

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE LINERBOARD ANTITRUST
LITIGATION**

MDL No. 1261

**THIS DOCUMENT RELATES TO:
Civil Action Numbers 98-5055 and 99-1341**

ORDER

AND NOW, this 31st day of May, 2007, upon consideration of the Motion by Howard Langer for Protective Order and to Compel (Document No. 907, filed May 17, 2007);¹ a May 11, 2007 letter to the Court from Peoples's counsel; a May 18, 2007 letter to the Court from Peoples's counsel; a May 18, 2007 letter to the Court from Langer's counsel; a May 23, 2007 letter to the Court from Langer's counsel; and a May 23, 2007 letter to the Court from Peoples's counsel,² **IT IS ORDERED** that the Motion by Howard Langer for Protective Order and to Compel is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. John F. Peoples's October 19, 2005 letter to the Disciplinary Board of the Supreme Court of Pennsylvania shall remain under seal;
2. Counsel for Howard Langer shall serve a copy of the October 19, 2005 letter to John F. Peoples's counsel, Frank Marcone;
3. The parties and their counsel shall not disseminate the October 19, 2005 letter to

¹ By letter dated May 24, 2007, the Court extended the time for Peoples to respond to this motion to May 30, 2007. Peoples did not file a response to this motion.

² Copies of these letters shall be docketed by the Deputy Clerk.

anyone absent further order of this Court. Frank Marcone may review the October 19, 2005 letter with John F. Peoples, but may not furnish a copy of the letter to John F. Peoples; and

5. The Motion by Howard Langer for Protective Order and to Compel is **DENIED** in all other respects.

IT IS FURTHER ORDERED that the supplemental memoranda of law referred to in the Court's Order dated May 4, 2007, currently due June 6, 2007, shall be filed under seal. John Peoples's Memorandum of Law Addressing Issues of Whether Any Improprieties Requiring Referral to Chief Judge for Disciplinary Consideration (Document No. 63, improperly filed in Civil Action No. 04-2785 on May 30, 2007) shall be placed under seal.

IT IS FURTHER ORDERED that all filings by the parties shall be filed in MDL No. 1261, not in Civil Action No. 04-2785.

MEMORANDUM

This contempt matter arises out of allegedly threatening telephone messages left on the voicemail of Howard Langer, Liaison Counsel for the class-action component of MDL No. 1261. A Motion for an Order Holding John Peoples, Esquire in Contempt, Imposing Disciplinary Sanctions Upon Him, Referring his Behavior to Chief Judge Bartle for an Order to Show Cause Why He Should Not be Suspended From Practice and Request for Expedited Hearing ("Motion for Contempt") is currently pending, but is not fully briefed. Currently at issue and fully briefed is the Motion by Howard Langer for Protective Order and to Compel. For the reasons set forth below, the Motion by Howard Langer for Protective Order and to Compel will be granted in part and denied in part. This Memorandum does not address the merits of the Motion for Contempt.

I. BACKGROUND

The Court sets forth only those facts necessary to resolve the Motion by Howard Langer

for Protective Order and to Compel. The Court will detail the full procedural and factual history of the dispute between Langer and Peoples when it addresses the Motion for Contempt.

On March 16, 2007, May 3, 2007, and May 4, 2007, the Court conducted a Contempt Hearing on the issue of whether, by leaving a June 29, 2006 telephone message on Langer's voicemail, Peoples violated this Court's Orders of March 21, 2005 and September 8, 2005.³

Peoples's testimony during the hearing revealed that he may also have violated this Court's Order of July 6, 2004 by submitting a letter to the Disciplinary Board regarding Langer.⁴

Accordingly, at the conclusion of the hearing, the Court directed Peoples to produce a copy of the letter he wrote to the Disciplinary Board. May 4, 2007 Tr. at 140. The Court subsequently entered its oral Order as a written Order. The written Order provided, in relevant part:

On or before May 11, 2007, John F. Peoples shall provide to the Court and opposing counsel a copy of the letter which, according to his testimony, he sent to the Pennsylvania Disciplinary Board. In the event the said John F. Peoples concludes that this Order conflicts with any applicable statute or rule of the Pennsylvania Disciplinary Board, he shall so advise the Court and opposing counsel on or before May 9, 2007, setting forth the details of his position

Order of May 4, 2007.

