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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE BANCORP BANK, INTERACTIVE COMMUNICATIONS INTERNATIONAL, INC., and INCOMM FINANCIAL SERVICES, INC., Defendants-Below, Appellants/Cross-Appellees, v. RUSSELL S. ROGERS, Plaintiff-Relator-Below, Appellee/Cross-Appellant.	No. 38, 2023 Court Below: Superior Court of the State of Delaware C.A. No. N18C-09-240 PRW CCLD

APPELLEE/CROSS-APPELLANTS' REPLY BRIEF ON CROSS APPEAL

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I. THE TRIAL COURT ERRED IN APPLYING AN INCORRECT LEGAL STANDARD IN DISQUALIFYING FOX.

The trial court's order disqualifying one of Relator's counsel, Benjamin Fox, effectively erased the dividing line that this Court drew in *Infotechnology* between lawyer conduct regulated by this Court through the Bar disciplinary process and lawyer conduct that the trial courts of the State may address. *In re Appeal of Infotechnology, Inc.* 582 A.2d 215, 221 (Del. 1990) ("Absent misconduct which taints the proceeding, thereby obstructing the orderly administration of justice, there is no independent right of counsel to challenge another lawyer's alleged breach of the Rules outside of a disciplinary proceeding."); *see also Crumplar v. Superior Ct. ex rel. New Castle Cnty.,* 56 A.3d 1000, 1009 (Del. 2012) ("Absent conduct that prejudicially disrupts the proceeding, trial judges have no independent jurisdiction to enforce the Rules of Professional Conduct."); *Hunt v. Court of Chancery*, 2021 WL 2418984, at *6 (Del. June 10, 2021) (TABLE) (when the evidence does not prove "'an actual impact on the administration of justice,'" or where there is a "lack of clear evidence showing … an impact on the administration of justice," the trial court is not the venue for enforcing the Rules of Professional Conduct).

Delaware trial courts are authorized to enforce the Rules of Professional Conduct only in cases in which misconduct *and* prejudice are clear. *Infotechnology* holds that "[t]he non-client litigant does not have standing to merely enforce a

technical violation of the Rules." 582 A.2d at 221. To disqualify opposing counsel, such a party must by clear and convincing evidence establish both lawyer misconduct and "demonstrate that the opposing counsel's [violation of the Rules] somehow prejudices *his* or *her* rights." *Id.* (emphasis in original).

In its Cross Appeal Answering Brief ("CAB"), InComm ignores the dividing line established by *Infotechnology*. Instead, InComm argues the Superior Court correctly disqualified Fox based on a different standard – one that does not require clear and convincing evidence of prejudice. InComm argues a taint on the proceedings arises from the nature of the alleged misconduct alone. *See* CAB, 8 (quoting Order, 36) ("Bondurant's surreptitious and protracted access to InComm's privileged materials . . . casts 'a substantial taint on any future proceedings.'"). And InComm relies on cases from jurisdictions with no such limitation on when their trial courts may enforce Rules of Professional Conduct. *See* CAB, 19 *citing Abamar Housing and Dev., Inc. v. Lisa Daly Lady Décor, Inc.,* 724 So.2d 572, 573-74 (Fla. Dist. Ct. App. 1998) (noting disqualification is warranted "for the sake of the appearance of justice, if not justice itself, and the public's interest in the integrity of the judicial process"); *see also* CAB, 34 (citing Florida cases). While Relator disputes InComm's characterizations of his counsel's conduct, discussed in more detail below, this appeal may be decided solely on the Superior Court's deviation

from the *Infotechnology* standard requiring clear and convincing evidence of prejudice. *See* Order, 21.

A. InComm had the burden of proving prejudice by clear and convincing evidence.

This Court explained in *Infotechnology:*

> [T]he burden of proof must be on the non-client litigant to prove by clear and convincing evidence . . . how the [misconduct] will prejudice the fairness of the proceedings.

582 A.2d at 221.

The clear and convincing standard is "higher than a mere preponderance," and requires "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of the factual contentions are 'highly probable.'" *Cerberus Intern., Ltd. v. Apollo Management, L.P.,* 794 A.2d 1141, 1151 (Del. 2002). Stated another way, the clear and convincing evidence standard requires "proof to be highly probable, reasonably certain, and free from serious doubt." *Id.* (internal punctuation and citations omitted).

