

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

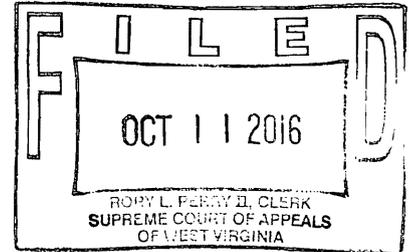
SUPREME COURT NO: 16-0936

PETITIONER

v.

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

RESPONDENT.



**RESPONDENT EDGAR F. HEISKELL, III'S
RESPONSE TO THE VERIFIED PETITION FOR WRIT OF PROHIBITION**

**Shawn P. George, Esquire
WV State Bar #1370
George & Lorensen PLLC
1526 Kanawha Blvd., East
Charleston, WV 25311
PH: 304-343-5555
sgeorge@gandllaw.com**

**COUNSEL FOR RESPONDENT
EDGAR F. HEISKELL, III**

TABLE OF CONTENTS

<u>Heading</u>	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
QUESTIONS PRESENTED.....	1
STATEMENT OF THE CASE.....	1
A. Introduction.....	1
B. Relevant Procedural History.....	4
C. Relevant Facts.....	5
1. Respondent’s counsel contacted Mr. Lees with a reasonable expectation of confidentiality.....	5
2. The September 23 Hearing.....	6
3. Petitioner’s choice of counsel.....	10
SUMMARY OF ARGUMENT.....	10
STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	11
ARGUMENT.....	11
A. Petitioner has not met the criteria necessary for issuance of a Writ.....	11
B. The trial court’s ruling was not clearly erroneous as a matter of law.....	13
C. Petitioner cannot have its cake and eat it, too, on the specifics of the confidential communication.....	16
CONCLUSION.....	17

TABLE OF AUTHORITIES

FEDERAL CASES

HealthNet, Inc. v. Health Net, Inc., 289 F.Supp.2d 755 (S.D.W.Va. 2003).....16
United States v. Clarkson, 567 F.2d 270 (4th Cir. 1977).....16

STATE CASES

Garlow v. Zakaib, 186 W.Va. 457, 413 S.E.2d 112 (1991).....16
Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979).....13
Nichols v. Village Voice, Inc., 417 N.Y.S.2d 415 (1979).....14
State ex rel. Billups v. Clawges, 218 W.Va. 22, 620 S.E.2d 162 (2005).....14
State of West Virginia ex rel. George J. Cosenza, et. al. v. Hill, 216 W.Va. 482,
607 S.E.2d 811 (2004)..... 14
State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1997).....12, 13
State ex rel. McClanahan v. Hamilton, 189 W.Va. 290, 430 S.E.2d 569 (1993).....13
State ex rel. Michael A.P. v. Miller, 207 W.Va. 114, 529 S.E.2d 354 (2000).....15
State ex rel. Ogden Newspapers, Inc. v. Wilkes, 198 W.Va. 567, 482 S.E.2d 204 (1996).....17
State ex. rel. Taylor Associates v. Nuzum, 175 W.Va. 19, 330 S.E. 2d 677 (1985).....11, 14, 15

STATUTES AND REGULATIONS

West Virginia Rules of Civil Procedure § 55-1-1.....11

QUESTIONS PRESENTED

1. Did the trial court abuse its power or exceed its legitimate authority when it disqualified attorney James Lees from representing Petitioner Bailey & Glasser? **ANSWER: NO.**
2. Was the trial court's ruling clearly erroneous as a matter of law? **ANSWER: NO.**
3. Did the trial court commit clear legal error by not determining the actual information disclosed? **ANSWER: NO.**