By letter to the Court dated May 11, 2007, Peoples's counsel, Frank Marcone, informed

³ In relevant part, the Orders of March 21, 2005 and September 8, 2005 enjoined Peoples "from having any contact or other communication, or leaving any messages for Liaison counsel, Howard Langer"

⁴ In relevant part, the Order of July 6, 2004 enjoined "all attorneys who participated in any way in MDL 1261 including, but not limited to, John F. Peoples, Esquire, and all persons acting in their behalf . . . from taking any further action relating to the allocation of fees in MDL 1261, or the action of liaison counsel in connection therewith, in any court or forum other than the United States District Court for the Eastern District of Pennsylvania." Peoples conceded during the Contempt Hearing that the Order of July 6, 2004 enjoined him from writing to the Disciplinary Board. Peoples, May 3, 2007 Tr. at 28 (stating "we couldn't write the Disciplinary Board").

the Court as follows: “I have procured what I believe is a copy of a letter which was sent by Mr. Peoples to the Disciplinary Board. That letter is dated October 25, 2004 and is marked ‘Draft.’ It does appear to be a completed document and was gleaned from Mr. Peoples’ file in his office.” Marcone then stated that “before we may safely release any letter . . . we must procure a release from Mr. Langer” under “the confidentiality provisions of the Disciplinary System” Id. He then stated that “once Mr. Langer provides such a release, Mr. Peoples would be free to” disperse the letter. Id.

In response to this letter, Langer filed under seal the Motion for Protective Order and to Compel. The Motion provides, in relevant part:

The letter of Peoples’ counsel on May 11, 2007 contains a threat: that before Peoples will comply with the Court’s recent Order, and will provide the document in question, Langer must execute a “release” to Peoples. This “release” would then permit Peoples to disseminate the contents of his draft letter far and wide—i.e. it would give him carte blanche to the violate the [Court’s] Orders . . . with impunity.

Meanwhile, anticipating that Peoples was going to engage in this type of charade, Langer obtained from the Office of Disciplinary Counsel the actual letter that Peoples wrote. It is dated October 19, 2005, a full year after the “draft.”

Mot. at 2. Langer attached a copy of the October 19, 2005 letter to the Motion for Protective Order and to Compel. He also stated that the October 19, 2005 letter would “be provided to Mr. Marcone after the Court enters the Order sought by this motion, by which Mr. Marcone is required to preserve its confidentiality, and after Mr. Marcone acknowledges such Order.” Mot. at 2 n.1.

The Proposed Order attached to the Motion for Protective Order and to Compel provides, in relevant part, as follows:

John F. Peoples shall telefax to the Court and to Howard Langer’s counsel . . . the “draft”

letter of October 25, 2004 written by Mr. Peoples . . . and any other document in draft or final form written by Mr. Peoples and addressed to the Disciplinary Board that mention, refer to, or relate to Howard Langer. . . .

John F. Peoples shall telefax to the Court and to opposing counsel a certification that no other [relevant] documents . . . are in his possession, custody or control, either in hard copy or on computer hard drives

The documents referenced . . . and the actual letter that John Peoples wrote to the Disciplinary Board . . . dated October 19, 2005, shall be considered confidential and shall be filed under seal in this Court.

The documents . . . shall be used solely for the purpose of the briefing that the Court has ordered to be submitted The parties and their counsel are hereby restrained and enjoined from disseminating them to anyone absent further Order of this Court. Violation of this Order shall constitute contempt.

