IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0485

JOHN M. BOURDELAIS and
JMB COMMERCIAL PROPERTIES, LLC,
Plaintiffs Below, Petitioners,

v.

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 Below, Respondents.

Honorable Gregory L. Howard
Circuit Court of Cabell County
Civil Action Nos. 15-C-431 and 17-C-303

PETITIONERS' BRIEF

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2. THE CIRCUIT COURT ERRED BY HOLDING THAT PETITIONERS WERE NOT ENTITLED TO THAT PORTION OF THEIR ELECTRONICALLY STORED CLIENT FILE IN ITS ORIGINAL OR NATIVE FORMAT.

3. THE CIRCUIT COURT ERRED IN HOLDING THAT PETITIONERS RECEIVED THEIR ENTIRE CLIENT FILE AS OF JUNE 29, 2015, WHEN THE RESPONDENTS WITHHELD ELECTRONIC COMMUNICATIONS AND ATTACHMENTS THAT WERE NOT INTERNAL FIRM COMMUNICATIONS.

II. STATEMENT OF THE CASE

John M. Bourdelais is a businessman who lives in Huntington, West Virginia, having moved his family and various businesses from Compton, California to Huntington, West Virginia in 1972. The primary businesses owned by Mr. Bourdelais are "Level One Fasteners" and "High Performance Fasteners," which manufacture fasteners for the US Navy through the United States Defense Department for the aerospace industry, nuclear submarines, and aircraft carriers, employing more than 70 people in highly skilled jobs in Huntington, West Virginia. [A110, Vol. I]

On November 18, 2010, one of Mr. Bourdelais' businesses, JMB Commercial Properties, LLC ("JMB"), a real estate holding company, was created by Mr. Bourdelais for the purpose of entering into a Real Estate Purchase Agreement with the Huntington Municipal Development Authority (HMDA) to purchase the Huntington Industrial Center for approximately $3.2 million, an amount JMB had bid in a public auction. JMB and Mr. Bourdelais were represented by the firm of Huddleston Bolen LLP ("Huddleston"). Huddleston attorney Daniel Earl prepared the Purchase Agreement.

The sale did not close until February 16, 2011. In the meantime, HMDA negotiated a lease for a portion of the Industrial Center to United Waste Water Services, L.C. (later to be called Valicor Environmental Services LLC and referred to hereafter as Valicor) to operate a centralized waste water facility.

HMDA and Valicor signed the Lease Agreement dated February 1, 2011 on February 2, 2011. They used a template Lease Agreement that Valicor initially signed to lease a facility next door owned by the Huntington Area Development Council (HADCO). That lease arrangement had fallen through but the lease document was used as a starting point. The Lease Agreement contained certain provisions for rent set off for improvements but also provided that Valicor was taking the premises as is. HMDA would be responsible for repairing structural defects.

Consistent with Paragraph 18(d) of the Lease, HMDA, Valicor and JMB executed an Assignment

and Estoppel Certificate on February 10, 2011 in advance of the JMB closing.. The document recited that JMB was willing to be assigned Valicor's Lease Agreement on the condition that JMB would assume only those obligations of landlord that would arise after the effective date of the Assignment.

The purchase closed on February 16, 2011, with Huddleston serving as the closing agent.

Beginning in March, 2011, Valicor undertook alterations, build-outs and separate meters for electricity, water and gas. It experienced problems with making the concrete floor usable for storage tanks and heavy trucks, which also involved the substrata. Valicor claimed it was entitled to a rent set-off of almost $200,000 for improvements and another amount to fix the flooring under the terms of the Lease, and it stopped paying rent.

Mr. Bourdelais turned the matter over to Huddleston. Mr. Earl wrote a letter to Valicor's lawyer dated July 19, 2011, pointing out various portions of the Lease Agreement to support JMB's position that it was not responsible for these costs.

Huddleston sued Valicor on JMB's behalf on August 10, 2011 in the United States District Court for the Southern District of West Virginia captioned, *JMB Commercial Properties, LLC V. Valicor Environmental Services, LLC,* Civil Action 3:11-CB-00543 ("Federal Court Case") seeking a determination that under the Lease Agreement and the Assignment, Valicor had no right of setoff. Valicor counterclaimed for breach of contract, claiming that under the Lease Agreement, JMB as Assignee was responsible for most of the construction costs because the building was defective and in need of repair.

The Huddleston attorneys initially advised Mr. Bourdelais that he had a strong case, based on the Lease and Assignment documents. Daniel Earl, John Mahaney, Thomas Lockhart and Cindy McCarty are the Huddleston attorneys who worked on the Valicor litigation.

Mr. Bourdelais had his deposition taken by Valicor's lawyers on May 18, 2012. Toward the end of the deposition, defense counsel Stachler asked Mr. Bourdelais questions about the February 1, 2011 Lease Agreement, designed to make him aware that a Huddleston attorney, had prepared it.

Mr. Bourdelais did not understand the point Mr. Stachler was trying to make–that Huddleston had a potential conflict of interest of which it had not made Mr. Bourdelais aware. However, he perceived that

his attorneys' positive attitude about the litigation changed after his deposition. The case settled on May 13, 2013 on terms Mr. Bourdelais considered unfavorable.

Mr. Bourdelais ultimately paid Huddleston $173,385.98 in legal fees and expenses for the litigation.

In a March 2015 meeting on another matter, Mr. Bourdelais met informally with attorney Roy D. Baker, Jr. At the end of the meeting, Mr. Bourdelais explained mentioned to Mr. Baker that he still had an "uneasy feeling" about the conclusion of the Valicor litigation. Mr. Baker advised that he would be willing to look at Mr. Bourdelais' Client File on the matter and share his thoughts and observations.