STATEMENT OF THE CASE

A. Introduction

In the thirty-five (35) months this action has been pending, Bailey & Glasser ("B&G" or "Petitioner") has made no fewer than four (4) requests for a continuance of the trial date or stay of the proceedings, as Respondent has diligently prepared his case for trial and has done nothing that would provide grounds for a continuance or stay. This Petition is yet another groundless attempt to delay the longstanding trial date of November 14, 2016 and Petitioner misstates the record in at least three (3) material respects in a desperate attempt to achieve that result. First, proposed Intervenor, James B. Lees ("Mr. Lees"), did not testify as Petitioner presents. Mr. Lees did not deny that he received confidential information from Respondent's counsel in the May 27, 2016 telephone call. Mr. Lees stated that he did not remember receiving confidential information from counsel, but did not deny that he may have done so. The affirmative testimony by Respondent's counsel that he did, in fact, convey confidential information to Mr. Lees thus stands uncontroverted. Second, Petitioner asserts repeatedly that Mr. Lees, when contacted by Respondent's counsel on May 27, 2016, to conduct focus groups for Respondent, refused to conduct focus groups *for Heiskell*, and suggests thereby that Mr. Lees was leaving himself open and available to assist Petitioner, if asked. Such a statement is a blatant misrepresentation. It is in

direct contradiction to the only contemporaneous writing from Mr. Lees immediately after the May 27, 2016 telephone call with Respondent's counsel, which states: "I do not want to be involved in any way in this litigation since I know all the parties." Exhibit 8 to Plaintiff's Motion to Disqualify (APP 000179-181).¹ This statement was included in the email string which Mr. Lees sent to Respondent's counsel at 10:48 a.m. May 27, 2016, when Mr. Lees confirmed that he had contacted another individual, Paul Scoptur, for Respondent's counsel to pursue discussions about conducting focus groups for Respondent. *Id.*

Third, Petitioner misrepresents the testimony of Respondent's counsel regarding his telephone conversation with Mr. Lees on May 27, 2016 and Respondent's counsel's receipt and understanding of the confirming email. (APP 000180-81). The hearing transcript regarding the Motion to Disqualify and Order granting the Motion to Disqualify (APP 000189-192) establish that Respondent's counsel contacted Mr. Lees with the expectation of confidentiality based on several past engagements for the identical purpose and course of conduct. Respondent's counsel testified he conveyed to Mr. Lees confidential thoughts, impressions, information and potential trial themes and issues, both before and after Mr. Lees said "I do not want to be involved in any way in this litigation since I know all the parties." Respondent's counsel testified that he did so because he had every expectation that Mr. Lees could not and would not be involved for anyone, as he had represented, and that this confidential information and the mental impressions of Respondent's counsel would aid in making the referral recommendation for another person to

¹ The confidential email exchange marked Exhibit 8 to Plaintiff's Motion to Disqualify (APP 000179-181) contains three of the four emails included in Exhibits 4 and 5 of B&G's Response to Plaintiff's Motion to Disqualify (APP 000121-22). Petitioner produced Exhibits 4 and 5 as if they are independent and unconnected emails. They are not. Petitioner re-ordered them (they are numbered pages 3, then 2) to disassociate them from each other, but Plaintiff's Exhibit 8 shows clearly that Mr. Lees's comment that he did not want to "be involved in any way in this litigation" was sent by Mr. Lees to Mr. George the same morning as their call and as a confirmation of that conversation, stating, "Shawn completely understands." (APP 000181).

assist Respondent in conducting the focus groups. The latest in the string of emails in Exhibit 8 to the Motion to Disqualify (APP 000180) supports this when Mr. Lees writes: “Paul is the only guy in the country I trust to do focus groups in my absence and I know you will be pleased with his work and results.”²

Respondent’s counsel would never have disclosed additional confidential information to Mr. Lees if he had said, indicated, intimated or reserved the right to be retained in any capacity by Petitioner. In fact, while not disclosed in the Petition, B&G’s Reply in Support of its Motion to Stay Proceedings, or in the Alternative, Motion to Continue (APP 000193-98), discloses obliquely in paragraph 2, for the first time, that Mr. Lees conducted focus groups of this action for Petitioner. Respondent assumes this occurred between Mr. Lees’s May 27, 2016 disavowal and refusal to be involved for anyone and the filing September 12, 2016 of his Notice of Appearance as counsel for Petitioner. Thus, Petitioner and Mr. Lees have already benefited from having Mr. Lees conduct focus groups after confidential disclosures by Respondent’s counsel. The prejudice therefrom to Respondent far outweighs any prejudice Petitioner or Mr. Lees could suffer by Mr. Lees’s disqualification as trial counsel. Petitioner has been ably represented for the last three and one-half years by the Jenkins Fenstermaker firm. Petitioner recently added Charleston attorney Joe Lovett to its trial team and has the ability to augment its list of counsel with additional lawyers, except for Mr. Lees. Judge Cummings got it right when he determined that Respondent should not be confronted with trying this action against an attorney to whom

