oct. 23, 2013) (memorandum decision) (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329, 337 (1995)).

Client File Contents and Production

54. Whether internal email correspondence by and between attorneys and their staff is part of a client's file is a question of law.[15]

55. There is no dispute that a client owns its client file. *See* W. Va. Office of Disciplinary Counsel Opinion 2002-01. Furthermore, there is no dispute that attorneys must provide a client with the client's file upon the client's request. *See* W. Va. Office of Disciplinary Counsel Opinion 92-02 ("The client is entitled to the attorney's file, whether the client discharged the attorney or the attorney withdrew.").

56. The only provision of the West Virginia Rules of Professional Conduct which deals with an attorney's duty to surrender a file to a former client is Rule 1.16(d). Rule 1.16(d) provides:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

[15] The Court notes that in support of their position, Plaintiffs filed a declaration of an individual expressing an expert opinion as to whether internal firm correspondence is part of a client's file. *See*, Sept. 23, 2015 Decl. of Bernard J. DiMuro ("There is no reason to keep from the client internal [e]mails and other communications related and [sic] the representation that might reflect negatively upon the attorneys."). Expert opinions are appropriate when "scientific, technical, or other specialized knowledge will assist the trier of *fact* to understand the evidence or to determine a *fact* in issue." W. Va. R. Evid. 702(a) (emphasis added).

W. Va. R. of Professional Conduct 1.16; *see also Comm. on Legal Ethics of the W. Va. State Bar v. Cometti*, 189 W. Va. 262, 269, 430 S.E.2d 320, 327 (1993) ("Once the relationship is terminated, Rule 1.16(d) comes into play and the attorney is required to promptly return the client's papers and documents.").

57. West Virginia Office of Disciplinary Counsel Opinion 92-02 provides "The file which must be turned over consists of all material provided by the client; all correspondence; all pleadings, motions, other material filed and discovery, including depositions; [and] all documents which have evidentiary value and are discoverable under the Rules of Civil Procedure, such as depositions and business records."

58. Neither the West Virginia Rules of Professional Conduct nor the formal opinions of the West Virginia Office of Disciplinary counsel detail whether internal firm communications constitute "correspondence" such that the internal firm communications are part of the client file that must be turned over to the client.

59. Likewise, Frymyer's April 10, 2015 letter did not address internal firm communications.[16]

60. The ABA Standing Committee on Ethics and Professional Responsibility issued a formal ethics opinion, ABA Formal Opinion 471, *Ethical Obligations of Lawyer to Surrender Papers and Property to Which Former Client is Entitled*, on July 1, 2015.[17] The formal opinion

[16] The Court finds this informal advisory opinion of the Office of Disciplinary Counsel under Rule 2.15 of the Lawyer Disciplinary Board is not binding on this Court or on the Lawyer Disciplinary Board. *See State ex rel. Morrisey v. W. Va. Office of Disciplinary Counsel*, 234 W. Va. 238, 246, 764 S.E.2d 769, 777 (2014).

[17] The West Virginia State Bar Lawyer Disciplinary Board and Office of Disciplinary Counsel, while not bound by formal ethics opinions issued by the ABA, often make reference to and rely upon ABA formal opinions in absence of relevant authority in West Virginia. As noted

states in relevant part:

> Administrative materials related to the representation, such as memoranda concerning potential conflicts of interest, the client's creditworthiness, time and expense records, or personnel matters, are not considered materials to which the client is entitled under the end product approach. Additionally, the lawyer's personal notes, drafts of legal instruments or documents to be filed with a tribunal, other internal memoranda, and legal research, are viewed as generated primarily for the lawyer's own purpose in working on a client matter, and, therefore, need not be surrendered to the client under the end product approach."

(footnotes omitted).

61. The position adopted by the ABA in this formal opinion is consistent with the Restatement (Third) of The Law Governing Lawyers, Section 46, Comment c., which provides:

> A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client.

62. In addition to the ABA formal opinion and the Restatement (Third) of The Law Governing Lawyers, the highest courts in at least three states have addressed the issue of what constitutes the contents of a client file in terms of what must be released to the client upon termination of an attorney-client relationship.

