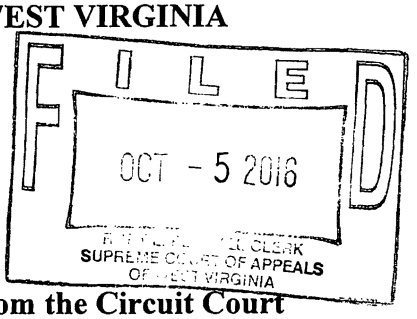
16-0936

**BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**




**STATE OF WEST VIRGINIA EX REL.**
**BAILEY & GLASSER, LLP**
**a Limited Liability Partnership,**

**Petitioner,**

**v.**

**From the Circuit Court**
**of Kanawha County, WV**
**(Civil Action N. 14-C-1048)**

**THE HONORABLE JOHN L. CUMMINGS, and**
**EDGAR F. HEISKELL, III,**

**Respondents,**

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# VERIFIED PETITION FOR WRIT OF PROHIBITION

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## PETITIONER'S VERIFICATION

I, Benjamin Bailey, state under oath that I am a Partner with the law firm of Bailey & Glasser, LLP and authorized to execute this Verification on behalf of Bailey & Glasser, LLP. I have reviewed the Petition for Writ of Prohibition. Based upon my personal knowledge and belief, I hereby verify that the Petition for Writ of Prohibition is true and accurate and the act of Bailey & Glasser, LLP.

Benjamin Bailey

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## VERIFIED PETITION FOR WRIT OF PROHIBITION

Petitioner Bailey & Glasser, LLP ("B&G") respectfully petitions this Honorable Court, pursuant to Article 8, § 3 of the West Virginia Constitution, West Virginia Code § 53-1-1 and Rule 16, West Virginia Rules of Appellate Procedure, to issue a Writ of Prohibition against the Honorable John Cummings, in his official capacity as appointed-presiding Judge for Civil Action No. 14-C-1048, now pending in the Circuit Court of Kanawha County and styled *Edgar F. Heiskell, III v. Bailey & Glasser, LLP* ("the Action"), and against Edgar F. Heiskell, III ("Heiskell") to prevent the enforcement of the Circuit Court's ruling to disqualify James B. Lees, Jr., Esq. ("Lees") and the law firm of Hunt & Lees, LLP from acting as B&G's lead trial counsel in the Action. The dispute at issue revolves around a telephone call, initiated by Heiskell's counsel, Shawn George ("George"), to Lees for the purpose of determining whether Lees was available to run focus groups for Heiskell in the Action against B&G. During the call, Lees declined to be retained for the focus groups. It is undisputed that Heiskell never had an attorney-client relationship with Lees and George admitted that he did not intend to create an attorney-client relationship between Heiskell and Lees through the telephone call. B&G subsequently retained Lees to be both its focus group consultant and then lead trial counsel.

When Heiskell sought to disqualify Lees, the Circuit Court applied conflict of interest standards for attorney-client relationships to find a "possible appearance of impropriety." In disqualifying Lees on this basis, the Circuit Court made a clear error of law.

The Circuit Court's ruling disqualify Lees is <u>not</u> based on a finding of a former, current or potential attorney-client relationship between Heiskell and Lees creating an actual or imputed conflict of interest. Rather, the ruling is predicated on a bare assertion by George that during the telephone call, he (George) unilaterally disclosed, unsolicited confidential information to Lees

after Lees declined to serve as a focus group consultant for Heiskell. Lees denies any disclosure of confidential information occurred at any time during the telephone call with George.

Absent object evidence that confidential information was disclosed, the Circuit Court found "if" confidential information was disclosed then it would give rise to a "possible appearance of impropriety," warranting disqualification of Lees both as B&G's counsel in the Action and as B&G's retained focus group consultant. The Circuit Court's ruling is contrary to the facts and law and is an unjustified interference in the attorney-client and contractual relationships between B&G and Lees. It also rewards George and his client (Heiskell) for (a) using a ploy to disqualify Lees from participating in this litigation; and/or, (b) disclosing confidential information to Lees when Lees undisputedly refused to enter into any relationship with George or Heiskell in the Action.

## QUESTIONS PRESENTED

1. Did the Circuit Court abuse its power, commit clear error and exceed its legitimate authority when it disqualified Lees and prevented him from continuing to represent B&G even though Lees had no prior relationship with Heiskell and where Heiskell's counsel concedes that he never intended to create an attorney-client relationship between Heiskell and Lees?
2. Did the Circuit Court abuse its power, commit clear error and exceed its legitimate authority when it disqualified Lees and prevented him from continuing to represent B&G based upon a purported disclosure of confidential information by Heiskell's counsel to

Lees when such purported disclosure occurred after Lees expressly refused to work on behalf of Heiskell in any capacity?

3. Did the Circuit Court abuse its power, commit clear error and exceed its legitimate authority when it disqualified Lees from continuing to represent B&G without first finding (a) that an objectively reasonable expectation of confidentiality existed between Heiskell and Lees; and, (b) that any information purportedly shared by Heiskell's counsel with Lees was, in fact, confidential and significantly harmful to Heiskell as required by West Virginia law?

## STATEMENT OF THE CASE

This Petition arises from litigation pending in the Circuit Court of Kanawha County, West Virginia, and the recent decision by the Circuit Court to disqualify B&G's lead trial counsel, Lees, just seven weeks before trial. As of this filing, only the transcript from the Hearing memorializes the Circuit Court's ruling from the bench (APP000130-171); no Order has been entered and recorded by the Circuit Clerk.[1]

B&G is a multi-state law firm with significant experience handling multi-district litigation involving plaintiffs' product liability claims. In 2008, B&G began work on claims arising from sudden, unintended acceleration of Toyota vehicles. Also in 2008, B&G contracted with Heiskell, a licensed West Virginia attorney, to perform legal services related to B&G's product liability cases. Heiskell's relationship with B&G ended on or about November 28, 2012.

