

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

20 CVS 3348

PETER FLEMING,

Plaintiff,

v.

ADAM HORNER and HAMILTON,
STEPHENS, STEELE + MARTIN,
PLLC,

Defendants.

**ORDER ON MOTIONS FOR LEAVE
TO FILE UNDER SEAL**

1. THIS MATTER is before the Court following the filing by Defendants Adam Horner (“Horner”) and Hamilton, Stephens, Steele + Martin, PLLC (“HSSM”) (together, “Defendants”) and Plaintiff Peter Fleming (“Plaintiff”) of several motions to seal (together, the “Motions to Seal”). On June 8, 2020, Defendants filed Defendants’ Motion for Leave to File Under Seal (“Defendants’ Motion to Seal”). (ECF No. 16.) On June 18, 2020, Plaintiff filed his Motion for Leave to File Under Seal, (ECF No. 21), and less than thirty (30) minutes later filed his Corrected Motion for Leave to File Under Seal, (ECF No. 23), (“Plaintiff’s Motion to Seal”). The Motions to Seal seek to seal indefinitely certain information presented to the Court for its consideration of whether Ronald L. Richter, Jr., Esq. (“Richter”) and Eric S. Bland, Esq. (“Bland”), counsel with the firm of Bland Richter, LLP, licensed in South Carolina, but not North Carolina, should be granted admission to appear as counsel

for Plaintiff *pro hac vice* (the “Motions for Admission”). (ECF Nos. 6 & 7.) Defendants’ Motion to Seal seeks to seal several paragraphs of an unfiled complaint attached as Exhibit 2 to Defendants’ brief in opposition to the Motions for Admission (the “Draft Complaint”). (ECF No. 15, Ex. 2.) Plaintiff’s Motion to Seal seeks to seal certain paragraphs of Plaintiff’s reply brief regarding the Motions for Admission, (ECF No. 19), the Affidavit of Ronald L. Richter, Jr., and several exhibits attached to Richter’s affidavit, in whole or in part, (ECF No. 20), related to the same allegations underpinning Defendants’ Motion to Seal. The Court held a hearing on the Motions to Seal and the Motions for Admission on July 15, 2020.

I. BACKGROUND

2. Plaintiff’s lawsuit lies in professional negligence (legal malpractice). Plaintiff contends that Horner and his then-employer HSSM agreed to represent Plaintiff to contest transfer to and recordation in North Carolina of a judgment against a company formerly operated by Plaintiff, entered in the courts of Texas, and defend a claim that Plaintiff was personally liable for the corporate debt by virtue of veil piercing. (See Compl., ECF No. 3, ¶¶ 41, 62–106.) Plaintiff claims that Defendants negligently represented him, resulting in a large judgment entered against him personally. Defendants contest the merits of Plaintiff’s suit. (See Answer to Pl.’s Compl., ECF No. 12.)

3. Plaintiff is represented in the action by North Carolina counsel Charles H. Rabon, Jr., Esq. As noted above, the Motions for Admission were filed because Plaintiff also wants to be represented in this action by Messrs. Richter and Bland

pursuant to N.C.G.S. § 84-4.1. Plaintiff initially moved the Court on February 24, 2020 for permission for Messrs. Bland and Richter to appear, in association with Mr. Rabon, on a *pro hac vice* basis by the filing of the Motions for Admission.

4. On March 26, 2020, this action was designated to the North Carolina Business Court by Order of North Carolina Supreme Court Chief Justice Cheri Beasley, (ECF No. 1), and assigned to the undersigned by Order of Chief Business Court Judge Louis A. Bledsoe, (ECF No. 2), that same day. Prior to that time, no judge had considered and determined the Motions for Admission.

5. Following designation to the Business Court, the undersigned received an e-mail communication from Defendants' counsel that Defendants intended to oppose the Motions for Admission and wished an opportunity to file a formal opposition. As a result of counsel's e-mail, the Court entered a scheduling directive giving Defendants an opportunity to file a response to the Motions for Admission. (*See* Scheduling Order, ECF No. 14.)

6. In conformity with the Court's scheduling directive, on June 8, 2020, Defendants filed under seal in its entirety Defendants' brief in opposition to the Motions for Admission and attached exhibits thereto. (ECF No. 15.) Sixteen (16) days thereafter on June 24, 2020, Defendants filed a public version of their June 8 submission with certain redactions.¹ (ECF No. 24.)