1. The trial court erred in failing to apply the *Infotechnology* burden of proving prejudice.

Contrary to the clear and convincing standard described above, in evaluating prejudice, the trial court held that "[a] direct cause-effect type prejudice finding . . . is not required." Order, 21. The trial court further explained that while "the advantage from [the 55 documents] cannot be precisely determined, a precise

determination is not necessary." See Order, 30. These are not correct statements of Delaware law. *See Infotechnology*, 582 A.2d at 221 (requiring proof of prejudice); *Hunt*, 2021 WL 2418984, at *6 (evidence must prove "an actual impact on the administration of justice").

The trial court looked to opinions from courts across the country in formulating the legal standard it applied in this case. *See* Order, 22. But the cases upon which the trial court relied employed legal standards divergent from Delaware law. As a result, as discussed in Relator's Cross Appeal Opening Brief ("CA"), CA 44-47, the legal standard the Superior Court applied in disqualifying Mr. Fox involved a lesser burden that is inconsistent with Delaware law. In its Cross Appeal Answering Brief, InComm does not even address the fundamental flaws of these decisions.

In his Cross Appeal Opening Brief, Relator summarized the following fundamental flaws underpinning the opinions relied upon by the trial court. *See* CA, 43-47. First, the trial court followed cases that rely on the proposition that "'doubts are to be resolved in favor of disqualification.'" *See* Order, 12. This rule is contrary to the heightened clear and convincing burden required by *Infotechnology*. 582 A2d at 221; *see also* CA, 44-47.

Second, the trial court relies on cases holding that disqualification is appropriate to avoid "even the appearance of impropriety." *See e.g.*, Order, 33 n.143

citing Sun Life Assurance Co. of Canada v. Wilmington Savings Fund Soc., 2019 WL 6998156, *7 (Del. Super. Ct. Dec. 19, 2019) *vacated by* 2021 WL 1343670 (Del. Super. Ct. Apr. 12, 2021). But the source of this standard, Canon 9 of the now-replaced ABA Model Code of Professional Responsibility, is not part of the DLRPC. The DLRPC are based on the ABA Model Rules, which do not have an analogous provision. *Waters v. Kemp,* 845 F.2d 260, 265 (11th Cir. 1988) ("[u]nder the Model Rules, the appearance of impropriety is not a ground for disqualifying a lawyer from representing a party to a lawsuit."). Indeed, this Court has refused to apply the appearance of impropriety standard in an attorney disqualification motion. *See Seth v. State,* 592 A.2d 436, 443 (Del. 1991) (noting Wolfram, *Modern Legal Ethics* § 7.1.4 criticizes appearances test as imprecise and leading to ad hoc results).

Third, as discussed in more detail below, the trial court followed cases that rely on now-withdrawn ABA Formal Opinion Nos. 92-368 and 94-382. *See, e.g., Arnold v. Cargill,* 2004 WL 2203410, at *10 (D. Minn. Sept. 24, 2004); *Richards v. Jain,* 168 F. Supp.2d 1195, 1200-01 (W.D. Wash. 2001); *See also Mt. Hawley Ins. Co. v. Feldman Prod. Inc.,* 271 F.R.D. 125, 131 (S.D. W.Va. 2010) (court will disregard cases that cite to withdrawn opinions).

2. InComm seeks to justify the Superior Court's disqualification of Fox with similarly flawed authority.

InComm's Cross Appeal Answering Brief continues to rely on cases based on withdrawn or superseded legal standards. *See, e.g.* CAB, 18 *citing Bona Fide*

Conglomerate, Inc. v. Sourceamerica, 2016 WL 4361808, *12 (S.D. Cal. Aug. 16, 2016) (relying in part on now-withdrawn ABA Formal Op. 382 (1994) and *Richards,* 168 F. Supp. 2d at 1204 (following the standards that the Court should resolve doubts in favor of disqualification and courts should disqualify a lawyer for even the slightest doubt concerning ethical propriety.)[1] *See, e.g.,* CAB, 20 (arguing for the Court to disregard the affidavits of Relator's counsel) *citing Maldonado v. New Jersey,* 225 F.R.D. 120, 137 (D.N.J. 2004) ("any doubt is to be resolved in favor of disqualification"); *MMR/Wallace Power & Indus., Inc. v. Thames Associates,* 764 F.Supp. 712, 728 (D. Conn. 1991) ("While the court is reluctant to disqualify counsel, this appears to be one of those 'unusual situations' where the *appearance of impropriety* is clearly sufficient to warrant so drastic a remedy.") (emphasis added); *Gifford v. Target Corp.,* 723 F.Supp.2d 1110, 1121 (D. Minn. 2010) ("doubts must be resolved in favor of disqualification") (internal citation omitted); *Cargill,* 2004 WL 2203410, at *5.

