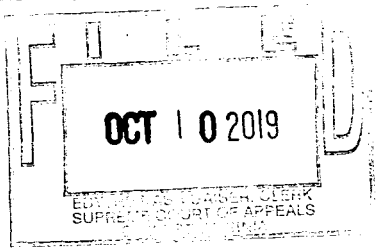
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No.: 19-0485



John M. Bourdelais and JMB Commercial Properties, LLC,

Petitioners/Plaintiffs,

v.

Appeal from a Final Order of the Circuit Court of Cabell County (Civil Action Nos: 15-C-431 and 17-C-303)

Richard J. Bolen, Cindy D. McCarty, T. Matthew Lockhart, John Mahaney, Daniel A. Earl, Christopher J. Plybon, Huddleston Bolen, LLP, Brian S. Sullivan, and Dinsmore & Shohl, LLP,

Respondents/Defendants.

BRIEF OF RESPONDENTS, 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.

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STATEMENT OF THE CASE

A. Introduction

This appeal centers on issues relating to the production of a "client file" from a prior action in which one of the Petitioners, JMB Commercial Properties, LLC, was represented by four attorneys with t`he law firm of Huddleston Bolen, LLP, which has since merged with the law firm of Dinsmore & Shohl, LLP. What started as a seemingly simple request for a client file turned into a litigation struggle spanning over four (4) years in the Circuit Court of Cabell County mainly over a dispute about what constitutes a "client file." From the initiation of the request for the file, Respondents have maintained that certain internal e-mail communications among and between the attorneys and staff at Huddleston Bolen, LLP, who worked on the JMB/Valicor litigation, were not part of the "client file" and belonged instead to the attorneys/law firm based on a formal ethics opinion from the American Bar Assoication. West Virginia, as well as most states, does not have a reported decision from an appellate court or bar association on this issue.

Almost two years later, during discovery, Petitioners requested, for the first time, that copies of the electronically stored portions of the client file be produced in the files' native electronic format, i.e., Word, Excel, Outlook, etc. Respondents took the position that their former clients had not demonstrated a legitimate need for obtaining the files in their native electronic format in addition to the paper copies, which had already been produced to them multiple times, that outweighed the time, expense and inconvenience to the Respondents involved in searching for, gathering

and producing the files in their native format. Even fewer jurisdictions and bar associations have issued decisions or opinions on this issue than on the question of what constitutes a "client's file."

Eventually, after nearly four years of litigation and the completion of discovery, Judge Howard, Judge of the Circuit Court of Cabell County, ruled in Respondents' favor on these two legal issues by granting their motion for summary judgment. What constitutes a "client file" and whether a client is entitled to electronically stored portions of a "client file" in native electronic format, are the sole issues on appeal. The broader issue as to whether some of the Respondents committed malpractice in their representation of their former client, JMB Commercial Properties, LLC, is still pending before the Circuit Court of Cabell County and is not addressed in this response, although Petitioners spent a great deal of time in their brief discussing this issue.

B. Procedural History

This appeal comes from two civil actions pending in the Circuit Court of Cabell County which were consolidated by the Circuit Court. Petitioners filed their original Complaint in Civil Action No.: 15-C-431 on June 17, 2015 [A1-A39], and an Amended Complaint on June 23, 2015 [A40-A57]. The Complaint and Amended Complaint solely concerned a closed client file maintained by Respondent Dinsmore & Shohl, LLP.[1] Four of the respondent attorneys and respondent, Huddleston

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

Bolen, LLP,[2] represented one of the petitioners, JMB Commercial Properties, LLC, ("JMB"),[3] in a case styled: *JMB Commercial Properties, LLC, vs. Valicor Environmental Services, LLC,* ("Valicor") which was litigated in the United States District Court for the Southern District of West Virginia, at Huntington, Civil Action No.: 3:11-CV-0543 (the "JMB/Valicor litigation"). The litigation concluded when an agreed settlement was reached between the litigants in May of 2013. The Complaint and Amended Complaint sought the "full and complete" client file from this litigation and contained three separate counts: Count I – Breach of Contract; Count II – Breach of Fiduciary Duty; and Count III – Civil Conspiracy. All counts were based on the Defendants' alleged "**collective refusal to provide the Plaintiffs with the full and complete original of their file, thus causing the Plaintiffs to be damaged.**" See, *¶¶24, 26 and 28 of Plaintiffs' Amended Complaint.* [A47 – A48]. No claim was asserted regarding legal malpractice in the original Complaint or Amended Complaint in Civil Action No.: 15-C-431.

At the very first hearing held in the Circuit Court in this matter on July 17, 2015, the following dialogue occurred between Petitioners' counsel and the Court:

> **Attorney Baker**: ....It's not that Mr. Bourdelais is trying to be coy in any way, it's just that these attorneys represented him in the past. He wanted his file. And for them to say, now almost 90 days later, that they're still not willing to provide the entire file, Mr. Bourdelais's

[2] The four attorney respondents who represented JMB in the JMB/Valicor litigation were Richard J. Bolen, Cindy D. McCarty, John H. Mahaney, and T. Matthew Lockhart. Respondent Christopher J. Plybon was involved in JMB's purchase transaction for the property in question. Respondent Brian Sullivan was not involved in the JMB/Valicor litigation or the commercial lease transaction between JMB and Valicor and is the General Counsel for Dinsmore & Shohl, LLP.

