

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

In re:

Laser Spine Institute, LLC. ¹	Case No. 2019-CA-2762
CLM Aviation, LLC	Case No. 2019-CA-2764
LSI HoldCo, LLC	Case No. 2019-CA-2765
LSI Management Company, LLC	Case No. 2019-CA-2766
Laser Spine Surgery Center of Arizona, LLC	Case No. 2019-CA-2767
Laser Spine Surgery Center of Cincinnati, LLC	Case No. 2019-CA-2768
Laser Spine Surgery Center of Cleveland, LLC	Case No. 2019-CA-2769
Laser Spine Surgical Center, LLC	Case No. 2019-CA-2770
Laser Spine Surgery Center of Pennsylvania, LLC	Case No. 2019-CA-2771
Laser Spine Surgery Center of St. Louis, LLC	Case No. 2019-CA-2772
Laser Spine Surgery Center of Warwick, LLC	Case No. 2019-CA-2773
Medical Care Management Services, LLC	Case No. 2019-CA-2774
Spine DME Solutions, LLC	Case No. 2019-CA-2775
Total Spine Care, LLC	Case No. 2019-CA-2776
Laser Spine Institute Consulting, LLC	Case No. 2019-CA-2777
Laser Spine Surgery Center of Oklahoma, LLC	Case No. 2019-CA-2780

Assignors,

Consolidated Case No.
2019-CA-2762

to

Soneet Kapila,

Division L

Assignee.

**ASSIGNEE'S MOTION TO DETERMINE PROCEDURES FOR
REQUESTS FOR LEGAL FILES IN ASSIGNEE'S POSSESSION**

Soneet Kapila, as assignee (“Assignee”) for the benefit of the creditors of the Assignors (defined below), by and through his undersigned attorneys, hereby files this motion seeking entry of an order establishing procedures, including for handling requests submitted to the Assignee for

¹ On April 8, 2019, the Court entered an order administratively consolidating this case with the assignment cases of the following entities: LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC; Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC; Total Spine Care, LLC; and Spine DME Solutions, LLC.

legal files presently in his possession and for reimbursing the Assignee for costs incurred in responding to such requests. In support of this motion (the “**Motion**”), the Assignee states as follows:

Summary of Relief Requested

The Assignee is in possession of legal files related to various lawsuits in which the former in-house counsel of Laser Spine Institute, LLC (“**LSI**”) jointly represented LSI and other defendants. As a result, the Assignee has possession of a large number of files related to the defense of LSI and other co-defendants. The Assignee has recently received requests, including a request from two of the other defendants, Dr. James St. Louis and Dr. Michael Perry (“**St. Louis & Perry**”), for possession of certain files. The Assignee does not appear to have any files that solely relate to an individual litigant and does not have any files that belong solely to St. Louis & Perry. To the extent that any parties, including St. Louis & Perry, seek copies of files in the Assignee’s possession, the Assignee maintains that parties, including St. Louis & Perry, and not the assignment estates, should bear the cost for the Assignee to locate, sort, analyze, and copy these files. Accordingly, the Assignee seeks entry of an order prescribing procedures for requesting such files and for co-defendants to reimburse the Assignee for his expenses.

Background

1. On March 14, 2019, LSI executed and delivered an assignment for the benefit of creditors to the Assignee. The Assignee filed a Petition with the Court on March 14, 2019, commencing an assignment for the benefit of creditors proceeding pursuant to Section 727 of the Florida Statutes (the “**LSI Assignment Case**”).

2. Simultaneous with the filing of the LSI Assignment Case, the Assignee filed fifteen other Petitions (collectively, the “**Assignments**”) commencing assignment for the benefit of

creditors proceedings for 15 affiliates of LSI (the “**Assignment Cases**”): LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC; Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC; Total Spine Care, LLC; and Spine DME Solutions, LLC (collectively, together with LSI, the “**Assignors**”).

3. Since approximately 2014, many of LSI’s legal affairs were handled by LSI’s in-house attorney, Christopher Knopik. In the certain instances, LSI would undertake the defense of Assignors, or other co-defendants.