[1] The Circuit Court directed Heiskell's counsel to prepare an Order memorializing the Court's rulings from the September 23, 2016 hearing on the Motion to Disqualify. George prepared a proposed Order and B&G's counsel has tendered B&G's objections to the same. APP000172-000178.

On November 6, 2013, Heiskell filed a *pro se* Complaint in the Circuit Court of Monongalia County, West Virginia. APP000001[2]. Approximately seven months after the Action was filed, the Circuit Court of Monongalia County dismissed the Action and transferred it to the Circuit Court of Kanawha County, West Virginia.

After the Action was transferred to Kanawha County, George entered an appearance as Heiskell's counsel and amended the Complaint, expanding the factual allegation and adding additional claims. APP000020.

All of the Circuit Court of Kanawha County judges recused themselves. The Honorable James Holliday was appointed to preside, but he, too, withdrew. Discovery, therefore, did not commence in earnest until after the Honorable John L. Cummings (Senior Status), was appointed to preside over the Action in August 2015, and subsequently scheduled the Action for trial to begin on November 14, 2016.

The undersigned counsel has been representing B&G since the inception of this litigation and has been actively engaged in discovery since the Circuit Court denied, in part, B&G's Motions to Dismiss. During the Summer of 2016, B&G retained Lees to serve as its focus group consultant in the Action and then to appear as its lead trial counsel.

Weeks after being retained, Lees filed his Notice of Appearance as counsel for B&G in the Action on September 12, 2016. APP000047. On September 19, 2016, after first requesting by letter that Lees voluntarily withdraw as counsel for B&G and, having received Lees' response that he had no intention of doing so, George filed a Motion to Disqualify Lees, which was noticed for an emergency hearing on September 23, 2016. APP000039. In the Motion to Disqualify, George asserted that on or about May 27, 2016, he discussed with Lees potential trial

[2] This action was assigned Civil Action No. 13-C-849. The Complaint contained detailed factual allegations and asserted claims for breach of implied contract and *quantum meruit*, demanding millions of dollars in addition to the monies B&G paid him under his hourly contract.

issues and themes when George sought to retain Lees' services as a focus group consultant on behalf of Heiskell in the Action. It is disputed that Lees refused to be retained, making clear to George during that preliminary telephone call that he (Lees) had personal and professional conflicts based on his relationships with B&G and his friend Benjamin Bailey, a principal partner of B&G. Despite Lees' refusal to work for Heiskell in this Action, George, an experienced West Virginia trial attorney, asserted that he believed that a confidential relationship arose with Lees from that preliminary telephone call. APP000043

On September 21, 2016, B&G filed its Response in Opposition to the Motion to Disqualify, which B&G supported with an Affidavit from Lees. APP000064 In his Affidavit, Lees testified that, contrary to Heiskell's assertions in the Motion to Disqualify, he [Lees] had no recollection of discussing any trial issues or themes that George wanted to present to a focus group. APP000117-000120[3]. Further, Lees testified that other than George's desire to conduct a focus group, he learned no more from the telephone call with George than was available from the Complaint and Amended Complaint filed in the Action. *Id.* at ¶18.

On September 23, 2016, immediately before the hearing, Heiskell filed his Reply to B&G's Response in Opposition. APP000125. Heiskell's Reply, signed by George, did not include any additional exhibits or a counter-affidavit, but did provide this response to Lees' Affidavit:

> ...[W]hile Lees has offered an affidavit which states that he does not remember receiving confidential case specific information in the telephone with Plaintiff's counsel on May 27, 2016, he did receive such information in that call. This information was given to him <u>after he said he could not get involved in the litigation for anyone and when Plaintiff's counsel was seeking a referral</u> of

[3] The Affidavit attached to the Response and made part of the Appendix does not reflect Lees' signature. The original Affidavit bearing Lees' signature was presented to the Circuit Court on September 23, 2016. APP000168.

> another person to contact for the service. In that portion of the conversation, Plaintiff's counsel provided confidential impressions of the case and certain issues, concepts and themes he wanted to explore. This disclosure and discussion would never have happened if Mr. Lees had not said that he could not get involved in the litigation for anyone.

APP000126 (Emphasis added.) Moreover, the Reply clearly stated that Heiskell never intended to enter into an attorney-client relationship with Lees; such was not the purpose of the preliminary call from George to Lees on May 27, 2016. APP000125, n. 1.

During the September 23rd hearing, both Lees and George testified. *See* APP000130. Lees' testimony was consistent with his Affidavit. APP000135-000147. Specifically, Lees testified that (a) George contacted him on May 27, 2016 to inquire whether Lees would conduct a focus group; (b) George provided some facts about the case and the parties involved; and, (c) Lees refused to act as a focus group consultant when he learned B&G was involved:

> Q: Okay. And when I contacted you on May the 27th of this year that was for the purpose of seeing if you were available to do a focus group for me in a case?
>
> A: Yes.
>
> Q: Okay. And I disclosed to you who my client was?
>
> A: Correct.
>
> Q: And then I made known to you some facts about the case?
>
> A: Yes.
>
> Q: Okay. And when you learned who the Defendant was you told me you couldn't be involved in the case for anyone, right?
>
> A: I don't know if I told you that. I remember telling you—and here's my memory of it. I remember saying, whoa. Ben Bailey is a friend of mine. I don't want to be involved in this case. I've known Ben for a long time. I do work for Ben and his firm.

APP000139.