[3] Respondent John M. Bourdelais was at the time and currently still is the sole owner of JMB Commercial Properties, LLC.

upset about that.

The Court: Let me inquire. Is that the whole basis of this lawsuit:

Attorney Baker: The lawsuit emanates from – and I will tell you this is a unique issue. I have never –

The Court: That's what I'm trying to get at. Is the only purpose of this lawsuit to get his file?

Attorney Baker: And the damages that emanate from the fact that they have refused to provide it to him.

See, *Hearing Transcript, 7/17/2015, p. 6.* [A3678].

On May 15, 2017, Petitioners filed a separate lawsuit, Civil Action No.: 17-C-303, in the Circuit Court of Cabell County against the same defendants as those named in Civil Action No.: 15-C-431, with the inclusion of two additional parties, Christopher J. Plybon, Esquire, and Brian S. Sullivan, Esquire. [A1590 – A1601]. The Plaintiffs chose not to serve the Defendants in 17-C-303 until they filed an Amended Complaint in that matter on September 14, 2017. [A1610 – A1624]. On August 25, 2017 Petitioners filed a motion for leave to file a Second Amended Complaint in 15-C-431 and that motion was granted. A copy of the Second Amended Complaint in 15-C-431 is in the record at [A1570 – A1589].

The Second Amended Complaint in 15-C-431 contains thirty-seven (37) separately numbered paragraphs with six (6) separate Counts. The Amended Complaint in 17-C-303 contains forty-five (45) separately numbered paragraphs with six (6) separate counts. The counts or causes of action pled in Civil Action No. 15-C-431 are Count I – Breach of Contract; Count II – Breach of Fiduciary Duty;

Count III – Civil Conspiracy; Count IV – Legal Malpractice; Count V – Fraud; and Count VI – Fraudulent Misrepresentation. The Counts or causes of action pled in Civil Action No. 17-C-303 are Count I – Legal Malpractice; Count II – Breach of Contract; Count III – Breach of Fiduciary Duty; Count IV – Unjust Enrichment; Count V – Fraud, Concealment and Misrepresentation; and Count VI – Civil Conspiracy. Both civil actions seek substantially the same remedies: compensatory and punitive damages for legal malpractice, breach of contract, breach of fiduciary duties, fraud, misrepresentation and concealment, and civil conspiracy. Both civil actions seek disgorgement of approximately $200,000.00 in legal fees and costs paid by the Plaintiff, JMB Commercial Properties, LLC, to Huddleston Bolen, LLP, regarding the representation of JMB in Civil Action No.: 3:11-C-00543 in the United States District Court for the Southern District of West Virginia. The Amended Complaint in Civil Action No.: 17-C-303 also seeks a copy of the "client file," from Civil Action No.: 3:11-C-00543 and recovery of sanctions for allegedly not providing the full and complete file regarding the federal civil action.

The Respondents filed separate motions for summary judgment on the "client file" issue and the "legal malpractice" claim in the Circuit Court of Cabell County after the completion of discovery. The Circuit Court granted the motion for summary judgment on the "client file" issue on April 26, 2019. [A3601-A3635]. The Petitioners are appealing this order.[4] The legal malpractice claim has been stayed

[4] Respondents will not comment about the legal malpractice claim in this Response other than to state that Petitioner Bourdelais was kept fully informed through direct e-mail communications and by receiving copies of other important e-mails forwarded to him by Respondents regarding his purchase of the property in question and the negotiations of a lease with Valicor.

by the Circuit Court pending the outcome of this appeal over the objection of Respondents. [A4412-A4444].

C. Factual Background

On April 20, 2015, nearly two years after the resolution of the JMB/Valicor litigation, Roy D. Baker, Jr., counsel for Petitioners, directed certified mail to Respondents, Richard J. Bolen, Cindy D. McCarty, John H. Mahaney, T. Matthew Lockhart and Christopher J. Plybon, requesting the original of their respective files as well as the original of the file(s) maintained by Respondent Huddleston Bolen, LLP, from the JMB/Valicor litigation. [A12-A14]. On May 20, 2015, Respondent, Brian Sullivan, responded on behalf of the respondent attorneys and the merged law firm respondents to the request by letter and provided 12 boxes of paper documents containing Huddleston Bolen's original paper file related to the JMB/Valicor litigation. In his letter, Mr. Sullivan indicated that electronic data related to the litigation, including e-mails, was being collected and would be provided at a later date. [A28-A29]. In addition, in this letter, Mr. Sullivan explained that he would not provide copies of firm policies of Huddleston Bolen, n/k/a Dinsmore, as requested until an actual claim was asserted on behalf of Mr. Bourdelais and JMB Commercial Properties and he invited Petitioners' counsel to contact him to further discuss the matter.[5]