Before drafting a letter to the Huddleston firm, Mr. Baker contacted Renee N. Frymyer, Esquire, of the Office of Disciplinary Counsel on April 10, 2015. He sought an informal advisory opinion, pursuant to Rule 2.15 of the Rules of Lawyer Disciplinary Procedure, concerning what constitutes the complete client file. Mr. Baker wrote a letter memorializing his conversation with Ms. Frymyer: on April 10, 2015, confirming that parts of the complete Client File to which Mr. Bourdelais was entitled were copies of all emails, text messages, and other forms of communications that Mr. Bourdelais' former counsel had with attorneys or individuals within their law firm, as well as with attorneys or individuals outside of their law firm. [A1, Vol. I] Ms. Frymyer signed off on Mr. Baker's letter and also provided him with a cover letter that read in part, "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." [A1, Vol. I]

By letter dated April 20, 2015, Mr. Baker wrote to all five attorneys seeking all files that relate in any way whatsoever to Mr. Bourdelais and JMB:

> 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, including, but not limited to, all papers, documents, work product, other tangible materials, and electronic data, emails, text messages, and other forms of communication 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 outside of your firm that relate in any way whatsoever to Mr. Bourdelais or JMB Commercial Properties, LLC. Pursuant to L.E.I. 89-02, at your expense, you may retain copies of such files for your own records. [A1, Vol. I]

Mr. Baker also requested copies of certain administrative documents. Mr. Baker included his April 10, 2015 confirming letter to Ms. Frymyer and her responding letter of April 10, 2015. [A1, Vol. I]

By cover letter dated May 20, 2015, Brian S. Sullivan, Esquire, of Dinsmore responded on behalf of the five attorneys by providing 12 boxes of documents, consisting primarily of expert witness reports, deposition transcripts, and communications with expert witnesses. Mr. Sullivan explained that the emails and other electronic data involving Mr. Bourdelais and JMB would be provided at a later date given technical difficulties arising from the firms merging. He also stated that the firm was unsure whether Mr. Bourdelais and JBM were making a claim, adding, "Until we understand from you what this is all about, we will not provide some of the information you seek." [A1, Vol. I] On May 21, 2015, Mr. Baker emailed Mr. Sullivan asking what information would not be provided. [A1, Vol. I] Having received no response, Mr. Baker emailed Mr. Sullivan again on May 29, 2015, and June 3, 2015. [A1, Vol. I] Mr. Baker also received the informal opinion of Ms. Frymyer that a former client of a law firm does not have to provide any reason for requesting a complete copy of the file because the file is the legal property of the client. [A1, Vol. I] He sent the confirming letter to Mr. Sullivan by letter dated June 4, 2015. [A1, Vol. I]

The Petitioners initiated Civil Action No. 15-C-431 in the Circuit Court of Cabell County ("Case 431") on June 17, 2015, against the Respondents alleging breach of contract, breach of fiduciary duty, and civil conspiracy. For relief, they sought the full and complete original file , damages from the Respondents resulting from their failure to provide them with the file and attorney fees and costs. [A1, Vol. I] An Amended Complaint was filed in Civil Action No. 15-C-431 on June 22, 2015, amending the manner in which each of the Attorneys was named as a party, and clarifying certain elements of damages. [A2, Vol. I]

By letter dated June 29, 2015, Brian Sullivan of Dinsmore wrote to counsel for the Petitioners, providing additional information concerning that portion of the Petitioners' client file that was stored in electronic format, and providing the Petitioners with emails to and from outside individuals by converting them to PDF and placing them on a CD. [A4, Vol. I]

During the course of the litigation the Petitioners submitting discovery requests. Respondents filed a Motion for Protective Order, seeking to withhold certain portions of the Petitioners' client file described as internal emails. [A4, Vol. I] Petitioners filed Motions to Compel the Respondents to provide full and complete responses to their Requests for Production [A5, Vol. I]. In response to the Respondents' Motion for Protective Order [A6, Vol. I], Petitioners submitted the Affidavit of Affidavit of John M. Bourdelais. He explained that the Petitioners requested the complete client file to determine whether their rights were violated by their former counsel, and to determine whether their former counsel fulfilled their legal and fiduciary duties to the Petitioners.[A7, Vol. I] The Petitioners also filed the Declaration of Bernard J. DiMuro, who is a professional responsibility expert. Mr. DiMuro opined that the American Bar Association Formal Opinion 471 recognizes that the majority of state jurisdictions follow the "entire file" approach to surrendering the client file to the client, and that the exception for "documents reflecting only internal firm communications and assignments" related to internal administrative matters and would not include internal firm communications related to the representation of the client. [A8, Vol. I]

As set out in greater detail in the argument section, Judge Hustead eventually ruled after multiple hearings that because the Respondents had not asserted a valid privilege with respect to the internal emails they had located, they had to produce them. [A17, A28, Vol. I]

A Hearing was held before Judge Hustead on November 13, 2015 [A132, Vol. V], at which time Judge Hustead ordered that "the Defendants shall file individual answers and responses to Plaintiffs' individual Interrogatories and Requests for Production of Documents, and, if necessary, file a Privilege Log with each question to which the Defendants assert privilege. [A18, Vol. I]

The Respondents produced the internal emails to the Petitioners in printed hard copy only on April 22, 2016, and did not produce any of the attachments to such emails. Eight days after receiving the hard

copies of the internal emails produced by the Respondents on April 22, 2016, the Petitioners filed their "Requests for Inspection and Copying" on May 1, 2016 regarding "electronic data." [A23, Vol. I]

On November 2, 2016, Respondents moved for Partial Summary Judgment in regard to the Petitioners' claims in Civil Action No. 15-C-431, to which the Petitioners responded and the Respondents replied. [A34, A39, Vol. I, A54, A56, A57, Vol. II]. Judge Hustead retired from her position as Circuit Court Judge on December 31, 2016 and was succeeded by the Honorable Gregory Howard.

Judge Howard held a hearing on May 15, 2017, upon Respondents' Motion for Partial Summary Judgment. [A55, Vol. II, A138, Vol. V] Following the Hearing held on May 15, 2017, Judge Howard denied Defendants' Motion for Partial Summary Judgment. [A58, Vol. II, A139, Vol. V]

On July 7, 2017, Judge Howard held a Hearing, granting Respondents' Motion to Strike Petitioners' experts, Robert H. Davis, Esquire and J. Rudy Martin, Esquire, denying Petitioners' Motion to enter judgment against the Respondents, and other discovery issues relating to the production of the Petitioners' client file. [A62, Vol. II, A140, Vol. V] On August 25, 2017, Petitioners filed their Motion for Leave to File a Second Amended Complaint in Civil Action No. 15-C-431. [A61, Vol. II] On October 18, 2017, Respondents filed their Motion to Consolidate Civil Action Nos. 15-C-431 and 17-C-303 for purposes of discovery and trial, to which the Petitioners objected.