¹ Defendants originally filed a public (partially redacted) version of the Draft Complaint on June 18, 2020, (ECF No. 18), but did not file a public version of their brief in opposition, which was included in their June 8, 2020 submission. Both documents, together, were filed on the public docket on June 24, 2020 as "Amended Public Version of Memo in Opposition with redacted unfiled Complaint (Exhibit 2)". (ECF No. 24.) The Court, therefore, construes this as the relevant public filing for purposes of determining Defendants' Motion to Seal. The

7. Defendants based their opposition to the Motions for Admission on the contention that Richter and Bland engaged in improper conduct in violation of the North Carolina Rules of Professional Conduct during pre-suit communications with Defendants and their agents and in their negotiations with Defendants. As a result, Defendants submitted that the Court, in its discretion, should deny the Motions for Admission and prohibit Richter and Bland from being permitted to appear as counsel for Plaintiff in this action *pro hac vice*.² Because the Motions to Seal require the Court to evaluate whether information that was filed with the parties' respective briefs regarding the Motions for Admission should be sealed from the public, the Court briefly describes the context in which the documents subject to the Motions to Seal were filed and why.

8. As Exhibit 1 to their opposition brief to the Motions for Admission, Defendants filed a pre-suit demand letter with an attachment from Richter to Horner and HSSM's representative dated May 21, 2018. (*See* ECF Nos. 15, 24, Ex. 1.) The correspondence notified Defendants that Richter, the firm of Bland Richter, LLP, and the Rabon Law Firm, PLLC had been retained to represent Plaintiff to pursue a claim against Defendants. The letter further advised Defendants that, if the dispute could not be voluntarily resolved, counsel would file suit in state court in Mecklenburg County, North Carolina. The letter attached the Draft Complaint, naming Peter

Court notes that Defendants' filing on June 24 was untimely. *See* BCR 5.2(d) ("Within five business days of the filing or provisional filing of a document under seal, the party that filed the document should file a public version of the document[.]").

² The Court, following careful consideration, in its discretion granted the Motions for Admission by separate order. (*See* ECF No. 28.)

Fleming as the plaintiff and Horner and HSSM as the defendants. (See ECF Nos. 15, 24, Ex. 2.) Finally, the letter advised Defendants that if one of the Defendants or their liability carrier did not contact Richter by May 31, 2018, Richter would assume that Defendants “ha[d] elected to proceed directly to suit.”

9. At the top of the first page of the Draft Complaint attached to Richter’s letter appeared the following:

NOTE: THIS IS A DRAFT COMPLAINT SUBMITTED TO NAMED DEFENDANTS FOR REVIEW AND EVALUATION FOR SETTLEMENT PURPOSES PURSUANT TO RULE 408 OF THE RULES OF EVIDENCE. PRIOR TO THIS COMPLAINT BEING FILED AND SERVED, IT MAY BE FURTHER AMENDED AND MODIFIED BOTH AS TO FACTUAL ALLEGATIONS AND CLAIMS ASSERTED.

10. The Draft Complaint contained allegations at paragraphs 86–89 and 96–100 regarding Horner’s alleged conduct and HSSM’s response thereto, as well as allegations of legal wrongdoing by HSSM and Horner at sub-paragraphs 133.j. and k., that are now the subject of Defendants’ Motion to Seal. It is of particular note that the allegations Defendants seek to maintain under seal did not appear in the Complaint that commenced this lawsuit.³ In fact, the only reason the Court is aware of these allegations is because Defendants filed the Draft Complaint with its opposition to the Motions for Admission.

³ The communications between Defendants’ counsel and Richter indicate that Defendants’ counsel told Richter that all of these allegations (except for the allegation contained in paragraph 96 of the Draft Complaint) were irrelevant and demanded that they be removed from, and not appear in, any complaint or public pleading that might ultimately be made against Defendants. Based on the filing of the Complaint, it appears to the Court that Plaintiff’s counsel ceded to Defendants’ counsel’s demand and, even though not mentioned by Defendants’ counsel, also removed draft paragraph 96 from the as-filed Complaint.