(a) In *Sage Realty Corp. v. Proskaueer Rose Goetz & Mendelsohn, LLP*, 689 N.E.2d 879, 91 N.Y.2d 30 (1997), the New York Court of Appeals, the highest appellate court in New York, held that a client is not entitled to the disclosure of "documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law," or documents which contain "firm documents intended for internal law office review and use" that are "unlikely to be

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in footnote 1 of LEI 2002-01, "ABA opinions are not binding in West Virginia, but are generally persuasive. ABA informal opinions are not as persuasive as formal opinions."

of any significant usefulness to the client or to a successor attorney." *Sage Realty Corp.*, 91 N.Y.2d at 37-38. Elaborating, the Court stated:

> [N]onaccess would be permissible as to firm documents intended for internal law office review and use. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client. This might include, for example, documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation.

Id. (internal quotation omitted).

(b) In 2007, in an opinion regarding a lawyer disciplinary matter, the Iowa Supreme Court said:

> A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client.

Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812, 820 (Iowa 2007) (quoting Restatement (Third) of The Law Governing Lawyers § 46, cmt. c).

(c) In 2016, the Supreme Court of Arkansas adopted a rule proposed by the Arkansas Bar Association related to the maintenance of a client's file and the contents of the file. The rule, as adopted, provides that documents such as a lawyer's work product, internal memoranda prepared by or for the lawyer, internal conflict checks, firm assignments, notes regarding any ethics consultation or records that might reveal the confidences of other clients are not part of the client file. Ark. R. of Prof'l Conduct 1.19(a)(2).

63. The West Virginia State Bar's Lawyer Disciplinary Counsel has not promulgated an informal or formal opinion on what constitutes a client's file, but a few other Bar Associations have issued such opinions.

(a) In 1999, prior to the issuance of ABA Formal Opinion 471, the Vermont Bar Association issued an advisory ethics opinion on this issue based on ABA Informal Opinion 1376, issued in 1977. The Vermont advisory opinion said that materials a lawyer must return are

> (1) all of the property delivered to the lawyer by the lawyer's client; (2) the 'end product' of the lawyer's work; and (3) all other material which is useful to the client in fully benefiting from the services of the lawyer. Notwithstanding the foregoing, a lawyer need not deliver his/her internal notes and memos which have been generated for the lawyer's own purposes in working on the client's problem.

Vt. Bar Assoc., Advisory Ethics Opinion 1999-07.

(b) The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility issued a formal ethics opinion in 2007 which opined that a client is entitled to receive all materials in an attorney's possession relating to the representation including all materials that have potential utility to the client and the protection of the client's interests. The opinion notes that a client would not normally need or want, and therefore would not typically be given, attorney notes from the lawyer's personal files, unless those notes have been placed by the attorney in the case file because they are significant to the representation, copies of electronic mail messages, unless they have been placed by the attorney in the file because they are significant to the representation or memoranda that relate to staffing or law office administration. Penn. Bar Assoc. Comm. on Legal Ethics & Prof'l Responsibility, Formal Opinion 2007-100.

(c) In 2008, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics issued a formal opinion on this issue, Formal Opinion 2008-01, *A Lawyer's Ethical Obligations to Retain and to Provide a Client with Electronic Documents Relating to a Representation.* Therein, the Committee addressed (i) a lawyer's ethical obligation to retain emails and other electronic documents relating to a representation; (ii) the ethical limitations on a lawyer's ability to delete emails and other electronic documents and (iii) the extent

to which a client has a presumptive right to obtain emails and other electronic documents in a lawyer's possession. Citing *Sage Realty*, the Committee noted that the Disciplinary Rules recognize that a client has a right to certain "papers and property" in the possession of the attorney, but the Rules do not spell out what those "papers and property" consist of. Specifically, with regard to emails, the Committee found that a client does not have a presumptive right of access to email communications between lawyers of the same law firm "intended for internal law office review and use" or to email communications which are "unlikely to be of any significant usefulness to the client or to a successor attorney." Assoc. of the Bar of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Opinion 2008-01 (July 2008). The Committee Opinion also stated the client is not entitled to "access otherwise inconsequential documents similar to those intended for internal law office review and use," such as an email to opposing counsel confirming the starting time of a deposition or an email "to a testifying expert asking for transcripts of recent testimony." *Id.*

(d) In 2010, The Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline issued an opinion on whether a lawyer's notes must be relinquished to a client upon the client's request. In its opinion, the Committee said that "[a] lawyer's notes to himself or herself regarding passing thoughts, ideas, impressions, or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflict of interest checks will probably not be items reasonably necessary to a clients' representation." Supreme Court of Ohio Bd. of Comm'rs on Grievances & Discipline, Opinion 2010-2 (April 9, 2010).

