

16-0936

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Edgar F. Heiskell, III,

Plaintiff,

v.

Civil Action No.: 14-C-1048

Bailey & Glasser, LLP

Defendants,

ORDER GRANTING PLAINTIFF'S MOTION TO DISQUALIFY

On September 23, 2016, the parties and counsel appeared, by agreement, for a duly noticed and scheduled hearing on Plaintiff's Motion to Disqualify James Lees as counsel for Defendant ("Motion"). The Court acknowledged receipt and review of the Motion, Defendant's Response in Opposition ("Response") and Plaintiff's Reply ("Reply"). Plaintiff requested, pursuant to *Ogden Newspapers Inc. v. Wilkes*, 198 W.Va. 587, 482 S.E.2d 204 (1996), that the Court hear and take testimony *in camera* of Plaintiff's proposed witnesses to avoid publication of case-specific and attorney work product confidential information. The Court declined to do so and indicated its intention to hear all of the testimony in open court, unless advised by counsel in advance of the imminent disclosure of information not currently in the record, which a party contended is confidential.

Whereupon, the Court heard testimony of Mr. Lees and Mr. George, respectively, and Plaintiff tendered two additional Exhibits relating to Mr. Lees's conduct of focus groups and Confidentiality Agreements with focus group jurors. No other witnesses were tendered.

Defendant offered the signed Affidavit of Mr. Lees to replace the unsigned version previously supplied with Defendant's Response. All of the Exhibits were received.

The Court then heard argument of counsel. Upon consideration of the record, the argument of counsel and the authorities cited, the Court GRANTS the Motion and finds: 1) Plaintiff and Defendant agree that Mr. George called Mr. Lees May 27, 2016 for the purpose of engaging Mr. Lees to conduct confidential focus groups for Plaintiff and that Mr. Lees and Mr. George had such a discussion that morning; 2) there is no recording of or contemporaneous notes made by Mr. Lees or Mr. George of their telephone conversation May 27, 2016. Each agrees Plaintiff had a reasonable expectation of confidentiality regarding the information conveyed and discussed; 3) Mr. Lees does not recall receiving any case-specific confidential information in the call that was not already of record. Mr. George testified that he conveyed to Mr. Lees case-specific confidential information not in the record, as well as Mr. George's mental impressions, thoughts and ideas about certain focus group issues, themes and potential trial strategies; 4) there is no dispute Mr. Lees wrote Exhibit 8, an email to Mr. Scoptur May 27, 2016, after speaking with Mr. George, in which Mr. Lees stated that he did not want to be involved for anyone in the litigation because he knows the parties. This email is different from Mr. Lees's testimony and from his affidavit, in which Mr. Lees bases his declination of Mr. George's request only upon Mr. Lees's relationship with Ben Bailey; 5) the adoption of revised ethics rules in West Virginia does not override or invalidate existing case law regarding conflicts of interest, appearance of impropriety and disqualification of counsel, including the *Nuzum* case discussed below; 6) Mr. George's call to Mr. Lees and any general discussion about him conducting focus groups is not of itself sufficient to disqualify Mr. Lees, but Mr. Lees's email to Mr. Scoptur tilts the analysis in favor of disqualification and the Motion should be granted to avoid the appearance of impropriety

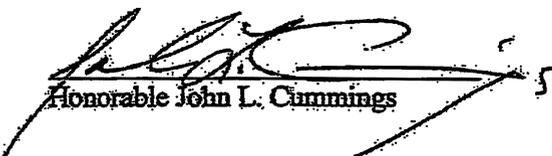
created if Mr. Lees is not disqualified; and 7) disqualifying Mr. Lees avoids prejudice to Plaintiff and does not leave Defendant without counsel as there are four (4) other lawyers of record for Defendant, three (3) of whom have represented Defendant for over three (3) years. Under *State ex rel. Taylor Associates v. Nuzum*, 175 W. Va. 19, 330 S.E. 2d 677, 681 (1985), a lawyer who is a recipient of a potential client's confidence is thereafter disqualified from acting for any other person interested adversely in the same general matter, however slight the adverse interest may be. *Internal citation omitted*. See also, *State of West Virginia ex rel. George J. Cosenza, et. al. v. Hill*, 216 W. Va. 482, 607 S.E.2d 811 (2004) ("As the repository of public trust and confidence in the judicial system, courts are given broad discretion to disqualify counsel when their continued representation of a client threatens the integrity of the legal profession." 607 S.E.2d at 817 and *State ex rel. Michael A.P. v. Miller*, 207 W. Va. 114, 529 S.E.2d 354 (2000) ("Any doubt regarding disqualification must be resolved in favor of disqualification. In determining whether to disqualify counsel for conflict of interest, the trial court is not to weigh the circumstances 'with hair-splitting nicety' but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing 'the appearance of impropriety,' it is to resolve all doubts in favor of disqualification.")

Counsel for Defendant then sought clarification whether the Court's ruling also disqualified Mr. Lees from conducting focus groups for Defendant. The Court responded affirmatively and ordered that Mr. Lees is to have no further involvement with Defendant regarding this action.

The Court instructed counsel for Plaintiff to prepare this Order and all counsel to file the Motion, Response and Reply with the Circuit Clerk in the ordinary course and not under seal, with the exception of Exhibit 8, which Plaintiff may file under seal. The Court notes the objection and exception of Defendant to the Court's ruling and this Order.

The Clerk is **DIRECTED** to send a copy of this Order to counsel of record.

Entered this 5th day of October, 2016.



Honorable John L. Cummings



325 EIGHTH STREET HUNTINGTON, WV 25701
POST OFFICE BOX 2688 HUNTINGTON, WV 25726-2688
P: 304.523.2400 F: 304.523.2347
www.jenkinsfenstermaker.com

Charles K. Gould, Esquire
Direct Dial Number: 304.399.9701
E-mail: ckg@jenkinsfenstermaker.com
File No. 3837.0001

October 4, 2016

Cathy Gatson, Circuit Clerk
Circuit Court of Kanawha County
Kanawha County Courthouse
111 Court Street
Charleston, WV 25301

Re: Edgar F. Heiskell, III v. Bailey & Glasser, LLP
Civil Action No: 14-C-1048
Circuit Court of Kanawha County, West Virginia

Dear Ms. Gatson:

Enclosed please find *Defendant Bailey & Glasser LLP's Reply In Support Of Its Motion To Stay Proceedings Or, In The Alternate, Motion To Continue* in connection with the above-referenced matter. Please file this in your usual manner. A copy has been served upon counsel of record as reflected upon the original attached Certificate of Service.

Thank you for your assistance with this matter.

Sincerely,

Charles K. Gould

CKG:lal

Enclosure

cc: Hon. John Cummings, Judge (via e-mail)
Shawn P. George, Esquire (via e-mail and First Class Mail)
Lindsay Agée (via e-mail)

4831-6660-3066, v. 1

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

EDGAR F. HEISKELL, III,

Plaintiff,

v.

**Civil Action No. 14-C-1048
Judge John Cummings**

**BAILEY & GLASSER, LLP,
a Limited Liability Partnership,**

Defendant.

**DEFENDANT BAILEY & GLASSER LLP'S REPLY IN SUPPORT OF ITS MOTION
TO STAY PROCEEDINGS OR, IN THE ALTERNATE, MOTION TO CONTINUE**

Defendant Bailey & Glasser LLP ("B&G"), by counsel, files this Reply in support of its *Motion to Stay or, in the Alternative, Motion to Continue* ("Motion"). Plaintiff's response fails to advance any cogent argument as to why Mr. Lees' disqualification does not constitute good cause sufficient to warrant a stay of the instant proceedings or continuance of the looming trial date. Accordingly, B&G reiterates its request that this Court enter an Order staying the enforcement of its September 23, 2016 decision or, in the alternate, continue the current trial date beyond November 14, 2016 so that the parties may properly brief the Supreme Court of Appeals regarding B&G's *Writ of Prohibition* to be filed today. In support thereof, B&G states as follows:

1. Plaintiff's Response relies upon the incorrect assumption that B&G knew, or should have known, that Plaintiff would seek to disqualify Mr. Lees. On the contrary, B&G retained Mr. Lees under the reasonable belief that he would be able to assist and represent B&G in the trial of this matter.

2. On numerous prior occasions, Mr. Lees had assisted B&G by performing focus groups for the sudden acceleration cases at issue in this action. Based upon this pre-existing

relationship, B&G contacted Mr. Lees and retained his services as a focus group consultant for this action, and after doing those focus groups retained Mr. Lees to serve as trial counsel. Neither B&G nor Mr. Lees had any reasonable basis to believe Plaintiff would subsequently assert that Plaintiff's counsel would assert that he divulged confidential information in his conversation with Mr. Lees, especially given that Mr. Lees had explicitly informed Plaintiff's counsel that he would not be able to assist Plaintiff.

3. Moreover, Plaintiff's argument centers upon his assertion that he "could not have moved faster" in requesting Mr. Lees withdraw is immaterial in determining whether staying these proceedings is proper. Plaintiff cannot deny, and the record supports, that B&G retained Mr. Lees significantly prior to his formal notice of appearance. Immediately upon Mr. Lees' retention, B&G altered its trial preparation and strategy under the assumption that Mr. Lees would be capable of fulfilling his contractual obligations as B&G's consultant and attorney.

4. Within its Order disqualifying Mr. Lees, the Court expressly forbade Mr. Lees from performing any further work in this matter for B&G, either as an attorney or consultant. Thus, the harm facing B&G is two-fold. First, B&G is faced with reformulating its trial strategy a mere seven (7) weeks before trial, while simultaneously briefing the Supreme Court on its *Writ* in accordance with its statutory right. Second, B&G has been unable to consult with Mr. Lees about the focus group work he already performed, an integral part of any trial presentation. Contrary to Plaintiff's bare suggestion that B&G may retain separate trial counsel prior to November 14, the addition of other trial counsel in such a short period of time cannot reasonably be considered sufficient to negate harm caused by Mr. Lees' disqualification, nor does such suggestion bear any weight on B&G's argument that the entry of a stay is proper in the instant proceedings.

5. Additionally, Plaintiff's continual reference to the number of attorneys retained by B&G is wholly irrelevant to the issue of staying these proceedings until such time as the Supreme Court can consider B&G's pending *Writ*. As detailed in B&G's previously filed *Motion to Stay*, the proper issue is whether proceeding with this action while a writ of prohibition is pending will harm the parties and offend judicial economy. And the Court is aware of the other issues for which B&G previously sought a continuance.

6. Plaintiff seemingly asks the Court to ignore the fact that there is a probability that the Supreme Court will review the decision to disqualify Mr. Lees. Plaintiff presupposes that B&G is being "presumptuous" in its assertion that the Supreme Court will take its pending *Writ* for review. In doing so, however, Plaintiff neglects to review the voluminous number of cases wherein the West Virginia Court of Appeals reviewed an attorney's disqualification. To the contrary, Plaintiff cites no case law demonstrating any instance wherein the Supreme Court *denied* review of a writ of prohibition stemming from an attorney's disqualification. Thus, the overwhelming weight of pertinent case law unequivocally demonstrates there is a strong probability the Supreme Court will review B&G's *Writ*.

7. The interests of judicial economy undoubtedly demonstrate that staying these proceedings is proper while the Supreme Court considers B&G's *Writ*. Moving forward with this action while the *Writ* is under consideration forces B&G to duplicate its trial preparation efforts. Specifically, B&G would be forced to prepare a trial strategy assuming that the Supreme Court either grants, or denies, its requested relief. This duplicative effort, combined with the significant potential that a retrial would be necessary should the Supreme Court make its determination after the current trial has commenced, are the very grounds the Supreme Court has cautioned against when reviewing writs of prohibition.

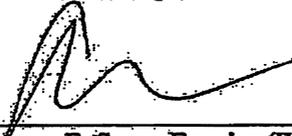
8. Therefore, an Order staying the instant proceedings while the Supreme Court considers B&G's *Writ* is appropriate and necessary to protect B&G and this Court from unnecessarily duplicating efforts by way of a retrial.

9. Plaintiff repeatedly references that this action has been pending for three (3) years. See Resp. at ¶ 2, 5, 6. Absent from Plaintiff's *Response*, however, is the unavoidable fact that the parties have only been operating under a Scheduling Order since December 17, 2015, a period of less than eleven (11) months prior to the current trial date. B&G notes that Plaintiff complains of the three (3) years this action has been pending when, in fact, Plaintiff contributed significantly to this delay by filing this action in the improper venue. Moreover, discovery has been inhibited by continual discovery disputes between the parties, a fact with which the Plaintiff and this Court are quite familiar.

10. Finally, this Court candidly recognized in its ruling from the bench that it had concerns about its conclusion to disqualify Mr. Lees, saying "I am not wild about this decision." Those same concerns should weigh heavily in granting a stay, to permit a review of this decision and to prevent the possible harms to all the affected parties, including Mr. Lees, set out above.

WHEREFORE, Bailey & Glasser LLP respectfully requests this Court grant the relief requested in its previously filed *Motion to Stay Enforcement of Order Disqualifying James B. Lees, Jr. and Suspend Proceedings or, in the Alternative, Motion to Continue*.

BAILEY & GLASSER, LLP
By Counsel



Thomas E. Scarr, Esquire (WV Bar #3279)
Charles K. Gould, Esquire (WV Bar #7539)
Jason D. Bowles, Esquire (WV Bar #12091)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, WV 25726-2688
Phone: (304) 523-2100
Fax: (304) 523-2347

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

EDGAR F. HEISKELL, III,

Plaintiff,

v;

Civil Action No. 14-C-1048

Judge John Cummings

**BAILEY & GLASSER, LLP,
a Limited Liability Partnership,**

Defendant.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 4th day of October, 2016, a true and accurate copy of the foregoing *Defendant Bailey & Glasser LLP's Reply In Support Of Its Motion To Stay Proceedings Or, In The Alternate, Motion To Continue* was served upon counsel of record by e-mail and First Class Mail to:

Shawn P. George, Esquire
GEORGE & LORENSEN, PLLC
1526 Kanawha Blvd. East
Charleston, WV 25311
sgeorge@gandllaw.com



Thomas E. Scarr, Esquire (WV Bar #3279)
Charles K. Gould, Esquire (WV Bar #7539)
Jason D. Bowles, Esquire (WV Bar #12091)

JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, WV 25726-2688
Phone: (304) 523-2100
Fax: (304) 523-2347

4835-6139-1930, v. 1