Mr. Peoples's counsel may obtain from Mr. Langer's counsel a copy of the letter dated October 19, 2005 . . . only upon the condition that he furnish to the Court and opposing counsel a written statement certifying that: . . . (B) he understands it is being furnished to him on an "attorney's eyes only" basis; (C) he acknowledges that this Order requires him to use this document only in connection with briefing in this case, and not for any other purpose, and acknowledges that he will not further disseminate it to anyone, including but not limited to John Peoples . . . ; (D) he acknowledges that furnishing the letter to him does not constitute any waiver of confidentiality by Mr. Langer.

Proposed Order at 1-2.

By telephone conference on May 16, 2007, the Court directed counsel for Langer and Peoples to provide the Court with an agreed-upon form-of-order regarding the production and confidentiality of the draft letter and the actual letter sent to the Disciplinary Board. By separate letters to the Court on May 18, 2007, the parties informed the Court that they would be unable to agree upon a form-of-order. Langer's letter of May 18, 2007 provides, in relevant part,

I am withdrawing the request in the . . . motion that we obtain the draft letter or any other documents from Mr. Peoples or Mr. Marcone. And I am similarly withdrawing any offer to provide to Peoples' counsel the original letter we obtained. I respectfully request permission to submit the actual letter we obtained on an *ex parte* basis in our submission I request that Mr. Marcone be permitted to submit his draft letter on the same basis.

Langer Letter of May 18, 2007 at 2.

II. LEGAL STANDARDS

A. Sealing of Court Documents

“It is well-settled that there exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records.” In re Cendant Corp. 260 F.3d 183, 194 (3d Cir. 2001) (citing Littlejohn v. BIC Corporation, 851 F.2d 673, 677-78 (3d Cir. 1988)). “The public’s right of access extends beyond simply the ability to attend open court proceedings. Rather, it envisions ‘a pervasive common law right to inspect and copy public records and documents, including judicial records and documents.’” Id. (citing Leucadia, Inc. v. Applied Extrusion Tech., Inc., 998 F.2d 157, 161 (3d Cir. 1993)).

“Although the common law right to public access is a recognized and venerated principle, courts have also recognized the accompanying principle that ‘the right is not absolute.’” Id. “The presumption of public access may be rebutted.” Id. (citing Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 662 (3d Cir. 1991)). “Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.” Littlejohn, 851 F.2d at 678 (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978)). “Thus, the question becomes, under what circumstances may a district court seal . . . documents . . . by means of a confidentiality order.” Cendant, 260 F.3d at 194.

“In order to override the common law right of access, the party seeking the closure of a hearing or the sealing of part of the judicial record ‘bears the burden of showing that the material is the kind of information that courts will protect’ and that ‘disclosure will work a clearly defined

and serious injury to the party seeking closure.” Id. (citing Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994)). “In delineating the injury to be prevented, specificity is essential.” Id. (citing Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984)). “Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient. As is often the case when there are conflicting interests, a balancing process is contemplated.” Id. (citing Leucadia, 998 F.2d at 165). The “presumption of access must be balanced against the factors militating against access. The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption.” Bank of Am. Nat’l Trust and Sav. Ass’n v. Hotel Rittenhouse Assoc., 800 F.2d 339, 344 (3d Cir. 1986).

B. Pennsylvania Rules of Disciplinary Enforcement

The Pennsylvania Rules of Disciplinary Enforcement provide that

until the proceedings are open . . . all proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential unless:

- (1) the respondent-attorney requests that the matter be public, or waives confidentiality for a particular purpose specified in writing;
- (2) the investigation is predicated upon a conviction of the respondent-attorney for a crime or reciprocal discipline;
- (3) in matters involving alleged disability, the Supreme Court enters its order transferring the respondent-attorney to inactive status pursuant to Enforcement Rule 301 (relating to proceedings where an attorney is declared to be incompetent or is alleged to be incapacitated);
- (4) the proceeding is based upon allegations that have become generally known to the public; or
- (5) there is a need to notify another person or organization, including the Lawyers’ Fund for Client Security, in order to protect the public, the administration of justice, or the legal profession.

Pa. R.D.E. 402(c).