4. For example, prior to the filing of the Assignment Cases, LSI was a party in the lawsuit styled as *Gulf Coast Orthopedic Center – Alfred O. Bonati, P.A., et al. vs. Laser Spine Institute, LLC, et al.*, Case No. 12-CA-009002, pending in the Circuit Court for the Thirteenth Judicial Circuit (the “**Bonati Lawsuit**”). St. Louis & Perry were co-defendants with LSI in the Bonati Lawsuit and Mr. Knopik was counsel of record in the Bonati Lawsuit to LSI, as well as other defendants, including St. Louis & Perry.

5. After the filing of the Assignment Cases, Mr. Knopik’s employment with LSI ended and he withdrew from his representation of defendants in various lawsuits, including the Bonati Lawsuit. No party objected to Knopik’s withdrawal.

6. By virtue of Mr. Knopik’s representation of LSI and the other co-defendants while he was in-house counsel for LSI, the Assignee now finds himself in possession of various files and

document arising from those lawsuits, including files in the Bonati Litigation (the “**Bonati Litigation Files**”).

7. St. Louis & Perry have made demand on the Assignee to turn over the Bonati Litigation Files and the Assignee anticipates receiving demands from other parties. The Assignee understands the parties’ need for litigation files and is willing to work with St. Louis & Perry as well as any other co-defendant asking for records to provide copies of the requested information. However, the Assignee does not believe the assignment estates should be responsible for shouldering the cost and expense required to locate, review, and produce these files, especially where the benefit of such action inures to parties who may not even be creditors in the Assignment Cases.

8. The cost and expense of production is driven by the state and organization of LSI’s legal files as they were provided to the Assignee. Contrary to St. Louis & Perry’s mistaken belief, there are no discrete and separate, identifiable files pertaining *only* to St. Louis & Perry, nor does the Assignee appear to be in possession of any other files that belong solely to any other co-defendants. There also does not appear to be a separately identifiable file for St. Louis & Perry in the Bonati Lawsuit. Before any litigation files can be produced, the Assignee will incur professional fees to review the legal files in his possession to determine which files can be produced. Perhaps more importantly, the Assignee must determine what *cannot* be produced; i.e., files from other legal matters in which the Assignee risks waiving the attorney-client privilege if documents are inadvertently produced.

9. Based on the above issues, the Assignee requested that St. Louis & Perry agree to pay the costs and any professional fees that may be incurred in producing the Bonati Files. St. Louis & Perry refused the Assignee’s offer and instead filed a *Defendants’ Motion to Require*

Assignee to Turn Over Client Files in the Bonati Lawsuit (the “**Bonati Turnover Motion**”). A copy of the Bonati Turnover Motion is attached as **Exhibit A** to this Motion. The Assignee is not a party to the Bonati Lawsuit.

10. Because this Court has exclusive jurisdiction over the Assignment Cases and the assets of the assignment estates, the Assignee has filed this Motion seeking guidance from the Court.

Relief Requested and Basis for Relief

11. The Assignee seeks entry of an order prescribing procedures governing the Assignee’s production of the litigation files, including the Bonati Litigation Files. These procedures would require requesting parties to reimburse the assignment estates for the fees and costs associated with production. To resolve these issues, the Assignee proposes the following procedures (the “**Legal File Request Procedures**”):

- a. Any party requesting legal files in possession of the Assignee (a “**Requesting Party**”) shall submit a request (a “**Legal File Request**”), in writing, to the Assignee, c/o Edward J. Peterson, Esq., Stichter, Riedel, Blain & Postler, P.A., 110 East Madison St., Suite 200, Tampa, Florida 33629, Email: epeterson@srbp.com. The Legal File Request shall (i) specify the case style of the litigation involved; (ii) identify the requesting party and the party’s involvement in such litigation; and (iii) identify the documents requested.
- b. Upon receiving a Legal File Request, the Assignee shall have 21 days to respond to the requesting party, in writing. In his response, the Assignee shall (i) state whether the requested files are in the possession of the Assignee, and (ii) provide a cost estimate for locating, producing and, if applicable, the professional fees for reviewing² the documents prior to production (a “**Cost Estimate**”); and (iii) provide notice and the Cost Estimate to all other co-defendants in the applicable lawsuit that a party has submitted a Legal File Request. Any party receiving notice under subsection (iii) above shall have 14

² Review of the documents may be required where for example, as in the case of the Bonati Litigation Files, the files subject to the Legal File Request are comingled with other files and are not separately identifiable. Review also may be required if the Legal File Request includes a request for electronic data or communications.

days to send notice to the Assignee that it will join the Legal File Request (a “**Joinder Party**”).