(e) In 2010, the Illinois State Bar Association issued an advisory opinion on professional conduct stating "[w]ith respect to [internal administrative materials relating to the representation such as memoranda concerning potential conflicts of interest or the client's

creditworthiness, time and expense records, or personnel matters, and internal administrative materials], the Committee does not believe that a client is entitled to copies of or access to such materials . . . . These materials are not relevant to the status of the client's matter and are usually prepared only for the lawyer's internal use." Ill. State Bar Assoc., Advisory Opinion on Professional Conduct No. 94-13 (Jan. 1995, Aff'd May 2010).

(f) In 2014, the North Carolina State Bar issued a formal ethics opinion regarding what electronic records an attorney may omit from production when a client requests a copy of his or her file. The Bar opinion stated:

> [A] lawyer may omit from the records that are considered a part of the client's file the following: (1) email containing the client's name if the email is immaterial, represents incomplete work product, or would not be helpful to successor counsel; (2) drafting notes saved in preliminary versions of a filed pleading since these are incomplete work product; (3) notations or categorizations of documents stored in a discovery database since these are incomplete work product; and (4) other items that are associated with a particular client such as backups, voicemail recordings, and text messages unless the items would be helpful to successor counsel.

N.C. State Bar, Formal Ethics Opinion 2013-15 (January 24, 2014).

(g) In 2016, the State Bar of Wisconsin issued an opinion stating that "[m]aterials containing only internal firm communications concerning the client file, such as conflicts checks, personnel assignments, and advice the lawyer receives concerning the lawyer's own conduct, such as compliance with the Rules" may be withheld from a client. State Bar of Wis., Ethics Opinion EF-16-03: *Surrender of the Client File Upon Termination of Representation* (Dec 29, 2016) (footnotes omitted).

(h) In 2018, the Colorado Bar Association Ethics Committee, in addressing a client's right to access the file related to legal representation, found that there are two primary types of material the lawyer may retain because they constitute portions of the file to which the client is not entitled. The first type includes documents in which a third party, e.g., another client,

has a right to nondisclosure. The second type of material involves those documents that would be considered practice-related materials relating to the business of representing the client. These include, for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. Colo. Bar Assoc. Ethics Comm., Formal Opinion 104, *Surrender of File to the Client Upon Termination of the Representation* (Revised Sept. 15, 2018).

64. As noted above, a point of contention between the parties throughout this case has been whether Defendants' internal email correspondence by and between the attorneys and staff of Huddleston regarding the JMB/Valicor litigation is part of Plaintiffs' client file.

65. The Court finds the above authorities highly persuasive on this issue and determines that, no, the internal email correspondence is *not* part of Plaintiffs' client file.

66. Therefore, Defendants were under no legal or ethical obligation to provide the internal email correspondence to Plaintiffs in any format—paper, PDF, native, or other—when Plaintiffs requested the client file by letter dated April 20, 2015.[18]

Client File Format

67. There is no dispute that Plaintiffs have received the entirety of the physical portion of their client file, i.e., the twelve (12) boxes of paper files which Mr. Sullivan initially provided to Mr. Baker with his May 20, 2015 letter.

68. There is no dispute that Plaintiffs received the electronic portion of their file—external email correspondence, electronic documents, etc.—in either electronic PDF or paper

[18] This ruling does not address whether Defendants' internal email communications are otherwise discoverable, only whether they are part of Plaintiffs' client file.

format by June 29, 2015.

69. Plaintiffs' position is that Defendants were required to produce the electronic portion of the client file in its native format upon Plaintiffs' request for the client file on April 20, 2015, and that because Defendants have not produced the electronic portion of the client file in its native format, the client file has not produced in its entirety.

70. Baker's April 20, 2015 letter did not request electronically stored documents "in the format in which it existed while in the Defendants' possession," nor did it request that the electronically stored documents be produced in their "native" format.

71. Neither party has directed the Court to an agreement existing between the parties setting forth the format in which Plaintiffs' client file should be produced. *See generally* District of Columbia Ethics Opinion 357, *Former Client Records Maintained in Electronic Form* (Dec. 2010) ("Lawyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form; entering into such agreements is prudent and can help avoid misunderstandings.").[19]

72. Without such an agreement, the Court must determine whether Defendants were ethically required to produce the electronic portion of Plaintiffs' client file in its native format upon receiving Plaintiffs' request for the client file on April 20, 2015.

73. Whether Plaintiffs were obligated to produced the client file in its native format is question of law for the Court to decide.[20]

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[19] During a hearing, counsel for Defendants indicated that no written fee agreement existed between the parties. *See* Nov. 13, 2015 Tr. 29:6.