Lees went on to explain that learning Heiskell's fee dispute related to the Toyota sudden acceleration cases prompted him (Lees) immediately to ask which law firm was the defendant and to decline, then and there, to serve as Heiskell's focus group consultant. APP000143. Lees had previously done confidential focus groups in these same Toyota sudden acceleration cases, for Bailey & Glasser. APP000143. Lees denied any recollection that George told him "things" that George "wanted to explore in the focus group." APP000142-000143. Lees also denied that George disclosed to him anything "adverse or harmful" to Heiskell regarding the pending action. APP000145. Lees testified that it is only after he agrees to be a consultant to perform focus groups that his obligation of confidentiality begins and the information gleaned from the focus group becomes the work product of the attorney who retains him. APP000137.

Following Lees' testimony, George took the witness stand and testified that he believes Lees is "trustworthy," "discreet" and "extremely good at what he does." APP000148. George then described the conversation with Lees on May 27th, which description is at odds with Lees' description with respect to George's characterization of the amount of information that he shared with Lees and the confidential nature of that information (although George provided no details about the information itself). APP000147-000159. George also testified that he continued to share what he deemed to be "confidential information" with Lees <u>after</u> Lees refused to be retained as a consultant in the action:

> ...[T]he purpose of the call on the morning of the 27th [of May] was for me to secure his services to conduct the focus groups on behalf of the Plaintiff in this case. I described for him in some detail what was involved in the case. I told him the nature of the case. I also conveyed to him some themes that I was considering for the case, some issues, potential issues that I wanted to test in the focus group. <u>In the course of that he told me – we discussed that Bailey & Glasser was involved and</u> that based on his knowledge of me, based on his knowledge of Ben [Bailey], <u>that he couldn't get involved in the case in any way.</u> <u>We talked some</u>

> more about – I gave him some confidential information about things I was thinking....

APP000149-000150. (Emphasis added.) *See also*, extended passage quoted on page 5, *supra*, from Heiskell's Reply, APP000126.

George further testified that he believed "anything and everything" that he shared with Lees-- even after Lees told him that he was a friend of Benjamin Bailey and refused to conduct focus groups for Heiskell- "would be confidential." APP000151. He also testified, in direct contradiction to Lees' testimony, that he disclosed to Lees "information that could significantly harm Mr. Heiskell in his pursuit of this case," including, the mere fact that George wanted to conduct focus groups before trial, which George considered highly confidential. *Id.*[4]

The Court thereafter declined George's offer to provide further testimony, *in camera,* regarding the information he purportedly shared with Lees on May 27th. APP000152. Following counsel's oral arguments, the Court announced its findings and rulings:

> There's several matters to be considered by the Court in this regard. Regretfully, the Court does not see it as clear cut as either counsel represents it to be, so this may sound a little disjointed, but I believe it is necessary to rule at this time. I have reviewed the memos and briefs filed, and make several findings upon the testimony provided, in the documents proved and contained therein. First, the rules or canons of ethics as I call them, the rules of ethics or disciplinary rules at this time govern, as well at the case law in this state. The change in any recent ethical rules, if its 1.18, do not override any existing case law such as in *Newsom [sic]*, but they do supplement. I am of the opinion that both Mr. Lees and Mr. George testified correctly as best as their memories recall....
>
> But we have some evidence of what Mr. Lees thought in his email to Mr. Scoptur. That is in the line that says I do not want to be involved in any way in this

[4] Both parties now know that each considered conducting focus groups in this Action. Neither side knows whether focus groups have been convened or what the results of any focus groups have been. The playing field on this issue is even.

> litigation since I know all the parties.[5] Slightly different than what he testified here today and also different than what is indicated in the other communications. I also doubt if Mr. George kept copious notes of what he was saying in a preliminary phone call to see if someone is available for focus groups. I wish to make clear at this time that I do not consider the existence or possibility of doing a focus group, that in and of itself this Court does not consider to be a confidential nature. I further, though, also find that if there were areas of inquiry divulged between Mr. George and Mr. Lees in this regard, that that may be enough to determine that there was a confidential relationship by inference between Mr. George's client and Mr. Lees. Now, having worked this far in this off the top, I've still got to figure out what I'm going to do. I believe the perception and the possible of appearance of impropriety make it enough and with the aid of that one email between Mr. Scoptur and Mr. Lees that there is enough of an appearance of impropriety to disqualify Mr. Lees in this case. I am not wild about this decision, but I believe it is correct.

APP000166-000168. (Emphasis added.)

In addition to disqualifying Lees as counsel for B&G, the Court also barred Lees from continuing to meet or fulfill his contractual obligations to B&G as a consultant in this matter. APP000169. It is from these rulings that B&G seeks immediate and permanent relief through the instant Petition for Writ of Prohibition.

## SUMMARY OF ARGUMENT

Motions to disqualify attorneys are disfavored in West Virginia, because they interfere with the confidential relationship between an attorney and a client which is a cornerstone of our legal system. Disqualification is an extreme action which should only be used when absolutely necessary to uphold the integrity of the judicial process. When disqualification is premised on the presence of a conflict of interest for an attorney arising from a purported confidential

[5] The email to Paul Scoptur referenced by the Circuit Court is attached as an exhibit to B&G's Response in Opposition to Motion to Disqualify. *See* APP000121.

relationship, the predicate question is whether the attorney has entered into an actual or potential attorney-client relationship through which there is an exchange of confidential information that the attorney has a duty to protect.

Without making a predicate finding that an actual or potential attorney-client relationship existed as between Heiskell and Lees --a finding that could not have been made because George admits he and Heiskell never intended to form one with Lees—the Circuit Court inferred only that if confidential information was disclosed, then it may result in "a possible appearance of impropriety," presumably from an inferred confidential relationship, and granted Heiskell's Motion to Disqualify Lees." In so doing, the Circuit Court made no specific findings under the West Virginia Rules of Professional Conduct[6] with respect to the nature of that inferential confidential relationship. To explain its decision not to invoke the West Virginia Rules of Professional Conduct for its analysis, the Court stated that the West Virginia Rules of Professional Conduct supplement, rather than supplant, West Virginia's common law with respect to conflicts of interest, appearances of impropriety and disqualification of counsel, citing during the hearing *State ex rel Taylor Associates v. Nuzum,* 175 W.Va. 19, 330 S.E.2d 677 (1985). In *Nuzum*, however (and each cased cited by Heiskell in support of disqualification), the Court found conflicts or the appearance of impropriety arising from former, current or potential attorney-client relationships and applied the Code of Professional Responsibility or the Rules of Professional Conduct, whichever existed at the time, as part of its analysis.