3. InComm failed to meet the burden required by *Infotechnology*.

Had the Superior Court applied the correct clear and convincing evidence of prejudice standard from *Infotechnology,* it could not have disqualified Fox. The

[1] *See Kyko Global,Inc. v. Prithvi Information Solutions, Ltd.*, 2014 WL 2694236, *2 (W.D. Wash. June 13, 2014) (describing *Richards* as "a case applying an old version of the model ethical rules and an outdated ABA opinion.").

Superior Court correctly recognized that in other cases, "the 'prejudice' inquiry has turned on 'the significance and materiality of the privileged information to the underlying litigation.'" Order, 25. "Access [alone] to inconsequential information does not support disqualification." *Id.* But despite noting that "the advantage from [the 55 documents] cannot be precisely determined," the Superior Court disqualified Fox. *Id*., 30.

InComm did not prove prejudice by clear and convincing evidence. As illustrated in Relator's Cross Appeal Opening Brief, while movants in other cases have pointed to use or attempted use of privileged documents or information in the litigation, InComm cannot do so here. *See* CA, 47-50. In response, InComm offers only the Superior Court's comment regarding "troubling links" between discovery requested by Relator and a Metabank agreement among the 55 documents identified as privileged by InComm. CAB, 29 *citing* Order, 37. This comment by the trial court was based on argument of InComm's counsel, not clear and convincing evidence. *See* A1147-49. The agreement that is the subject of this comment, moreover, which could only have been reviewed for a brief duration, *see* CA, 13-17, and for which only redline edits, but not comments could have been visible to Fox, A0390; A0671, highlights the failure of InComm to meet its burden. The trial court was left to speculate as to what prejudice may have occurred. Because the document itself was never reviewed by the Superior Court, there is no way the court could find

a link to discovery by any standard, much less clear and convincing evidence. There is no way the trial court could find that prejudice could result from the review of unknown edits based on nothing more than InComm's claims that they are privileged, material and significant. And, in any event, Relator's Complaint, which pre-dates any review of the laptop documents, alleged that the details of the Metabank agreement at issue in Plaintiff's discovery requests supported his DFCRA claims against Defendants. *See* A0110-11.

Furthermore, InComm cannot prove prejudice by clear and convincing evidence where none of the documents InComm claims to be privileged were ever deemed material under 6 *Del. C.* § 1203(b)(2) and produced to the State; indeed, none of the 55 documents were ever even printed or downloaded. *See* A0576-78; A0671; A0258, ¶¶ 10-11.

InComm asserts that Relator's opening brief misrepresents the record when it points out that InComm never tendered or submitted any of the 55 documents it claims to be privileged for *in camera* review. *See* CAD, 13. InComm goes so far as to assert that Relator's counsel has violated a duty of candor to the Court by even making such an argument. This assertion is both incorrect and completely beside the point.

As an initial matter, Relator's representations concerning *in camera* review in its opening brief are accurate. In arguing that InComm had failed to establish

prejudice by failing to prove the "significance and materiality" of the documents at issue, Relator's opening brief notes:

> While InComm mentioned *in camera* review in a footnote, A0425 n.3, it elected not to submit the documents. InComm has thus chosen to proceed without submitting these documents in support of a motion on which it bears a clear and convincing burden of proof. InComm has opted instead to rely on an argument that *any* exposure to their confidential information requires disqualification, regardless of whether it is consequential (or even privileged).

CA, 29. Other references in the brief similarly describe that "InComm never submitted," CA, 3, "InComm failed to submit," CA, 16, "InComm chose not to submit," CA 41, and "InComm did not tender," CA 50-51, the fifty-five documents for *in camera* review in support of its motion. *See also* CA 49 (distinguishing *Richards v. Jain* where "the movant submitted certain documents at issue for *in camera* review, something InComm opted not to do here.").