On June 17, 2015, less than thirty (30) days after receiving the original

[5] Petitioners' counsel did not contact Mr. Sullivan in this regard presumably due to the fact that his clients purportedly directed him to not have any direct communications with Respondents or Respondents' counsel other than in writing or by e-mail. This has continued to be the case throughout the litigation.

paper file in twelve file boxes, Petitioners filed a Complaint in the Circuit Court of Cabell County seeking a complete copy of the "client file" from the JMB/Valicor litigation and for alleged damages due to the Respondents' alleged failure to provide their entire "client file" when requested. [A1-A15]. Then Petitioners filed an Amended Complaint on June 23, 2015. [A40-A51]. The Complaint and Amended Complaint contain essentially identical factual allegations and allege three Counts upon which relief is requested: (1) Count I - Breach of Contract; (2) Count II – Breach of Fiduciary Duty; and (3) Count III – Civil Conspiracy.

On June 29, 2015, Mr. Sullivan sent a second letter to Mr. Baker enclosing a disk containing PDF copies of external e-mail communications related to the JMB/Valicor litigation. In his letter, Mr. Sullivan indicated that copies of the internal e-mail communications among and between the attorneys and staff at Huddleston Bolen, LLP, who worked on the JMB/Valicor litigation, were not included in the production because such internal e-mail communications were not part of the "client file." [SA66-SA68]. Judge Howard's Order Granting Respondents' Motion for Summary Judgment on the "Client File" Issue addresses whether these internal e-mail communications are part of the Petitioners' client file, not whether they are otherwise discoverable. [A3625].

In his letter of June 29th, Mr. Sullivan also provided detailed information to Mr. Baker regarding the efforts made to locate and retrieve the e-mail communications related to the JMB/Valicor litigation. In addition, Mr. Sullivan,

Cindy McCarty, and Pete Pepiton[6] were questioned by Mr. Baker during their depositions about how the JMB/Valicor e-mails were searched for and produced. The relevant portions of Mr. Sullivan's deposition testimony are in the record at [SA69 – SA74]. The relevant portions of Ms. McCarty's deposition testimony are in the record at [SA75 – SA109]. The relevant portions of Mr. Pepiton's deposition testimony are in the record as [SA110 – SA120]. The facts elicited during these depositions and through discovery establish that the entire e-mail systems of the attorneys and paralegals involved in the JMB/Valicor litigation[7] were first exported into PST[8] files, one PST file for each attorney and paralegal.

After the export, an attempt was made to search the files with a program called "LAW." None of the PST files would load into the LAW search program because of errors presumably caused by the extremely large size of the files. A Microsoft repair utility called ScanPST was then used to try to fix the errors in the files. When ScanPST did not fix all of the errors, additional steps were taken to try to repair the files so they could be searched. Eventually, using a software program from a vendor named Kernel, the PST files were repaired and were searchable. Documents without text were converted to TIFF images and an Optical Character Recognition (OCR) program was used to generate text from the images. This process resulted in ***1.7 million*** electronic e-mail files to be indexed and searched.

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[6] Mr. Pepiton is an e-discovery specialist employed by Dinsmore & Shohl who was involved in the search and retrieval of the e-mail files.

[7] The attorneys whose e-mail systems were preserved and searched were those of Respondents, Dan Earl, Richard Bolen, J. H. Mahaney, Matt Lockhart, Cindy McCarty, and Christopher Plybon. In addition, the e-mail system of Jill Francisco, a Huddleston Bolen paralegal assigned to the JMB/Valicor file, was included in the search.

[8] 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.

Search parameters were established to search for and retrieve all of the e-mails related to the JMB/Valicor litigation. The time parameters were to search all files from January, 2010, through December, 2013, which encompassed the span of time running from nearly six months before Mr. Bourdelais first made an offer to purchase subject property from the Huntington Municipal Development Authority (HMDA) on July 14, 2010, through the conclusion of the JMB/Valicor litigation in May of 2013 when the settlement was reached. The universe of files searched, as Mr. Sullivan described in his letter, was 1.7 million e-mail files. It should be noted that the 1.7 million e-mail files represent every single e-mail stored in the e-mail systems of the six attorneys and one paralegal whose e-mail systems were searched. Therefore, every e-mail communication to and from these individuals was contained in the files searched. These included not only the e-mail communications relevant to the JMB/Valicor litigation, but also all e-mails concerning every other client matter handled by the attorneys involved and personal, non-legal e-mail communications to family and friends.[9]

The search terms used were JMB, Valicor, UWW, United Waste, Stachler, Shawnw/3 Young, Bourdelais, HADCO, HMDA, Caprewest, jackbour1@comcast.net,

[9] During discovery, Petitioners demanded electronic access to these 1.7 million e-mail files in order to conduct their own search for e-mails related to the JMB/Valicor litigation. 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 was 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/herself 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 violation of the attorney client privilege and would disclose attorney work product performed by the attorney for other clients.