It is undisputed that George made a single, preliminary contact with Lees to inquire whether Lees would agree to be a focus group consultant for Heiskell. As reflected in Heiskell's Reply to B&G's Response in Opposition to Disqualification, Heiskell's counsel, George, had no intention or expectation of creating an attorney-client relationship between Lees and Heiskell or

[6] The West Virginia Rules of Professional Conduct are silent regarding "appearances of impropriety."

Lees and George. APP000125, n.1 If there is no intention by any party to create an attorney-client relationship, then it is axiomatic that there is no meeting of the minds necessary to find an express or implied attorney-client relationship or potential attorney-client relationship. *See State ex rel Defrances v. Bedell*, 191 W.Va. 513, 517, 446 S.E.2d 906, 910 (1994)(The relationship of attorney and client is a matter of contract, express or implied, even where there is no agreement for compensation.) *See also* Rule 1.18(a), West Virginia of Professional Conduct (Defining the phrase "potential client.")

If Lees received information as a potential retained consultant or expert, and not in the context of the attorney-client relationship, then the Circuit Court should have determined whether Heiskell met his burden of proving both (a) an objectively reasonable expectation of privacy when George purportedly disclosed information to Lees on May 27th; and, (b) an actual disclosure of confidential information. *See State ex rel Billups v. Clawges,* 218 W.Va. 22, 620 S.E.2d 162 (2005) (Defining the burden to be met for disqualification of an expert witness based upon conflict.) No presumption or inference that confidential information was shared with an attorney arises outside the creation of an attorney-client relationship. *See State ex rel Blackhawk Enterprises, Inc. v. Bloom,* 219 W.Va. 333, 633 S.E.2d 278 (2006).

In Heiskell's Reply and in George's September 23rd testimony, George made it abundantly clear that he intentionally provided the alleged "confidential information" regarding his client's case to Lees only <u>after</u> Lees informed him that he (Lees) declined to do the consulting work requested for Heiskell because of his relationship with B&G and Benjamin Bailey. APP000126 and APP000150. In fact, the Reply expressly states that it was Lees' refusal to do any work in the litigation based on that conflict which prompted George to make the allegedly "confidential" disclosures. APP000126. Lees did not invite the alleged disclosures, nor

was there any relationship between Lees and George or Lees and Heiskell through which an expectation of confidentiality or legally protected privileges would (or could) extend. Even if George made the alleged disclosures to Lees—which Lees repeatedly denied- George did so at his (and his client's) peril. No experienced lawyer could or should reasonably believe that anything he says is confidential after being told that the consultant he seeks to retain is personal friends with the adverse party and/or that the consultant cannot perform the requested work without creating a conflict of interest due to professional relationships with the adverse party. It is implausible, therefore, that George would have disclosed confidential information at that point, but, if he did, he did so with no reasonable expectation of confidentiality.

Alternatively, even if the Circuit Court found—which it did not and could not—that Lees received information in the context of a potential attorney-client relationship, then the Circuit Court failed to apply the exceptions under Rule 1.18, West Virginia Rules of Professional Conduct, which would permit Lees to continue as B&G's counsel rather than summarily destroying the relationship through disqualification. There was no evidence that anything allegedly disclosed was outside the public record or harmful to Heiskell.

Under either analysis—as a consultant or as an attorney- disqualification is not warranted. Lees did not initiate or solicit the call or control the flow of information from George. There is no dispute that Lees promptly disclosed his conflict to George and refused to be retained upon learning of B&G's involvement in the Action. The Circuit Court's ruling, in effect, simultaneously (a) punishes B&G (and Lees) for George's conscious decision to release unsolicited, allegedly confidential information after Lees refused to work with them (Heiskell and George) against one of his (Lees') friends and professional clients; and, (b) rewards Heiskell for his lawyer's decision to disclose information when he (George) should have known that

confidentiality or legal privilege would not extend to such disclosures. The Circuit Court's reasoning is contrary to all existing law and common sense. The Circuit Court, therefore, committed clear error, exceeded its legitimate authority, and must be reversed.

B&G respectfully requests that this Court order that the Action be stayed pending resolution of this Verified Petition. B&G further requests that this Court issue a Rule to Show Cause why a Writ of Prohibition should not be issued and enter a Writ prohibiting the Circuit Court's enforcement of its ruling disqualifying Lees from representing B&G in this Action.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner B&G does not waive oral argument under Rule 18(a) and expressly requests oral argument, pursuant to Rule 19 or Rule 20. Oral argument will assist this Honorable Court in evaluating whether the Circuit Court abused its discretion and erred as a matter of law when the Circuit Court disqualified Lees from representing B&G against Heiskell. Petitioner believes this case is appropriate either for a memorandum or published opinion to give guidance to West Virginia's bench and bar with respect to retaining consultants who are also licensed attorneys and when a confidential relationship arises in such situation.

## STANDARD OF REVIEW

An Order to disqualify an attorney from representing a client is properly challenged through a Petition for Writ of Prohibition. *Syl. Pt. 1, State ex rel Bluestone Coal Corp. v. Mazzone,* 226 W.Va. 148, 697 S.E.2d 740 (2010). A Writ of Prohibition is "an extraordinary remedy" that is issued only "'where the trial court has no jurisdiction or having such jurisdiction

exceeds its legitimate powers. *W. Va. Code* 53–1–1.'" *State ex rel Verizon West Virginia, Inc. v. Matish,* 230 W.Va. 489, 740 S.E.2d 84, 90 (2013)(quoting *Syl. Pt. 2, State ex rel. Peacher v. Sencindiver,* 160 W.Va. 314, 233 S.E.2d 425 (1977). This Court considers five (5) factors in determining whether to grant a Verified Petition for Writ of Prohibition:

> "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight."

*Id,* 230 W.Va. 489, 740 S.E. 2d 90-91 (quoting *Syl. Pt. 4*, *State ex rel. Hoover v. Berger,* 199 W.Va. 12, 483 S.E.2d 12 (1996).)

Four of these five factors are met here. The first two factors are met in that B&G has no other adequate means, such as a direct appeal, to obtain the desired relief and B&G will be damaged or prejudiced in a way that is not correctable on appeal. The Order to disqualify Lees just seven weeks before trial immediately strips B&G of its fundamental right to choose its counsel and interferes with its existing attorney-client relationship. *See State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 198 W.Va 587, 482 S.E.2d 204, n. 10 (W.Va. 1996)("Disqualification is a drastic measure" viewed with disfavor, because it "serves to destroy a relationship by depriving a party of representation of their own choosing.") Additionally, the

Order extends to B&G's ability even to use Lees as its focus group and trial consultant, for which B&G has already expended valuable resources in both time and money.

For the reasons set forth in the Argument Section, *infra*, the third factor also is met. The Circuit Court's disqualification of Lees was clearly erroneous as a matter of law. Finally, the fifth factor is met based on the facts and available case law. This case presents an issue of first impression with respect to the application of the Rules of Professional Conduct to an attorney who is approached by another attorney to provide consulting services outside of the attorney-client relationship, promptly tells that lawyer he is unwilling to work on the case but, then, is accused of receiving unsolicited, confidential information. Accordingly, issuance of a Writ of Prohibition is warranted.

## ARGUMENT

1. **The Circuit Court Erred as a Matter of Law When It Found An Appearance of Impropriety in Lees' Representation of B&G Adverse to Heiskell in the Absence of an Attorney-Client Relationship (Former, Current, Potential or Imputed) Between Heiskell and Lees.**

As this Court has explained, "[d]isqualification" is "a prophylactic device for protecting the attorney-client relationship" and thus the judicial process. *Id.* It is a "drastic measure which courts should hesitate to impose except when absolutely necessary." *Id.* Here, the only attorney-client relationship that needs to be protected is the relationship between B&G and Lees. There is no evidence or even contention by any of the parties that Heiskell and Lees ever had an attorney-client relationship or contemplated an attorney-client relationship. *See*App000125, n.1. The Circuit Court, therefore, erred when it disqualified Lees from representing B&G under the guise of protecting a confidential relationship between Lees and

Heiskell that never existed and which the Circuit Court seems to infer arose only from George's unsupported assertions that he shared client confidences with Lees. It is an impermissible blurring of standards without any facts or law.

Remarkably, in explaining its ruling, the Circuit Court announced that it need not look at the Rules of Professional Conduct which define an attorney's obligations to protect the confidences of former, current and prospective clients and which define when those obligations can be imputed to an attorney. APP000166. The Court instead based its ruling on the opinion in *State ex rel Taylor Associates v. Nuzum, supra,* and ultimately found that a "possible appearance of impropriety" exists in Lees representing B&G in a matter adverse to Heiskell. The proposed Order prepared by Heiskell's counsel states that the Court's ruling also was based upon decisions cited in Heiskell's Motion to Disqualify, specifically *State ex rel Cosenza v. Hill,* 216 W.Va. 412, 607 S.E.2d 811 (2004) and *State ex rel Michael A.P. v. Miller,* 207 W.Va. 114, 529 S.E.2d 354 (2000.) APP000172. Irrespective of whether the Circuit Court actually relied upon *Nuzum* alone or in conjunction with similar cases, the Circuit Court's ruling is in error insofar as *Nuzum* (and others cases cited) specifically involved the presence of the attorney-client relationship, actual or imputed. The Circuit Court eschewed any analysis of the facts, the cases and the Rules of Professional Conduct that would have revealed the complete absence of an attorney-client relationship between Lees and Heiskell that could give rise to an appearance of impropriety.

For example, in *Nuzum,* a former client contacted an attorney about new litigation. The former client revealed all the information she possessed in connection with the lawsuit. Thereafter, the attorney agreed to represent the adverse party. The *Nuzum* Court analyzed the attorney-client relationship pursuant to the now superseded Code of Professional Responsibility,

DR 5-105, and found that the attorney could not later agree to represent parties adverse to the *former* client without either compromising representation of his new clients or sacrificing his duty of confidentiality to his former client. *Nuzum, supra*, 175 W.Va. at 22-23, 330 S.E.2d at 681.

In *Cosenza*, an attorney left one law firm to join another law firm. Both firms were in the midst of litigation representing adverse parties. The attorney, upon joining his new firm, was tasked with assisting in the prosecution of the litigation, despite the fact that the opposing party was being defended by his former firm. The Court held that the attorney and his new firm were disqualified from representing the plaintiff in that matter pursuant to Rule of Professional Conduct 1.10, based on *an imputed* attorney-client relationship arising from the attorney's prior relationship with the firm representing the defendant. *Cosenza, supra*, 216 W.Va. at 486-87, 607 S.E.2d at 815-16.

*Miller* involved the disqualification of a court-appointed attorney for a juvenile. The Court found an appearance of impropriety arising from the fact that the court-appointed attorney had a prior attorney-client relationship with a juvenile who was to be called as a witness by the prosecution. The Court found that it was within the sound discretion of the trial court to find the attorney's cross examination of her *former client* constituted a potentially adverse position that could not be waived. *Syl. Pt. 4, Miller, supra,* 207 W.Va. at 116, 529 S.E.at 356.