InComm argues that the foregoing statements are misrepresentations in violation of Relator counsel's duty of candor. But in so arguing InComm recasts Relator's statements based on what InComm describes as an "insinuation" or "implicit accusation." InComm asserts, "Bondurant repeatedly insinuates that InComm did not make the privileged documents available for *in camera* inspection . . ." and "[a]t six points in its brief, Bondurant implicitly accuses InComm of having failed to make the privileged documents available for *in camera* review." *See* CAB,

1 & 13. The footnote in the motion to disqualify in which InComm mentioned *in camera* review noted "upon request InComm will provide these documents to the Court for *in camera* review." A0425 n.3. InComm notes in its Cross Appeal Answering Brief that the Superior Court never took InComm up on its offer. CAB, 14. InComm argues that *in camera* review was not necessary and Relator's Counsel never argued below that it was. *Id.* Both assertions are incorrect.

Relator consistently argued that InComm had not established prejudice. *See e.g.*, A0937-938. And Relator's Counsel specifically argued that the Superior Court could not make a finding of prejudice without an *in camera* review. *See* AR8 ("Indeed, InComm has not tendered any of the documents to the Court to conduct an *in camera* review to assess whether the information that could have been seen by Mr. Fox is actually privileged and even has the potential to prejudice InComm in this case.")

Significantly, InComm's footnote offer and the trial court's lack of response are immaterial. The Superior Court is not responsible for determining what evidence InComm should or should not introduce in support of its motion to disqualify. InComm had the burden to establish prejudice by clear and convincing evidence. Yet InComm's experienced counsel opted not to submit any of the 55 documents it claims to be privileged to the trial court for *in camera* review.

InComm's arguments that movants are not required to submit privileged documents *in camera* ignores the facts of cases upon which InComm relies. *See* CAB, 31; *see e,g. Walker v. Geico Indemnity Co.,* 2016 WL 11234453, *2 (M.D. Fla. 2016) (cited by InComm, CAB, 34, noting under Florida law "courts look at the content of the inadvertent disclosure"); *Richards,* 168 F. Supp. 2d at 1206 ("A careful in camera examination of the submitted emails . . . "). But more importantly, such an argument misses the point. As the movant, InComm must present evidence sufficient to meet its burden and prevail on its motion. InComm bears the burden. *Infotechnology,* 582 A.2d at 221.

Whatever the reason, InComm did not submit any of the relevant documents for *in-camera* review and, therefore, the trial court had no specific evidence of the contents of the documents from which to make its prejudice determination. Without the documents and the assessment of whether their contents were significant and material or inconsequential, there cannot be a finding of prejudice and thus, no disqualification should have been found. *See* Order, 25.

4. InComm asks the Court to ignore fundamental differences and incorporate presumptions from conflicts cases.

Recognizing that it did not prove prejudice by clear and convincing evidence, InComm asks the Court to apply presumptions from "side switching" and lawyer conflicts cases. *See* CAB 32-34 *citing Madukwe v. Delaware State Univ.*, 552 F. Supp. 2d 452, 463 (D. Del. 2008); *Acierno v. Hayward*, 2004 WL 1517134, (Del.

Ch. July 1, 2004); *see also* CAB, 25-27 *citing Bleacher v. Bose,* 2017 WL 1854794 (Del. Super. Ct. May 3, 2017); *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 778 (Cal. Ct. App. 2010); *Goldberg v. Warner/Chappel Music, Inc.,* 125 Cal. App.4th 752, 765 (Cal. Ct. App. 2005); *Crudele v. New York City Police Dep't,* 2001 WL 1033539 (S.D.N.Y. Sept. 7 2001). InComm, in its Cross Appeal Answering Brief, in substance argues for a presumption of prejudice. *See*, *e.g.,* CAB, 33 ("[M]ovant simply had to show, based on the general circumstances, that the firm '*might have* learned confidential information . . . that *could* be used to the [movant's] detriment.'") (emphasis added). And InComm argues for a legal presumption that taint of one lawyer taints an entire firm. *See* CAB, 25-28. It asserts that there is no basis for what it refers to as an arbitrary distinction between conflict cases and the situation here.