11. In Defendants' Motion to Seal, Defendants argue that "a review of the [Draft] Complaint is necessary to consider the arguments of counsel in Defendants' [brief in opposition to the Motions for Admission]."

12. Plaintiff, through counsel, replied to Defendants' opposition by filing under seal on June 18, 2020 a reply brief and supporting affidavit executed by Richter. (ECF Nos. 19, 20.) Plaintiff's Motion to Seal seeks to seal paragraphs 20 through 36 of Richter's affidavit. In addition to the portions of the affidavit itself Plaintiff seeks to seal, Plaintiff's Motion to Seal also seeks to seal several exhibits attached to Richter's affidavit.⁴ Exhibit B is comprised of a number of letters from Richter and his firm on behalf of other claimants making similar demands against other lawyers and firms for alleged misconduct. Exhibit C is a pre-suit e-mail dated May 30, 2018 from Becky Cheney, a partner at HSSM, to Richter and Adam Horner regarding Richter and Horner's pre-suit conduct and providing Richter with Horner's written response to a grievance filed by Plaintiff against Horner with the North Carolina State Bar. Exhibit D is a series of e-mail communications from July 2018 through February 2019 between the parties' respective counsel in this case regarding pre-suit mediation. Finally, Exhibit E is a copy of the parties' Tolling Agreement and a copy of a check consistent with the provisions of that agreement. Exhibits C through E are sought by Plaintiff to be sealed in their entirety.

13. Plaintiff's Motion to Seal contends that the information in his reply brief and in Richter's affidavit and exhibits thereto should be sealed solely because the

⁴ The Court omits discussion of Exhibit A to Richter's affidavit because this is his curriculum vitae and is not subject to any sealing motion.

information is directly related to the information sought to be sealed in Defendants' Motion to Seal. Plaintiff argues that it was necessary for Richter to defend the arguments raised by Defendants in their opposition to the Motions for Admission by substantively responding to both the basis for the allegations set forth in the Draft Complaint and the basis for Richter's pre-suit conduct.

14. As a result, Plaintiff seeks to maintain under seal the same allegations contained in paragraphs 86–89, 96–100, and sub-paragraphs 133j. and k. of the Draft Complaint which underpin Defendants' Motion to Seal.

II. ANALYSIS

15. “Whether to grant or deny a motion to seal lies within the trial court’s sound discretion.” *Addison Whitney v. Cashion*, 2020 NCBC LEXIS 23, at *3–4 (N.C. Super. Ct. June 10, 2020) (citation omitted). The question before the Court in deciding whether to seal documents from public disclosure turns on whether there is a “compelling countervailing public interest” in keeping certain information out of the public domain and “sealing of documents is required to protect [that] countervailing public interest.” *Doe v. Doe*, 263 N.C. App. 68, 80, 823 S.E.2d 583, 591 (2018) (quoting *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 476, 515 S.E.2d 675, 693 (1999)). The movant, therefore, must meet a high burden in showing the Court why the documents sought to be maintained under seal should be kept from the public, and this is because there are both statutory and constitutional mandates that require our courts to be open to the public. *See* N.C.G.S. § 7A-109(a); *Virmani*, 350 N.C. at 476, 515 S.E.2d at 693 (holding “that the open courts provision of Article I, Section

18 of the North Carolina Constitution guarantees a qualified constitutional right on the part of the public to . . . inspect or copy the records of [court] proceedings”).

16. In certain circumstances, it may be appropriate to seal filings because of compelling countervailing interests already acknowledged by our legislature, such as the protection of a company’s trade secrets, N.C.G.S. § 66-152, or based on the facts unique to the specific case. However, our appellate courts have been clear that information will not be sealed from the public simply because the information or allegations contained in court filings are sensitive or embarrassing. *Doe*, 263 N.C. App. at 89–91, 823 S.E.2d at 597 (“Adjudicating claims that carry the potential for embarrassing or injurious revelations about parties . . . is part of the day-to-day operations of the North Carolina courts We understand why . . . individual defendants . . . would be embarrassed by some of the factual allegations of the plaintiffs’ complaint . . . [but] the public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may show” (internal quotation marks and citation omitted)).