III. ANALYSIS

A. Sealing of the October 19, 2005 Letter

Langer obtained from the Office of Disciplinary Counsel the actual letter that Peoples wrote, dated October 19, 2005. To obtain this letter, Langer wrote a letter to the Disciplinary Board that states, in relevant part:

By this letter, I request that your office furnish to me a copy of any letter, complaint, or other communication that John Peoples wrote about me to your office. *I make this request pursuant to Rule 402(c)(1) of the Pennsylvania Rules of Disciplinary Enforcement, and am waiving confidentiality for the purposes of the above Linerboard hearing.*

Langer Letter of May 7, 2007 (emphasis added).

Rule 402(c)(1) provides that a respondent-attorney may “request[] that the matter be public, *or waives confidentiality for a particular purpose* specified in writing” Pa. R.D.E. 402(c)(1) (emphasis added). When the Disciplinary Board provided the October 19, 2005 letter to Langer, it stated that “your client, Howard Israel Langer, Esquire, tendered a written waiver under Pa.R.D.E. 402(c)(1) and requested a copy of a letter written to the Disciplinary Board by John F. Peoples, Esquire.” Sodroski Letter of May 10, 2007.

Rule 402(c)(1) permits both global waivers (request “that the matter be public”) and limited waivers (“waives confidentiality for a particular purpose”). Langer explicitly waived “confidentiality for a particular purpose” rather than to make “the matter be public.” Pa. R.D.E. 402(c)(1). The “particular purpose” in this case is Langer’s submission of the letter to the Court for consideration in the Peoples contempt proceeding.⁵ See Langer Letter of May 7, 2007.

⁵ As Langer wrote in his letter of May 7, 2007,

I am a litigant in a federal court proceeding before the Honorable Jan DuBois, captioned In re Linerboard Antitrust Litigation, MDL 1261 (E.D. Pa.) At an evidentiary hearing this

Accordingly, the Pennsylvania Rules of Disciplinary Enforcement mandate that the October 19, 2005 letter remain confidential for all other purposes.

Sealing the October 19, 2005 letter and ordering the parties to maintain its secrecy is an appropriate means to achieve the confidentiality contemplated by the Pennsylvania Rules of Disciplinary Enforcement. Specifically, sealing the October 19, 2005 letter would prevent the following injuries: (1) public dissemination of the letter in violation of the Pennsylvania Rules of Disciplinary Enforcement; (2) frustration of the Court's July 6, 2004 Order, which enjoined "all attorneys who participated in any way in MDL 1261 . . . from taking any further action relating to the allocation of fees in MDL 1261, or the action of liaison counsel in connection therewith, in any court or forum other than the United States District Court for the Eastern District of Pennsylvania;" and (3) harm to Langer's reputation based on allegedly unfounded claims by Peoples.⁶ The Court concludes that these considerations outweigh the presumption of access to court documents. See Bank of Am. Nat'l Trust and Sav. Ass'n., 800 F.2d at 344. Accordingly, the October 19, 2005 letter shall remain under seal.

past Friday, May 4, 2007, Judge DuBois determined that a letter or complaint written to your Board . . . was relevant to the proceeding

⁶ The Court makes no determination in this Memorandum as to whether Peoples violated the July 6, 2004 Order or the Pennsylvania Rules of Professional Conduct. The Court does note, however, that Comment 4 to Rule 8.3 provides as follows:

While a lawyer may report professional misconduct at any time, the lawyer must report misconduct upon acquiring actual knowledge of said misconduct. The discretionary reporting of misconduct should not be undertaken for purposes of tactical advantage over another lawyer, to punish or inconvenience another for a personal or professional slight, or to harass another lawyer.

The Court further notes that there is no evidence that the Disciplinary Board has taken any action against either Langer or Peoples based on the October 19, 2005 letter.

B. Compelling Production of the Draft Letter

In his letter of May 18, 2007 to the Court, Langer withdrew “the request in the . . . motion that we obtain the draft letter or any other documents from Mr. Peoples or Mr. Marcone.”

Accordingly, the Court will not compel production of this document on the present state of the record.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.