There is, however, a significant distinction between a motion to disqualify one's former counsel because of a conflict and cases like the one at bar in which a non-client seeks disqualification of opposing counsel. Indeed, this is the very distinction drawn by this Court in *Infotechnology.* The distinction flows from the purpose of the conflict rules to protect clients from misuse of information by their own lawyers. Rule 1.9, for example, is a "prophylactic rule to prevent even the potential that a former client's confidences and secrets may be used against him," and "importantly, a client has a right to expect the loyalty of his attorney in the matter

for which he is retained." *In re Corn Derivatives Antitrust Litig.,* 748 F.2d 157, 162 (3d Cir. 1984). And comment 2 to DLRPC Rule 1.10 notes: "The rule of imputed disqualification . . . gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm." It further explains, "[s]uch situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client." DLRPC Rule 1.10, cmt. 2. Such concerns do not apply here where InComm was never a client of Bondurant or Fox.

Here, no attorney-client relationship between InComm and Relator's counsel invokes the duty of loyalty. And no past representation exposed counsel to InComm's confidential information. Instead, the scope of information at issue is limited to a maximum of 55 documents. No presumption of taint is warranted or necessary.

Finally, InComm attempts to justify its argument to incorporate presumptions of taint from conflicts cases because of the threat to the administration of justice and the integrity of the bar. CAB, 27. But, as *Infotechnology* and the Rules make clear, trial courts are not to entertain non-client motions to disqualify based on those concerns, alone. *Infotechnology,* 582 A.2d at 216 ("[T]he Rules may not be applied in extra-disciplinary proceedings solely to vindicate the legal profession's concerns in such affairs."); DLRPC Preamble n.[20].

5. InComm builds a straw man to argue that the *Infotechnology* standard is "unworkable."

InComm engages in a parade of horribles arising from what it describes as the legal standard urged by Relator. *See* CAB, 29. But the position to which these arguments purport to respond is a distortion of Relator's actual position. Moreover, they reveal that InComm is really advocating for a new standard, different from the clear and convincing standard of prejudice in *Infotechnology*. *See* CAB, 34, 40-42.

InComm complains that Relator would require InComm to effectively waive privilege over the documents that the motion was intended to protect. *See* CAB, 29. That is not correct. *In camera* review would preserve the privilege. And InComm's objection to such a review cannot be squared with its purported offer to provide the documents "upon request." *See* CAB, 14; A0425 n.3.

InComm also complains that Relator is attempting to assign to InComm "the formidable task of proving what insights Bondurant took away from InComm's privileged documents." CAB, 29-30 (emphasis omitted). Not so. The question of what, if any, insights Relator's counsel could have taken away from InComm's purportedly privileged documents would have been answered by an *in camera* review of the documents at issue. But InComm chose not to submit them to the court.

Nor does InComm need to adduce proof of the internal deliberations of Relator's counsel. *Infotechnology* requires clear and convincing evidence of

prejudice; therefore any strategic utility of the 55 documents must be clear to the court. CAB, 34. Again revealing the faulty logic behind its extensive reliance on conflicts cases, InComm quotes *In re Complex Asbestos Litigation,* 232 Cal. App. 3d 572, 596 (Cal. Ct. App. 1991) to assert that it is "at a loss to prove what [was] known by the adversary's attorney." CAB, 34-35. But that is not the situation here because this is not a motion to disqualify filed by a current or former client. All that Fox could have possibly learned is contained in 55 documents InComm claims to be privileged.

B. InComm continues to obscure the issues by interchangeably referring to privileged and non-privileged material on the laptop.

InComm's briefing frequently equates review of any of the laptop files with invading InComm's privilege. But InComm has identified 55 of the 874 documents opened by Fox as privileged. A0385; A0822-23(noting removal of 4 of original 59 documents from InComm privilege log). And Bondurant only opened 874 of the 36,648 files on the laptop. A0384-85. This sematic conflation is a carry-over from InComm's initial complaints concerning the copying of the laptop. In its Cross Appeal Answering Brief, InComm asserts Fox's decision to preserve Relator's laptop files by copying them "was not the basis of InComm's motion to disqualify and is not at issue in this appeal." CAB, 6. Relator appreciates this concession on appeal, but it is not an accurate description of InComm's arguments below.

InComm argued for disqualification below based on "two principal reasons," (1) access to privileged documents and (2) "misappropriation of InComm's property" which, according to InComm, "violated Bondurant's ethical obligations and InComm's rights under contract and state law." A0436-37, A0448-451. As part of its misappropriation argument, InComm accused Bondurant of assisting Relator in violating confidentiality and non-disclosure terms of his employment agreement, violating trade secret law and committing computer theft. *See* A0449-50. InComm asserted that disqualification of Bondurant was necessary, "[e]ven if Bondurant had never seen InComm's privileged material." A0448. InComm ultimately abandoned its trade secret and computer theft allegations and they are not mentioned in InComm's appellate briefing.