² Mr. Lees does not deny that this consultation took place, saying in Paragraph 9 of the Motion to Intervene that no further conversation occurred, “other than [Lees] helping Mr. George secure help from another consultant.” Mr. Lees in fact had, as Mr. George’s testimony documents, additional conversation regarding the focus groups and the best person available to conduct them for Respondent. It was in this discussion that Mr. George has testified that he conveyed additional confidential information to Mr. Lees. Mr. Lees’s email confirms these additional discussions, if not their content.

Respondent had conveyed, with a reasonable expectation of confidentiality, strategic information about the identical matter.

B. Relevant Procedural History

This case was originally filed by Edgar F. Heiskell, III (“Respondent” or “Mr. Heiskell”) *pro se* on November 4, 2013 and the Complaint was subsequently amended after Mr. Heiskell retained counsel. Following a series of recusals, this Court by Order entered July 31, 2015, appointed the Honorable John L. Cummings to preside. After extensive briefing and argument on Petitioner’s Motions to Dismiss, all of which were denied, except as to Respondent’s claim for emotional distress, Judge Cummings held a hearing on December 17, 2015, set timeframes for crucial depositions, and scheduled the trial for 11 months later, November 14, 2016. In the ensuing nine months, B&G has taken only four (4) depositions, but has moved for a continuance or stay at least four (4) times.

B&G moved for a continuance on June 2, 2016, which the Court denied on July 12. (Order on July 2016 Discovery Matters ¶ 13, APP 000184). B&G again moved for a continuance on August 16, 2016. B&G included a third Motion to Continue with its Motion to Stay Enforcement of the Order Disqualifying James B. Lees, Jr. on September 30, 2016. Its Petition for Writ of Prohibition again seeks a continuance of the trial, as does B&G’s Motion for Expedited Stay of Proceedings filed Friday October 8, 2016. Each time, Respondent has opposed delaying the trial.

In addition to its three original attorneys at Jenkins Fenstermaker (as well as an additional undisclosed contract lawyer there), Petitioner has had access to its own significant resources and lawyers to defend the claims. It also added Joseph M. Lovett as counsel in August, 2016. (APP 000187). On September 12, 2016, Mr. Lees filed and served a Notice of Appearance as

additional counsel for Defendant. (APP 000047). Mr. Heiskell filed a Motion to Disqualify Mr. Lees on September 19, 2016, after first requesting that Mr. Lees withdraw, which he declined to do. By agreement of the parties and counsel, the Court on September 23, 2016, conducted an expedited evidentiary hearing on Respondent's Motion to Disqualify and granted the Motion. On October 5, 2016, the Court entered its Order granting the Motion. (APP 000189-192). The Petition was filed before entry of that Order, but after the draft Order had been prepared by counsel for Respondent and objected to by Petitioner.

C. Relevant Facts

1. Respondent's counsel contacted Mr. Lees with a reasonable expectation of confidentiality.

Counsel for Respondent contacted Mr. Lees by telephone on or about May 27, 2016, to inquire about retaining him to conduct focus groups regarding Mr. Heiskell's claims and the counterclaims against him. Mr. George had retained Mr. Lees on four occasions over the preceding ten years to conduct focus groups. All had been confidential proceedings, the existence and conduct of which were not known or disclosed to the adverse parties or their counsel. In the May 27 discussion, Mr. George identified the parties and counsel, outlined generally the Respondent's claims and Petitioner's counterclaims, and suggested issues and themes that he wanted to explore in the focus groups. As set out more fully below, Mr. Lees advised that he did not want to be involved in any way in this litigation since he knew all the parties and their counsel. On request, Mr. Lees identified only one other person, Paul Scoptur, that he would recommend to conduct the focus groups. Mr. Lees made that referral by email dated May 27, 2016, at 9:28 a.m., stating to Mr. Scoptur, "I do not want to be involved in any way in this litigation since I know all the parties. Shawn understands completely." (APP 000121). Mr. Lees forwarded that email, with Mr. Scoptur's reply, to Mr. George on May 27,