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The search resulted in 14,191 "hits", or 14,191 e-mails, some with attachments and some without attachments, which contained one or more of the search terms. These were all personally reviewed by Cindy McCarty and those that had nothing to do with the JMB/Valicor litigation were pulled from the relevant hits. Irrelevant hits were caused for many reasons. For example, Huddleston Bolen had a secretary with the initials "JMB," which produced many irrelevant hits. In addition, the firm was a member of the Chamber of Commerce and all attorneys in the firm regularly received an e-mail communication from the Chamber entitled "Monday Morning Memo" which often made reference to HADCO. Of the 14,191 files identified by the original search terms, 3,003 were related to the JMB/Valicor file. Of those 3,003 files, 1,278 were internal firm e-mail communications which were originally withheld from production to the Petitioners based on the Respondents' interpretation of existing law on the subject of what does and does not constitute a law firm's or attorney's client's file. The remaining 1,725 were provided to Petitioners in PDF format by Mr. Sullivan with his June 29, 2015 letter. Printed copies of the 1,278 internal firm e-mails originally withheld from production were produced, over objection by the Respondents, to Petitioners' counsel on April 22, 2016. Copies of the e-mail attachments, along with another copy of the e-mail

communications, to which they were attached, consisting of a total of 9,403 pages, were provided to Petitioners' counsel on June 6, 2016.

In her deposition, Respondent Cindy McCarty, who was the attorney primarily responsible for searching for the JMB/Valicor file, including the paper and electronic portions of the file, was asked if the entire file was produced. She responded, *"[t]he entire file has been produced. Part of that was a hard copy production of the original twelve boxes. There was an electronic production of external e-mails. There was a production of all internal e-mails."* [SA121]. Petitioners produced no evidence during discovery to dispute Ms. McCarthy's testimony in this regard. In fact, Petitioner Bourdelais admitted during his deposition that personally reviewed very little of the JMB/Valicor client file produced by Respondents. He admitted he looked through a few of the boxes containing the original paper files. [SA122]. He admitted that he has not reviewed a single external email file which was produced. [SA123 – SA124]. He also admitted that he has not reviewed any of the internal firm e-mails which were produced. [SA125].

It is undisputed that since the request for the client file was made, Petitioners have received 50,912 pages of documents, either in the form of paper copies or on disk in electronic PDF format, from the Respondents regarding the JMB/Valicor litigation. In fact, throughout the course of this dispute, Respondents have received multiple duplicate copies of the JMB/Valicor file because their attorney has requested it to be produce on forty separate occasions. These

documents constitute the entirety of the JMB/Valicor litigation client-matter file, regardless of whether internal firm e-mail communications are considered part of the "client file" or not.

SUMMARY OF ARGUMENT

This Court should deny the Petitioners' Petition for Appeal, because the Circuit Court did not err in granting Respondents' Motion for Summary Judgment on the "Client File" issue.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents request oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. Standard of Review

"A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994). In conducting the review, the Court is to apply the same standard for granting summary judgment that is applied by the circuit court. Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, such as where the non-moving party has failed to make a sufficient showing of an essential element of the case that it has the burden to prove. *Id.* at Syl. Pt. 4. The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Id.* at Syl. Pt. 3.

B. The Circuit Court Was Correct in Holding That a Client File to Which the Client is Entitled to Receive From the Client's Attorney Does Not Include Internal Firm Communications or Electronically Stored Files in Their Native Format

1. *Petitioners Have Received the Entirety of the "Client File," as Defined by the American Bar Association and a Number of Other Bar Associations and Jurisdictions*

Rule 1.16(d) of the West Virginia Rules of Professional Conduct provides:

> "[u]pon 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."

The twelve (12) boxes of paper files which Mr. Sullivan initially provided to Mr. Baker with his May 20, 2015 letter and the external e-mails and e-mail strings he provided in PDF format on June 29, 2015, constitute the entire JMB/Valicor "client file" as defined by the American Bar Association and by nearly all jurisdictions and bar associations which have considered this issue. The only documents withheld from production initially, but later produced by order of Judge Hustead, were copies of internal firm e-mail communications which were not part of the client file and belonged to Huddleston Bolen, LLP, not its client.

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.[10] [SA126 – SA132]. The formal opinion 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."

The position adopted by the ABA in this formal opinion is consistent with the judicial decisions of **all** jurisdictions and bar associations which have considered the issue of what constitutes a "client file." It is also consistent with the Restatement [Third] 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."