In this instance, unlike *Nuzum, Cosenza* and *Miller,* it is undisputed that no prior attorney-client relationship existed between Heiskell and Lees. *See*APP000141 (Lees has never met Heiskell.) Moreover, it is also undisputed that no attorney-client relationship was intended by Heiskell when George called Lees on May 27, 2016. APP000125, n.1.

That no attorney-client relationship existed in this matter is underscored by this Court's holding in *Bedell,* wherein it noted that the attorney-client relationship "is a matter of contract, expressed or implied." *Bedell, supra,* 191 W.Va. at 517, 446 S.E.2d at 910. The relationship comes to being, regardless of any agreement on compensation "'[a]s soon as the client has expressed a desire to employ an attorney and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity....all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation.'" *Id.* (quoting *Syl. Pt. 1, Keenan v. Scott,* 64 W.Va. 137, 61 S.E. 806 (1908).) (Additional citations omitted.)

It is well settled that an initial consultation between an attorney and a prospective client does not automatically result in disqualification of the attorney in future proceedings adverse to the prospective client; the facts surrounding the communications between attorney and prospective client must be considered. *See Bedell, supra* (No attorney-client relationship arose from a single general meeting regarding estate planning service)*; see also In re James,* 223 W.Va. 870, 679 S.E.2d 702 (2009)(No attorney client relationship formed from a single meeting when prospective clients "convey[ed] factual information about the incident and ask[ed] questions about related legal issues"). *And see Comments 2 and 4, Rule 1.18(a), West Virginia of Professional Conduct* ("Whether communications, including written, oral or electronic communications constitute a consultation depend on the circumstances." "[A] lawyer considering whether to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary... to avoid acquiring disqualifying information.") Thus, in *Bedell*, which involved beneficiaries of an estate attempting to disqualify an attorney who at one time met with the testator about estate planning services, the Court found that no

attorney-client relationship was formed when the consultation consisted of a single general meeting and no services were rendered. *Id.* Even when the initial meeting involves a detailed discussion of facts with family members, as was the case in *In re James*, *supra,* such does not necessarily create an attorney-client relationship.

An apparent conflict of interest or appearance of impropriety is predicated on a lawyer's actual or imputed confidential relationship with an opposing party. *See Syl. Pt. 2, Nuzum, supra,* 175 W.Va. at 21, 330 S.E.2d at 679. Where, as here, there is no intent of creating an attorney-client relationship and one party unequivocally has refused to have any relationship at all, no confidential relationship can arise to support a finding of apparent conflict of interest. Likewise, and contrary to the Circuit Court's findings, there can be no appearance of impropriety when an attorney, who is not in a confidential relationship, chooses to enter into a professional relationship with an adverse party.

There simply was no evidence before the Circuit Court that suggested an appearance of impropriety of any kind other than George's bald assertion of confidential disclosures to Lees, which Lees (whom George described as both "trustworthy" and "discreet") denied occurred. The Circuit Court did not identify or explain what the apparent conflict might have been. The Circuit Court also failed to provide any analysis or discussion of what constituted the "apparent" impropriety. Consequently, the Circuit Court clearly abused its authority and erred as a matter of law.

2. **Lees Refusal to Act as A Focus Group Consultant Could Not, as a Matter of Law, Be the Basis for Finding the Existence of a Confidential Relationship to Protect Disclosures Made by Heiskell's Counsel to Lees.**

If an attorney-client relationship was never contemplated by Heiskell and Lees, then the consultant role that George asked Lees to undertake was akin to that of an expert in litigation.

To that end, this Court has held that the burden of proof for a motion to disqualify an expert is borne by the movant:

> In cases where disqualification of an expert witness is sought, the party moving for disqualification bears the burden of proving that at the time the moving party consulted with the expert: (1) it was objectively reasonable for the moving party to have concluded that a confidential relationship existed with the expert; and (2) confidential or privileged information was disclosed to the expert by the moving party. Disqualification is warranted only when the evidence satisfactorily demonstrates the presence of both of these conditions.

*Syl. Pt. 3, State ex rel Billups v. Clawges, supra,* 218 W.Va. at 24, 620 S.E.2d at 164.[7]

The Circuit Court's finding that a confidential relationship could be "inferred" "if there were areas of inquiry divulged between Mr. George and Mr. Lees" is insufficient. APP000167-000168. There must be objective evidence of both and none was adduced at the September 23rd hearing or in any sworn Affidavits submitted to the Circuit Court.

Here, the testimony in Lees' Affidavit and the testimony of both Lees and George at the September 23rd Hearing demonstrated that no confidential relationship was formed. APP000064, and APP000138. George's single call to Lees on May 27th was to inquire whether Lees would enter into a confidential relationship with Heiskell as a focus group consultant. It is undisputed that Lees categorically refused during that telephone call to enter into such a relationship once George mentioned the Toyota sudden acceleration cases and then disclosed that B&G was the party defendant. George's purported belief that the mantle of confidentiality extended to the very fact of the call and any part of that conversation, including information he purportedly imparted after Lees refused to enter into a relationship with Heiskell, is inherently unreasonable.

[7] This two-part test is similar to the analysis under Rule 1.18(a) and (c), West Virginia Rules of Professional Conduct which requires first the intent to enter into a confidential relationship and then an evaluation of whether confidential information that is harmful to the prospective client has been disclosed.

In effect, Heiskell's assertion is that merely by Lees answering the telephone call from George a confidential relationship came into being.

Such an assumption by George, in addition to being unreasonable, ignored George's obligation to protect his client's confidentiality and the protections afforded his (George's) work product. *See* Rule 1.6, West Virginia Rules of Professional Conduct. In adopting the two-part test for disqualification of experts, this Court explained that the burden is on the attorney retaining the expert consultant to define any expectation of confidentiality prior to disclosing confidential information:

> Similarly, disqualification should not occur in the absence of a confidential relationship even though some confidential information may be disclosed. In this event the disclosure is essentially a waiver of any existing privilege. Lawyers bear a burden to make clear to consultants that retention and a confidential relationship are desired and intended.

*Clawges, supra,* 218 W.Va. at 28, 620 S.E.2d at 168 (quoting *Wang Laboratories, Inc. v. Toshiba Corporation,* 762 F.Supp. 1246, 1248 (E.D.Va. 1991).)(Emphasis added.) Disqualification of a consultant is not the remedy for the lawyer's failure to protect his client's confidences; the lawyer's disclosure of confidential information, as George claims here, is made at his peril.

In an effort to shoehorn the initial communication between George and Lees into the confines of a "possible" confidential relationship, the Circuit Court relied upon an email from Lees to another focus group consultant, Scoptor. APP000167-000168. The email, however, did not demonstrate the existence of a confidential relationship between Heiskell and Lees. APP000121. To the contrary, it memorialized Lees' refusal to enter into a relationship with Heiskell. *Id.* The email also did not contain any words that could be construed as assurances that Lees believed or understood that any information that George disclosed to him, including the

mere fact that George called him, was part of a confidential relationship between Lees and Heiskell.

The Circuit Court, therefore, abused its authority and erred as a matter of law when it disqualified Lees absent objective evidence of a confidential relationship. B&G should not be penalized with the disqualification of its counsel, Lees, even if George continued to talk after Lees told him, "No."[8] Issuance of a Writ of Prohibition is, therefore, warranted.

### 3. The Court Committed Legal Error When It Failed to Determine Whether Confidential Information Was Disclosed by Heiskell's Counsel to Lees

The Circuit Court also erred when it inferred that confidential information was disclosed by George to Lees before disqualifying Lees. The Circuit Court's finding on this issue was equivocal: "*if* there were areas of inquiry divulged between Mr. George and Mr. Lees." APP000167-000168 (Emphasis added). Heiskell is not entitled to any presumptions or inferences that confidential information, in fact, was shared, because there has never been a contention that an attorney-client relationship existed or was ever intended. *See Bedell, supra,* 191 W.Va. at 518, 446 S.E.2d at 911("'Because there was no direct attorney client relationship between the party seeking to disqualify the attorney, there was no presumption that confidential information was exchanged ...[and] movant must prove that fact.'")(Internal citation omitted.)

The *Clawges* two-part test requires that the party moving for disqualification of an expert present evidence that confidential information was disclosed[9] and, of necessity, that the Court make such a finding:

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[8] Again, Lees unequivocally denies that George divulged any sensitive or confidential information or information harmful to Heiskell during the call.

[9] In its Response to the Motion to Disqualify, B&G urged the Circuit Court to consider the application of Rule 1.18(c), West Virginia Rules of Professional Conduct which would require that the information disclosed by George to Lees be both confidential <u>and harmful</u> to Heiskell's interests. Comment 6 to Rule

> [D]isqualification does not seem warranted where no privileged or confidential information is passed. Were this not so, lawyers could then disable potentially troublesome experts merely by retaining them, without intending to use them as consultants. Lawyers using this ploy are not seeking expert help with their case; instead, they are attempting only to prevent opposing lawyers from obtaining an expert. This is not a legitimate use of experts, and courts should not countenance it by employing the disqualification sanction in aid of it.

*Clawges, supra,* 218 W.Va. at 28, 620 S.E.2d at 168 (quoting *Wang, supra,* 762 F.Supp. at 1248).

Aside from George's bald assertions that confidential information was disclosed, there is no evidence that such occurred. The only testimonial and documentary evidence is that during a brief telephone to inquire whether Lees would serve as a focus group consultant, George disclosed to Lees the names of the parties, the type of litigation, the desire to conduct focus groups and, according to George only, themes for the focus groups. APP000042, APP000062-000063, APP000117-000120, APP000121, APP000139, APP000142-000145, APP000149-000151. None of this information was confidential and, with the exception of the desire to conduct focus groups, all could be gleaned from the public record.[10] Indeed, plaintiff's themes in the Action are reflected in Heiskell's Amended Complaint, his various motions and in deposition examinations. *See e.g.* APP000001-000037.

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1.18 emphasizes this requirement: "Even in the absence of an agreement [waiving an assertion of future conflict as discussed in Comment 5], under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the attorney has received from the prospective client information that would be significantly harmful if used in the matter." In light of the fact that there is no evidence that any confidential information was disclosed, there is obviously is no evidence that the information disclosed could be harmful. Moreover, as discussed, *supra*, in Section 1 of this Petition's Argument, no attorney-client relationship was intended by Heiskell or George when George contacted Lees, so Heiskell's was not even a "prospective client" as defined by Rule 1.18(a).

[10] George conceded that conducting focus groups is a frequent or prevalent practice in litigation. APP000153-000156.

George urged the Circuit Court to find that the very fact that he contemplated conducting focus groups was confidential. APP000151. The Circuit Court rejected that argument. APP000168. The Circuit Court also declined to hear any evidence *in camera* notwithstanding the fact that George testified that he disclosed confidential information to Lees after Lees refused to be retained and Lees denied that any confidential disclosure occurred at any time. Thus, no objective evidence exists that any confidential information was disclosed and the Circuit Court did not make an express finding that George, in fact, disclosed confidential information. The Circuit Court relied on an impermissible inference.