2016, at 10:48 a.m. (APP 000180). Mr. George proceeded accordingly, comfortable in the knowledge and reasonably believing that (1) Mr. Lees would not get involved on behalf of either party in this action and (2) that his conversation with and disclosures to Mr. Lees would remain confidential. At some as-yet-undisclosed time after May 27, 2016, but before Mr. Lees filed on September 12, 2016, his Notice of Appearance as counsel for Petitioner (APP 000047), Mr. Lees conducted focus groups for B&G in this action.³

Respondent's counsel immediately asked Mr. Lees to withdraw on receipt of the Notice of Appearance, based upon their prior communication.⁴ (APP 000050, 000056-57). Mr. Lees refused. (APP 000062). Respondent filed a Motion to Disqualify on September 19, 2016. (APP 000039). By agreement, the parties argued the Motion on September 23, 2016. The Court ruled from the bench that Mr. Lees was disqualified from further representation of or work with B&G in this action, all within eleven (11) days after first disclosure of his involvement. (APP 166-170).

2. The September 23 Hearing

At the hearing on the Motion, Respondent's counsel requested that the Court hear his testimony and that of Mr. Lees regarding confidential communications *in camera* in order to avoid further disclosure of confidential information to opposing counsel. Petitioner objected, and

³ Counsel for B&G at the hearing stated only that Mr. Lees had "been retained to handle the focus groups in this matter" (APP 000169). Respondent was alerted to the fact that the focus groups had already occurred by paragraph 2 of B&G's Reply in Support of its Motion to Stay Proceedings (APP 000194-95), filed October 4, which states, "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." (emphasis added). B&G misleads this Court in Footnote 2 of the Petition, stating, "Neither side knows whether focus groups have been convened or what the results of any focus groups have been." The first part of that statement is demonstrably untrue and highlights B&G's recognition that even the conduct of a focus group is a sensitive, proprietary and confidential matter.

⁴ This chronology is set out in more detail in Respondent's Motion to Disqualify, APP 000039 and Respondent's Reply in Support of Motion to Disqualify, APP 000125.

the Court instructed the parties to raise the issue again if it appeared during the course of the hearing that confidential information was about to be disclosed. (APP 000134-135).

Respondent's counsel's testimony on the pivotal issue of whether he disclosed sensitive, non-public confidential information and mental impressions about the case to Mr. Lees stands **uncontroverted**. Mr. Lees did not deny that he may have received that information from Respondent's counsel, only that he couldn't recall it. Respondent's counsel's affirmative testimony establishes that he made those disclosures, both before and after Mr. Lees stated that he would not represent or be involved with either party. It is axiomatic that one party's *failure to recall or to deny* cannot be said to have probative value equal to the other party's *affirmative recollection* on the same substantive point.⁵ Further, contrary to the repeated characterization in the Petition, Mr. Lees acknowledged that he had stated in writing that he would not get involved *on behalf of either party*, and stated only that he did not remember saying it to Mr. George in that way. He never "denied" hearing confidential information from Mr. George, again stating or confirming multiple times that he either *did not know, did not remember, or did not recall* Mr. George conveying confidential information. A review of the transcript is telling on both these crucial facts:

Q. [by Mr. George] 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....

(APP 000139).

⁵ Mr. Lees's failure to recall may be explained by the number of calls he gets to conduct focus groups (APP000143). The record contains no suggestion that any reason exists to question Mr. George's recollection of the conversation.

Q. Okay. And in that email to Paul (APP 000181) I want you to go down to the sentence that's about ten lines down where you say, quote, "I do not want to be involved in any way in this litigation since I know all the parties...."

A. I don't recall conveying that to you

...

Q. But what you conveyed is that you didn't want to be involved in any way in the litigation because of that knowledge regardless of to whom it was intended?

A. That's what I said in this email.

Q. Okay. And do you recall telling me that same thing when we spoke?

A. No. I don't recall telling you that.

(APP 000141-42).

A. I simply recall – my recollection totally and what I remember, and I'm sorry, but I get a lot of calls, is Mr. Heiskell was a former Secretary of State. Mr. Heiskell had been successful in auto product litigation....

(APP 000143).