17. If the Court determines that a compelling countervailing interest exists that supports sealing of certain documents, the Court should make sure the redacted information is as limited as practicable to protect that interest while protecting the public’s right to access court records. *See* BCR 5.2(d).

18. While our appellate courts have made it clear through *Virmani* and its progeny—most recently *Doe*—that a strong presumption of open records in civil cases

prevails in this State, our courts have had little opportunity to define the exact contours of the compelling countervailing interests that would justify sealing. Therefore, this Court is often times left to parse whether the alleged compelling countervailing interest argued by the parties in a specific case is acutely similar to a factual scenario in which our appellate courts found that there was (or was not) a compelling countervailing interest.

19. Our appellate courts have never addressed whether there is such a compelling countervailing interest in a situation like that before the Court today, namely where the parties' sealing motion concerns documents submitted to the Court not for their truth or for any evidentiary support as to a substantive motion, but for a procedural, collateral motion such as a motion for *pro hac* admission.

20. With the novelty of this situation in mind, the Court turns to the Motions to Seal. At bottom, Defendants contend (albeit only vaguely) that the allegations of misconduct on Defendants' part contained in the paragraphs in question of the Draft Complaint constitute irrelevant, scandalous, or impertinent matter that was included by Plaintiff's counsel to force Defendants into settling the case before it was made a part of the public record. First, whether the allegations are "scandalous" are of minor, if any, importance to the Court in deciding the Motion to Seal. *Doe* is clear on its face that sealing is not warranted merely because allegations are potentially embarrassing or injurious to the reputation of a party.

21. Second, the Court cannot conclude, based on the record before it, that the allegations contained in the Draft Complaint are irrelevant to the underlying claims

for relief. Nor does the Court believe the standard normally employed on a motion to strike pursuant to Rule 12(f) is appropriate here when considering an unfiled complaint. Additionally, and most importantly, the Court is not convinced that whether an allegation is subject to being stricken answers the question of whether the allegation should properly be kept off the public record.

22. Instead, the Court concludes that, in this unique situation, its focus should be on the purpose for which the Draft Complaint was presented to the Court. The Draft Complaint was submitted to the Court not for the proof or denial of the Draft Complaint's allegations sought to be maintained under seal, but to provide context to the Court on why attorneys who are not licensed in this State should or should not be allowed to appear before our General Court of Justice as counsel of record *pro hac vice* for Plaintiff. Defendants' counsel filed the Draft Complaint as an exhibit only to show Plaintiff's out-of-state counsel's pre-suit conduct.

23. While it is arguable whether actually filing the Draft Complaint was necessary to explain Richter and Bland's conduct, Defendants' counsel's purpose in presenting the Court with this information—to alert the Court to conduct potentially implicating our Rules of Professional Conduct—is of great importance to the Court in deciding motions for admission *pro hac vice*. While our appellate courts have not directly addressed whether documents presented to the Court on a motion for admission *pro hac vice* may be worthy of protection from public view, our appellate courts have long held that full and open candor with our courts is of great significance in this State. *See Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 670–71, 554

S.E.2d 356, 365–66 (2001) (recognizing that attorneys permitted to practice in this State *pro hac vice* are given a privilege that can be revoked for failure to act with full candor to the court). In this case, Defendants’ counsel presented the Court with the Draft Complaint to argue that Richter and Bland’s inclusion of paragraphs 86–89, 96–100, and sub-paragraphs 133j. and k. therein was for the purpose of “threat[ening] public dissemination of that information if the case was not settled[,]” which Defendants argue is in violation of Rule 4.4 of the North Carolina Rules of Professional Conduct. (Opp’n Br. Mot. for Admission 4, ECF No. 24.) The Court does not wish to stifle an attorney’s ability to present the Court with information germane to its determination whether to grant out-of-state counsel the privilege of *pro hac* admission and the opportunity to litigate on behalf of our citizens when, as is here, that information appearing in the public domain would be potentially adverse to his client.