Nevertheless, InComm continues to refer to what it contends to be inappropriate access to the non-privileged "laptop files." *See* CAB, 12, 15. For example, InComm asserts, "[a]nd after making its meager disclosure in January 2019, Bondurant continued to periodically rummage through *the laptop files* for another year and a half." CAB, 12 (emphasis added). Such assertions may easily be misread to refer to the 55 privileged documents. InComm does not clarify that none of the 55 documents InComm has identified as privileged that were opened as part of Fox's search for material information, were opened again after Relator's January 2019 supplemental production to the State. *See* A0393-409. While 1 of the

55 documents appeared among the results of electronic searches run on May 31, 2020, it was open for a maximum of 11 seconds and then 10 seconds. CAB, 13-16; A0408-409 (Doc#29692). Thus InComm's claim of periodic rummaging through InComm's privileged information is another semantic conflation unsupported by the record.

Access to "the laptop files" is different from access to privileged documents, particularly in the context of this whistleblower action. See A1305-06. Relator's Cross Appeal Opening Brief detailed the inapplicability of InComm's confidentiality and non-disclosure arguments in this context. *See* CAB, 32-35. InComm offers no response to those arguments in its Cross Appeal Answering Brief.

C. The trial court applied incorrect standards of attorney conduct.

In addition to proving prejudice, to authorize a trial court to enforce the Rules of Professional Conduct, the movant must prove a clear incident of attorney misconduct. The trial court held that two things warranted the sanction of disqualification here: (1) the handling of potentially privileged information after recognizing such information may be present in the laptop files, and (2) the delay in providing notice to opposing counsel after the seal was lifted. Order, 30. The trial court's findings were based on a standard of attorney conduct derived from flawed authority. Particularly in light of Relator's statutory obligation to provide material information to the State, the ad hoc standard assembled by the Superior Court is not

a basis for a finding of lawyer misconduct. See *Schlumberger Techs., Inc. v. Wiley,* 113 F.3d 1553, 1560 (11th Cir. 1997) (courts must rest their disqualification decisions on the violation of specific Rules of Professional Conduct, not on a code of conduct known to the court for which the attorney has no notice).

1. Fox's conduct was not in bad faith and was reasonable under the circumstances.

Fox was aware of his obligations under Rule 4.4 (a) to respect the rights of InComm, including avoiding its privileged information. And while the trial court disagreed with the method that Fox chose in seeking to avoid InComm's privileged information while complying with Relator's statutory obligation to provide substantially all material information in Relator's possession pursuant to 6 *Del. C.* § 1203(b)(2), the trial court acknowledged that Fox was not acting in bad faith. A1306.

InComm's Cross Appeal Answering Brief incorrectly argues that the trial court's "good intention" findings related only to Fox's preservation of evidence. CAB, 6. Not so. *See* A1306 & Order, 43 (finding no bad faith "in the actions or arguments" of Relator's counsel "in addressing this specific disqualification issue"). Much of InComm's Cross Appeal Answering Brief, alleging nefarious purpose and a deceitful cover up, is therefore in direct contradiction to the trial court's findings.

After ascribing ill-intent and improper motives to Relator's counsel, contrary to the findings of the trial court, InComm then speculates as to what could have

happened, arguing that calculations of maximum possible viewing times based on data from the Special Master do not tell the story because documents could be viewed in "preview mode," or Fox may have somehow taken screen shots of documents. CAB, 10. That pure speculation ignores the record. "Preview mode" provides extremely limited information as to the content of a document. *See* A0646 (containing a screenshot of preview mode). And the Special Master was clear that none of the 55 documents InComm claims to be privileged were downloaded or printed. A0671. Such speculation is the antithesis of clear and convincing evidence.

Relator's Cross Appeal Opening Brief details the maximum time that some of the documents could have been opened, and illustrates the very short duration of what InComm argues to be intentional returns to the documents. *See* CA, 10-17; 58-67. Contrary to InComm's claim that these were "cherry-picked," they are the documents that InComm mentioned in its Opening Brief. *Compare* CAB, 8 *with* Appellant's Opening Br., 10, 13. Thus they are the only documents InComm has argued to be significant and material.