Q. ...[D]o you remember commenting to me I can't believe that they want to try this case? Do you remember that at all?

A. No. I don't.

Q. Okay.

A. I really don't. Again if you said something, Shawn, and I don't remember it – and if you said something – and I know and you know lawyers, we always puff things up. ... I truly do not remember anything other than what I just said.

(APP 000144).

On cross-examination and against this backdrop, Mr. Lees denied learning anything "adverse or harmful to Mr. Heiskell" during the May telephone call. (APP 000145). "Adverse or harmful" does not rule out "confidential" or "strategic." Because Judge Cummings, at the urging of counsel for Bailey & Glasser, determined not to hear the testimony of either Mr. Lees or Mr. George *in camera*, the precise nature of the confidential communications is not detailed, but, based on the record, it is not required in order to deny the Petition.

The affirmative testimony of Mr. George at the hearing was that he had a professional relationship with Mr. Lees regarding the conduct of focus groups that included adherence to the utmost standards of confidentiality:

...[O]ne of the things that is important in any part of this work is to make sure that what you're doing as a trial lawyer on behalf of your client is confidential, and so we go to significant lengths to conduct the focus groups in places that are secure, without disclosure of the parties, without publication of the fact that they are being conducted. We spend a lot of money and we invest a lot of money and time in that process, and we safeguard it. That was certainly my expectation when I approached Mr. Lees and had been my experience when I had used him on the previous occasion[s].

(APP 000148-49). He testified that he conveyed confidential information to Mr. Lees before Mr. Lees stated he would not get involved for either party and that thereafter, Mr. George conveyed additional confidential strategic information to Mr. Lees in order to get his help securing an appropriate referral:

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.... I gave him some confidential information about things I was thinking.

(APP 000150). Mr. George confirmed that he conveyed information that could significantly harm Mr. Heiskell in his pursuit of this case. (APP 000151:23). A renewed motion for the Court to hear further testimony from Mr. George in camera was denied. (APP 000152:6).

After hearing this testimony and the arguments of counsel, Judge Cummings found that Mr. Lees's testimony was at variance with his email of May 27, 2016 to Paul Sceptur (APP 000167), which Mr. Lees also forwarded to Mr. George later that morning (APP000180-81). The trial court then disqualified Mr. Lees from representing Bailey & Glasser in this action and barred him from further communication with B&G regarding either the trial or focus groups, which, unbeknownst to Judge Cummings and Respondent's counsel, had already been conducted by Mr. Lees for B&G, but not disclosed. (APP 000168:8-9; 000169:21).

3. Petitioner's Choice of Counsel

Petitioner, in addition to its own stable of lawyers and resources, engaged Jenkins Fenstermaker as counsel no later than July of 2013, almost three and one half (3½) years ago, prior to Plaintiff filing suit. Throughout that period, a team of no fewer than three (3) attorneys within that firm has worked on this case. In addition to the three original attorneys, Petitioner added Joseph M. Lovett as counsel in August, 2016. (APP 000187). On September 12, 2016, eight (8) weeks before trial is set to begin, Mr. Lees filed and served a Notice of Appearance as counsel for B&G, by which he became the fifth lawyer of record for B&G. (APP 000047).

SUMMARY OF ARGUMENT

This Petition and Petitioner's related, just-filed Motion for Stay are the most recent in a series of tactics to secure a continuance or stay and to further delay recovery by Mr. Heiskell of substantial sums he is owed, which B&G has already received, as well as additional substantial payments which are imminent. The trial court did not abuse its power or exceed its legitimate authority when it disqualified Mr. Lees from representing B&G and Petitioner has not met its burden of establishing that the Court should issue a discretionary writ. Judge Cummings exercised his discretion appropriately and his ruling is supported by long-established case law. As this Court acknowledged in *State ex. rel. Taylor Associates v. Nuzum*, 175 W.Va. 19, 330 S.E.2d 677, 681 (1985), "The disqualification of an attorney by reason of conflict of interest will not be denied solely because there is no actual attorney-client relationship between the parties." Mr. George and his client, Mr. Heiskell, had an objectively reasonable expectation that Mr. Lees would (1) keep the fact of his inquiry confidential, (2) honor his statement and commitment not to get involved on behalf of either party to the case and (3) safeguard the confidential information conveyed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary to decide this Petition. Given the November 14, 2016 trial date and Respondent's Motion for Expedited Consideration, Respondent respectfully requests that the Court not schedule oral argument or delay ruling on the Petition.

ARGUMENT

A. Petitioner has not met the criteria necessary for issuance of a Writ.

The trial court was within its legitimate powers when it made the fact-specific ruling on Respondent's Motion to Disqualify. A writ of prohibition lies as a matter of right in cases of usurpation and abuse of power, lack of subject matter jurisdiction, or when the court having such jurisdiction exceeds its legitimate powers. W.Va. Code § 55-1-1. Jurisdiction in this case is not disputed. As stated by the Court in syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1997):

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.

Respondent agrees that Petitioner satisfies the first criterion: It cannot get the result it wants if the Court declines to issue the writ. Petitioner does not, however, meet any of the four remaining criteria. With regard to factor (2), it is Respondent, not Petitioner who has been prejudiced by

the actions of Mr. Lees. Petitioner has already had Mr. Lees conduct focus groups for it after receiving confidential information from Respondent, even though Mr. Lees earlier told Respondent's counsel he would not do focus groups for either side. Petitioner did not disclose this fact to Respondent or Judge Cummings.⁶ Respondent had no knowledge of any involvement by Mr. Lees with Petitioner in this action until Mr. Lees filed on September 12, 2016, his Notice of Appearance. That potential was not and could not be envisioned as possible based upon Mr. Lees's written confirmation May 27, 2016 that he would not be getting involved for anyone.

Petitioner is represented by at least four counsel of record, in addition to its own members and employees. It also has access to nearly every other attorney in the state and beyond, should it need additional brainpower. The potential prejudice from disqualifying one attorney out of all the attorneys in the world is minimal. It is far outweighed by the prejudice to Respondent Heiskell, who is represented by one attorney, who turned to Mr. Lees, reasonably, as a potential resource for trial strategy and disclosed confidential information related thereto. Petitioner cannot satisfy factor (3), because Judge Cummings's ruling is not "clearly erroneous as a matter of law," as set out more fully below. Factor 4 is not applicable because the ruling here is case- and fact-specific and based upon a record and evidentiary hearing. It cannot be characterized as a situation involving "an oft repeated error". Finally, Petitioner cannot satisfy factor 5 as the issue of attorney disqualification is not an issue of first impression, nor is there a need for a test case. Having met only one of the five factors in *Hoover v. Berger*, the Petition must be denied.

The Court also has said that it will use prohibition

... in this discretionary way to correct only *substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate* which may be resolved independently of any disputed facts and *only in cases where there is a high*

⁶ See footnote 3.

probability that the trial will be completely reversed if the error is not corrected in advance.

Syl. pt. 6, *State ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569 (1993), quoting Syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979) (emphasis added).

Petitioner cannot meet this standard either. This is not a case in which a party is being deprived of adequate representation. As found by the trial court based on its determination of the facts, continued representation by Mr. Lees would create the appearance of impropriety, and his disqualification does not leave Petitioner without able counsel, given that it is represented by four other attorneys, three of whom have been on the case for over three years. (APP 000190-91).

B. The trial court's ruling was not clearly erroneous as a matter of law.

Contrary to Defendant's assertions, an attorney-client relationship is not required in order to disqualify Mr. Lees. The trial court ruled correctly that the issue of disqualification should be determined by reference to both the Rules of Professional Conduct and pertinent case law. The Rules of Professional Conduct are "rules of reason," to be "interpreted with reference to the purposes of legal representation and of the law itself." Preamble, Scope and Terminology ¶ 14. In a case cited by the trial court in its Order, this Court acknowledged that fact:

The disqualification of an attorney by reason of conflict of interest will not be denied solely because there is no actual attorney-client relationship between the parties. A 'fiduciary obligation or an implied professional relation' may exist in the absence of a formal attorney-client relationship.... It is clear that *when an attorney receives confidential information from a person who, under the circumstances, has a right to believe that the attorney, as an attorney, will respect such confidences*, the law will enforce the obligation of confidence irrespective of the absence of a formal attorney-client relationship.