24. For this reason, the Court believes there is a compelling countervailing interest that supports the sealing of portions of the Draft Complaint. When balancing the competing interests of the Court being properly informed about the conduct of attorneys seeking *pro hac* admission with the public’s interest in knowing specific allegations in an unfiled complaint, the Court concludes that the balance strikes, in this case, in favor of limited sealing. For this reason, the Court GRANTS Defendants’ Motion to Seal and determines specifically that the allegations contained in

paragraphs 86-89, 96-100, and 133.j. and k. of the Draft Complaint should remain under seal pending further orders of the Court.⁵

25. Having concluded that Defendants' Motion to Seal should be granted, the Court now turns to Plaintiff's Motion to Seal, which seeks to seal certain paragraphs of Plaintiff's reply brief regarding the Motions for Admission and the Affidavit of Ronald L. Richter, Jr. and the attachments thereto. Plaintiff seeks sealing on the sole basis that these documents reference the same allegations underpinning Defendants' Motion to Seal.

26. On review of the reply brief, the Court concludes that the redactions proposed are not as limited as practicable pursuant to BCR 5. At the July 15, 2020 hearing, Plaintiff's counsel indicated that he was sealing this information out of an abundance of caution based on what Defendants filed under seal. The reply brief does contain a general reference to the specific allegations in the Draft Complaint, but it also contains other information significantly beyond that scope which does not justify sealing. For this reason, the Court concludes that it is appropriate to revise the redactions proposed by Plaintiff so that the redactions to the reply brief are as limited as practicable.

27. With respect to Richter's affidavit and Exhibits B through E attached thereto, Plaintiff has redacted far more than is necessary or proper. As to Richter's affidavit itself, the Court concludes that the redactions are not as limited as

⁵ The Court's decision with respect to the sealing of the Draft Complaint is subject to reconsideration at a later date in the event that the allegations in question later become relevant to this lawsuit beyond the now-decided Motions for Admission. (*See* ECF No. 28.)

practicable. Only one sentence in paragraphs 20 through 36 directly addresses the allegations in the Draft Complaint subject to sealing. Accordingly, the Court concludes that revised redactions are appropriate to only permit this single sentence to remain under seal.

28. As to Exhibit B to Richter's affidavit, the Court concludes that the partial redactions of the unrelated pre-suit demand letters may remain redacted indefinitely because these documents involve identifying information regarding other clients not involved in this litigation, and the identity of clients is the client's privilege, not the attorney's, to waive. Richter's other clients should not be prejudiced by his filing of these letters in this lawsuit. On review, the Court concludes that the redactions to Exhibit B are appropriate and sufficiently limited in conformity with BCR 5.

29. As to Exhibits C and D, the Court concludes there is nothing within these exhibits that warrants sealing. Neither exhibit discusses in any detail the now-sealed allegations in the Draft Complaint, and counsel has presented no additional reason to support sealing these exhibits. Likewise, the Court finds no basis to seal Exhibit E, the parties' Tolling Agreement. However, the Court does believe that personal identifying information on the check, namely the check account number, should be redacted pursuant to N.C.G.S. § 132-1.10.

III. CONCLUSION

30. THEREFORE, the Court, in its discretion, GRANTS Defendants' Motion to Seal and GRANTS in part and DENIES in part Plaintiff's Motion to Seal as follows:

- A. The Draft Complaint, (ECF No. 15), may properly remain under seal pending further order of this Court. Because Defendants originally filed their brief in opposition to the Motions for Admission and the Draft Complaint as one document, that entire document is under seal at ECF No. 15. Defendants corrected their mistake by publicly filing their brief in opposition to the Motions for Admission at ECF No. 24, which attaches a redacted version of the Draft Complaint. Accordingly, the Draft Complaint may properly remain partially redacted at ECF No. 24 as well.
- B. Contemporaneously with the filing of this Order, the Court files under seal the following documents as exhibits hereto:
- (1) Revised redactions to Plaintiff's reply brief which the Court finds and concludes are worthy of protection from public view; and
 - (2) Revised redactions to the Affidavit of Ronald Richter and Exhibits C–E attached thereto which the Court finds and concludes are worthy of protection from public view. Because Plaintiff filed Richter's affidavit and the supporting exhibits as one document, the Court will refile the document in its entirety, with revised redactions consistent with this Order.
- C. In the absence of a motion for reconsideration or an appeal from this Order, thirty-four (34) days following entry of this Order, the Court will

unseal the revised redacted versions of Plaintiff's reply brief and Richter's affidavit (with the supporting exhibits) attached to this Order.

SO ORDERED, this the 27th day of July, 2020.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases