The Defense Line

S.C. Defense Trial Attorneys' Association

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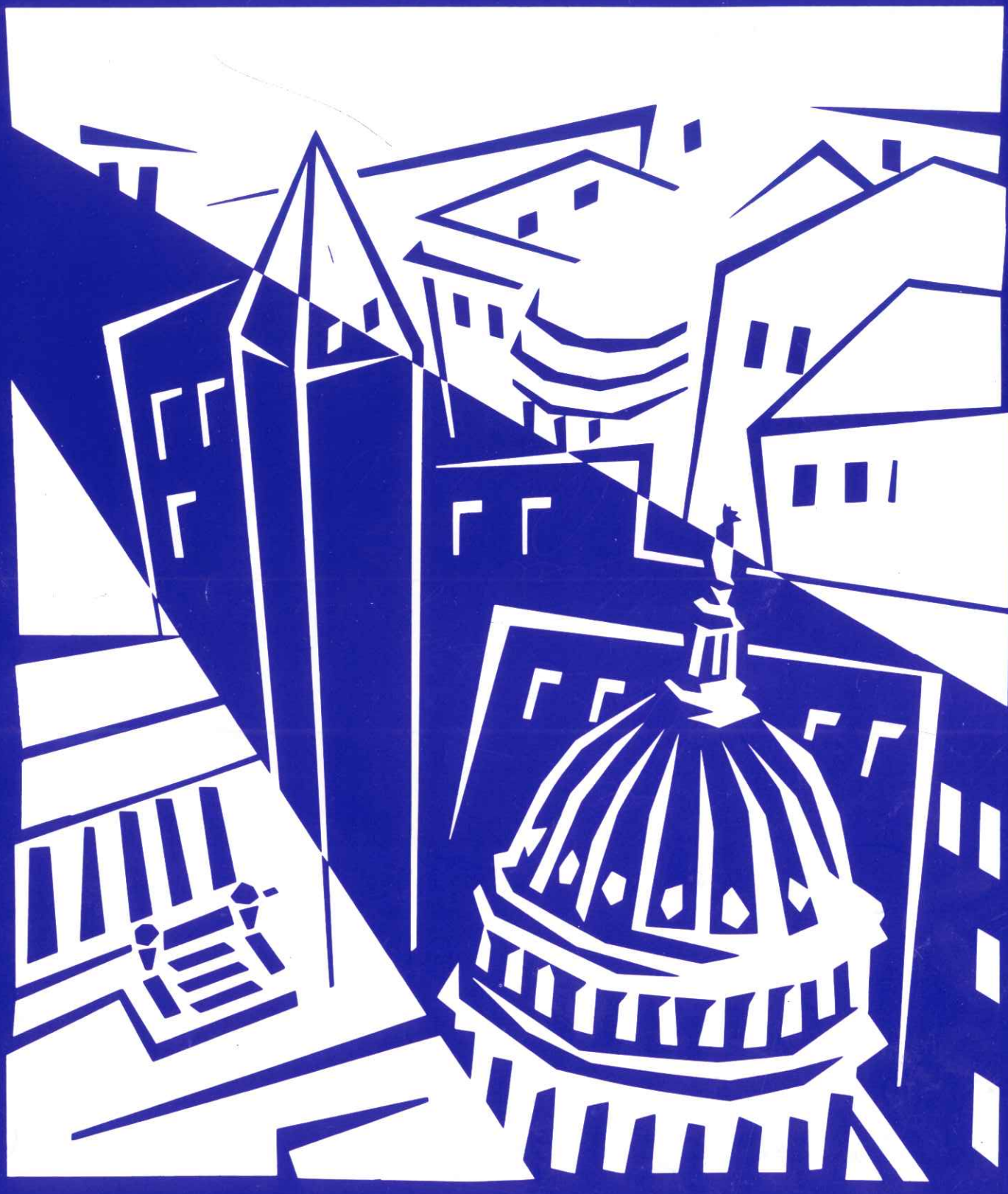

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The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 1-800-445-8629.

President's Page

W. Hugh McAngus

First, I would like to thank Bill Grant, immediate past president, and congratulate him on a job well done. Under his guidance, our Association prospered, and adhered to its traditional standard of excellence. His footsteps will be difficult to follow.

Among the accomplishments of 1992 is the formation of the Student Defense Trial Attorneys' Association. Originally the brain child of Glenn Bowers, the Student Association became an official University Organization in 1992. Its membership is rapidly growing. The Student Trial Lawyers' Association was the only choice law students had, so now defense minded law students have an option. We hope to actively interact with the law students, with the relationship being beneficial to both.

Kay Crowe and Frankie Marion made a great success of the second Trial Academy. The Academy received excellent reviews and will be directed this year by Frankie and Joel Collins. Its success depends on the participation of experienced trial attorneys, so please volunteer to help. The Academy needs the experience of our senior members, so please call Frankie or Joel to volunteer in this worthwhile effort.

Every other year our Association co-sponsors a seminar with the State Bar Association. This year our seminar topic was ethics and was successful beyond all expectations. Over 500 people attended. John Wilkerson and his committee should be congratulated on a job well done. In fact, this seminar was so well received the Bar has decided to repeat the seminar in January via video.

Bob Erwin and Charlie Ridley did an excellent job with the Annual Meeting. Attendance was good, both from our members and the judiciary. Bob and Charlie deserve our thanks.

The Hemphill Award was presented at the Annual Meeting. This award is for distinguished and meritorious service to the legal profession and the public. Given in honor of the late U.S. District Judge Robert W. Hemphill, Jr., the award is presented to those who have devoted their effort and time to the benefit of the Association. The recipient for 1992 was Dewey Oxner. Dewey personifies the South Carolina Defense Attorneys and the legal profession and has truly served the Association well. Congratulations.

Our Joint Meeting with the Claims Managers is scheduled for July 29-31 at the Grove Park Inn in Asheville. The Annual Meeting will be November 11-14 at The Cloister at Sea Island. Mark your calendar for these important events, as member participation is vital to the success of these meetings.

The Defense Line Committee, chaired by Will Davidson has made our publication one of the best in the country. With the assistance of Larry Orr, we hope to make it the best. To do this, we need member support. Our publication is only as good as those who contribute. Please think of the Defense Line when you have an important case or novel issue. Recent decisions are important to us all. If we make the Defense Line our priority, it will be the best.

Please welcome the new Executive Committee members, Joel Collins, Sid Connor, John O'Rourke and Larry Orr. Charlie Ridley was re-elected to a second term. The officers and Executive Committee look forward to serving you this year. Below are listed the names and addresses of Committee Chairs. Committee service is vital, so please serve. Contact the Committee Chair of your choice and volunteer.

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PRESIDENT'S LETTER

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Committee Chair appointments are:

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I look forward to serving as your President this year, and I am honored by the opportunity.

IADC 21ST ANNUAL DEFENSE COUNSEL TRIAL ACADEMY OFFERS YOUNG LAWYERS A CHANCE TO SHARPEN SKILLS

Defense attorneys with two to six years of trial experience will have the opportunity to hone their trial advocacy skills when the Defense Counsel Trial Academy conducts its 21st annual program of instruction July 24-31 at the University of Colorado in Boulder.

Widely regarded as the nation's premier source of practical training for younger defense trial lawyers, the Defense Counsel Trial Academy is sponsored by the International Association of Defense Counsel (IADC). Its intensive, eight-day program of instruction, taught by a faculty of leading defense trial lawyers from throughout the United States, puts primary emphasis on "learning by doing" and employs state-of-the-art teaching methods, such as the videotaping of students' performances in a trial setting.

To ensure the maximum effectiveness of training and because the trial concept is utilized, enrollment in the Academy's program is by application only and is limited to 105 registrants. Thus, it is recommended that persons interested in participating in the 1993 program register promptly. An application brochure can be obtained by contacting the International Association of Defense Counsel, 20 North Wacker Drive, Suite 3100, Chicago, Illinois 60606.

The IADC's Trial Academy qualifies for continuing legal education credits in all states. In 1992, most students earned approximately 55 hours of state accreditation through the Academy program, the cost of which is tax deductible.

Participants in the program are assigned to groups of seven, with each group supervised by one of 15 faculty members.

According to Harvey L. Kaplan of Kansas City, Missouri, the 1993 Trial Academy Director, lectures and demonstrations by skilled lawyers expose the participants to different approaches and ideas in solving common trial problems.

In addition, Mr. Kaplan noted, videotaping student performance is a major element of the learning experience offered by the Academy. Each student is videotaped while conducting voir dire examination, making an opening statement and closing argument, and conducting the direct and cross-examination of witnesses. Student also are given the opportunity to examine expert witnesses represented by doctors from the Denver General Hospital Emergency Residency Program and by economists and graduate students in economics located in the Denver area. Each participant receives a copy of his or her videotaped presentation at the conclusion of the Academy program.

Several weeks prior to their arrival at the Academy, registrants receive, by mail, a complete set of practice materials. The set contains cases, fact-situation trial problems, and student assignments, all of which form the basis of program participation.

Accommodations and meals are provided at the College Inn Conference Center at the University of Colorado.

For further information, contact: International Association of Defense Counsel, 20 North Wacker Dr., Suite 3100, Chicago, Illinois 60606.

South Carolina Law Review Symposium on Bankruptcy

Chapter 11 Issues

DATE: March 12, 1993
TIME: 9:00 a.m. to 5:30 p.m.
PLACE: College of Charleston Conference Facilities, Charleston, S.C.
COST: $175.00

RECEPTION: All registrants are invited to a reception on March 11 from 6:00 p.m. to 7:30 p.m. at The Calhoun Mansion.

ANTICIPATED CLE CREDIT:
South Carolina - 5.5 hours
North Carolina - 5.75
Georgia - 5.7 hours

SPONSORS:
Adams, Quackenbush, Herring & Stuart, P.A., Columbia
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Robinson, Mendoza, Barton, McCarthy & Calloway, P.A., Columbia
Sinkler & Boyd, Charleston

Participants and topics included:

Professor John D. Ayer, University of California at Davis School of Law - *Ethical Duties of Bankruptcy Trustee or Debtor in Possession*

Professor David G. Carlson, Benjamin N. Cardozo Law School - *Single Asset Cases*

Professor Frank R. Kennedy, University of Michigan Law School; and **Gerald K. Smith, Esquire;** Lewis & Roca, Phoenix - *Post-Confirmation Issues*

Dean Phillip T. Lacy, University of South Carolina School of Law - *Partial Surrender of Collateral and the Indubitable Equivalent*

Richard B. Levin, Esquire; Stutman, Treister & Glatt, Los Angeles - *What is a "Professional" in a Bankruptcy Case?*

Ralph R. Mabey, Esquire; LeBoeuf, Lamb, Leiby & MacRae, Salt Lake City - *Mass Tort and Chapter 11*

Professor Charles J. Tabb, University of Illinois College of Law - *Evaluating Proposals for Reforming Chapter 11 Bankruptcy*

Professor Barry L. Zaretsky, Brooklyn Law School - *Trustees and Examiners in Chapter 11*

***Professor Lawrence P. King,** New York University School of Law, will serve as conference moderator.

For further information, please contact Robin Johnson, Symposium Editor, at (803) 777-3427 or Steven Pruitt, Managing Editor, at (803) 777-8415.

Please complete the registration form below. Make check payable to the **South Carolina Law Review** and Mail to:

1993 Bankruptcy Conference
South Carolina Law Review
University of South Carolina School of Law
Main and Greene Streets
Columbia, SC 29208

❑ Check for $175.00 enclosed. Please reserve a place for me at the conference.

❑ I am interested in attending the conference and will submit a check for $175.00 by March 1, 1993.

Name: _____

Firm/School/Company: _____

Address: _____

_____

Telephone: _____ State Bar Number: _____

STATUTORY EMPLOYERS AND EMPLOYEES UNDER THE SOUTH CAROLINA WORKERS' COMPENSATION ACT
THE LAW AND RECENT CASES

by: Darryl D. Smalls, Esquire
Associate of Nelson, Mullins, Riley & Scarborough
Practicing in the area of Workers' Compensation

INTRODUCTION

The South Carolina Workers' Compensation Act imposes liability on a "statutory employer" who is not in privity of contract with the employee. The Act intends that all employees working on a job undertaken by a principal contractor be covered in the event a financially irresponsible subcontractor does not provide for his employees.[1]

South Carolina is one of forty-three states which have statutory employee/employer statutes.[2] Sections 42-1-400 through 42-1-450 establish the liability of owners, contractors and subcontractors for compensation benefits to workers not immediately employed by them. The legislative intent is to insure benefits to the claimant while placing liability upon all participants involved; owner, contractor and subcontractor. "In consequence, both the owner and the contractors whom he engages to do his work, are subjected to the requirements of the Act, and the workers receive double protection."[3] The statutory employer/employee doctrine also protects the statutory owner/contractor from civil suit by restricting the employee to his exclusive remedy of the Workers' Compensation Act for work-related injuries under S.C. Code §42-1-540.[4] Sections 42-1-400 and 42-1-540 give an owner tort immunity when an employee of a subcontractor has become a statutory employee.[5]

OWNER LIABILITY

Section 42-1-400 covers owner liability. This section provides that when an owner undertakes to perform any work which is part of his trade, business or occupation and contracts with any other person, subcontractor, for the execution by the subcontractor for any part of the work undertaken by the owner, the owner shall be liable for any compensation due employees of the subcontractor to the same extent as if the worker had been immediately employed by him.[6]

The South Carolina Court of Appeals[7] recognized the difficulty of determining whether a claimant is a statutory employee:

> The basic test is whether or not the work being done is a part of the general trade, business or occupation of the owner. This is true even though a subcontractor might occupy the status of independent contractor. Due to the many factual situations which arise, no easily applied formula can be laid down for the determination of whether or not the work in a given case is part of the general trade, business or occupation of the owner and, thus, each case must be determined on its own facts.[8]

The South Carolina Supreme Court has recognized several factors for consideration in determining the statutory employee issue.[9] These factors include: (1) whether the activity is an important part of the trade or business; (2) whether the activity is a necessary, essential and integral part of the business; and (3) whether the identical activity in question has been performed by employees of the principal employer.[10]

The first consideration is whether the activity is an important part of the owner's trade or business. In Marchbanks v. Duke Power Company,[11] the South Carolina Supreme Court recognized that the importance of the work to the owner is determinative of the statutory employee issue. Marchbanks involved an owner, Duke Power Company, which was in the business of generating and distributing electricity. Duke Power Company frequently required the erection and maintenance of poles and transmissions. It contracted with an independent contractor to paint 170 metal poles. One of the contractor's employees was injured while doing the work and sued Duke Power Company in a tort action. The Court held that the plaintiff was engaged in the trade, business, or occupation of Duke Power because such activity was an important part of the power company's business.[12] In addition, the Supreme Court noted that the power company had its own employees for similar work in the past; therefore, the Court also recognized the owners' employee factor.[13]

The second consideration is whether the activity is a necessary, essential, and integral part of the business. The Court of Appeals explained in Hairston v. RE: Leasing, Inc. the meaning of this factor.[14] Hairston involved an injury to an employee of a subcontractor. The subcontractor was responsible for the transportation of vehicles to RE: Leasing, Inc. The court determined that the transportation of vehicles to RE: Leasing, Inc. was an integral part of the trade and business of RE: Leasing. The Court of Appeals held that if the nature of the work being done is such an integral part of the operation of the company that the company cannot function without it, the company is a statutory employer.[15]

The third factor to consider is whether the identical activity in question has been performed by employees of the principal employer. The primary determinant will be whether the owners' employee could have performed the work. The Court of Appeals applied the owners' employ-

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ees test in Raines v. Gould Inc.[16] Raines involved an injury to an employee of an electrical subcontractor. The injured employee brought suit against the manufacturer, Gould, Inc., whose plant was being constructed at the time of the injury. The Court of Appeals stated that "ordinarily construction work, such as building a factory structure or making electrical installations, is considered outside the trade or business of a manufacturer", such work may be a part, if the "business by its size and nature is accustomed to carrying on a more or less ongoing program of construction, perhaps having a construction division, or has handled its own construction work in the past..."[17] The Court held that the employee was not a statutory employee. The Court found that while Gould had been involved in the construction of numerous of its own facilities in the past, Gould did not have a construction division nor did any of their regular employees perform construction work.

CONTRACTOR LIABILITY

Section 42-1-410[18] provides that when a contractor contracts to perform any work for an owner which is not a part of the trade, business, or occupation of the owner and then contracts with a subcontractor, the contractor shall be liable to any worker employed by the subcontractor for compensation which he would have been liable to pay if the worker had been immediately employed by the contractor. The owner's liability is limited to only those cases where the injury arose out of his trade, business, or occupation. The Act contains no limitation upon the liabilities of contractors.

RECENT CASES

The South Carolina Supreme Court and Court of Appeals have recently decided several statutory employer/employee liability cases. First, in Smith v. T.H. Snipes & Sons, Inc.,[19] a 1991 case the Supreme Court decided that a subcontractor himself may recover under §42-1-400. The Smith case represents a change in the law. In 1947, the Supreme Court in McDowell v. Stilley Plywood held that §42- 1-400 provides protection only to the employees of the contractor or subcontractor, and not to the contractor or subcontractor himself.[20] The court in Smith opined that there is "nothing in the language of the statute which precludes classification of a subcontractor as a statutory employee.[21]

Smith, a self-employed welder was hired by Snipes & Sons to repair a machine used as part of his business. Smith was fatally injured while repairing the machine. His dependents received workers compensation death benefits pursuant to the coverage that Smith obtained for his company. Smith's personal representative then sued Snipes & Sons for wrongful death. The defendants were granted summary judgment based upon the trial court's finding that Smith was a statutory employee of Snipes & Sons. Smith's personal representative appealed the decision.

The Supreme Court held that under South Carolina Code §42-1-400, a subcontractor himself may be a statutory employee. Factors to be considered in determining whether they worked as a "statutory employee" of the owner, for purposes of workers' compensation are: (1) whether the activity is an important part of the trade or business; (2) whether the activity is a necessary, essential, and integral part of the business; and (3) whether the identical activity in question has been performed by employees of the principal owner. The Court concluded that the record supported the findings and that the trial court had considered these factors in granting summary judgment.

A similar situation arose in Gentry v. Milliken & Company.[22] Milliken hired Sanders Brothers to install machinery at a textile mill. The plant had 40 to 50 regular employees who installed, maintained and removed equipment. Milliken often altered the equipment at the plant to meet changing market demands. In hiring Sanders Brothers, Milliken required them to obtain workers' compensation coverage for their employees and the payments to Sanders Brothers included an amount for this coverage. While an employee of Sanders Brothers, Gentry was fatally injured at the Milliken Plant as he was assisting with the installation of a scouring machine. Gentry's dependents received workers' compensation benefits from Sanders Brothers, and the decedent's estate later brought a wrongful death action against Milliken. The Circuit Court dismissed the wrongful death action finding that the suit was barred by the exclusive remedy doctrine since Gentry was a statutory employee of Milliken. Gentry's estate appealed.

The Court of Appeals affirmed the decision that Gentry was Milliken's statutory employee because he performed work that was part of Milliken's general trade, business, or occupation. The record indicated that Milliken employees had installed similar equipment in the past and the scouring machine was essential to Milliken's trade and business. The Court further noted that there was no simple formula to determine if work is part of the owner's general trade and that each case must be decided on its own facts. The court pointed out that a previous workers' compensation commission finding that decedent was a Sanders Brothers employee did not preclude a finding that the decedent was also Milliken's statutory employee. In Boone v. Huntington & Guerry Electric Company,[23] the Court of Appeals again addressed the statutory employee-employer relationship and the exclusive remedy doctrine.

Margaret Boone was an employee of J.P. Stevens. Plant management asked Huntington & Guerry Electric Company to run a temporary power supply to a sign. In carrying out this task, Huntington & Guerry ran conduit across a roadway. Margaret Boone tripped on the conduit and injured herself as she was leaving work. She sued Huntington & Guerry for negligence. Huntington & Guerry raised the exclusive remedy provisions of the Workers' Compensation Act as a defense to the lawsuit. The trial judge ruled that (1) the statutory provisions of workers' compensation laws do not give tort immunity to Huntington & Guerry in a suit by an employee of J.P. Stevens, and (2) Huntington & Guerry was not a statutory employee of J.P. Stevens.

The Court of Appeals affirmed

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STATUTORY EMPLOYERS

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the trial court's decision that Boone's lawsuit was not barred by the exclusive remedy provision of the Workers' Compensation Act. In reaching this decision, the court indicated that § 42-1-400 is meant to relieve from tort liability those potentially responsible for providing workers' compensation. The court further stated that "the plain language of code Section 42-1-400 persuades us to hold Huntington and Guerry had no workers' compensation liability to Margaret Boone"; therefore, "it has no tort immunity in this lawsuit."[24]

In Carter v. Florentine Corporation, Inc.,[25] the Supreme Court reversed a finding of the Circuit Court that the employee was not a statutory employee and therefore could maintain a civil negligence action.

Florentine was a South Carolina Corporation owned by a single shareholder. The sole asset was the land and building comprising Magnolia Mall in Florence, South Carolina. The Mall was managed by Equity Property Management Corporation. The management contract between Equity and Florentine required that Equity (1) hire and discharge all Magnolia Mall employees, (2) negotiate leases for all stores in the Mall, (3) maintain necessary repairs/upkeep of the Mall, and (4) compensate all employees of the subcontractors.

Carter, who was a customer service representative for the Mall, was hired and paid by Equity. On June 8, 1990, Carter clocked out from work and, while carrying trash from the customer service area, slipped and fell in the Mall corridor. Thereafter, he instituted a negligence action against Florentine for $250,000 in damages. Florentine answered and moved for summary judgment alleging that Carter was a statutory employee whose exclusive remedy was workers' compensation. The motion was denied. The South Carolina Supreme Court held that the Florentine Company had met all three tests in determining whether a subcontractor was a statutory employee of the owner. The Mall was clearly Florentine's sole business, and the work being performed by Equity was essential to its operation. Therefore Carter, the subcontractor, was a statutory employee.

The Court of Appeals also considered in Smith v. Squires Timber Company,[26] whether the employee-employer relationship exists by estoppel or by application of the statutory employer statutes. In Smith, Squires Timber Company entered into an agreement to sell wood to International Paper Company. Squires contracted with Randy Brown Logging Company to deliver timber to the International mill in Georgetown. Randy Brown Logging Company contracted with the decedent, Smith, to haul timber to the mill. During the course of the contract Smith was killed as a result of an accident at work. His dependents brought a claim for workers' compensation benefits related to his death. The decedent's dependents asserted that Smith was an employee by estoppel of Randy Brown Logging Company since Brown's insurance carrier had allegedly withheld premiums for workers' compensation coverage for Smith. Alternatively, Smith's dependents asserted that he was a statutory employee of Squires Timber Company.

The Single Commissioner denied compensation finding that Smith was neither an employee of Randy Brown Logging Company nor a statutory employee of Squires. The Single Commissioner determined that Smith was an independent contractor. The Circuit Court affirmed adding that the employment by estoppel failed since Smith's dependents did not sustain the burden of proof that the carrier had accepted premiums from Smith for workers' compensation coverage. Smith's dependents appealed.

The Court of Appeals affirmed the case in part but remanded a portion of the case to the Commission. The court found substantial evidence existed to support the findings that no premium had been withheld from Smith for workers' compensation coverage. Accordingly, they affirmed the Circuit Court's decision denying employee status by estoppel.

The Court of Appeals noted that Smith v. T.H. Snipes & Son supports a finding that a first line subcontractor may be a statutory employee. However, they found that the deceased employee in this case was a subcontractor of a subcontractor. The Court of Appeals determined that this was a jurisdictional issue and remanded the case to the Commission to determine whether or not a subcontractor of a subcontractor can be a statutory employee.

In summary, these recent cases and our existing statutes should be useful to those defense counsel seeking to use the statutory employer /employee provisions of the Workers' Compensation Act.

ENDNOTES

[1]. See S.C. Code §42-1-400, §42-1-410 and §42-1-420. See also, Maybank, Kelly, Hundley & Tollison, The Law of Workers' Compensation in South Carolina, Chap. 2, p. 41-68.

[2]. See IC A. Larson's Workmen's Compensation Law §49-11. This number includes all states except Alabama, California, Delaware, Iowa, Maine, Rhode Island and West Virginia.

[3]. Parker v. William and Madjanik, Inc., 275 S.C. 65, 72, 267 S.E.2d 524, 527, s 28 (1980) (quoting Blue Ridge Rural Elec. Co. Op. v. Burd, 238 F.2d 346 (4th Cir. 1956), reversed on other grounds, 356 U.S. 525 (1958)).

[4]. See S.C. Code §42-1-540.

[5]. Brittingham v. Williams Sign Erectors, Inc., 299 S.C. 259, 384 S.E.2d 319 (Ct.App. 1989).

[6]. See S.C. Code Ann. § 42-1-400 (1976).

[7]. Bailey v. Owen Electric Steel Company, S.C. 298 S.C. 36, 38, 378 S.E.2d 63, 64 (Ct. of Appeals 1989), reversed on other grounds,__S.C.__, 392 S.E.2d 186 (1990).

[8]. Bailey v. Owen Electric Steel Company, 298 S.C. at 38, 378 S.E.2d at 64.

[9]. Smith v. T.H. Snipes & Sons, Inc., __S.C.__ 441 S.E.2d 439, 440 (1991).

[10]. Smith v. T.H. Snipes & Sons, Inc., 441 S.E.2d at 440.

[11]. 190 S.C. 336, 2 S.E.2d 825 (1939).

[12]. Id. at 351, 2 S.E.2d at 831.

[13]. Id.

[14]. 285 S.C. 493, 334 S.E.2d 825 (Ct.App. 1985).

[15]. Id. at 497, 334 S.E.2d at 827.

[16]. 288 S.C. 541, 343 S.E.2d 655 (Ct.App. 1986).

[17]. Id. at 545, 343 S.E.2d at 658.

[18]. See S.C. Code §42-1-410.

[19]. __S.C.__ 411 S.E.2d 439 (1991).

[20]. 210 S.C. 173, 41 S.E.2d 872 (1947).

[21]. 411 S.E.2d at 440.

[22]. __S.C.__, 414 S.E.2d 180 (Ct. App. 1992)

[23]. __S.C.__, 416 S.E.2d 212 (Ct. App. 1992).

[24]. 416 S.E.2d at 215.

[25]. Op.No. 23716 (Sept. 1992).

[26]. __S.C.__, 417 S.E.2d 101 (Ct.App. 1992).

SEVEN-GUIDELINES THROUGH FORMER-CLIENT CONFLICTS

by Kirk A. Swanson

Conflicts of interest involving former clients often seem to be minefields that must be maneuvered differently every time a new client is singed up. There are innumerable cases purporting to describe when a lawyer must be, or need not be, disqualified from representing a client whose interest conflict with those of the lawyer's ex-clients. But the sheer number of decisions has done little to lessen the uncertainty.

The subject of conflicts of interest is one of the most fact-specific in the entire field of legal ethics. Any court decision that is intended to serve as a guide to future behavior is vulnerable to continual arguments to distinguish it. Moreover, lawyers and litigants alike have caught on to the tactical advantage of disqualification motions, and some are not shy about a move will advance their own interests.

Despite these difficulties, the conflict-of-interests rules on former clients exist for good reasons, not the least of which is to remind lawyers that their duties toward clients are not completely extinguished when the lawyer-client relationship comes to a close. In practice, the rules also limit those same duties, so that a former client cannot block the lawyer's representation of just any new client the ex-client doesn't like.

A Path Through The Minefield

While there is one Model Rule on the subject of representation adverse to the interests of a former client–Rule 1.9–there is no one principle answering when a conflict of this type is charged, or when a lawyer wishes to avoid the charge in the first place. It is possible, however, to find guidelines through the forest of opinions that address this topic. Each is generally relevant when a former-client conflict is at issue, although not all of the guidelines will necessarily be addressed by a judge or ethics panel; the matter may be disposed of on narrower grounds. And there are always exceptions to any general standard, as well as the potential for exceptions yet to come. What follows is a suggested path through (pick your metaphor) the minefield, the forest, or the maze of the precedents.

While this approach (like the case law) focuses on post-conflict disqualification, it is just as applicable--and, one hopes, more valuable--in helping a lawyer avoid a conflict of interest in the first place by providing a systematic method of examining how each new potential client may fit with the lawyer's past clientele.

Here are seven questions that should be asked when one wishes to determine whether a lawyer's representation a client will impermissibly conflict with his representation of a former client.

1. Was there ever an attorney-client relationship between the lawyer and a party who might seek his disqualification?

The starting point is to ask whether the person or entity who could ask for the lawyer's disqualification has any right to demand his removal from representation of the current client. Generally speaking, only one who had an attorney-client relationship with the lawyer has standing to seek that lawyer's disqualification. For example, it has been held that:

• A party cannot complain of a lawyer's current representation merely because the lawyer formerly represented the moving party's co-defendants in other litigation. *Fred Weber Inc. v. Shell Oil Co.*, 566 F2d 602 (CA 8 1977), *overruled on other grounds.* 612 F2d 377 (CA 8 1980).

• A lawyer who helped a corporate client obtain a patent can represent a second corporation that is opposing the patent's assignee and can argue the patent's invalidity, because the lawyer never represented the current holder of the patent. *Telectronics Proprietary Ltd. v. Medtronic Inc.*, 836 F2d 1332, 4 Law. Man. Prof. Conduct 3 (CA FC 1988).

• A lawyer who represented a bank and its directors can subsequently represent the directors and officers in a suit brought against them by the bank's successor in interest, the Federal Deposit Insurance Corp. The bank's attorney-client relationship did not transfer to the FDIC in this instance. *Federal Deposit Insurance Corp. v. Amundson,* 682 FSupp 981, 4 Law. Man. Prof. Conduct 19 (DC Minn 1988).

See also *In re Appeal of Infotechnology Inc.,* 582 A2d 215, 6 Law. Man. Prof. Conduct 374 (Del SupCt 1990) (non-client litigant lacks standing unless it can demonstrate actual conflict that will taint the proceedings); *In re Head,* 110 Bankr 621 (US BankrCt MGa 1990) (creditors could not demand disqualification of debtor's counsel); *Dillingham v. Crowley Maritime Corp.,* 6 Law. Man. Prof. Conduct 19 (DC Alaska 1990) (law firm's relationship with parties seeking its disqualification was at all times adversarial).