A Second Amended Complaint was filed in Civil Action No. 15-C-431 on September 10, 2018, alleging additional theories of recovery based upon legal malpractice, unjust enrichment, fraud, concealment, misrepresentation, relating to the Respondents continued refusal to provide Mr. Bourdelais with the full and complete original of his client file in its original or native format. [A67, Vol. II]

On May 17, 2017 the Petitioners filed Civil Action No. 17-C-303, alleging theories of legal malpractice, breach of contract, breach of fiduciary duties, fraud, concealment, misrepresentation, and civil conspiracy. The Complaint alleged that the Respondents had committed malpractice arising from a conflict of interest and also had a claim regarding their refusal to provide the complete file.

An Amended Complaint was filed in Civil Action No. 17-C-303 on September 14, 2017, alleging additional theories of recovery against the Respondents. Civil Action No. 17-C-303 was transferred to

Judge Howard by Order dated June 30, 2017. [A69, Vol. II] Subsequently, over the objection of the Petitioners, the Circuit Court consolidated Civil Action Nos. 15-C-431 and 17-C-303 for purposes of discovery and trial.

On September 14, 2018, Petitioners filed their Brief as ordered by the Court at the Status Conference held on June 28, 2018, to which the Respondents Responded on October 3, 2018, and the Petitioners Replied on October 19, 2018. [A81, A83, A85, Vol. II]

On December 7, 2018, Petitioners filed their Supplemental Expert Witness Disclosure, disclosing Derek W. Ellington as an Expert Witness on behalf of the Petitioners in regard to the production of the electronic portion of Petitioners' Client file in its native format. [A89] By Affidavits dated February 1, 2019, March 11, 2019, and April 16, 2019 [A98, Vol. III, A113, A122, Vol. IV]

On December 14, 2018, Petitioners submitted the Affidavit of Lawrence Lessig, a Professor at Harvard Law School, detailing the importance of the production of the Petitioners' electronic file in its' native/original format. [A90, Vol. III]

On January 7, 2019, the Respondents filed their Motion for Summary Judgment on the issue of the "Client file," to which the Petitioners Responded and the Respondents Replied. [A96, A103, A107, Vol. III] A Hearing was held before the Court on February 15, 2019, at which time Judge Howard granted Respondents' Motion for Summary Judgment regarding the "Client file." [A124, A143, Vol. V]

On March 11, 2019, Petitioners moved for reconsideration of the granting of Summary Judgment on behalf of the Respondents regarding the "Client file" issue, to which the Respondents Responded and the Petitioners Replied. [A112, A118, A121, Vol. V]

A Hearing was held before the Court on April 19, 2019, at which time Judge Howard denied Petitioners' Motion for Reconsideration. [A126, A144, Vol. V]

III. SUMMARY OF ARGUMENT

The Circuit Court's decision to grant summary judgment to the Respondents was erroneous: It imposed a narrow standard on what constitutes the client file inconsistent with the high fiduciary duty owed to clients and in conflict with current Lawyer Disciplinary Board opinions. A client is presumptively entitled to the complete file subject only to a lawyer carrying the burden of establishing good cause to withhold certain types of internal documents. Additionally, the Circuit Court erred by finding that a lawyer does not have a duty to provide electronic data in the same format he/she stores it.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this appeal presents two issues of first impression—under what circumstances is a client entitled to internal emails or memoranda as part of the client file and whether lawyers have an ethical duty to provide material from the client file in the same format as it is stored—the Petitioners request oral argument under Rule 20 of the Rules of Appellate Procedure.

V. ARGUMENT

STANDARD OF REVIEW

The Circuit Court granted the Defendants' Motion for Summary based on its interpretation of law. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, this Court will apply a *de novo* standard of review. *** *See also* Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)" *Coleman v. Sopher,* 201 W. Va. 588, 594, 499 S.E.2d 592, 598 (1995). Additionally,

> 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 is not desirable to clarify the application of the law. Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, Andrick v. Town of Buckhannon, 187 W. Va. 706, 421 S.E.2d 247 (1992).Syl. pt. 1, Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).
>
> Syl. pt. 1, Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).

Ibid.

ARGUMENT

1. THE CIRCUIT COURT ERRED BY HOLDING THAT A CLIENT FILE, TO WHICH A CLIENT IS ENTITLED TO UNDER THE LAWYER'S LEGAL AND ETHICAL OBLIGATIONS, DOES NOT INCLUDE THE LAWYER'S INTERNAL COMMUNICATIONS, WHETHER BY EMAIL OR WRITTEN MEMORANDUM

The Petitioners submit that the Circuit Court reached the wrong conclusion for the following reasons:. (A) The Circuit Court's Order Granting the Respondents' Motion for Summary Judgment omitted any facts explaining why the Petitioners sought the client file from Respondents. Such facts would have made clear why internal firm documents were so important to the clients' interest. The Order also made significant misstatement of facts; (B) The Circuit Court's ruling was inconsistent with the long-established legal ethics opinions of the Lawyer Disciplinary Board; (C) the Circuit Court Order made

only a passing reference to the predecessor Judge's ruling that the internal emails were part of the file and did not explain why it was reversing that ruling; (D) the Circuit Court Order did not acknowledge that the Lawyer Disciplinary Board had issued long-standing opinions that attorney work-product was part of the client file, and reached a decision inconsistent with those opinions; and (E) The Circuit Court would have been assisted by permitting the Respondents' experts to provide the Court with the benefit of their nationwide knowledge. Each point will be addressed in turn.