In addition to the ABA formal opinion and the Restatement [Third], the highest courts in at least three states have addressed the issue of what constitutes the contents of an attorney-client file in terms of what must be released to the client

[10] 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 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."

upon termination of an attorney-client relationship. In *Sage Realty Corp. v. Proskaueer Rose Goetz & Mendelsohn, LLP*, 91 N.Y.2d 30 (1997), [SA133 – SA137]. the New York Court of Appeals, the highest appellate court in New York, followed the majority rule of allowing an expansive general right of a client to have access to the contents of his or her attorney's file while recognizing certain exceptions, citing the Restatement [Third] of the Law Governing Lawyers. The Court held that a client is not entitled to the disclosure of "(i) documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law, or (ii) which contain 'firm documents intended for internal law office review and use' that are 'unlikely to be 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:

> ". . . nonaccess [sic] 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.' [citing the Restatement]. 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.*

In 2007, in an opinion regarding a lawyer disciplinary matter, the Iowa Supreme Court, citing *Sage Realty* and the Restatement [Third], held that 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 Atty. Disciplinary Bd. v. Gottschald*, 729 N.W.2d 812 (Iowa 2007). [SA138 – SA146]. 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 by the Arkansas Supreme Court, provides that documents such 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 the client file. *In re Rule 1.19 –Ark. Rules of Prof'l Conduct,* 2018 Ark. 468, 2016 Ark. LEXIS 387 (2016). [SA147 – SA149].

While every jurisdiction has adopted ethical rules regarding a client's right to access the legal files maintained by the attorney for the client, few bar associations have specifically addressed what "constitutes" a client file. ABA Model Rule 1.16(d) and Rule 1.16(d) of the West Virginia Rules of Professional Conduct provide that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." Additionally, both the Model Rule 1.16(d) and West Virginia Rule 1.16(d) require a withdrawing lawyer to surrender papers and property to which the client is entitled to protect the former client's interests. *See Comm. on Leg. Ethics of The W. Va. State Bar v. Cometti,* 430 S.E.2d 320, 327 (W. Va. 1993) (holding that once an attorney-client relationship

comes to an end, "Rule 1.16(d) comes into play and the attorney is required to promptly return the client's papers and documents").

The West Virginia State Bar's Lawyer Disciplinary Counsel has not promulgated an informal or formal opinion on what constitutes a client's file and what documents must be provided to a client or former client in an electronic format upon a request for a copy of the client file, but a few other bar associations have issued such opinions. 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 stated: "materials that a lawyer must return in such circumstances are as follows: (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." Vermont Bar Association Advisory Ethics Opinion 1999-07 (emphasis added). [SA150 – SA151].

The Pennsylvania Bar 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. Pennsylvania Bar Committee on Legal Ethics and Professional Responsibility Formal Opinion 2007-100. [SA152 – SA160].

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, *Lawyer's Ethical Duty to Retain and Provide Client with Electronic Documents Relating to a Representation.* [SA161 – SA167]. Specifically the Bar Committee addressed (i) a lawyer's ethical obligation to retain e-mails and other electronic documents relating to a representation; (ii) the ethical limitations on a lawyer's ability to delete e-mails and other electronic documents and (iii) the extent to which a client has a presumptive right to obtain e-mails 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 e-mails, the Committee found that a client does not have a presumptive right of access to e-mail communications between lawyers of the same law firm intended for internal law office review and use or to e-mail communications which are unlikely to be of any significant usefulness to the client or to a successor attorney. The

Committee Opinion also stated the client is not entitled to access otherwise inconsequential documents similar to those intended for internal review and use, such as an e-mail to opposing counsel confirming the starting time of a deposition, or an e-mail to a testifying expert asking for transcripts of recent testimony.[11]

With regard to how copies of e-mail communications must be organized and stored, the Committee Opinion stated that "a lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation, or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve." *Id.*

In 2010, the Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline issued an opinion on "*Whether a Lawyers' Notes Must be Relinquished to a Client Upon the Client's Request.*" In its opinion, the Committee noted 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. Opinion 2010-2. [SA168 – SA179]. Internal office management memoranda such as personnel assignments or conflict of interest checks will probably not be items reasonably necessary to a clients' representation."

Also in 2010, the Illinois State Bar Association issued an advisory ethics opinion stating "[w]ith respect to the sixth category (**administrative materials**

[11] It should be noted that copies of **all** external e-mail communications were produced to Petitioners in this case by Mr. Sullivan on June 29, 2015. No effort was made to identify communications which were inconsequential to the client and withhold those from production.

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** under either Rule 1.4(a) or Rule 1.15(b). These materials are not relevant to the status of the client's matter and are usually prepared only for the lawyer's internal use." Illinois State Bar Association Advisory Opinion on Professional Conduct No.: 94-13 (Jan. 1995, Aff'd. May 2010). (emphasis added). [SA180 – SA186].

In 2014, the North Carolina State Bar issued a formal 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) **draft notes saved in preliminary versions** of a filed pleading since these are incomplete work product; (3) **notations or categorizations or 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." North Carolina State Bar Formal Ethics Opinion 2013-15 (Adopted January 24, 2014). (emphasis added). [SA187 – SA188].

In 2016, the Wisconsin Bar Association 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."** Wisconsin Bar Association Ethics Opinion EF-16-03 (Dec 29, 2016). (emphasis added). [SA189 – SA195].

Most recently, in 2018, the Colorado Bar Association in addressing a client's right to access the file related to a 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. Colorado Bar Association Ethics Committee Formal Opinion 104 (Revised 09/15/2018). (emphasis added). [SA196 – SA208].

It should be pointed out that Petitioners cite no case, ethics opinion, or law review article in existence which argues, rules, or even suggests that such communications are, or should be, part of a client's file. The Circuit Court clearly did not commit error in ruling in Respondents' favor on this issue.

At the time the Request for Inspection and Copying came in May, 2016, Defendants had formally responded to requests for the "client file" on thirty-nine (39) previous occasions.[13] In addition to the fact that the material had already been provided to Petitioners' counsel multiple times, Respondents moved for a protective order because the Request for Inspection and Copying sought to examine in their original format all of the documents which the Respondents initially examined in the search for the e-mail communication related to the JMB/Valicor litigation, including those which were ultimately excluded from production to Petitioners because the documents involved clients other than Bourdelais or JMB.

Rule 34 of the West Virginia Rules of Civil Procedure provides that any party may serve on any other party a request to produce and permit the party making the request "to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained," or "to permit entry upon designated land or other property in the possession of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)."

Rule 34(b) provides that "[a] party who produces documents for inspection shall reproduce them as they are kept in the usual course of business **or** shall

[13] The litigation tactics employed by Petitioners' counsel have been abusive. Judge Howard tactfully pointed this out in his order granting Respondents' Motion for Summary Judgment on the Client File Issue by pointing out in a footnote that the Clerk's file for the consolidated cases is the largest of any active case in the Cabell County Circuit Clerk's Office, consisting of 29 volumes measuring a total of 5' 3". [A3613].

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organize and label them to correspond with the categories in the request." (Emphasis added.) There is no requirement in Rule 34 that documents be produced in discovery as they are kept in the usual course of business. Rule 34(b) specifically provides that a party may produce documents which are organized and labeled to correspond to the categories in the request. This is the standard method used in virtually every civil litigation case when copies of documents are produced, whether the documents are copies of medical records, business records, accident reports or, in this case, attorney-client records.

West Virginia generally models its Rules of Civil Procedure after the Federal Rules of Civil Procedure. Rule 34 of the Federal Rules of Civil Procedure has been amended several times since the last amendment to West Virginia's Rule 34, including a recent amendment to Federal Rule 34 which contains more specific details regarding the production of electronically stored information. Section E of Federal Rule 34 now provides that "(i)[a] party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request *(same as Rule 34 of the W. Va. R. Civ. P.)*; (ii) [i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and (iii) [a] **party need not produce the same electronically stored information in more than one form**." (Emphasis added.) While West Virginia's Rule 34 has not been amended to conform with the Federal Rule as of this date, it will likely be amended in the future because discovery of

electronically stored information is becoming more frequent. West Virginia will likely follow the Federal lead as it has done in the past and adopt the same or very similar language governing discovery of electronically stored information and the Court should look to federal law and case decisions regarding Rule 34 of the Federal Rules of Civil Procedure for guidance in this case.

In *Chapman v. General Bd. of Pension and Health Benefits of the United Methodist Church, Inc.*, 2010 WL 2679961 (N.D. Ill. 2010), the court found that the defendant had no duty under Fed. R. Civ. P. 34 to produce electronic versions of the plaintiff's employee performance evaluations in addition to paper copies that it had already produced. The court noted that the requirement of Rule 34 to produce electronically stored information in a form in which it is ordinarily maintained or in a reasonably usable form, was satisfied by the paper production of the complete employee evaluation file as kept in the course of business and the defendant did not have to produce the same electronically stored information in more than one form. *Id.* [SA219 – SA225].

In a similar case, a federal court held that Fed. R. Civ. P. 34 does not require a nonparty to produce documents in native electronic format when it had already produced the documents in hard copy format. *Smyth v. Merchants Credit Corp.*, 2013 WL 5200811 (W.D. Wash. 2013). [SA226 – SA228].

During the course of this litigation, Petitioners have sought the production of the same client file multiple times in multiple ways and Respondents have responded to each request. As set forth above, the Request for Inspection and

Copying was the fortieth (40th) request for the same client file. Other than the internal e-mail communications, which Respondents have consistently maintained are not part of the client file, the Petitioners have had a copy of the entire client file in their possession since June of 2015. The internal firm e-mail communications were produced in April, 2016, pursuant to the terms of a protective order. Despite having multiple copies of the entire client file for years, including the disputed internal firm e-mail documents, the Petitioners' counsel continues to seek the same information.

Most judicial decisions and opinions from bar associations addressing this issue favor the application of a balancing test regarding the need of the client to receive his or her documents in their "native" electronic format against the burden of producing those files in that manner by the attorney or law firm. For example, a formal opinion issued by the Orange County, California, Bar Association supports the use of a balancing test in determining whether to turn over an electronic copy of the client's file when a lawyer has already produced the file in hard copy. Orange County Bar Association: Formal Opinion 2005-01, *File Transfer and Work Product Rules Applicable to Electronic Files,* 48 Orange County Lawyer 37, 44. [SA233 – SA239]. The opinion states that the lawyer should weigh the expense and time involved in copying and/or transferring the electronic files against the client's need for the electronically produced files. *Id.*

The North Carolina Bar Association in Formal Ethics Opinion 2013-15 (adopted January 24, 2014), notes that "if the usefulness of an electronic record in a

client file would be undermined if the document is provided to the client or successor counsel in a paper format, the record must be provided in an electronic format unless the client requests otherwise. For example, providing a spreadsheet without the underlying formulas or providing a complex discovery database printed in streams of text on reams of paper would destroy the usefulness of such data to both the client and successor counsel. Similarly, a video recording cannot be reduced to a paper format and therefore must be provided to the client in its original format." *See* N. C. Bar Ass'n Formal Ethics Opinion 2013-15 at p. 2. [SA240 – SA241].

In the underlying consolidated cases, none of the above-described situations exist. The Petitioners have not articulated any reason why they need the electronically stored portions of the client files, mainly e-mails, in their "native format," more than five years after the conclusion of the JMB/Valicor litigation.[14] Presumably, it is to search the files electronically, looking for a basis to assert a viable claim for legal malpractice beyond the applicable two year statute of limitations. This is a discovery issue controlled by the discovery rules set forth in the Rules of Civil Procedure, not by the Rules of Professional Conduct.

Rule 34(b) of the West Virginia Rules of Civil Procedure provides that in responding to a request for production of documents, "a party who produces documents for inspections shall produce them as they are kept in the usual course

[14] Only two state bar associations, California and New Hampshire, have rejected a balancing test when a client or former client requests a client file in its native electronic format, holding that an attorney must turn over a client's file in its native electronic format, upon request, regardless of the burden. *See*, California State Bar Formal Opinion 2007-174 and New Hampshire Bar Association Ethics Committee Opinion No. 2005-06/3.

of business or shall organize and label them to correspond with the categories in the request." The original paper litigation file was produced as it was kept in the regular course of business. The e-mail files were organized into internal and external e-mail files, labeled, and produced in that fashion. The Circuit Court properly ruled that Respondents complied with the requirements of the Rule.

C. The Informal Opinion Letter to Don Baker by Renee Frymeyer, Lawyer Disciplinary Counsel, is Not Binding on Respondents or This Court

In 2012, the State Bar issued a formal opinion, LEO 2012-01, concerning storing a client's file electronically, but the opinion does not address a client's right to receive copies of the files, in either paper or electronic format. [SA229 – SA232]. Since Petitioners filed their original Complaint in Civil Action No. 15-C-431, they have relied on an informal advisory letter authored by Renee Frymeyer, Lawyer Disciplinary Counsel, dated April 10, 2015. [A15]. Although the information provided to Ms. Frymeyer by Mr. Baker in his request is not known, Ms. Frymeyer writes that ". . . client documents do include electronic data and e-mail communications as well as papers and other tangible material." *Id.*

Respondents and their counsel are confident that Ms. Frymeyer did not intend for her informal opinion to apply to the facts of this case or that she did or would conclude that internal emails are part of the client file, or that electronic data is required to be provided in its "native format." Regardless, the opinions expressed by Ms. Frymeyer in her informal advisory letter to Mr. Baker, which are undisputed and largely irrelevant, have no binding effect on the Court or even on the Lawyer

Disciplinary Board. The Office of Disciplinary Counsel, in certain circumstances, and Investigative Panel of the Lawyer Disciplinary Board are authorized to issue informal advisory opinions under Rule 2.15 of the Rules of Lawyer Disciplinary Procedure. Rule 2.15 provides:

> (a) A lawyer may by written request seek an informal advisory opinion or by telephonic inquiry seek informal ethics advice from Disciplinary Counsel as to whether specific actions may constitute a violation of the Rules of Professional Conduct.
>
> (b) Unless extraordinary circumstances are present which require an expedited response, Disciplinary Counsel shall file a report on each request for an informal advisory opinion with the Investigative Panel of the Lawyer Disciplinary Board. If extraordinary circumstances are present which require an expedited response, Disciplinary Counsel may render an informal advisory opinion without reference to the Investigative Panel. All such informal advisory opinions rendered by Disciplinary Counsel shall be in writing and a copy shall be forwarded to the Chairperson of the Lawyer Disciplinary Board and the requesting lawyer. Disciplinary Counsel may render informal ethics advice by telephone; provided that the requesting lawyer shall memorialize the advice by letter and obtain Disciplinary Counsel's signature attesting to the accuracy of the memorialization.
>
> (c) The Investigative Panel may render in writing such informal advisory opinion as it may deem appropriate or may return the report to Disciplinary Counsel for further review. The Investigative Panel shall forward a copy of every informal advisory opinion to the Chairperson of the Lawyer Disciplinary Board, the Office of Disciplinary Counsel, and the requesting lawyer. If approved by Disciplinary Counsel, a signed copy of memorialized ethics advice shall be forwarded to the Chairperson of the Investigative Panel and the requesting lawyer.