- c. A Requesting Party and any Joinder Parties shall have 14 days to object to the Cost Estimate through written transmission to the Assignee’s counsel via the email address identified above. Upon receiving an objection to a Cost Estimate, the Assignee and the objecting party or parties shall confer in good faith in an effort to resolve the objection(s) to the Cost Estimate. If the parties are unable to resolve the objection, the objecting party shall file an “Objection to the Assignee’s Cost Estimate in Connection with Legal File Request” with the Assignment Court and notice such objection for hearing. The reasonableness of the Cost Estimate shall be resolved by this Court.
- d. After any objections to the Cost Estimate have been resolved, the Requesting Parties and the Joinder Parties shall be obligated to reimburse the Assignee for actual costs incurred, up to the Cost Estimate. The reimbursement shall be divided evenly between the Requesting Party and any Joinder Parties. Payment of the Cost Estimate shall be a precondition to receipt of the requested files.

12. The Assignee believes the Legal File Request Procedures fairly allocate the cost of production to the party requesting such files and do not unfairly burden the assignment estates with the cost of responding to certain litigants’ requests. It goes without saying that the Assignee or the assignment estates did not undertake the representation in these lawsuits, but the Assignee now finds himself in the position of custodian over certain litigation files.

13. Since the Bonati Turnover Motion has been filed, the Assignee also will respond to certain issues raised by in the Bonati Turnover Motion in order to assist the Court in ruling in this Motion. First, as discussed briefly above, the Bonati Turnover Motion is premised on the mistaken belief that separately identifiable files exist for St. Louis & Perry in the Bonati Lawsuit. Second, St. Louis & Perry assert that the Assignee has no right to the Bonati Litigation Files because the Assignee is adverse to them in pending litigation. Neither of these arguments have merit.

14. First, the Assignee has an unqualified right to the Bonati Litigation Files because LSI’s rights to the Bonati Litigation Files were assigned to the Assignee. In these Assignment Cases, nearly identical Assignments were filed in each Assignment Case, which followed the

statutory form prescribed by Section 727.104(1)(b) of the Florida Statutes. In addition to the assets assigned, the Assignment also transferred all related “books, records, and electronic data.” One of the statutorily prescribed duties of an assignor is to “deliver to the assignee all of the assets of the estate in the assignor’s possession, custody, or control, **including, but not limited to, all accounts, books, papers, records, and other documents.**” Fla. Stat. § 727.107(2) (emphasis added). The Bonati Litigation Files in possession of LSI were turned over in accordance with Florida statutes, just as if the files were in the possession of a third-party law firm. As successor-in-interest, the Assignee succeeded to the Assignors’ clients rights to the Client Files.

15. Second, the Assignee holds the attorney-client privilege of LSI and is therefore entitled to full access to the Bonati Litigation Files. The United States Supreme Court, in *Commodity Futures Trading Com’n v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986 (1985), held that a bankruptcy trustee over a corporate entity becomes the party entitled to assert (or waive) the corporate entity’s attorney-client privilege. All of the factors considered by the Court in *Weintraub* apply with equal force to an assignee in an assignment for the benefit of creditors case. *See id.* at 351–56 (reasoning that “the actor whose duties most closely resemble those of management should control the privilege in bankruptcy”)³.

16. Although there is no Florida case law directly applying *Weintraub* to an assignee, Florida Statutes expressly provide that an assignee or successor of an entity is entitled to assert the attorney-client privilege. *See* Fla. Stat. § 90.502(1)(d) (stating that the privilege may be claimed by “[a] successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence”). Moreover, at least one other court has held that an assignee in an assignment for the benefit of

³ “State courts often look to federal bankruptcy law for guidance as to legal issues arising in proceedings involving assignments for the benefit of creditors.” *Moecker v. Antoine*, 845 So. 2d 904, 912 n.10 (Fla. 1st DCA 2003).

creditors proceeding holds the attorney-client privilege of the assignor. *MFS & Company, LLC v. Caterpillar, Inc.*, 2010 WL 11549935 (E.D. Mich. Sept. 20, 2010) (stating that the assignee's possession of the attorney-client privilege "is consistent with the general law of privilege, which holds that receivers, liquidators, and subrogees have the authority to waive or assert the privilege").