[20] In support of their position that they are entitled to their client file in its native format, Plaintiffs filed an affidavit of an individual expressing an expert opinion on the issue. *See* April

74. Just as the applicable West Virginia Rule of Professional Conduct and the formal opinions of the West Virginia Office of Disciplinary Counsel do not detail whether internal firm correspondence is part of a client file, these authorities also do not provide instruction as to the format in which an electronic portion of a client's file must be produced.

75. Furthermore, there is no West Virginia authority explaining what constitutes "native" or "original" format and how these terms relate to the production of electronic documents.

76. Legal ethics opinions from bar associations in other jurisdictions indicate that, when determining whether the electronic portion of a client's file has been produced, the primary inquiry is whether electronic documents are produced in a format that is reasonably accessible, usable, and useful for the client.

(a) In Ethics Opinion No. 657, the Professional Ethics Committee for the State Bar of Texas said:

> In most cases, the client's file will consist of paper documents, electronically stored documents or information, or some combination of the two. The lawyer may generally provide such portions of the client's file to the former client in any format that is reasonably accessible to the ordinary client. The lawyer may provide the file as it is maintained, or convert (at the lawyer's expense) some or all of it to paper or to a reasonably accessible electronic format for delivery to the client. However, if some of the information in the file is maintained in a special format that is not reasonably accessible to the ordinary client, the lawyer must bear the cost of converting the information to a reasonably accessible format or print the information in a format that can be read by the client. If the file contains material that has unique or significant value in the form originally acquired by the lawyer, such material should be returned to the client in its original form.

Prof'l Ethics Comm. for the State Bar of Tex., Opinion No. 657, 79 Tex. B.J. 560, 560–61 (July

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20, 2017 Aff. of Robert H. Davis ("[T]here is no justification under law or ethics in the continued failure, to the date of this affidavit, . . . to have provided the electronic emails and other internal electronic communications of the Huddleston Boland [sic] firm in representation of Mr. Bourdelais and his company."). Expert opinions are appropriate when "scientific, technical, or other specialized knowledge will assist the trier of *fact* to understand the evidence or to determine a *fact* in issue." W. Va. R. Evid. 702(a) (emphasis added).

2016).

(b) In Ethics Opinion 357, The District of Columbia Bar said: "Lawyers who maintain client records solely in electronic form should take reasonable steps . . . to ensure the continued availability of the electronic records in an accessible form during the period for which they must be retained . . . ." D.C. Bar Ass'n, Ethics Opinion 357, *Former Client Records Maintained in Electronic Form* (Dec. 2010).

(c) In Ethics Opinion EF-16-03, the State Bar of Wisconsin said:

> Lawyers have an obligation to provide the file in a format that is usable by the client. If the lawyer keeps the file in electronic format, and the client or successor counsel request that it be provided in that format, the lawyer must comply. A lawyer may also be obligated to convert an electronic file to hard copies if the client lacks the ability to access the file in electronic format that is usable by the client to another simply for the convenience of the client or successor client.
>
> . . . Regardless of the format in which the file is kept, in order to protect the interest of the client upon termination of the representation, the file must be provided to the client in a format that is usable to the client.

State Bar of Wis., Ethics Opinion EF-16-03: *Surrender of the Client File Upon Termination of Representation* (Dec 29, 2016).

(d) With regard to converting documents in a client file from one format to another, the North Carolina Bar Association has said, "[E]lectronic records may be copied and provided to the client in an electronic format . . . if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense." Formal Ethics Opinion 2013-15 (2014).

77. Baker's April 20, 2015 letter to Defendants did not request that the electronically stored client files be produced in their "native" format or "in the format in which they existed while in Defendants' possession"; Baker requested only "originals" of electronic documents. The nature of electronic documents is such that an original cannot be produced; only copies of these

documents can be produced. Baker's letter did not specify the format in which such copies should be produced.

78. Plaintiffs' first request for access to electronically stored documents "in the format in which [they] existed while in the Defendants' possession" appeared in Plaintiffs' May 6, 2016 Request for Inspection and Copying on Behalf of John M. Bourdelais and JMB Commercial Properties, LLC. Plaintiffs requested "that Defendants produce for inspection and allow the Plaintiffs to copy the following matters: 1. The Plaintiff's complete Client File in the original format in which it has existed while in the Defendants' possession . . . ."

79. Plaintiffs' May 6, 2016 request for access to the client file "in the original format in which it has existed while in the Defendants' possession" more than ten months after Civil Action No. 15-C-431 commenced and Defendants produced the electronic portion of Plaintiffs' client file in PDF format.

80. The first motion filed by Plaintiffs mentioning "native" format was Plaintiffs' Motion to Strike the Defenses on the Behalf of the Defendants, to Enter Judgement in Favor of the Plaintiffs Against the Defendants, for Sanctions, and for the Award of Full Attorneys Fees and Costs Incurred by the Plaintiffs, which Plaintiffs filed on November 7, 2016. This motion was filed more than a year after Civil Action No. 15-C-431 commenced and Defendants produced the electronic portion of Plaintiffs' client file in PDF format. The motion stated, "On April 22, 2016, the Defendants represented to this Court that they had complied with the Order of this Court concerning the Hearing held on April 13, 2016, despite the fact that the Defendants had refused to produce the emails in their original (native) format as originally requested by the Plaintiffs on April 20, 2015 . . . ."

81. The April 13, 2016 hearing focused on the production of internal firm

communications. At the hearing, Plaintiffs did not express displeasure with the format in which electronic documents had been produced to date, and neither party nor the Court mentioned the production of *any* document in native format.[21]

82. At the April 13, 2016 hearing, Plaintiffs did not request any documents from Defendants in their native format, and the Court did not order the production of any documents in native format.

83. The Order from the April 13, 2016 hearing was entered on August 29, 2016. The Order was prepared by the parties and submitted to the Court for entry. This Order did not require the production of any electronic documents "in the original format in which [they] existed while in the Defendants' possession" or "native" format.

84. On April 22, 2016, Defendants produced the disputed internal firm communications for Plaintiffs pursuant to a Protective Order. Before this date, Plaintiffs had given neither Defendants nor the Court reason to believe the method in which Defendants had previously produced electronic documents for Plaintiffs was unacceptable. More specifically, Defendants had no reason to believe that the production of the electronic portion of the client file—or the production of any electronic document—in either PDF or paper format was unsatisfactory to Plaintiffs.

85. Plaintiffs acquiesced to the production of electronic documents in PDF or paper format for more than ten months after Defendants first produced electronic documents in this

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[21] During the April 13, 2016 hearing, the Court expressed its exasperation with the parties:

> I'm going to use that stupid phrase -- it's a tempest in a teapot. Unless there's something in those internal emails that you're just really worried about -- and I can't imagine that there would be unless there's just some smoking gun that I don't know about -- this is just crazy that this has gone on this long. I mean, you gave him all of the important stuff. And now we're fighting about this niggly stuff?

manner on June 29, 2015.

86. Plaintiffs have not provided an explanation as to why the first request for electronic documents "in the original format in which [they] existed while in the Defendants' possession" was not made for more than ten months after these documents were provided to Plaintiffs in PDF or paper format.

87. The Court must conclude that the production of the electronic portion of Plaintiffs' client file in PDF and paper format was reasonably accessible, usable, and useful to Plaintiffs when they were provided to Plaintiffs on June 29, 2015.[22]

88. Therefore, the Court determines that Defendants fully complied with Plaintiffs' April 20, 2015 request for the client file on June 29, 2015, which is when Plaintiffs received the electronic portion of their client file. Plaintiffs received their *entire* client file by June 29, 2015.

89. This determination is in no way intended to indicate it is the Court's position that, after a client requests his client file and said file is produced, the client cannot later request the production of the electronic portion of the file in a different format. It is this Court's position that when such a request is made, and when a court is asked to examine the propriety of such a request, the court must weigh the client's need to receive the electronic portion of the client file in a format other than that in which it has already been produced against the burden on the attorney to produce the electronic documents pursuant to the new request. *See, e.g.*, Orange County Bar Association, Formal Opinion 2005-01, *File Transfer and Work Product Rules Applicable to Electronic Files*, 48 Orange County Lawyer 37, 39 (April 2006) ("In general, it is the attorney's obligation to turn

[22] Plaintiffs have vehemently argued that there was no reason for Defendants to convert the electronic documents contained in the client file from their native format to PDF format. The Court believes that as long as the electronic portion of a client's file is produced in a format that is accessible, usable, and useful to the client, the fact that the format in which electronic documents are produced is different than their native format is of no moment.

over to the client only one copy of the file . . . . The attorney must consider the stated wishes of the client, however, and if the client expresses a need for the electronic files, the attorney should make an effort to comply with that request. . . . [T]he attorney should balance his cost of providing the client files in the particular requested format against the client's need to have the files in that format." (citation omitted)).