> (d) An informal advisory opinion or memorialized ethics advice is not binding on the Hearing Panel of the Lawyer Disciplinary Board or the 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. Memorialized ethics advice shall be admissible, but shall be accorded only such weight in any subsequent disciplinary proceeding involving the requesting lawyer as deemed appropriate by the Hearing Panel Subcommittee. Informal ethics advice that has not been memorialized in accordance with this rule shall be inadmissible and shall not be accorded any weight in any subsequent disciplinary proceeding involving the requesting lawyer.

In *State ex rel. Morrisey v. W. Va. Office of Disciplinary Counsel*, 234 W. Va. 238, 764 S.E.2d 769 (2014), the Attorney General of the State of West Virginia sought an advisory opinion from the West Virginia Supreme Court concerning whether the Attorney General's Office was bound by an informal advisory opinion issued by the West Virginia Office of Disciplinary Counsel (ODC). The Supreme Court ruled that the Attorney General lacked standing to have the Court determine the enforceability of an informal advisory opinion issued by the ODC and that the Court could not address the merits of the informal advisory opinion because doing so would result in the Court issuing an advisory opinion. However, in its discussion of the case, the Court made it clear that an informal advisory opinion of the ODC under Rule 2.15 of the Lawyer Disciplinary Board is not binding on the Court or even on the Lawyer Disciplinary Board. The Supreme Court noted that a formal advisory opinion rendered by a Hearing Panel under Rule 2.16 is binding on the Hearing Panel of the Lawyer Disciplinary Board in any subsequent disciplinary

proceeding involving the requesting lawyer, but it is not binding on the Supreme Court of Appeals.

> The ODC and Investigative Panel of the Lawyer Disciplinary Board are authorized to issue an informal advisory opinion under Rule 2.15 of the Rules of Lawyer Disciplinary Procedure. Under Rule 2.15(c), an informal advisory opinion "is not binding on the Hearing Panel of the Lawyer Disciplinary Board or the Court, but shall be admissible in any subsequent disciplinary proceeding involving the requesting lawyer."
> *Id.*
>
> Rule 2.16 of the rules provides for a formal advisory opinion, which is rendered directly by the Hearing Panel. Pursuant to Rule 2.16(d), "[a] formal advisory opinion is binding on the Hearing Panel of the Lawyer Disciplinary Board in any subsequent disciplinary proceeding involving the requesting lawyer, but is not binding upon the Supreme Court of Appeals."
> *Id.*

In *Norman T. v. Kerrie W.*, 2015 W. Va. Lexis 541, 2015 WL 1740387, the Supreme Court of Appeals of West Virginia commented in a memorandum decision on the binding effect of an informal advisory opinion by the Lawyer Disciplinary Counsel as follows:

> The ODC and Investigative Panel of the Lawyer Disciplinary Board are authorized to issue an informal advisory opinion under Rule 2.15 of the Rules of Lawyer Disciplinary Procedure. However, under Rule 2.15(d), an advisory opinion is not binding on the Hearing Panel of the Lawyer Disciplinary Board or the Court, but shall be admissible in any subsequent disciplinary proceeding involving the requesting lawyer.
>
> *Id.* at fn. 4.

First, it should be pointed out that Ms. Frymeyer's letter to Mr. Baker in no way even addresses the issue of internal firm e-mail communications, and there is no indication that Mr. Baker directed that specific question to Ms. Frymeyer or that she was aware of ABA Formal Opinion 471 at the time she wrote the letter. It is the same advice that any lawyer would give when asked if a client has a right to his or her file. It does not address, and was likely never intended to address, the question of what constitutes the client's file. It seems fairly certain that neither she, nor the ODC, ever intended her letter to be more than a generic statement concerning a client's right to have a copy of his or her legal file. Respondents are confident in saying that she certainly never intended her letter to be used as a sword by Attorney Baker in the cases he has filed against the Respondents in the underlying civil actions.

Furthermore, the primary purpose of having a rule allowing a practicing attorney to seek informal advice from the ODC and for the ODC to give that advice is so the requesting attorney can obtain guidance regarding an ethics issue and to use that advice in formulating the requesting attorney's conduct and as a shield in the event a formal ethics complaint is filed against the requesting attorney. The requesting attorney can rely upon the advice in his or her defense in certain instances, but this informal procedure was never intended to bind the courts or extrinsic parties. Clearly, by its very language, Rule 2.15 is not designed to be used as a weapon by an attorney requesting an informal opinion to use against an

adverse attorney or party in a civil case as Petitioners' counsel has done throughout the underlying cases.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Respondents, Richard J. Bolen, Cindy D. McCarty, T. Matthew Lockhart, John M. Mahaney, Daniel A. Earl, Christopher J. Plybon, Huddleston Bolen, LLP, Brian S. Sullivan and Dinsmore & Shohl, LLP, respectfully request that this Honorable Court affirm the rulings of the Circuit Court below in granting the Respondents' Motion for Summary Judgment on the Issue of the "Client File."

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