A. Omission and Mischaracterizations of Facts

Paragraphs 2 through 11 of the Order set forth facts concerning the Petitioners' purchase of the Huntington Industrial Park. Paragraph 2 states that "Plaintiffs were represented by Dan Earl of Huddleston Bolen, LLP ("Huddleston") and assisted by Chris Plybon of Huddleston." [A 3601, Vol. IV]. Mr. Plybon's role in the purchase was a contested fact. The statement ignores what the Petitioners contend was the beginning of Huddleston's conflict of interest and ignores Mr. Earl's own words in an interoffice email that Mr. Plybon didn't ask him first before he made changes in the Lease "for HMDA". [A 2810, Vol. III]] as set forth in more detail below.

A series of emails attached to the Respondents' Motion for Summary Judgment on Plaintiffs' Claims of Legal Malpractice demonstrates that Mr. Plybon was acting for HMDA on loan as it were from HADCO when he prepared the Lease Agreement between HMDA and Valicor. Tom Bell of HMDA and David Brown of Valicor primarily negotiated terms of the Lease; Mr. Bourdelais sat in on one meeting. On December 22, 2010, Mr. Bell sent Mr. Bourdelais a memo listing certain basic lease terms, such as length of the lease, rental rate and rent increases. Mr. Bell emailed a copy of this memo to Mr. Brown and wrote, "[Mr. Bourdelais] is in agreement with the terms. *** I'll check with Mark Sprouse and see who prepared the model agreement you had with HADCO and will get it revised accordingly." He copied Mark Sprouse of HADCO and Mr. Bourdealis

Mr. Sprouse responded to Mr. Bell that same day, informing him that "Chris Plybon prepared the lease. His number is 529-6181." Mr. Sprouse copied Mr. Brown and Mr. Bourdelais.

On December 23, 2010, Mr. Bell sent Mr. Brown an email confirming a conversation they had that day which modified the lease agreement to give Valicor free rent for the first three months to offset its current rent while it modified the new space prior to moving in. The email concluded, "I will have HADCO's attorney revise the lease agreement.". The email was copied to Mr. Sprouse, Mr. Bourdelais and others.

Mr. Plybon and Mr. Bell emailed each other about changes needed to the HADCO model agreement on January 10, 2011, January 18, 2011 and January 23, 2011. Although Mr. Sprouse is copied on some of these, Mr. Bourdelais is not. It wasn't until January 24, 2011 that Mr. Bourdelais was copied on an email involving Mr. Plybon's work on revising the Lease Agreement. In that communication, Mr. Bell emailed "CJP" with responses to Mr. Plybon's email of the day before. Mr. Sprouse was also copied.

Later that day, Mr. Plybon sent Mr. Bell a draft of the lease with the changes the latter had wanted as well as some changes the lawyer made to reflect that the leased building would be part of a larger facility. It appears from the email header that he hit "reply all" so that Mr. Sprouse and Mr. Bourdelais were both copied.

There were last minute revisions to the Lease Agreement discussed in emails between Mr. Bell and Mr. Plybon, on which Mr. Bourdelais was not copied: February 1 and February 2, 2010. . Of particular significance was a February 2, 2011 email from Mr. Bell to Mr. Plybon sent at 8:22 a.m. that set forth changes to the Lease Agreement Mr. Brown wanted following a telephone conversation between Brown and Bell the day before. . Mr. Bell wrote: "Page 5 – add language under para. D, structural damage such as the roof, walls or floor. [a somewhat definition of lessor's responsibility.]"

Mr. Plybon completed the Lease on February 2, 2011 at 10:30 a.m. The new language he placed in the Lease Agreement on page 5 read "Lessor shall, at Lessor's cost and expense, repair any structural damage or defect in the Building (including failure of the walls or floors). It is this language that Valicor relied upon to claim that the building's concrete floor was defective, thereby justifying ceasing to pay rent

while it made repairs. Mr. Bourdelais was copied on this 10:30 a.m. email, which attached the clean and marked versions of the revised lease.

Mr. Bell emailed the Lease to Mr. Brown at 11:18 a.m. for his signature, with a copy to Mr. Bourdelai]. Minutes after the Lease Agreement was sent to Valicor for its signature on February 2, 2011, Mr. Bell emailed Mr. Sprouse and another individual associated with HADCO, "Success at last. This will bring 20 new jobs to Huntington. Thanks very much for your assistance and perseverance. Thanks for the use of Chris Plybon." Mr. Sprouse sent Mr. Plybon a copy of this email, circling this last sentence and drawing a star next to it. Huddleston attorney Daniel Earl, who was representing the Petitioners' interests in the purchase of the building during this entire period of time, was not copied on any of these emails and was unaware of Mr. Plybon's participation, as borne out by his later interoffice memo.

The Circuit Court could only conclude that Mr. Plybon was assisting Mr. Earl in his legal representation of the Petitioners re the Huntington Industrial Center by totally ignoring the record.

Paragraph 5 of the Order found that the Lease Agreement was shared with Mr. Bourdelais by email "for his approval" prior to its execution on February 1, 2011. Although the effective date of the Lease was February 1, 2011, the record shows that Mr. Bourdelais was not specifically aware that Mr. Brown wanted the changes made in Paragraph 5 and had 48 minutes to review the revised Agreement on the morning of February 2, 2011 before it was sent to Mr. Brown for execution.

Paragraph 6 of the Order found that Mr. Earl prepared the Assignment of the lease from HMDA to JMB as part of the closing held on February 16, 2011 without referencing the Petitioners' complaints about the document. The Assignment and Estoppel Certificate was executed by HMDA, Valicor and JMB on February 10, 2011. The document recited that JMB was willing to be assigned Valicor's Lease on the condition that JMB would assume only those obligations of landlord that will arise after the effective date of the Assignment. HMDA and Valicor certified that all improvements or work required under the Lease to be made by landlord had been completed to the satisfaction of Valicor; that all charges

for labor and materials used or furnished for improvements and/or alterations made by HMDA or Valicor had been paid in full; and that there were no defenses, offsets, claims or credits that the Tenant had against the enforcement of the Lease by the landlord. In fact, Valicor had not moved in and did not begin making alterations or repairs until March 2011.