90. To the extent that Plaintiffs' claims regarding production of the client file could be interpreted as arising from Defendants' refusal to produce the electronic portion of the client file in its native format on or after May 6, 2016, the Court finds no question of fact exists that might support such claims.

91. First, the Court observes that Plaintiffs have not put forth any evidence or argument as to why the format in which the electronic portion of the client file had been produced was no longer adequate for Plaintiffs' needs. Plaintiffs have not represented that a change in circumstances following the production of the file in PDF or paper format has necessitated the production of the electronic portion of the file in its native format. As noted above, Plaintiffs were in possession of the electronic portion of their client file for more than ten months before requesting electronic documents be produced "in the original format in which [they] existed while in the Defendants' possession."

92. While Plaintiffs assert that converting an email to PDF "destroys the requesting party's ability to take the message apart and use the email's constituent information to populate fields in a database," Plaintiffs have not asserted in *any* filing in this case that they actually desire to use the external email correspondence in this fashion or why they might need to use the documents in this way.

93. Plaintiffs state that "commonly used review platforms" allow for searching and

organizing emails in their native format, but Plaintiffs do not state they are unable to search or organize the emails in the PDF format provided.

94. Finally, Plaintiffs allege that the conversion of the electronic portion of the client file into PDF format has omitted "header" information that Plaintiffs need to "authenticate" the electronic documents they have received; however, Plaintiffs have not presented any specific evidence or argument indicating that the electronic production in PDF format is not authentic and complete.

95. In sum, Plaintiffs have presented no evidence or argument establishing their need for the client file in its native format.

96. The Court concludes Defendants have undertaken the burden of producing the client file in PDF and paper formats and that the burden on Defendants to produce the electronic portion of Plaintiffs' client file in its native format would outweigh Plaintiffs' need for the same.

97. Defendants were not ethically or legally bound to produce the electronic portion of Plaintiffs' client file upon Plaintiffs' request for it. Any claim arising from Defendants' refusal to produce the client file in its native format fails.

Conclusion

98. As established above, no question of fact exists as to when Plaintiffs first requested their client file—April 20, 2015—and when Plaintiffs received the entirety of said file—June 29, 2015.

99. Defendants, the moving parties, having established there are no genuine issues of material fact, and Plaintiffs have failed to meet their reciprocal burden to show that genuine issues of material fact exist.

100. Plaintiffs have failed to present evidence establishing that the delay of slightly more than a month between the request and the production of the client file was unreasonable or unjustifiable.

101. Plaintiffs have failed to present any evidence to establish that the delay between the request and production of the client file caused Plaintiff any damage or what such damage might be.

102. Consequently, Plaintiffs have failed to produce evidence to establish any of the claims in either Civil Action No. 15-C-431 or Civil Action No. 17-C-303 relating to the production of Plaintiffs' client file by Defendants.

103. Defendants have established that they are entitled to summary judgment as a matter of law upon all claims and causes of action Plaintiffs' have alleged in either civil action relating to the production by the Defendants of the JMB/Valicor client file to the Plaintiffs.

ACCORDINGLY, summary judgment is hereby **GRANTED** in favor of the Defendants on all of Plaintiffs' causes of action relating to production of the JMB/Valicor client file.

The Court hereby **DISMISSES** the Original Complaint, Amended Complaint, and Second Amended Complaint filed in Civil Action 15-C-431, **WITH PREJUDICE,** and further **DISMISSES, WITH PREJUDICE**, any claims or causes of action contained in the Original Complaint and Amended Complaint filed in Civil Action No. 17-C-303 arising out of the production by the Defendants of the JMB/Valicor client file to the Plaintiffs.

It is further **ORDERED** that all claims asserted against Brian S. Sullivan in Civil Action No. 17-C-303, all of which related to the production of the JMB/Valicor client file, are also **DISMISSED, WITH PREJUDICE.**

The Court finds that there is no reason for delay and directs that this is a final and appealable judgment order pursuant to the provisions of Rule 54 of the West Virginia Rules of Civil Procedure on all causes of action relating to the production of the client file.

The exceptions and objections of the Plaintiffs are noted and preserved for the record.

The Circuit Clerk is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED this 26th day of April, 2019.

Gregory L. Howard, Jr., Judge

STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON APR 26 2019

GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS APR 26 2019

, CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA