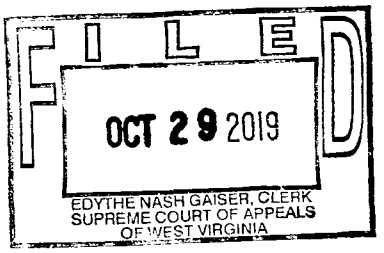
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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' REPLY BRIEF

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A. The Facts Giving Rise To The Client File Request Are Crucial In Determining Whether Internal E-Mails Are Part Of The Client File.

This Court has often held that it will not give advisory opinions or answer academic questions. *State ex rel. Morrisey v. W. Va. Office of Disciplinary Counsel,* 234 W.Va. 238, 764 S.E. 2d 769 (2014). Lawyer Disciplinary Counsel Renee Frymyer advised the Petitioners' counsel in her letter of April 10, 2015 that, "The content of a client's file will vary. . .depending upon the circumstances of the case and the nature of the relationship." [A15, Vol. I]. The Court understandably needs to know the factual underpinnings of the client file request in this litigation, so it will not be deciding such an important question in the abstract.

The Petitioners shared with the lower Court the reasons why they wanted Mr. Baker to obtain their client file as set forth in an Affidavit by John Bourdelais submitted to the lower Court on September 23, 2015 [A266-270, Vol. I]. The affidavit recited that he had a concern that the Huddleston Bolen law firm ("Huddleston firm") had a potential or actual conflict of interest that should have been discussed with him before representing his company in a lawsuit against one of its tenants. His Affidavit's penultimate paragraph stated:

> 10. I believe that I have a right to my complete Client File from Richard J. Bolen, Cindy D. McCarty, T. Matthew Lockhart, John H. Mahaney, Daniel A. Earl, and the Law Firms of Huddleston Bolen, LLP, and Dinsmore & Shohl, LLP, to determine whether my rights described herein were violated by my former counsel, and to determine whether my former counsel protected my legal and fiduciary rights, as they were required to do pursuant to the West Virginia Rules of Professional Conduct.

The external emails produced by the Respondents on CD in scanned PDF reflected that Huddleston attorney Christopher Plybon, prepared a lease agreement between the Huntington Municipal Development Authority ("HMDA") and United Waste Water Services, LLC ("Valicor") under the direction of HMDA's Executive Director Tom Price, which lease would be

assigned to Petitioner JMB Commercial Properties, LLC ("JMB") days before JMB was to close on its purchase of the HMDA facility. At Valicor's request, as conveyed to Mr. Plybon through Mr. Price, Mr. Plybon added at the last minute a provision making the Lessor responsible to repair damage and defects in the roof and floor of the facility.[1] Valicor relied upon this provision to contend that the floor was defective and would not support the weight of its trucks and/or tank farm [A3452, Vol. IV].

Only when the external emails and the internal emails are read together does it become clear that (1) Mr. Plybon had prepared the Valicor lease containing the potential liability of JMB, as Assignee, at HMDA's request, without consulting or keeping Huddleston attorney Daniel Earl, the primary attorney on the real estate purchase, advised; (2) that Mr. Earl expressed concern to another Huddleston attorney about the firm being conflicted out of the litigation against Valicor if HMDA were made a co-defendant with Valicor; and (3) that Mr. Earl made a unilateral decision not to sue HMDA despite Mr. Bourdelais' specific direction to do so without informing him of the potential conflict. [A3000-3002, Vol. IV]. The email to the other firm attorney discussing whether there was conflict and whether Mr. Earl should add HMDA (after informing Mr. Bourdelais by email that he had a right to do so) is an internal email relating to the representation of JMB.

Respondents argue in their Brief at page 11, that Mr. Bourdelais had not even reviewed these documents at the time of his deposition in the instant case as justification for not releasing the internal emails and insinuating that the entire request for the client file was pointless. This is an insubstantial argument. Mr. Bourdelais wanted Mr. Baker to review the file and advise him. Additionally, he submitted a Supplemental Affidavit explaining he misunderstood the deposition

[1] These emails were attached to the Respondents' Motion for Summary Judgment on Plaintiffs' Legal Malpractice Claim as Exhibits L, M, N, P, Q, R, S and T and are a part of the record in C.A. 17-C-303 [A3667, Vol. V].

question to be asking if he reviewed the material by himself rather than with Mr. Baker. [A2456, Vol. III].