Moreover, the Circuit Court refused to consider the Rules of Professional Conduct and apply those Rules to the facts before it. If, as George testified, he divulged confidential information to Lees after Lees refused to be retained, then Lees was a third-party and George waived any protections of privilege and confidentiality that may have existed. Pursuant to Rule 1.6, West Virginia Rules of Professional Conduct, "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation." As a general principle, if privileged communication is disclosed to third-parties, then the attorney-client privilege is waived. *Syl. Pt. 12, Marano v. Holland,* 179 W.Va. 156, 366 S.E.2d 117 (1988). *See United States v. Jones,* 696 F.2d 1069 (4th Cir.) (Disclosure inconsistent with confidential nature of attorney-client relationship waives attorney-client privilege.) *See Lawyer Disciplinary Bd. v. McGraw,* 194 W.Va. 788, 798, 461 S.E.2d 850, 860 (1995). The duty of confidentiality binds the lawyer at <u>all</u> times. *Id.*

A lawyers is, of course, presumed to know that bedrock rule. The client's trust in the lawyer is of utmost importance, and the lawyer's duty to protect that trust is foundational. *See Lawyer Disciplinary Bd. v. Artimez,* 208 W.Va. 288, 300, 540 S.E.2d 156, 168 (2000). If George

disclosed any "confidential" or "privileged" information to Lees as he has testified occurred, then George knowingly waived the privileges and there is no confidentiality that can be asserted or protected.

As the *Clawges* Court explained, when considering disqualification (of an expert), the Circuit Court must engage in a balancing of interests, which includes not only the interests of the party who claims that a confidential disclosure occurred, but also the "'opposing party's right to retain those persons it feels are needed to prosecute its case...and the interest of experts to seek employment.'" *Id.,* 218 W.Va. at 27, 620 S.E.2d at 167 (Quoting *Great Lakes Dredge & Dock Co. v. Harnishfeger Corporation,* 734 F.Supp. 334, 336-337 (N.D. Ill. 1990).) To permit, as the Circuit Court did here, a lawyer to claim that he disclosed confidential information to an expert/consultant without any evidence of the same and in direct contradiction to the testimony of that expert/consultant, particularly when such disclosure purportedly occurred <u>after</u> the expert/consultant categorically refused to enter into a confidential relationship, grossly skews the balancing of interests and unfairly rewards the lawyer who claims to have made the disclosure contrary to his obligations to maintain his client's confidences. It is a result that should not be countenanced. In effect, it would mean that a client or his/her attorney could telephone any potential opposing counsel, consultant or expert, speak a few sentences about a case and thereby trigger disqualification of the counsel, consultant or expert from representing the opposing party or otherwise being involved in the case. It is the very ploy that this Court expressly discouraged in *Clawges, supra.; and see Nuzum, supra,* 175 W.Va at 23, 330 S.E.2d at 681-682 (The Court "realize[s] that in contemporary litigation, a motion to disqualify [an attorney] is often simply a weapon to delay or destroy an incipient lawsuit....[C]ourts must be vigilant against the abuse of [disqualification motions] where no reasonable ground exist for such disqualification.")

The Circuit Court's disqualification of Lees was not established by the evidence and not supported by the law. The Circuit Court, therefore, exceeded its jurisdiction and erred as a matter of law. Issuance of a Writ of Prohibition is warranted.

## CONCLUSION

The Circuit Court's disqualification of Lees stripped B&G of its lead trial counsel seven weeks before trial and also interfered with B&G's pre-existing contractual relationship with Lees as a consultant. The disqualification was not premised on objective evidence that a confidential relationship existed between Lees and Heiskell or that any confidential information actually was disclosed. The evidence adduced at the September 23rd hearing was that Heiskell's counsel, George, made the decision to disclose to Lees what George considered confidential and privileged after Lees refused to be retained. If George made disclosures at that time contrary to his obligations to Heiskell under Rule 1.6, Rules of Professional Conduct, George did so at his peril. Neither B&G nor Lees should be punished for something within George's control and not theirs.

The ruling of the Circuit Court rewards George for making his alleged disclosure of confidential information to Lees when George had no reasonable basis for believing such information was protected once disclosed. Prior to such alleged disclosure, Lees informed George that a conflict existed and he could not serve as a consultant to Heiskell. No relationship existed – attorney-client or attorney-employee—to extend any recognized privileges to George's alleged disclosures to Lees. The logic by which the Circuit Court came to the conclusion that an appearance of impropriety was created disqualifying Lees is contrary to the laws of West Virginia and the balancing of interests for a fair and equitable judicial process. Additionally, even if the "impropriety standard" were appropriate (and it is not), the Circuit Court failed to

explain what, given the uncontested facts, constituted even the appearance of impropriety or a conflict. Accordingly, the Circuit Court's ruling must be reversed.

WHEREFORE, the Petitioner respectfully requests that this Verified Petition for Writ of Prohibition be accepted for filing; that this Court issue a Rule to Show Cause against the Respondents directing them to show cause, if any they can, as to why a Writ of Prohibition should not be issued; that all proceedings in the Circuit Court of Kanawha County be stayed, pursuant to West Virginia Code § 53-1-9, until resolution of the issues raised in this Petition; that this Court award a Writ of Prohibition against the Respondents, reversing the Order to disqualify Lees; and, that this Court award Petitioner such other and further relief as the Court deems just and appropriate.

**Bailey & Glasser, LLP,**

**Petitioner,**

**By Counsel,**

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## CERTIFICATE OF SERVICE

I, the undersigned counsel for the Petitioner, Bailey & Glasser, LLP, hereby certify that I have served a true and correct copy of this Verified Petition for Writ of Prohibition and Certified Appendix upon the following counsel of record and presiding judge on this 5th day of October, 2016, by placing the same into the United States mail, first class, postage prepaid and addressed as follows:

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*Counsel for Respondent Edgar Heiskell, III*

The Honorable John Cummings, Judge (Senior Status)
c/o The Circuit Court of Kanawha County, West Virginia
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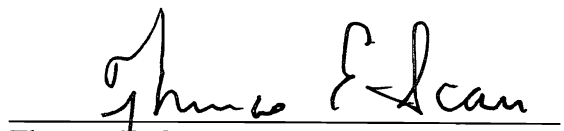
Charleston, WV 25301



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