Implied Relationship

But every so often a party succeeds in convincing the court that its plea for disqualification should be heard despite the lack of a formal attorney-client relationship. A judge may find that there was an implied attorney-client relationship (or, more generically, a fiduciary connection) because the "client" was encouraged to place trust and confidence in the lawyer. Precisely when a court may reach this conclusion is difficult to predict, but a rule of thumb is that the more a lawyer deals personally with a non-client -- and especially the more it appears the lawyer may have had an opportunity to learn confidential information about the non-client -- the more potential there is for trouble in the form of disqualification under Rule 1.9.

In *Nemours Foundation v. Gilbane,* 632 FSupp 418, 2 Law. Man. Prof. Conduct 123 (DC Del 1986), the plaintiff, Nemours, established that even though it had not been a client of the lawyer whose disqualification (and that of his new firm) it sought, the lawyer had been privy to confidential information about Nemours' co-party in other litigation against a common adversary. The two parties had held joint "strategy sessions" that "necessitate a sharing of work product, attorney-client privileges, and other confidential information." The court concluded that Nemours must be considered a former client of the lawyer's explaining: "Although there was no express attorney-client relationship, a fidu-

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ciary obligation, or 'implied professional obligation,' existed nevertheless because Nemours disclosed information acting on the belief and expectation that such submission was made in order for [the lawyer's former firm] to render legal service to Nemours in furtherance of Nemours' interest."

This case differs from the Eight Circuit's result in *Fred Weber,* cited above, in which the court of appeals made clear that the complaining parties failed to show that they had supplied any confidential information to their former co-defendant's lawyers. Moreover, the Eighth Circuit emphasized that the previous litigation had ended at the preliminary stage, before the co-defendants had to prepare much of a defense or plan trial strategy. The court added in a footnote that it left open the question that was later reached in *Nemours Foundation* about what difference it would make if the co-parties jointly had extensively prepared for trial.

Insurance Cases

Insurance cases are always tricky, because they typically involve an attorney who was retained by an insurer to represent one or more insureds. There is no question the insured were the attorney's client in this situation (see, e.g. Ohio Ethics Opinion 88-6 (1988)), but what are the ramifications in future representations? The lawyer may succeed in defeating the insurer's claim that it, like the insured was also the lawyer's client for conflicts purposes. *Emons Industries Inc. v. Liberty Mutual Insurance Co.,* 747 FSupp 1079, 6 Law. Man. Prof. Conduct 355 (DC SNY 1990). But as noted previously, a party does not always have to prove former client status in order to complain of a lawyer's conflict of interest. A court is not going to ignore evidence that the insurer's interest would be significantly harmed by a conflict of interest that the insured himself has waived. See *State Farm Mutual. K.A.W.,* 575 So2d, 7 Law. Man. Prof. Conduct 3 (Fla SupCt 1991).

Organizations As Clients

It is clear that when a lawyer is retained by an organization, the client is the entity, not its employees, directors, or stockholders. E.G., *McCarthy v. John T. Henderson Inc.,* 587 A2d 280, 7 Law. Man. Prof. Conduct 117 (NJ SuperCt AppDiv 1991) (lawyer who represented corporation may represent party opposing separate corporation with same shareholders and officers as former client). Therefore, these constituents of the organizational client usually are unsuccessful in arguing that the lawyer also represented them personally and may not later represent a party opposing them. *E.g., Dalrymple v. National Bank & Trust Co. of Traverse City,* 615 FSupp 979 (DC WMich 1985) (bank directors); *Professional Service Industries Inc. v. Kimbrell,* 785 FSupp 676 (DC Kan 1991) (ex-president of company that lawyers' client acquired); *Ferranti International PLC v. Clark* 767 FSupp 670, 7 Law. Man. Prof. Conduct 118 (DC EPa 1991) (former vice president and general counsel of corporate client.) See also *Bieter Co. v. Blomquist,* 132 FRD 220 (DC Minn 1990) (firm representing joint venture did not have attorney-client relationship with joint venturers individually).

Parent And Subsidiary

Representation of a subsidiary corporation may also constitute representation of its parent. *Hartford Accident & Indemnity Co. v. RJR Nabisco Inc.,* 721 FSupp 534 (DC SNY 1989). And vice versa. *Gould Inc. v. Mitsui Mining & Smelting Co.,* 738 FSupp 1121, 6 Law. Man.Prof. Conduct 197 (DC NOhio 1990).

Prospective Clients

Then there is the prospective client problem. A preliminary discussion in which the lawyer and a potential client sound each other out may prove to be the foundation for a motion disqualifying the lawyer even though the talks never ripened into a formal retainer agreement.

The key question is whether the prospective client imparted confidential information to the lawyer relevant to the current representation. *Derrickson v. Derrickson,* 541 A2d 149, 4 Law. Man. Prof. Conduct 166 (DC CtApp 1988); *Bennett Silvershein Associates v. Furman,* 776 FSupp 800, 7 Law. Man. Prof. Conduct 364 (DC SNY 1997); Wisconsin Ethics Opinion E-89-5 (1989). Look out for that shadowy specter, *Bridge Products Inc. v. Quantum Chemical Corp.,* 6 Law. Man. Prof. Conduct 158 (DC NIll1990).

The advice on this topic is that the prospective client should be warned at the outset to reveal only enough information to enable the lawyer to determine whether he has a conflict of interest. Only after the conflict check has been completed, and after the lawyer has decided he is interested in the possibility of handling this person's legal matter, should the potential client be allowed to impart what may prove to be confidential information to the lawyer. See ABA Formal Opinion 90-358 (1990).

Subjective/Objective Test

The test used in determining whether a party should be treated as a client of the lawyer is an uneasy mix of the subjective and the objective: "An implied attorney-client relationship exists whenever the lay party submits confidential information to an attorney whom he reasonably believes is acting to further his interest." *Dalrymple v. National Bank & Trust Co.,* 615 FSupp at 986. "[T]he court may focus on the subjective expectation of the client that he is seeking legal advice in order to safeguard his individual belief and reliance." *Smalley Transportation Co. V. Prime Computer Inc.,* 137 FRD 397, 399 (DC MFla 1991) (client approached lawyer in his capacity as attorney and not solely as technical consultant on computers).

While this inquiry is called subjective and tries to see things from the client's-eye view, it quite clearly must have an objective aspect too. Otherwise, all the moving party would ever have to do is to state that he considered the lawyer to have been his attorney, and that would be the end of it. So although "the focus is on the putative client's subjective intent, the belief in an attorney-client relationship, must still be 'reasonable.'" *Professional Service Industries Inc. v. Kimbrell,* 758 FSupp at 676, 682 n. 3.

2. Is the client truly a FORMER client of the lawyer's?

Once it is established that the person or entity in question would have standing to move for the lawyer's disqualification, the next step is to determine whether the attorney-client relationship with that party has actually ended, or whether for conflicts purposes the bond still exists between lawyer and client. Unless the individual or organiza-

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tion is truly a *former* client, the lawyer must forget about Rule 1.9 and its more lenient "substantial relationship' test. Concurrent representation of two clients whose interest conflicts with each other's must be handled under Rule 1.7, and it erects a much higher hurdle. Concurrent representation of clients either adverse interest is considered prima facie improper.

Where a lawyer's representation of a client is not limited to a discrete matter with a clearly defined termination point, a question may arise whether the representation has ended and the client can now be considered an ex-client. In these circumstances, the lawyer has the burden of making clear to the client when the attorney-client relationship has ended. The Comment to Rule 1.3 provides: "If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so."

This "mistaken assumption by the client that the attorney-client relationship has not concluded arises not just in cases involving a retainer agreement, but also in situations in which the lawyer performed a series of services for the client on an ad hoc basis. A court may conclude under the circumstances that the client's assumption of an indefinite continuation of the representation is not erroneous, so that the lawyer's conflicts must be examined under Rule 1.7 rather than Rule 1.9. See *SWS Financial Fund A v. Salomon Brothers Inc.,* _____ FSupp_____, 8 Law.Man.Prof.Conduct 125 (DC NIll 1992).