State ex. rel. Taylor Associates v. Nuzum, 175 W.Va. 19, 330 S.E. 2d 677, 681 (1985)

(hereinafter *Nuzum*), citing *Nichols v. Village Voice, Inc.*, 417 N.Y.S.2d 415, 418 (1979)

(emphasis added). Petitioner's reference to the standard for disqualifying an expert witness on the grounds of conflict of interest is neither dispositive, nor helpful to Petitioner. Attorneys, as officers of the court, are held to a higher standard than experts.⁷ *In State of West Virginia ex rel. George J. Cosenza, et. al. v. Hill*, 216 W.Va. 482, 607 S.E.2d 811, (2004), the West Virginia Supreme Court held, "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 (citations omitted). Judge Cummings exercised that discretion in this case, and his decision should not be second-guessed or overturned by this Court. It is simply unfair to Respondent, the Plaintiff below, for Petitioner to blindside Respondent eight weeks before trial by adding an attorney whose receipt of confidential tactical information from Respondent gives Petitioner insight into the mind of Plaintiff's counsel regarding the issues at hand. There is no evidence that Respondent's Motion to Disqualify was triggered or motivated by a desire to interfere in some inappropriate way with an attorney-client relationship; it was filed, pursued and granted to protect Respondent's substantial and legitimate confidentiality rights and to avoid irreparable harm to Respondent if Mr. Lees is permitted to assist B&G after receipt of Respondent's confidential information.

A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship.

⁷ The standard for disqualifying experts, set out in *State ex rel. Billups v. Clawges*, also requires disqualification in this case: "First, was it objectively reasonable for the first party who claims to have retained the consultant [previously] ... to conclude that a confidential relationship existed? Second, was any confidential or privileged information disclosed by the first party to the consultant?" 218 W.Va. 22, 620 S.E.2d 162, 167 (2005) (citations omitted).

State ex rel. Michael A.P. v. Miller, 207 W.Va. 114, 529 S.E.2d 354, 358 (2000) (citations omitted). The Court continued, "...[W]e used the word "may," thereby indicating that the decision whether to grant or deny a motion to disqualify is within the trial court's discretion." *Id.*

Petitioner makes much of the statement quoted above that motions to disqualify should be viewed with extreme caution. The basis for this caution is the potential for harassment. *See, e.g., Nuzum, supra*, 330 S.E.2d at 681 (motion to disqualify is often "simply a weapon to delay or destroy an incipient lawsuit"). That is the opposite of the case here, wherein Respondent seeks to retain the pending trial date and have a jury decide his entitlement to substantial fees that he has earned, but Petitioner, with its superior resources, seeks to delay and to win in a war of attrition. It is the law in West Virginia that 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.

Garlow v. Zakaib, 186 W.Va. 457, 413 S.E.2d 112, 115-16 (1991), *quoting, in part, United States v. Clarkson*, 567 F.2d 270 (4th Cir. 1977). The trial court rightly concluded that any ambiguity should be resolved by reference to objective evidence (the email) and with reference to the reasonable perceptions of attorney and client. As stated by the U.S. District Court for the Southern District:

A motion to disqualify counsel ... is not a referendum on the trustworthiness of the counsel sought to be disqualified. It is, rather, a motion that should succeed or fail on the reasonableness of a client's perception that confidences it once shared with its lawyer are potentially available to its adversary. Where a reasonable client would be concerned by a potential conflict, a court must err on the side of disqualification.

HealthNet, Inc. v. Health Net, Inc., 289 F.Supp.2d 755, 763 (S.D.W.Va. 2003). There is no basis for viewing the term “client” in this context as not including Respondent. As *Nuzum* makes clear, no attorney-client relationship is required to disqualify counsel. This holding negates any argument that one must be a client before disqualification can be available. Mr. Lees was contacted as a lawyer for focus group services he provides through his law firm to others who seek that service and are willing to pay significant sums for it. The uncontroverted testimony of Mr. George is that he contacted Mr. Lees for that precise purpose, had substantive discussions with him regarding this action and disclosed confidential information and mental impressions related thereto. Respondent has a reasonable belief that confidences shared with Mr. Lees are now available to B&G and have been used to Respondent’s detriment in the focus groups conducted by Mr. Lees for B&G. On these facts alone, the Court should refuse Petitioner’s request for a Writ.

C. Petitioner cannot have its cake and eat it, too, on the specifics of the confidential communication.

Counsel for Respondent Heiskell twice requested that the trial court hear testimony *in camera*. (APP 000134-35, 152:6). This is the method suggested by the Court in *State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 198 W.Va. 567, 482 S.E.2d 204, 208-09 (1996). Private communication of the information alleged to have been transmitted is necessary to protect the communicating party from the irreparable harm of having to disclose confidential information in open court and on the record. *Id.*, 482 S.E.2d at 207. The Petitioner, who opposed any *in camera* proceedings (APP 000135:8), now complains to this Court that Judge Cummings committed legal error by failing to determine whether confidential information was disclosed, *see* Petition at 22. By doing so, B&G seeks to place both the trial court and Mr. Heiskell in an impossible situation: either disclose to Mr. Lees specific confidential information and trial

strategies communicated to him (when Mr. Lees has already said he cannot recall any, but does not deny receiving any), or give up the right to seek his disqualification. In fairness, this argument must be rejected.

CONCLUSION

The Court should refuse the Petition. Petitioner has not satisfied, nor can it satisfy, the five-factor test of *Hoover v. Berger*. Judge Cummings exercised his discretion appropriately and should not be second-guessed for safeguarding the integrity of the legal system and disqualifying Mr. Lees. Petitioner has already received a benefit it should never have received- that is, Mr. Lees conducting focus groups for Petitioner to the prejudice of Respondent. The holdings and rationale in *Nuzum* and *Cosenza* are not nullified or diluted by any change in the ethics rules. There is no evidence to support a finding of an improper motive by Respondent in filing and obtaining the disqualification of Mr. Lees. The disqualification is justified and prevents manifest injustice to Respondent while preserving to Petitioner its right to retain whatever additional attorneys it desires to supplement the already substantial legal team it has mustered.

EDGAR F. HEISKELL, III
By Counsel



Shawn P. George, Esquire
WV State Bar #1370
George & Lorensen PLLC
1526 Kanawha Blvd., East
Charleston, WV 25311
Ph: (304) 343-5555
Fax: (304) 342-2513
sgeorge@gandllaw.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

SUPREME COURT NO: 16-0936

PETITIONER

v.

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

CERTIFICATE OF SERVICE

I, Shawn P. George, do hereby certify that I served the foregoing:

- 1) Original and (10) copies of Respondent Edgar F. Heiskell, III's Response in Opposition to Petition for Writ of Prohibition;
- 2) Original and (5) copies of Respondent Edgar F. Heiskell, III's Motion for Leave to File a Supplemental Appendix with the attached Original and (1) copy of the Supplemental Appendix;
- 3) Original and (5) copies of Respondent Edgar F. Heiskell, III's Response in Opposition to Motion to Intervene of James B. Lees, Jr.,; and
- 4) Original and (5) copies of Respondent Edgar F. Heiskell, III's Response in Opposition to Motion for Expedited Stay of Proceedings.

on counsel of record, via U.S. Mail and electronic mail, this 11th day of October, 2016 as follows:

Thomas E. Scarr, Esquire
Charles K. Gould, Esquire
Jenkins Fenstermaker, PLLC
P.O. Box 2688
Huntington, WV 25726
TES@jenkinsfenstermaker.com
ckg@jenkinsfenstermaker.com

Joseph M. Lovett, Esquire
117 E. Washington Street, #3
P.O. Box 468
Lewisburg, WV 24901
jlovett@appalmd.org

Honorable John L. Cummings
38 Regal Oaks
Barboursville, WV 25504
john.cummings@courtswv.gov

James B. Lees, Jr. Esquire
HUNT & LEES, L.C.
2306 Kanawha Blvd., East
P.O. Box 2506
Charleston, WV 25329-2506
jlees@huntlees.com

(Service Only as to Response to Motion to Intervene)



Shawn P. George, Esquire
(W.Va. State Bar #1370)
George & Lorensen PLLC
1526 Kanawha Blvd., East
Charleston, WV 25311
PH: (304) 343-5555
Fax: (304) 342-2513
sgeorge@gandllaw.com