Paragraph 8 of the Order recited that Petitioners retained the Huddleston firm to file a lawsuit against Valicor in the United States District Court a short six months after the Lease was signed and that Valicor filed a counterclaim. The Court did not elaborate that Valicor counterclaimed for breach of contract, claiming that under the Lease Agreement, JMB as Assignee was responsible for most of the construction costs because of the building being defective and in need of repair. The Order also ignored a key series of emails by Mr. Earl about whether to sue HMDA occurring three days before the lawsuit was filed. On August 8, 2011, Mr. Earl sent an email to Mr. Bourdelais informing him of the following:

> Working on it now. Will have to decide if want to sue HMDA. You have claims against HMDA for breach of representation and breach of warranty—the same as against [Valicor].

Mr. Bourdelais responded by email 20 minutes later:

> I believe this is standard practice, should be no hard feelings on their part. Valicor would draw them in anyway. Regards, Jack.

Nine minutes later, Mr. Earl forwarded this exchange to another firm member, J.H. Mahaney, seeking his input. Mr. Earl did not include Mr. Bourdelais in this exchange.

> I would like to discuss this with you if you get a minute in between beers. This will prevent diversity I think and not sure the HMDA has any money to pay anyway, unless possibly by insurance. I don't really care, but press likely to be all over this. *I think CJP [Chris Plybon] actually make [sic] changes to Lease for HMDA on the shower build-out portion. He didn't ask me first and probably didn't charge them either.* If we could keep the option open that may be a better approach.

[emphasis supplied]. So Mr. Earl ignored Mr. Bourdelais directive based upon his firm's own potential conflict without informing Mr. Bourdelais of the issue as required by Rule 1.7 of the Rules of

Professional Conduct.. This was only made evident because Judge Hustead ordered the Respondents to produce those emails.

Paragraphs 12 through 15 of the Order listed the undersigned's initial efforts at requesting the Respondents' client file but omitted any context. As set forth in the Statement of Case, *supra,* Mr. Bourdelais felt uneasy about the outcome of the *Valicor* litigation. His lawyers predicted that they would be successful, based upon the wording of the Lease Agreement that had been signed by Valicor and HMDA. In addition, the language in the Assignment of the Lease led him to believe that Valicor had had no issues about the lease, when in fact it had not yet moved in. Mr. Bourdelais perceived that the Huddleston lawyers lost their optimistic outlook after his deposition, at which opposing counsel asked him a series of questions designed to demonstrate to him that Huddleston had prepared the Lease Agreement at issue. During a break, the Huddleston lawyers present conferred with Mr. Bourdelais, who was confused about the significance of the questions. They informed him that Huddleston lawyer Christopher Plybon had prepared the Lease Agreement for HMDA but that it was not a problem, because he had not charged for his services. Mr. Bourdelais requested that the undersigned look into these issues.

Paragraph 17 of the Order omits the fact that before filing suit on June 17, 2015, the undersigned responded to Respondent Brian Sullivan's May 20, 2015 letter on May 21 and 29, and June 3 and 4, asking him to clarify what types of documents were being withheld but received no response.[1] Without this information, the Petitioners and their counsel are painted as being unreasonable and impatient.

B. Circuit Court Orders by Honorable Jane Hustead

Paragraph 29 of the Order simply recites:

> 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.

[1] In paragraph 17 of the Order recites that Mr. Bourdelais personally sent a letter to the Huddleston lawyers advising them that the undersigned had JMB and his personal authority to request the client file.

The significance of this ruling and the tortuous process leading up to it are not mentioned.

Briefly, the Petitioners served a Request for Production of Documents on August 3, 2015 seeking, among other material, all internal email and memoranda. On August 17, 2015, the Respondents filed a Motion for a Protective Order to relieve them of the requirement that they respond to the Request for Production because it sought internal firm communications which, they contended, were not part of the file and were therefore burdensome and irrelevant to the litigation. The Respondents filed a Motion to Compel on September 22, 2015.

At a September 5, 2015 hearing on these motions, the Circuit Court held that the Respondents need not respond to the discovery. They should produce a privilege log, a discovery commissioner would be appointed to review the documents and the Commissioner would ascertain whether any of the documents were relevant to the Petitioners. Judge Husted said, "[W]e'll ascertain if they're entitled to give [miscellaneous internal communications] to you ... or, you know, required to give that to you. And if we ascertain that they're not, then that should be the end of it. Okay? Because your suit was simply to obtain the file, correct?" No Order was prepared from this hearing.

At a November 13, 2015 hearing, the Respondents' counsel represented to the Court that what he characterized as "limited internal email communications" had been printed out and Bates stamped immediately after the last hearing, awaiting the appointment of a discovery commissioner..[2] Counsel did not want to formally respond to lengthy interrogatories and request for production of documents. The Circuit Court ruled that the Respondents must file discovery answers and a privilege log listing the applicable privilege to each documents. A discovery commissioner would be appointed if necessary once discovery responses were made.

[2] The parties were having trouble agreeing upon a commissioner who was willing to serve. Transcript pp. 9-16.

The Petitioners filed another motion to compel, because the Respondents' discovery responses were filled with objections and a 69-page privilege log which identified email dates, the sender, the recipient(s) and the subject line, but listed no privilege. At a February 17, 2016 hearing, the Respondent's counsel explained that all of the documents were privileged as internal firm communications and not subject to disclosure. The Circuit Court directed the Respondents to go back through the log and state why each document was not available to the Petitioners. The Circuit Court overruled their counsel's repeated assertion that the internal documents were not part of the client file. Judge Husted said, "If you want to take it up to the Supreme Court and they say, no, absolutely not, that judge overstepped her bounds, I'll accept that and be completely happy with it. Respondents' counsel told the Circuit Court that they could categorize the emails into four or five different groups so a discovery commissioner could identify the really important communications. An Order was entered reflecting this ruling on April 6, 2016.

The Petitioners filed a fourth supplemental motion to compel on March 15, 2016, because the Respondents did not file an amended privilege log by March 9, 2019. [A fourth supp. Motion] Instead, the Respondents' counsel sent an email on March 18, 2016 proposing a settlement: The Respondents would produce all of the documents which they have maintained are not part of the client file pursuant to a protective order protecting the confidentiality of the documents outside of the litigation. In return, the Petitioners would dismiss their request for sanctions, made in the fourth motion to compel, and either dismiss the lawsuit or amend the lawsuit to assert a legal malpractice action within 30 days of document production. At a hearing held on April 13, 2016, the Circuit Court expressed its frustration with the Respondents' counsel and ruled that the internal memorandum were part of the client file in this exchange:

> MR. OFFUTT: He keeps asking for part of the client file. That—you've never ruled that these documents are part of the client file.
>
> THE COURT: Okay. As of today—

MR. OFFUTT: --because you—

THE COURT: --I am ruling that—

MR. OFFUTT: --you've never—

THE COURT: --they are part—

MR. OFFUTT: --you've never—

THE COURT: --of the client file. Now you again have a basis to take me up on a writ of prohibition.

The Circuit Court also sanctioned the Respondents' counsel $1,000. The Circuit Court observed that the Respondents left it with no choice, because they refused to articulate why some emails were irrelevant, why some might involve another client, etc. The Court entered a Protective Order with respect to the documents produced limiting their use to the litigation. [Order Regarding Hearing of April 13, 2016].

Judge Hustead left office at the end of 2016, and Honorable Gregory L. Howard, Jr. took office January 1, 2017. During a status conference held on August 31, 2018, the undersigned counsel said "[W]hen I tried initially [to take depositions], when this case was pending before Judge Hustead, I was stymied by the defendants." Judge Howard interrupted and said,

> I don't want to hear anymore about the history of this case. I'm not going backwards. I don't even want to hear Judge Hustead's name again in a hearing any time soon. I'm frustrated. It seems like we're constantly going back and talking about what happened years ago ....

[8/31/2018 Transcript, pp. 9-10].

As the successor Judge in these cases, Judge Howard had the authority to take any action that Judge Hustead may properly have taken, but the Circuit Court's utter failure to even address the Judge

Hustead's ruling that internal memoranda and emails are part of the file is one of the infirmities of its Order granting summary judgment. *See, Allen v. Allen,* 212 W. Va. 283, 569 S.E.2d 804 (2002). In the *Allen* case, a Circuit Court adopted the family law master's recommended decision regarding change of custody to the father. The new Judge took office several weeks after the ruling. The mother then filed a Rule 60(b) motion, and the Judge reversed the family law master's recommended decision based upon mistake and misapplication of the law. On appeal, the Court held that the new Judge had the authority to rule on the Rule 60(b) motion just as the first Judge would have. Because the new Judge issued a detailed Order explaining why the family law master's recommendation was flawed, the Court held that the new ruling was not an abuse of discretion, the applicable standard of review. *Id.*, 212 W. Va. at 283, 569 S.E.2d 804 (2002).

C. Inaccuracies in the Statements of Law

Paragraph 57 and 58 of the Order read:

> 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".
>
> 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.

With all due respect, the Circuit Court misstated the issue, because the next paragraph of L.E.I. 92-02, which is a formal opinion of the Lawyer Disciplinary Board, not the Office of Disciplinary Counsel, opines that a client who does not owe his/her attorney money is entitled to all work product covered by Rule 26(b)(3) of the West Virginia Rules of Civil Procedure, because the attorney has been compensated for such work.

So the issue is not so much whether internal memoranda and emails are "communications;" the issue is whether such documents fall within the definition of work product under the Lawyer Disciplinary Board's opinions. The L.E. I. notes that some jurisdictions apply more "stringent" standards that permit

an attorney to withhold only opinion work product if the attorney has not been fully compensated. The implication is however, that if the client owes no legal fees, all work product—both fact and opinion—must be turned over.

2. THE PETITIONERS WERE ENTITLED TO ALL INTERNAL EMAILS AND MEMORANDA AS PART OF THE CLIENT FILE BECAUSE WEST VIRGINIA ALREADY EMPLOYS THE "ENTIRE FILE" APPROACH AND THE RESPONDENTS DID NOT ARTICULATE GOOD CAUSE FOR WITHHOLDING THEM.

There are two basic approaches to defining what materials constitute the client file which a lawyer must provide a client upon request after termination of representation: the "entire file "and the "end product." The *Restatement (Third) of the Law Governing Lawyers §* 46(2) (Am. Law. Inst. 2000) ascribes to the entire file approach: "On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse."

The Commentary to the Restatement clarifies that "a client is entitled to retrieve documents in possession of a lawyer relating to representation of the client. That right extends to documents placed in the lawyer's possession as well as to documents produced by the lawyer." The *Restatement's* Commentary section to § 46 recognizes certain circumstances when a lawyer may decline to deliver a document for (i) situations "when compliance would violate the lawyer's duty to another," (ii) cases of "extreme necessity," such as where the disclosure "is likely to cause serious harm" to the client, and (iii) "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. The Commentary added that "the lawyer's duty to inform the client. ... can require the lawyer to disclose matters discussed in a document even when the document itself need not be disclosed."

Courts adopting the entire-file approach have generally reasoned along two lines. First, they find that the approach best comports with the duty owed by a lawyer to his or her client.[1] Second, they find that the approach is consistent with the client's property interest in his or her file. *TCV VI, L.P. v. Trading Screen Inc., slip. op.,* 2018 Del. Ch. LEXIS 128, 2018 WL 1907212 (Chancery Del. 2018).

By contrast, the "end-product" interpretation limits what an attorney must provide as part of the client file. In 2015, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association (the "ABA Committee") issued Formal Opinion 471, *Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled.* The Opinion adopted a version of the "end-product" approach even though the ABA Committee recognized that the majority of state jurisdictions follow the "entire file" approach. The ABA Committee opined that a lawyer must make available to the client upon request any materials provided to the lawyer by the client; legal documents filed with a tribunal, executed instruments like contracts, orders or other records of the tribunal, correspondence issued or received, discovery, legal opinions issued at the request of the client and third party assessments.

The ABA Committee further opined that attorneys should not be required to produce drafts or mark-ups of documents to be filed with a tribunal, drafts of legal instruments, internal legal memoranda and research materials; internal conflict checks; personal notes; hourly billing statements; firm assignments; notes regarding an ethics consultation, a general assessment of the client or the client's matter and documents that might reveal the confidences of other clients.

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[1] See, e.g. Swift, Currie, McGhee & Hiers v. Henry, 581 S.E.2d 37 (Ga. 2003) ("[T]he majority view fosters open and forthright attorney-client relations. An attorney's fiduciary relationship with a client depends, in large measure, upon full, candid disclosure.");); *Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk,* 729 N.W.2d 812, 820 (Iowa 2007); ("We agree with the majority of jurisdictions and adopt the 'entire file' approach to this issue. Attorneys are in a fiduciary relationship with their clients requiring open and honest communication to ensure effective representation."); *Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn L.L.P.,* 689 N.E.2d 879, 882-83 (N.Y. 1997) ("That obligation of forthrightness of an attorney toward a client is not furthered by the attorney's ability to cull from the client's file documents generated through fully compensated representation, which the attorney unilaterally decides the client has no right to see.")

The Circuit Court in the instant case found this Opinion persuasive, Order at paragraphs 60-61. However, the list of documents that need not be produced under this approach demonstrates that it conflicts with the West Virginia Lawyer Disciplinary Board's long-established opinions that the client is entitled to work-product if the client has paid for it, such as drafts of legal opinions, research material and internal legal memorandum. *See* L.E.I. 92-02 and L.E.O 2012-01. According to the Circuit Court's Order that by June 29, 2015, the Petitioners received their entire file. By implication they were not entitled to be provided with drafts of the Lease Agreement that Mr. Plybon revised for HMDA. Yet these are clearly work-product documents producible under West Virginia's Lawyer Disciplinary Board formal opinions. *See also, TCV VI, L.P., supra (*cases adopting the "entire file" approach are more persuasive).

It is accurate that even those jurisdictions who adopt an "entire file" standard generally have some exceptions involving certain types of internal firm documents. Consistent with making the client's interests a priority, courts in these jurisdictions analyze whether an exception exists in a careful way that considers the client's individual circumstances, something the Circuit Court did not do here. The Court will note that most of the cases discussed herein involve business clients like the Petitioners.

In *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 689 N.E. 2d 879 (N.Y. 1997), clients retained the Proskauer firm to provide legal services in connection with a $175 million mortgage financing transaction. After the clients and the firm parted ways, the client retained another firm to represent them with all matters related to the financing transaction which had closed several months before. The new firm requested that Proskauer turn over its files in their entirety. Proskauer turned over many documents but also furnished a 58 page index of its files which listed a large number of documents such as internal legal memoranda, drafts of instruments, mark-ups and notes on contracts. The clients filed a special proceeding to recover all of the outstanding papers in the Proskauer files. Proskauer refused to make any further transfer of its files, but expressed a willingness to entertain a particularized request upon a showing of need.

The trial court and appellate court accepted Proskauer's position and ruled that the firm's drafts, internal memoranda, mark-ups, research and other material containing the opinions, reflections and thought processes of counsel were the firm's "private property" which did not need to be furnished absent a showing of particularized need. The Court of Appeals reversed. It first observed that where no claim for unpaid legal fees is outstanding, the client is presumptively accorded full access to the entire file on a represented matter with narrow exceptions, thus adopting the "entire file" approach. 689 N.E.2d at 881. This, said the Court, is supported by an attorney's fiduciary relationship with a client. In the Court's view, the "obligation of forthrightness of an attorney toward a client is not furthered by the attorney's ability to cull from the client's file documents generated through fully compensated representation, which the attorney unilaterally decides the client has no right to see." *Id.* at 882-83.

Second, the Court observed that particularly with complex transactions, "the client's need for access to a particular paper cannot be demonstrated except in the most general terms, in the absence of prior disclosure of the content of the very document to which access is sought. Therefore, barring a substantial showing by Proskauer of good cause to refuse client access, the clients should be entitled to inspect and copy work product materials.

The *Sage Realty* Court then found that Proskauer should not be required to disclose firm documents intended for internal law office review and use. The Court observed:

> 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, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation. Such documents presumably are unlikely to be of any significant usefulness to the client or a successor attorney.

Id. at 883. The Court directed on remand that the trial court might need to conduct an *in camera* review.

Courts considering the issue of internal documents after *Sage Realty*, have shown how narrowly they will interpret "firm documents intended for internal law office review and use." The Court in *Hahn*

& Hessen, LLP v Peck, 2012 N.Y. Misc. LEXIS 6563 (N.Y. Sup. 2012) held that interoffice emails did not fall within the category of materials for internal law office review as defined in the *Sage Realty* case and to the extent they did the clients demonstrated a need for their production that negated any privilege.

In *Bolton v. Weil, Gotshal & Manges LLP*, 836 N.Y.S.2d 483 [N.Y. Sup. 2005], the Court required production of internal firm documents because the *Sage Realty* presumption that such documents are unlikely to be of any significant usefulness to the client or a successor did not apply. Quoting the *Bolton* decision with approval, the Court in *In re McKinstry v. Genser (In re Black Diamond Mining Co., LLC,* 507 B.R. 209 (E.D. Ky 2014) concluded that the *Sage Realty's* instruction to trial courts to conduct *in camera* reviews of contested internal documents was to assess their usefulness to the client. The Court commented:

> A privilege for internal firm documents also comes with unique costs aside from those generally associated with all privileges: damage to the attorney-client relationship. Withholding from a client documents prepared on billable time—despite the client's demonstrated need—is fundamentally inconsistent with an attorney's fiduciary duties.

The Petitioners herein wanted another set of eyes to determine if they received competent representation from the Respondents. The undersigned could not effectively advised them without access to drafts of documents and internal communications. The information sought would not have appeared in the material originally produced. The emails and drafts had significant usefulness to the Petitioners. They demonstrated that Mr. Earl ignored a directive from Mr. Bourdelais to sue HMDA because of Mr. Plybon's work for HMDA, the potential publicity and his own lack of diligence in preparing an Assignment and Certificate of Estoppel that did not protect his client.

The Petitioners demonstrated a compelling need for internal documents under the *Restatement* (3d) and the Respondents never provided any justification to withhold individual documents, despite

Judge Hustead's multiple attempts to give them the opportunity.[2] Accordingly, the Court should reverse the Circuit Court's granting of summary judgment to the Respondents and remand the case for further proceedings.

4. THE CIRCUIT COURT ERRED BY HOLDING THAT PETITIONERS WERE NOT ENTITLED TO THAT PORTION OF THEIR ELECTRONICALLY STORED CLIENT FILE IN ITS ORIGINAL OR NATIVE FORMAT.

The Petitioners asserted that they were entitled to electronic data in its original, or native, format. For their first production of external emails on June 29, 2015, the Respondents had printed out copies of emails, scanned them into a pdf and then placed them on a CD. The internal emails were produced in April 2016 in hard copy. Without the email headers, the Petitioners were unable to search and authenticate the material.

The Circuit Court found that Mr. Baker's April 20, 2015 letter to the Huddleston firm did not request electronically stored documents in their original form; nor did it request that the electronically stored documents be produced in their "native" format. Paragraph 70. Instead, he requested "originals" of electronic documents without specifying the format. Paragraph 77.

The Court found that whether the Respondents were ethically required to produce electronic data in its native format in the absence of a specific request was a question of law for which there was no guidance in West Virginia. The Circuit Court refused to consider the Affidavits from experts the Respondents submitted. The Circuit Court found that the first time the Petitioners requested electronic data in the format in which it has existed while in the Respondents possession was May 6, 2016, more than ten months after Civil Action No. 15-C-431 commenced.

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[2] The Court was particularly frustrated at the April 13, 2016 hearing after Respondents' counsel reported that they had been unable to categorize the withheld emails into different groups according to importance, as they said they would do at the February 17, 2016 hearing because the documents were all in the same category—internal firm communications that are not part of the client file. Said Mr. Offutt, "They're as simple as, you know, what do we do with the file when we close it? Can you cover a deposition for me." [4/13/16 Transcript, p. 11].

The Circuit Court' found that the Petitioners had acquiesced in the production of electronic documents in PDF or paper format for more than ten months. All the Respondents were required to do was produce the electronic data in a reasonably accessible, usable and useful form. The Circuit Court further found that the scanned PDF and the paper format met this requirement.

The Respondents dispute the Circuit Court's finding that their requesting the electronic data in its "original" format was not tantamount to requesting the emails in the native format or in the manner in which the Respondents possessed them. Even if Mr. Bourdelais had not requested his Client File in its original or native format, a requesting party's obligation to specify a format for production is superseded by a responding party's obligation to refrain from converting "any of its electronically stored information to a different format that would make it more difficult or burdensome for [the requesting party] to use." *Crissen v. Gupta,* 2013 U.S. Dist. LEXIS 159534, at *20 (S.D. Ind. Nov. 7, 2013) (referencing *Craif & Landreth, Inc. v. Mazda Motor of America, Inc.*, 2009 U.S. Dist. LEXIS 66069, at *2 (S.D. Ind. July 27, 2009). The 2006 Advisory Committee Notes to Federal Rule 34 state: "[T]he option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation." *See, e.g., Jannx Med. Sys. V. Methodist Hosps., Inc.,* 2010 U.S. Dist. LEXIS 122574, at *12 (N.D. Ind. Nov.17, 2010) (ordering production in a reasonably usable format with connections between data fields intact).

Chapman v. General Bd. Of Pension and Health Benefits of the United Methodist Church, Inc., 2010 WL 2679961 (N.D. Ill. 2010), acknowledges that the production of the metadata is appropriate where there is some reason to believe that its production will yield an answer that the hard copy will not. *Id*, at page 4. Omitting the field data of an email by converting it 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 review database. What one sees as an e-mail message is actually a report queried from a database. The native

form of an e-mail carries fielded information with it, in addition to the transiting message itself, which is both apparent and not apparent on the face of an imaged facsimile of the same email. Commonly used review platforms are configured to extract from native emails the sent date, sent time, sender (from), recipients (to; cc; bc), subject line, name of the folder in which the e-mail resided, whether the e-mail was read or flagged, and its date and time of receipt. Having this information, which is part and parcel of the native digital document, allows the requesting party to sort and filter email by those parameters, both for detailed examination and for ease of review. Field data also allows analytical "crunching" of volumes of email into constituent threads, allowing the requesting party to avoid reviewing the same email message appearing in various iterations (forwards, replies) multiple times.

Although the Circuit Court decision recites that the Petitioners have not explained why they need the emails in their native form, the Court refused to accept the Affidavits of the Petitioners' Expert, Christopher I. Imler of Advanced Discovery which provided a firm basis to believe that there are more than ample reasons to believe that the production of Mr. Bourdelais' full and complete Client File in its original (native) format will yield answers that the hard copy did not, based upon the analysis described above[Ex. 19 to response]. Additionally, the Circuit Court's finding that the Petitioners acquiesced for 10 months with PDF ignores the fact that the Petitioners have been engaged in a constant struggle in this litigation to receive discovery responses.

L.E.O. 2012-01 provides that "The primary concern regarding file retention is the accessibility by the client to his property." It mandates that the attorney provide accessibility through the "Maintenance of compatible technology for access/reproduction throughout the duration of the file's retention..." Having made the unilateral decision to store a portion of the Plaintiffs' Client File in an electronic format, the Defendants have an unequivocal duty to provide the Plaintiffs with accessibility to such portion of their Client File in its original or native format.

VI. CONCLUSION

The Petitioners, John M. Bourdelais and JMB COMMERCIAL PROPERTIES, LLC, respectfully request that the Court reverse the Circuit Court's award of summary judgment with respect to the client file and the electronic data in native format and remand these cases to proceed to trial.

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