17. Further, courts have consistently held that analogous fiduciaries, such as receivers in receivership cases, hold the receivership entity's privilege. *See, e.g., Federal Deposit Ins. Corp. v. Cherry, Bekaert & Holland*, 129 F.R.D. 188 (M.D. Fla. 1989) (holding FDIC could assert bank's attorney-client privilege in FDIC receivership); *S.E.C. v. Ryan*, 747 F. Supp. 2d 355, 362 (N.D.N.Y. 2010) (holding that receiver in S.E.C. receivership, after succeeding to all management of the entity, effectively became the client with respect to pre-receivership law firm and was entitled to assert or waive privileges).

18. Under the co-client exception to the attorney client privilege, the Assignee is entitled to all communications in connection with the Bonati Lawsuit, regardless of with whom Mr. Knopik was communicating. LSI and St. Louis & Perry were all co-defendants in the Bonati Lawsuit. Knopik provided legal defense services for all co-defendants. The Assignee is entitled to full access to all communications and documents related to the defense of the Bonati Lawsuit. In Florida, this exception to the attorney-client privilege is codified. Section 90.502(4)(e) of the Florida Statutes excepts from the attorney-client privilege communications among co-clients "if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest." There is no expectation of confidentiality among co-clients. *See Transmark, U.S.A., Inc. v. State, Dep't of Ins.*, 631 So. 2d 1112, 1117 (Fla. 1st DCA 1994).

19. In bankruptcy cases, courts have applied the co-client exception to allow trustees to obtain communications and documents from law firms representing the debtor and other clients in the same matter before the bankruptcy case, even if those parties were adverse in the bankruptcy case. *See In re Fundamental Long Term Care, Inc.*, 489 B.R. 451 (Bankr. M.D. Fla. 2013) (holding that bankruptcy trustee could invoke the co-client exception to obtain all communications and work product in connection with joint pre-bankruptcy litigation defense); *In re Ginn-LA St. Lucie Ltd., LLLP*, 439 B.R. 801 (Bankr. S.D. Fla. 2010) (holding attorney-client privilege prevent law firms' production of documents in connection with joint transaction, despite the terms of the joint defense agreement). The doctrine has also been applied in the insurance context to allow an insurer to obtain production of document exchanged between an insured and its counsel. *Sun Capital Partners, Inc. v. Twin City Fire Ins. Co.*, 2015 WL 1860826 (S.D. Fla. Apr. 22, 2015).

20. There does not appear to be any basis for St. Louis & Perry to object to the Assignee's possession or use of the Bonati Litigation Files, much less to compel the Assignee to turn over litigation files. The Assignee remains willing to provide St. Louis & Perry with copies of files provided that the Assignee is compensated for his costs. The fact of the matter, however, is that substantial effort is required to located and segregate these files. The Assignee submits that the Legal File Request Procedures set forth above provide a fair manner of regulating such production requests while, at the same time, protecting the assignment estates from bearing the cost of such production requests.

WHEREFORE, the Assignee respectfully requests that this Court enter an order (i) granting this Motion, (ii) approving the Legal File Request Procedures, and (iii), providing for such other and further relief as is just and proper.

CERTIFICATE REGARDING CONFERENCE OF COUNSEL

Counsel for the Assignee and counsel for St. Louis & Perry participated in a telephone call in a good faith effort to resolve the issues in this motion, but were unable to reach an agreement.

DATED: March 3, 2020

/s/ Edward J. Peterson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Motion To Determine Procedures for Requests for Legal Files in Assignee's Possession* has been furnished on this 3rd day of March, 2020 by the Court's electronic system to all parties receiving electronic service, and by either U.S. mail or electronic mail to the parties listed on the attached Limited Notice Parties list and to:

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/s/ Edward J. Peterson
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MASTER LIMITED NOTICE SERVICE LIST

January 14, 2020

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Laser Spine Surgery Center of Pennsylvania, LLC
Laser Spine Surgery Center of St. Louis, LLC
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