Fox was obligated to preserve evidence, but he was also precluded from notifying InComm of the need to preserve it because this action remained under seal. Therefore, he imaged the laptop's files before Relator returned the laptop to InComm. Then, Fox was required by Section 1203(b)(2) to review the files and provide material information to the State. This is not a post hoc rationalization, as

InComm argues, CAB, 12, but a statutory mandate that Relator was required to follow. *See* A1119 ¶7; A0510-11. Ironically, InComm now complains that Bondurant should have reviewed, and disclosed, more documents to the State. CAB, 12.

Fox's approach to reviewing the laptop files was similar to the approach suggested by at least two commentators and the search methodology held not to unduly prejudice the defendant in *United States v. Adams,* 2018 WL 6991106, at *40 (D. Minn. Sept. 17, 2018). *See* CA58-67. Fox's actions should not be judged with 20/20 hindsight. *See United States ex rel. Thomas v. Duke Univ.,* 2018 WL 4211372 at *6, n. 15 (M.D.N.C. Sept. 4, 2018). Nor should they be judged by the lower court's subjective expectations of counsel. Op. at 34 (finding Fox's conduct "falls well below that which the Court expects of counsel dealing with any third-parties' documents"); *Schulmberger Techs*., 113 F.3d at 1561 (disqualification must not rest on some "transcendental code of conduct … that … exist[s] only in the subjective opinion of the Court.") (citation omitted).

2. The Superior Court also erred by enforcing an unwritten "rule" requiring notice.

The Superior Court agreed that Fox could not have notified InComm of possession of the laptop files while the case was under seal. *See* Order, 23. But the trial court disqualified Fox for failure to provide notice after the seal was lifted. Order, 30.

a. Fox did not violate a DLRPC Rule.

Prior to discovery, Relator's counsel was not required to provide notice that Relator's laptop files had been copied under the Delaware Lawyers Rules of Professional Responsibility. DLRPC Rule 4.4(b) is limited to instances of inadvertent disclosure. *See* DLRPC, Rule 4.4(b) & cmt.2; *see also* ABA Formal Op. 11-460 (2011). While some cases have applied Rule 4.4(b) to other situations, they generally rely on now-withdrawn ABA Opinions (Nos. 92-368 and 94-382). ABA Formal Opinion 94-382 required a lawyer receiving materials of an adverse party to notify opposing counsel. But that rule was withdrawn by Formal Opinion 06-440 (2006). Such a withdrawal signifies the ABA's view that the Opinion no longer reflects the requirements of ethical conduct. ABA Formal Opinion 06-440 explains: "if the providing of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply," and lawyers who are the intentional recipient of such materials are "therefore not required to notify another party or that party's lawyer of receipt as a matter of compliance with the Model Rules." While the ABA Rules and Opinions make clear that other legal requirements may apply, there is no requirement of notice in this situation under the DLRPC.

b. The trial court looked to flawed opinions in fashioning a rule for this case.

Based on its survey of cases from other jurisdictions, the trial court determined a requirement of "prompt notification to opposing counsel once the complaint is

unsealed." Order, 26. But this requirement is based on flawed authority developed from withdrawn ABA Opinions. *See* Order, 26 n.124 *citing United States ex rel. Frazier,* 2012 WL 130332, at *15 (D. Az. Jan. 10, 2012) (relying on Arizona Ethics Op. No. 01-04 (Mar. 2001), which, in turn, relies heavily on withdrawn ABA Formal Op. No. 94-382) & *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.,* 2013 WL 2278122, *2 (C.D. Cal. May 20, 2013) (relying on *Gomez v. Vernon,* 255 F.3d 1118, 1134 (9th Cir. 2001), which, in turn, relies on both withdrawn ABA Formal Op. No. 368 (1992) and withdrawn ABA Formal Op. No. 382 (1994)). The trial court erred, therefore, in imposing this requirement on Fox.

CONCLUSION

For the foregoing reasons the disqualification of Fox should be reversed.

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Dated: June 20, 2023

CERTIFICATE OF SERVICE

I, Bruce E. Jameson, do hereby certify on this 20th day of June, 2023, that I caused a copy of Appellee/Cross-Appellants' Reply Brief on Cross Appeal to be served by eFiling via File and ServeXpress upon the following counsel of record:

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