B. A Blanket Protection Of All Internal Emails Against Production As Part Of The Client File Is Inconsistent With West Virginia's "Entire File" Approach And Excludes Important Information That A Client Should Have.

The Petitioners have demonstrated the importance of some internal emails being included in the client file. The lower Court's and the Respondents' emphasis that its ruling would have no impact on discovery is hardly reassuring. A lawyer should not and will not file a legal malpractice case without a clear basis in the hopes that they will survive a motion to dismiss under Rule 12(b)(6) and be permitted to conduct discovery. A defendant would cry "fishing expedition."

Notwithstanding the Respondents' contention that the Petitioners cited no case law to support their position, *see* page 21, they cited and discussed three post *Sage Realty* cases from New York and Kentucky on pages 27-28 that required internal emails to be produced unless they did not fall within the category of materials for internal law office review, *Hahn & Hessen, LLP v. Peck,* 2012 N.Y. Misc. LEXIS 6563 (N.Y. Sup. 2012) or they were found unlikely to be of any significant usefulness to the client after conducting an *in camera* review (*Bolton v. Weil, Gotshal & Manges LLP*, 836 N.Y.S.2d 483 (N.Y. Sup. 2005); and *In re McKinstry v. Genser (In re Black Diamond Mining Co., LLC),* 507 B.R. 209 (E.D. Ky 2014)).

The *Restatement (Third) of the Law Governing Lawyers* § 46(2) (Am. Law. Inst. 2000) provides that "[o]n request, a lawyer must allow a client or former client to inspect and copy any document possess by the lawyer relating to the representation, unless substantial grounds exist to refuse." This includes documents produced by the lawyer. The *Commentary* to § 46 recognizes certain circumstances when a lawyer may decline to deliver a document for (1) situations when compliance would violate the lawyer's duty to another; (2) cases of extreme necessity where, for example, disclosure is likely to cause serious harm to the client and (3) certain law firm

documents reasonably intended for internal review, such as a memorandum discussing which lawyers 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. This is also the standard applied in a case cited by the Respondents, *Iowa Supreme Court Atty. Disciplinary Bd. v. Gottschald,* 729 N.W.2d 812 (Iowa 2007), p.15-16.

All of these exceptions would require a court to conduct an *in camera* review of emails that a law firm claimed met these conditions. If an *in camera* review of the Respondents' internal emails had been conducted, the email string about suing HAMDA in addition to Valicor would not have met any of these circumstances: production did not violate the Huddleston's firm duty to another; there was no extreme necessity for nondisclosure to avoid harm to JMB or Mr. Bourdelais; the string was not discussing which lawyers should be assigned to the Valicor litigation, the Petitioners had not engaged in any misconduct and Mr. Earl was not discussing possible malpractice liability to the Petitioners. He was discussing whether the firm should include HMDA as a co-defendant in the lawsuit against Valicor and risk potential disqualification.

Likewise, the email string in question would not be considered "administrative material" entitled to be withheld under the Illinois State Bar Association's 2010 advisory ethics opinion cited by the Respondents on page 19. Mr. Earl was discussing a legal objective of the client's—whether to name HMDA as a codefendant. Nor would it be considered an item not reasonably necessary to the client's representation under the Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline Opinion 2010-2 cited by Respondents on page 19. [A1809, Vol. II]. Nor is the string "immaterial" or "unhelpful" under North Carolina State Bar Formal Ethics Opinion 2013-15 [A2419 Vol. III] cited by the Respondents on page 20.

C. The Petitioners Urge The Court To Define What Constitutes The Client File With Respect To Internal Documents And Communications With Only Limited Circumstances Under Which A Lawyer May Decline To Provide Them As Established by *In Camera* review.

The Petitioners submit that the Court should reverse the lower Court's ruling that the Petitioners were not entitled to *any* internal emails as part of the client file. Instead, consistent with the high fiduciary duty lawyers owe their client, the Court should articulate a standard that all internal emails relating to the representation of a client are presumptively part of the client file and that a law firm bears the burden of establishing the presence of certain enumerated circumstances as grounds to withhold specific internal emails, such as those listed in the Restatement Third. The firm would prepare a log similar to a privilege log in discovery that sets forth the particular circumstance justifying nonproduction, and a lower Court would conduct an *in camera* review. This was the process that Judge Husted envisioned, using a Discovery Commissioner, but she could never get the Respondents to articulate any circumstances justifying nondisclosure other than all 1,283 emails were internal communications and not part of the file.

II. Production Of Electronic Data In The Client File In Its Original Or Native Format

A. Introduction

The production of electronic data that is a part of the client file presents new issues and concepts requiring thinking outside the box of an expanding redrope legal file. Emails present the greatest challenge. Electronic documents in Word, a spreadsheet or PowerPoint typically require the user to save them, and the user will save in an electronic folder with the client's name and/or legal matter. But emails relating to a client matter are automatically saved on lawyers' hard drive, firm server or cloud along with all other emails the lawyers send or receive unless they specifically route the email to an email subfolder or manually save it to the client folder where the Word, spreadsheet or PowerPoint documents have been saved. This applies to external as well as internal emails.

Whether internal emails are part of the client file that must be provided to the client upon request is only one such challenge. *See* Section I *supra.* Other challenges are (a) in what format should all electronic data belonging to a client file be provided to a client; and (b) how should a search for emails belonging to the client file be conducted to facilitate the client receiving the complete file.

In this case, the Petitioners requested the original of the client file which, according to LEI 89-02, LEI 92-02 and LEI 2002-01, is their property. This includes materials stored electronically. LEO 2012-01. The Respondents provided the Petitioners with a CD of 1,725 external emails in a scanned PDF format. This means that they printed out each document and then scanned them back into an electronic format, creating 1,725 individual documents in PDF that were titled JMB 00001 through JMB 01725. Without any designation as to the sender, the recipient or subject matter. They were not in chronological order or grouped by firm attorney. The text was not searchable, because a scanned PDF is essentially a photograph. Every document needed to be opened separately.

After the lower Court ordered the Respondents on April 13, 2016 to produce the 1,283 internal emails they had withheld and fined them for their intransigence [A635, A 3802-3831], they provided them on April 22, 2016 in paper format, prompting the Petitioners to seek production of those emails in their native and original electronic format in their Requests for Inspection and Copying on Behalf of John M. Bourdelais and JMB Commercial Properties, LLC on May 1, 2016 [A597-601].

The lower Court held that (a) the Respondents had no ethical duty to provide the emails in their original or native format absent a specific agreement between the lawyers and the client; (b) that their duty was to provide the electronic portion of the client file in a format that was reasonably accessible, usable and useful to the client; (c) that the Respondents' use of scanned PDF and paper form met that standard; (d) when the Petitioners filed their Motion shortly after receiving the paper printouts of the internal emails, Petitioners did not show good cause for the request being made one year after the first request for the client file or did not articulate a sufficient reason they needed the emails in their native format to outweigh the burden on the Respondents to produce the electronic documents; and (e) the

Petitioners therefore had not established a cause of action with respect to Respondents' failure to provide the electronic data component of the client file in its native or original format.

The Petitioners contend that the lower Court erred by:

(a) finding that the original client file, including electronic data, to which the Petitioners were entitled, did not include the electronic data in its native or original format, because the process strips the communications of important information and renders them incomplete;

(b) finding that the CD of scanned PDFs in no particular order was reasonably accessible as were the paper copies of the internal email when, to the contrary, the Respondents went to unreasonable lengths to render the data inaccessible.

(c) finding that the Petitioners had not articulated sufficient cause for the "new" request in May 2016 when the Respondents' persistent refusal to produce the internal emails and then producing them in paper format raised bona fide concerns about the completeness and authenticity of the paper copies.

(d) refusing to consider the evidence the Petitioners introduced of technical experts that supported the Petitioners' position in (a), (b) and (c) above.

B. The Original Electronic Data that Are Part of the Client File Must Be Provided to the Client in Their Original Electronic Medium

The Respondents owed an unequivocal fiduciary duty to provide the Petitioners with the full and complete original of their client file, which included the electronic portion. The only way to provide the full and complete electronic portion is to produce it in its original or native format. Otherwise, it is incomplete. This is not a question of semantics. There are very real consequences to the Respondents' act of converting the electronic data into another format, as described by the expert testimony the Petitioners tendered.

Professor Lawrence Lessig of Harvard Law School submitted an affidavit explaining the purpose and benefits of producing an electronic portion of the client file in its original or native format, by offering the following specific opinions [A2161-2164, Vol. III];

- I have reviewed the record in this litigation. Based upon my education, training, and experience, it is my opinion that in this case there is no sufficient reason to have converted the electronic client file into a format other than the native format.

- When a client requests a copy of the client file, the client's attorneys should provide the client file in a complete and usable format.

- If that format is proprietary or unusable by the client, it is appropriate for the attorney to convert the file to a standard format.

- But when a client requests the file in its native format, the decision to convert it to a less usable format serves no legitimate purpose. The expense incurred by the firm converting the data is solely for the purpose of reducing the utility of the data provided.

- In this case, the attorneys have detailed the extensive efforts they undertook simply to comply with a client file request in a way that hampered the utility of the file produced. These costs were unnecessary and inappropriate, given the willingness of the client to accept the files in their native format.

- Though the principle is particularly important with digital production, it is an obvious principle applicable generally. An attorney would not be permitted to copy a client file to black paper – making it very difficult to read – pursuant to a request to provide a client file. That additional expense, with the purpose of reducing the utility of the file, would serve no legitimate objective of attorney and simply impose unnecessary costs on the client. Likewise, with digital files: There is no legitimate reason to produce those files in a format that makes them less usable, when the client has agreed to receive them in their native format.

- Electronic files such as Word documents, Excel spreadsheet, PowerPoint presentations, and emails, unlike paper, enable a user to search, use, and validate the information contained in the file.

- When producing parties convert electronic files from their native format to paginated images format, such as PDF, they remove critical content and functionality.

- Copying and sharing electronic files in their native format is almost always faster and less expensive than converting them to images and extracting their text.

- Native files are also smaller than imaged files, making them less expensive to store.

Derek Ellington, a Certified Fraud Examiner, an AccessData Certified Forensic Examiner and an ACEDS Certified E-Discovery Specialist, gave a technically thorough explanation of the process by

which electronic data should be provided and also contested the deposition testimony of the Respondents' expert, Peter Pepiton. [A2432-2436 Vol. III] He stated in part:

- An email message in electronic format consists of three or four basic parts that constitute the entirety of the document. The first part of the document would be the visible sender, recipient, date and timestamp, and subject of the document. The second part would be the written visible body of the message. The third part would be any attachments or embedded graphics in the message. The final part of the message is referred to as the "message header." The header is the embedded computer code of a message that is not normally visible when a message is printed, nor is it typically visible when the original message format is converted to a PDF file unless that option is selected.

- The email header contains the tracking information for the message, similar to a postmark, that records and logs the messages transit through the Internet from the sender to recipient. It contains records such as originating and final mail servers and IP addresses. It can also contain information such as type of email client software, such as Outlook, or even originating operating system such as Windows 10. An email without a header present is simpl[y] a word document and subject to being edited or modified. A message composed and saved as a draft message could be indistinguishable from a message that [was] actually sent if the message is simply printed without the header. Specific data within the header is cross referential making it difficult if not impossible to compromise the integrity of the header date without detection.

- Electronic or native copies of emails can be searched electronically, and as a part of this, they can be threaded, deduplicated, and crosschecked for missing or incomplete messages. The ability to thread and deduplicate the emails electronically is an important part of an efficient and non-burdensome review process.

- An individual email message from the type of server used by the defendants is in an .MSG format. [A]n MSG file is as ubiquitous for email as XLS is for spreadsheets or JPG is for graphics. When multiple emails are exported from Outlook or [a Microsoft] Exchange server, they are containerized in a single file known as a PST file. PST is the standard format for producing a collection of emails and was referenced [by the Respondents' expert, Peter Pepiton] as the format the emails were originally exported in during the export process....

- The PST format is the standard format for producing native emails. All major E-Discovery platforms support exporting results to a PST or MSG for production in native format. Once the emails had been searched and reviewed by the defendant, production of the emails from the E-Discovery platform by simple exporting all of the responsive emails to a PST file would have been faster, easier, and cheaper than printing and binding hard copies.

- It is industry standard to produce native emails. It is industry standard to produce native emails as individual MSG files or consolidated as a PST file. Both of these formats can be opened and searched with Microsoft Outlook email client[,] a commonly available email program.

- A printed or PDG copy of an email without the email header is by definition an incomplete email. It is impossible to authenticate or trace an email that does not have a header. *** Printed email headers do not allow for electronic processing and searching, and the manual review of thousands of email headers would create an undue burden and expense.

The Petitioners submitted a video prepared by Mr. Ellington to demonstrate his point about the basic parts of an email as part of a reconsideration motion filed after the lower Court announced its decision to grant summary judgment but before the Order was entered. [CD – A3597, IV; DVD – A3598, IV].

The Petitioners also submitted an article written by attorney Jill McIntyre of Jackson Kelly, PLLC entitled "Can't We Just Produce In PDF?" and published on the firm's website, dated February 19, 2019. This was published after the lower Court's hearing of February 15, 2019 and was therefore attached to the Petitioners' reconsideration motion. [A3582-2583, Vol. IV]. Ms. McIntyre's article supports the Petitioners' request for their client file in its original native format:

- Printing each electronic file to PDF will be time consuming and susceptible to error.

- Jackson Kelly urges clients to use and request native productions. Rule 34 requires production in a usable form. Electronic files (including Word documents, Excel spreadsheets, PowerPoint presentations, and emails) – unlike paper – have multiple dimensions that support an investigator's ability to find, use, and trust the information contained therein. When producing parties convert electronic files from their native format to paginated images, they remove critical content. If a file's native format is proprietary or unusable by the client, it is appropriate to convert the file to a standard format. But when a file is sought in its native format, the decision to convert it to a less usable format serves no legitimate purpose. Indeed, one could argue that the expense incurred by converting the data serves solely to reduce the utility of the data provided. No ethical principle would justify such waste.

- Converting native files to PDF or printing them to paper, Heaven forbid, produces a different file from what was created by the responding party or its agents. Those differences can be profound. Embedded metadata that sheds light on the history and origin of the files (e.g., when they were created, who last edited them, etc.) is obliterated. Sometimes content is truncated. For example, we have seen printouts of spreadsheets that omitted columns and rows of data not included in the "print screen." We have seen Word documents missing their comment bubbles and records of tracked changes. Conversion frequently strips out searchable text. The recipient of such files is deprived of the option of filtering the production to emails sent within a date range or by a specific communicator.

- Complete native files permit deduplication and near-deduplication (clustering), sorting, filtering, threading (organizing an email sequence into

> its trunk and branches), searching, normalizing, and authenticate information in a way that PDF does not permit. Finally, copying and sharing electronic files in their native format is always faster and less expensive than converting them to images and extracting their text, plus native files are smaller and less expensive to store than their bloated facsimiles.

1. The Petitioners' Initial Request for the "Original" Client File Was a Request for Emails in their Native Format

By letter dated April 20, 2015, counsel for the Petitioners wrote to the five individual attorneys from Huddleston Bolen, LLP, n/k/a Dinsmore & Shohl, LLP,[2] requesting "...the complete originals (sic) of your respective files, as well as the complete original (sic) 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 (sic), emails, text messages, and other forms of communications that you had with attorneys or other individuals within your firm that relate in any way whatsoever to Mr. Bourdelais or JMB Commercial Properties, LLC, as well as electronic data (sic), 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." [A12, Vol. I].

One definition of the adjective "native" is "constituting the original substance or source." *Merriam-Wester* online at https://www.merriam-webster.com/dictionary/native. Mr. Ellington's affidavit established that the Respondents' initially exported the Microsoft Outlook emails into PST files, which is the format of the Microsoft Exchange type mail system that produces all of the electronic data contained in an email. This is what is considered the "original" for electronically stored emails. Petitioners did not need to use the magic word "native;" use of the word "original" should have sufficed.[3]

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[2] Contrary to the Respondents' recitation in their Brief, Petitioners' counsel did not write to attorney Christopher Plybon. The fifth attorney was Daniel Earl. Counsel did not know the role that Mr. Plybon played in drafting the Valicor Lease on April 20, 2015. It took an extended period of time to open and review all 1,725 emails.

[3] In fact, the lower Court observed that the Petitioners' first objection to the Respondents' production of internal emails in paper format only, made on May 1, 2016, was a request for the emails in the format in which [they] existed

In response to the Petitioners' request for the original file including electronic data, the Respondents undertook the circuitous journey of printing out documents from the Petitioners' Electronic Client File, and then rescanning such documents into PDF format before providing copies to the Petitioners, a task that raised serious credibility issues as to the completeness of the emails and other documents and rendered them extremely inaccessible.

Caselaw interpreting the Federal Rules of Civil Procedure, which require production of electronic data during discovery to be in a reasonably usable form, is instructive on this point.[4] 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). Surely the fiduciary duty a lawyer owes to a client to produce the client file is as great as a lawyer's obligation to an opposing party to respond to discovery in litigation.

The Respondents' inexplicable conversion of the electronic data into a printed document which was then scanned back into a non-searchable PDF brings the Petitioners to their next point.

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while in the Defendants' possession. The Court further noted that the Petitioners did not use the word "native" until a November 7, 2016 motion. *See* findings 79 and 80.

[4] So does Rule 34(a) of the West Virginia Rules of Civil Procedure.

C. The Respondents' Production of 1,725 External Emails on a CD in Scanned PDF and 1,278 Internal Emails in Paper Format Was, as a Matter of Law, Not Reasonably Accessible, Usable or Useful.

In deciding that the Respondents' production of the external emails in scanned PDF was reasonably accessible, usable and useful to Petitioners when they were provided on June 29, 2015, the lower Court relied upon its finding that they acquiesced by not objecting until May 6, 2016. *See* Findings 85-87 [A3601, V]. The lower Court ignored the Affidavits of Mr. Ellington and Professor Lessig concerning the technical aspects of email production and difficulty in using scanned PDF and paper. Instead the lower Court stated that the Petitioners relied on the Affidavit of Robert H. Davis, Jr., which it would ignore because it lacked specialized knowledge that would assist a trier of fact, and this was a question of law. *Ibid* at p. 26-27, n. 20.

With all due respect, the lower Court set out a legal standard—"reasonably accessible, usable and useful to the client"—and then had to apply facts to that standard. Mr. Ellington went to great lengths to explain what format is accessible, usable and useful to a requester from his specialized knowledge. He did not simply state a conclusory opinion.

The lower Court also ignored Professor Lessig's facts upon which he based his opinion that the Respondents' conversion of the electronic data into scanned PDF removed critical content and functionality. The lower Court further stated in a footnote that the fact that the Respondents produced the electronic documents in a different format was "of no moment" as long as that format was accessible, useable and useful to the client. *Id.* at page 31, n. 22. This appears to be circular reasoning since the lower Court only found the format to be accessible based solely on what it characterized as the Petitioners' acquiescence and failure to object immediately.

The lower Court should have reasonably inferred from the fact that the Respondents went to great lengths to provide its electronic data in two different formats (scanned PDF and paper) that their purpose was to hinder the Petitioners in their use of the electronic portion of their file. It is comparable to a party trying to bury the opposing party in paper by providing reams of paper documents in no order.

A review of the Respondents' privilege log regarding the internal emails demonstrates that they could have produced those emails and the external ones to the Petitioners in an accessible format. [A427-496, I]. The internal emails are each listed in spreadsheet fashion with a Beginning Document Number, an End Document #, the Date Sent (in reverse chronological order), the Sender, the Recipients and the Email Subject. If provided to the Petitioners electronically, this document would be fully searchable and would give access to the individual emails. Instead, they were provided paper copies.

Neither the CD nor the paper copies of the email met the Petitioners' needs. The docket sheet in C.A. 15-C-431 demonstrates that between June 29, 2015 and May 1, 2015, the Petitioners were occupied in constant motions and hearings pertaining primarily to obtaining the internal emails. [A3657, IV]. The Petitioners' counsel then needed to consult with experts, particularly Christopher L. Imler, to explain the problems inherent in converting electronic documents to scanned PDF or paper format. [A755, I].

D. The Petitioners Articulated Sufficient Cause For The Request For The Electronic Data To Be Produced In Original, Native And/Or Stored Format When The Respondents' Persistent Refusal To Produce The Internal Emails And Then Producing Them In Paper Format Raised Bona Fide Concerns About The Completeness And Authenticity Of The Paper Copies.

The factors outlined above and in the Petitioners' Brief—Respondents' refusal to follow through on their representations to the Court or comply with the Court's Orders[5] and the laborious process to change the format in which the internal as well as external emails were produced—created a legitimate concern that other relevant electronic documents may exist. In addition, the Respondents previously admitted in the record that they had searched their files using two separate incorrect spellings of Mr. Bourdelais' name: "Bourselais" or "Bordelais," casting serious doubt on their intentions or abilities to locate all of the electronic documents that make up the client file and providing yet another reason for its production in its original, native or stored format.

[5] In their Brief, the Respondents claim that the Petitioners' counsel engaged in abusive litigation tactics, all the while ignoring the fact that the only lawyers to be sanctioned by the lower Court in this case were the Respondents' counsel.

The Petitioners sought to engage in a collaborative search for electronic documents similar to the process used in Federal Courts. For example, in *Burd v. Ford Motor Co.*, No. 3:13-cv-20976 (S.D. W. Va. July 8, 2015) [A2546, Vol. III] Magistrate Cheryl A. Eiffert described this process thusly:

> The obligation of the parties to meet and confer early in the case includes a "discussion that can and should include cooperative planning, rather than unilateral decision-making, about matters such as 'the sources of information to be preserved and searched; number and identities of custodians whose data will be preserved or collected...; topics for discovery; [and] search terms and methodologies to be employed to identify responsive data...'" *Ruiz-Bueno v. Scott,* 2014 WL 6055402, at *3 (S.D. Ohio Nov. 15, 2013)....

However, the Respondents' counsel rebuffed all such requests that the Petitioners be allowed to participate in the selection of such search terms and phrases. [A739, Vol. I & A743, Vol. I]. Contrary to the lower Court's opinion, it would not be costly or burdensome for the Respondents to provide all emails in their native format, because, as is evident from their discovery log and Mr. Ellington 's Affidavit, they already had the emails in a PST format.

III. Relief Requested from the Court

The Petitioners respectfully request that the Court reverse the lower Court's award of summary judgment with respect to the client file and hold as a matter of law that Petitioners were entitled to internal communications relating to Respondents' representation of them as part of the client file. These cases should be remanded to proceed to a jury trial on the Petitioners' claims for breach of contract, breach of fiduciary duty and civil conspiracy as questions of fact. The Order denying Respondents' Motion for Partial Summary Judgement, entered by Judge Howard on June 29, 2017, envisioned such a trial on the Petitioners' claims, including monetary damages. [A 1364, Vol. II]

The Petitioners further request that the Court reverse the lower Court's award of summary judgment with respect to producing the electronic data in its native format and hold as a matter of law that electronic data that is part of the client's file should be produced in its original or native format; that production of the electronic portion of the Petitioners' client file in PDF and paper format was not reasonably accessible, usable and useful to them when provided by Respondents on June 29, 2015 and

April 22, 2016; and that the Petitioners articulated a sufficient reason to outweigh any burden on the Respondents to produce the electronic documents for the internal as well as external emails. On remand, Respondents should be directed to provide all electronic documents in their native format. In addition, the Petitioners should be permitted an opportunity to provide the Respondents with their own list of search words and phrases for emails as is done in Federal litigation discovery. Should other emails be located, the Respondents should be permitted to show they fall within any exceptions set by this Court and the lower Court should conduct an *in camera* review. Finally, the Petitioners request that their causes of action based on the Respondents not producing the electronic data in its original or native format also proceed to trial following production of said data.

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