'Hot Potato' Gambit

If a firm – perhaps because of a new hire or merger with another firm - finds itself with two clients who have or are heading into an adversarial relationship with each other, is the firm allowed to end its relationship with one of them then treat that client as a former client under Rule 1.9?

The answer in almost every case has been no. Courts will not allow a law firm to drop a client "like a hot potato" in order to shift resolution of the conflict question from Rule 1.7 to Rule 1.9. *Picker International Inc. v. Varian Associates Inc.,* 869 F2d 578, 5 Law. Man. Prof. Conduct 75 (CA FC 1989); *Stratagem Development Corp. v. Heron International NV,* 756 FSupp 789, 7 Law. Man. Prof. Conduct 43 (DC SNY 1991); *Harte Biltmore Ltd. v. First Pennsylvania Bank,* 655 FSupp 419, 3 Law. Man. Prof. Conduct 76 (DC SFla 1987); *Truck Insurance Exchange v. Fireman's Fund Insurance Co.,* 8 CalRptr2d 228, 8 Law.Man.Prof.Conduct 139 (Calif CtApp 1992).

Moreover, it was held in *Ransburg Corp. v. Champion Spark Plug Co.,* 648 FSupp 1040, 2 Law. Man. Prof. Conduct 268 (DC NIll 1986), that a client who terminates the attorney-client relationship upon being sued by another of its counsel's clients must, for conflicts purposes, be treated as a current client rather than as a former client. The question, the court said, is whether the lawyer-client relationship existed as of the date the lawsuit was filed. "To hold otherwise would allow such unethical behavior to continue unrestricted because a law firm could always convert a present client into a former client merely by seeking to withdraw after suing a present client," 648 FSupp at 1044 (citing *United Sewerage Agency v. Jelco Inc.,* 646 F2d 1339 (CA 9 1981)).

But the hot potato gambit is not always a disfavored move, when it is clear the lawyer is not deliberately maneuvering against one client to gain favor with another. Where a conflict develops between two clients the law firm already represents, the firm may be permitted to withdraw from its representation of one of them, so long as the firm was not responsible for creating the conflict and the withdrawal would not cause undue hardship to the client the firm wants to drop.

Citing its "common-sense" approach to resolving conflict questions, the Alabama Supreme Court concluded in *Ex parte Am-South Bank,* 589 So2d 715, 7 Law.Man.Prof.Conduct 316 (Ala SupCt 1991), that a firm may turn a current client into a former client, and then use Rule 1.9 to defeat a disqualification motion, if it can meet three conditions. First, the firm itself must not have created the conflict. Second, the firm must not have gained confidential information from the client seeking the firm's disqualification. Third, the firm may drop only the client whose interest would be less harmed by the withdrawal. (And, of course, under Rule 1.9 there can be no substantial relationship between the two clients' matters.)

A law firm was allowed to drop one client where the conflict was caused by client's merger activity as well as the law firm's own. *Gould Inc. v. Mitsui Mining & Smelting Co.,* 738 FSupp 1121, 6 Law.Man.Prof.Conduct 197 (DC NOhio 1990) (firm found itself representing both plaintiff and subsidiary of defendant in same action). In another case, a law firm succeeded in curing a conflict by getting rid of the partner who had brought the conflict-producing client of the firm. A key fact that saved the firm from disqualification was that the client who was dropped was not greatly prejudiced by the move on behalf of this client before, during, and after his affiliation with the firm. *Hartford Accident & Indemnity Co. v. RJR Nabisco Inc.,* 721 FSupp 534 (DC SNY 1989).

3. Are the interests of the current and former clients adverse?

Now that it has been determined that the party who might seek the lawyer's disqualification is a former client, the next question to ask is whether there really is a conflict between the interest of that party and those of the other client or clients involved. If their respective interests are not adverse, the lawyer is not forced to withdraw. E.g., *Jacuzzi v. Jacuzzi Brothers Inc.,* 32 CalRptr 188 (Calif CtApp 1963) (shareholders' derivative action not adverse to corporation's interest); *In re Dayco Corp. Derivation's Securities Litigation,* 102 FRD 624 (DC SOhio 1984) (no conflict between representation of employee suing corporation for wrongful discharge and representation of shareholders in derivative action); *In re Schraiber,* 103 Bankr 1001 (US BankrCt NIll 1989) (counsel's former representation of some defendants in dispute involving ownership of property did not disqualify him from representing other defendants in substantially related matter where two groups' interests were found not to be adverse).

Attempts to reach an all-inclusive definition of what makes clients' interest

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adverse have not proven to be much help. One court has said, "The adversity requirement protects against a former client's confidence being used against the client, in later litigation, to his or her detriment ... Generally the test of adversity is premised on whether or not the interest of the former and current clients are differing." *In re Dayco Corp. Derivative Securities Litigation,* "There is no requirement that the subsequent representation strike a totally adversarial posture. It should be enough that the two positions are not exactly aligned." *In re Blinder, Robinson & Co.,* 123 Bankr 900, 908 (US BankrCt Colo 1991).

The lawyer should take a clear-eyed view of the two representations. Would a reasonable observer conclude that the current client's success is likely to involve some detriment to the former client? Resolve doubts in favor of finding that two representations may be adverse, because as a practical matter the judge probably will do the same.

4. Is there a substantial relationship between the two representations?

The substantial relationship test is the keystone of the law on conflicts of interests involving former clients. This step of the process is the most heavily scrutinized by courts ruling on conflicts issues and is more often than not the deciding factor - occasionally the sole factor - in judicial determinations on disqualification motions filed by a lawyer's former client.

Unfortunately, it is also one of the two most confused questions that are addressed when purported conflicts involving former clients are at issue. (The other involves presumptions of shared confidences, discussed below under Question 6.)

What function is the substantial relationship test intended to serve? The courts are agreed that the test has something to do with a presumption of disclosure of confidential information. But how does this presumption work? Here are a pair of interesting explanations: "Once the former client proves that the subject matters of the present and prior, representations are 'substantially related,' the court will irrebuttably presume that relevant confidential information was disclosed during the former period of representation." And how can the former client prove this substantial relationship? "If there is reasonable probability that confidences were disclosed which could be used against the former client in the later adverse representation, moreover, a substantial relationship between the two cases will be presumed." (The first quote is taken from *Duncan v. Merrill Lynch, Pierce, Fenner & Smith Inc.,* 646 F2d 1020, 1028 (CA 5 1981), The second from *Thomas v. Municipal Court of Antelope Valley Judicial District of California,* 878 F2d 285, 288 (CA 9 1988).)

To be fair about it, the substantial relationship test was invented to spare former clients from the self-defeating necessity of having to reveal what confidential information they imparted to their lawyer as a means of making sure (through a disqualification motion) that the lawyer would not use this information to their disadvantage in his representation of another client. It also saves courts from having to hold in camera or ex parte proceedings every time a disqualification motion is filed. The test is a shortcut: If the former client demonstrates that there is a good deal of similarity between the matter the lawyer handled for him and the matter on which the lawyer is now representing another client, then the former client needn't go further and establish just what confidential information he gave the lawyer that will now likely be used against him. The very similarity in the two representations is enough to raise a common-sense inference that the lawyer learned from his former client will prove useful in his representation of another client whose interests are adverse to those of the former client.

Gallons of ink have been consumed by those who have tried to determine or explain what the test compares in deciding whether there is a substantial relationship between the representations: Facts? Legal issues? The representations overall? But the fundamental idea here seems to be *information.* All three subsections of Model Rule 1.9 (as amended in 1989) are limitations upon a lawyer's use of information generated in the representation of a former client; the subject of confidences is explicit in subsections (b) and (c), and is treated implicitly in subsection (a) because the substantial relationship test it set forth, if answered in the affirmative, leads to the presumption that the lawyer gained confidential information from the former client and is now in a position to use it to the former client's disadvantage.

What Information Is Confidential?

"Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client." Comment, Rule 1.9

The line of demarcation between confidential information and general information is frequently at issue in cases involving a former client's finances or business procedures. If the lawyer possesses detailed knowledge about them and, in his current representation, could use it to the former client's detriment, then there may exist grounds for the lawyer's disqualification.

An extreme example of this was represented in Michigan Ethics Opinion RI-35 (1989), involving a lawyer who had represented a corporation for more than three decades and had served on its board of directors. Part of his representation had involved the company's relations with distributors. The ethics panel ruled that unless the corporation gave its consent, the lawyer could not ethically represent a distributors association which at some point would probably take positions adverse to the corporation's interest even though the current status was that the association and the corporation were not adversaries and the lawyer had advised that he would not participate in any matter with which he had dealt as the corporation's attorney.

"The lawyer's extensive knowledge of the private and confidential matters of the Corporation's business necessarily provides the lawyer with greater insight and understanding of the Corporation's actions, and is certain to color the lawyer's thought processes while working with the Association," the committee stated. It concluded that "[e]ven though all business relations with the former client have ceased, the intimacy and breadth of the prior relationship with the former client makes it certain that the subject matter of the proposed representation and inevitable that an unintentional breach of

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confidences of the former client will occur."

To the same effect, on somewhat more common facts, its *Stitz v. Bethlehem Steel Corp.,* 650 FSupp 914 (DC Md 1987), where it was held that a lawyer who had worked as one of a corporation's in-house labor attorneys for more than nine years could not represent the plaintiff in a labor dispute against the corporation, given the lawyer's familiarity with the company's personnel policies and procedures that were substantially related to the issues in the present case and which knowledge could be used to the company's disadvantage.

But Model Rule 1.9 is careful to note that a lawyer's general familiarity with a former client's internal procedures usually is not, standing alone, enough to create a conflict of interest in representing a new client against the former client. The Comment to Rule 1.9 explains that "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client... The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question."

A prime example of this sensible outcome under the substantial relationship test is *Duncan v. Merrill Lynch, Pierce, Fenner & Smith Inc.,* 646 F2d 1020 (CA 5 1981). That case held that although a law firm had represented Merrill Lynch in 10 different matters during the previous decade, this fact alone did not warrant the firm's disqualification from representing an investor who was suing Merrill Lynch for securities fraud. The brokerage firm asserted that in the course of the prior representations involving securities matters, the lawyers had learned about Merrill Lynch's relationships with its customers and with its employees, knew its procedures, reviewed its records, held conferences with its officers and other employees, and worked closely with its inhouse lawyers.

Such generalities were not enough to require the law firm's disqualification, the Fifth Circuit said. "The statements offered by Merrill Lynch ... could be applied to virtually any law firm that had ever represented Merrill Lynch or any large brokerage firm," the court observed. "However, the fact that [this firm] used to represent Merrill Lynch, even on a variety of matters and over a relatively long period of time, is alone insufficient to establish the required nexus with the present case."

In Indiana Ethics Opinion 3 of 1991, the ethics committee decided that a lawyer who formerly had worked as a company's inhouse counsel on employment discrimination matters and who had left for private practice could represent a client in an employment discrimination matter against the company, provided the matter was a "wholly distinct problem" of the type he had handled while employed by the company and did not raise issues about policies or procedures the lawyer had prepared or implemented there. The committee advised that the lawyer's familiarity with the personalities and negotiating styles of those with whom he used to work fell into the category of "generally known" information whose use by the lawyer would not violate his former client's confidences.

5. Has the former client consented to the current representation, or waived objections to it?

A former client may consent to the lawyer's representation of another client with adverse interests, but the lawyer had better have strong documentation of informed consent before proceeding with the representation. Courts tend to be suspicious of assertions that an ex-client has released his lawyer from full adherence to the lawyer's duty of loyalty to the former client. They seek assurance that the former client truly understood what he was agreeing to when he gave consent to a potential conflict of interest.

Thus, it is sometimes said that in consulting with the former client, the lawyer must explain to him not only the conflicts that may arise, but also the implications they may have. E.g., *First Wisconsin Mortgage Trust v. First Wisconsin Corp.,* 422 FSupp 493 (DC EWis 1976) (disclosure of potential business conflicts between former and present clients does not indicate former client was informed of legal implications of law firm's continued representation of affiliated businesses which former client was now suing); *Martindale v. Richmond,* 782 SW2d 582, 6 Law. Man. Prof. Conduct 12 (Ark SupCt 1990).

The emphasis on informed consent means that the lawyer usually cannot treat the former client's bare knowledge of the other representation as consent to it. Lack of objection is not consent. Silence is not golden in this context - at least not for the lawyer. E.g., *Florida Insurance Guaranty Association, Inc. v. Carey Canada Inc.,* 749 FSupp 255, 6 Law. Man. Prof. Conduct 375 (DC SFla 1990) (law firm's letter to client's low-level employee that did not highlight conflict and did not disclose multi-million dollar magnitude of claims implicated in conflict does not amount to consultation with client); *Kearns v. Chrysler Corp.,* 771 FSupp 190 (DC EMich 1991) (fact that former client's new lawyers did not move for firm's disqualification does not indicate client's consent to conflict of interest); *Marketti v. Fitzsimmons,* 373 FSupp 637 (DC WWis 1974) (former client's knowledge that firm also represented another client is not consent to conflict); *Ransburg Corp. v. Champion Spark Plug Co.,* 648 FSupp 1040, 2 Law. Man. Prof. Conduct 268 (DC NIll 1986) (client's withdrawal from attorney-client relationship upon being sued by another of firm's clients did not constitute consent to firm's continued representation of other client).

Furthermore, if the former client is willing to give consent to the lawyer's representation of someone else with a potentially adverse interest, the lawyer is well advised to get it in writing, and to make sure the consent is not so limited that it may ultimately require his withdrawal anyway. For example, it has been held that a client's abstention from demanding the disqualification of his former lawyer during settlement negotiations does not constitute a waiver of his right to complain about a conflict if the negotiations fail and the matter heads for trial. *Koehring Co. v. Manitowoc Co.,* 418 FSupp 1133 (DC EWis 1976); *Kearns v. Chrysler Corp.,* 771 FSupp 190 (DC EMich 191).

Model Rule 1.9 does not indicate a limit on the scope of a former client's consent to the lawyer's conflict of interest. The Comment states: "Disqualification from subsequent representation is

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for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client." Nevertheless, even with consent the lawyer is probably still restrained by Model Rule 1.9(c) (1.9(b) before the 1989 amendment), which limits use of information about the former client to his detriment to that which is generally known and that which is allowed by the rules on confidential information and on candor toward tribunals, Rule 1.6 and 3.3.

This limitation was anticipated by some courts' interpretation of the Model Code. While the Code had no rule on former-client conflicts, some judges found in an ethical consideration, EC 4-5, a suggestion that clients could *never* truly consent to a lawyer's representation of a new client where the representation would entail the lawyer's use of the former client's confidences to the former client's disadvantage. The first sentence of EC 4-5 provides: "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes." Thus, it was said, a former client might allow lawyer to use confidential information for his own purposes, but not to the disadvantage of former client. *Westinghouse Electric Corp. v. Gulf Oil Corp.,* 588 F2d 221 (CA 7 1978).

The last sentence of EC 4-5 arguably supports this view: "Care should be exercised by a lawyer to prevent the disclosure of the confidences of one client to another, *and no employment should by accepted that might require such disclosure."* (Emphasis added.) Only where the client has clearly recognized and consented to the risk of disclosure of his confidences to his detriment (an improbable prospect) could this test be met. This test, arising as it did out if the ambiguity of the Model Code, has also been found compatible with the Model Rules; one court found the "same concepts" in Rule 1.9 as had been gleaned from the Code. *In re Schraiber,* 103 Bankr 1001 (US BankrCt NIll 1989).

In sum, the former client's consent allows the lawyer to represent his new client in a matter substantially related to the matter he handled for the former client, but realistically it does not permit the lawyer to engage in a representation that would truly harm the former client's interests. It defies common sense to expect that a former client would agree to let the lawyer injure his interests, or that the ethics rules would permit it.

Waiver

Consent–or more precisely, the lack of it–can be a two-edged sword, however. Courts usually will not allow lawyers to use the former client's absence of objection to the new representation as evidence of tacit consent. In extreme situations of hardship to the new client, however, they also will not allow a former client to play games with the lawyer by failing to object until the last minute and then springing a disqualification motion. A court presented with this fact pattern may allow the new representation, using various terms to justify it: implied consent, waiver, laches, or estoppel.

The common factor is that the former client has *unfairly* waited too long to object to the conflict of interest. That word "un-fairly" is important, because a waiver argument based on delay alone is an exceedingly weak one. E.g., *INA Underwriters Insurance Co. v. Nalibotsky,* 594 FSupp 1199, 1 Law. Man. Prof. Conduct 453 (DC EPa 1984); *Western Continental Operating Co. v. Natural Gas Corp. of California,* 261 CalRptr 100, 5 Law. Man. Prof. Conduct 283 (Calif CtApp 1989). One reason for this is that a lawyer's perceived disloyalty to his former client is considered an offense to the administration of justice as much as it is to the interests of the ex-client, so that the court has independent grounds upon which to disqualify the lawyer even when the former client is incapable of waiving the court's power to regulate the conduct of lawyers practicing before it, or the public's interest in what used to be called the appearance of impropriety. *Emle Industries Inc. v. Patentex Inc.,* 478 F2d 562 (CA 2 1973); *Cox v. American Cast Iron Pipe Co.,* 847 F2d 725, 4 Law. Man. Prof. Conduct 219 (CA 11 1988); *Baird v. Hilton Hotel Corp.,* 771 FSupp 24 (DC ENY 1991); *In re Head,* 110 Bankr 621 (US BankCT MGa 1990).

The circumstances that build an argument for finding implied consent (or a waiver of the right to object) are (1) the former client's full knowledge of the new representation and of the adverse interests it entails; (2) the opportunity to lodge an objection to it; (3) an unjustified failure to object, typically until just before trail; and (4) great hardship to the new client if disqualification is ordered. E.g. *River West Inc. v. Nickel,* 234 CalRptr 33, 3 Law Man. Prof. Conduct 35 (Calif CtApp 1987); *Donohoe v. Consolidated Operating & Production Corp.,* 691 FSupp 109, 4 Law. Man. Prof. Conduct 237 (DC NI11 1988); *Cox v. American Cast Iron Pipe Co.,* 847 F2d 725, 4 Law. Man. Prof. Conduct 219 (CA 11 1988); *Rossworm v. Pittsburgh Corning Corp.,* 468 FSupp 168 (DC NNY 1979).

One impressive step the lawyer can take, if feasible, is to provide the former client's new counsel with a copy of the lawyer's file from the former representation and to ask if there is any objection to the new representation. If no dissent is heard over a prolonged period during which the new representation proceeds, a court has reason to view suspiciously a late motion for disqualification. See *Trust Corp. of Montana v. Piper Aircraft Corp.,* 701 F2d 85 (CA 9 1983) (waiver of right to object where motion was not filed until 30 months after files were delivered for inspection); *First National Bank of Elgin v. St. Charles National Bank,* 504 NE2d 1257, 3 Law. Man. Prof. Conduct 116 (I11 AppCt 1987) (waiver after 16 months).

6. Is the presumption that the lawyer gained confidential information from the former client rebuttable in this jurisdiction?

Once it is established under the first four steps above that there is an actual or potential conflict of interest, the lawyer–by virtue of the substantial relationship test– is presumed to have gained confidential information from the former client that the lawyer will use in representing his new client, whose interests are adverse to those of this ex-client. If, under the fifth step, there has been no consent or waiver, then the question must be asked whether the jursidiction at issue gives the lawyer the opportunity to rebut the presumption that he posses confidential information.

If the presumption is irrebuttable in the particular jursidiction, then the inquiry is at an end. The lawyer cannot undertake the second representation

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or, if it has already begun, must withdraw from it. E.g., *Reardon v. Marlayne Inc.,* 416 A2d 852 (NJ SupCt 1980); *Carlson v. Langdon,* 751 P2d 344, 4 Law. Man. Prof. Conduct 84 (Wyo SupCt. 1988); *Huntington v. Great Western Resources Inc.,* 655 FSupp 565 (DC SNY 1987); *Monon Corp. v. Wabash National Corp.,* 764 FSupp 1320 (DC NInd 1991); *In re Blinder, Robinson & Co.,* 123 Bankr 900 (US BankrCt Colo 1991).

A minority of courts are willing to look at the circumstances of the former representation to determine whether a lawyer's involvement with a former client was so slight that it is possible he truly did not gain any confidential information from the client. The cases where this occurs are in which the lawyer in question did not personally represent the former client but rather was a member of the law firm that did. While the client of the firm is, legally speaking, a client of each lawyer in the firm, it may be that a particular lawyer's involvement with the client was nil, or peripheral. Such a lawyer (who has since moved to a different firm) may be offered the opportunity to explain to the court why he was not in a position to learn confidential information from his former firm's former client and thus why he should not be disqualified from now representing the former client's advisary. E.g., *Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp.,* 518 F2d 751 (CA 2 1975); *Roth v. Continental Casualty Co.,* 676 FSupp 816 (DC NI11 1987); *Graham ex rel. Graham v. Wyeth Laboratories,* 760 FSupp 1451 (DC Kan 1991); *Lemelson v. Synergistics Research Corp.,* 504 FSupp 1164 (DC SNY 1981).

Additional cases on the acceptability or (more usually) unacceptability of making rebuttable the presumption of receipt of confidential information during the representation of the former client are cited in *Smith v. Whatcott,* 757 F2nd 1098, 1100 (CA 10 1985); *U.S. Football League v. National Football League,* 605 FSupp 1448, 1461-62, 1 Law. Man. Prof. Conduct 740 (DC SNY 1985); and *Carlson v. Langdon,* 751 P2d 344, 348-49, 4 Law. Man. Prof. Conduct 84 (Wyo SupCt 1988).

One must be careful not to confuse the initial presumption created by the substantial relationship test–that the individual lawyer gained confidential information from his or his firm's former representation of a client–with the separate but related presumption that the lawyer with such information who then moves to another firm will share this confidential information with other lawyers in his new firm. This latter presumption relates to imputed disqualification of the entire firm, and is dealt with under a different provision in the Model Rules, Rule 1.10.

It may be that a particular court will consider both presumptions to be rebuttable *(Schiessle v. Stephens,* 717 F2nd 417(CA 7 1983)), or irrebuttable *(Reardon v. Marlayne Inc.,* 416 A2d 852 (NJ SupCt 1980), or will treat the first irrebuttable and the second as rebuttable *(Huntington v. Great Western Resources Inc.,* 655 FSupp 565 (DC SNY 1987) (dicta.)) But the important point in this analysis is that they are separate issues and must not be lumped together. The first inquiry–which is the focus of this article–must concentrate on the individual lawyer and whether that individual has a conflicts problem. Only if it is determined that he has a disqualifying conflict of interest involving a former client is the next question reached, which is whether that lawyer's new firm must also be disqualified. For a discussion of law firms' disqualification, see the Imputed Disqualification chapter behind the Conflicts of Interest tab in the Manual.

7. Has the presumption been rebutted?

If the jurisdiction allows the individual lawyer to offer evidence that he did not gain confidences or secrets about a former client, then the lawyer is given this last chance to avoid disqualification. The lawyer bears the burden of providing that his involvement with the former client was such as to permit a reasonable conclusion that he would not have learned any sensitive information about that client.

One way of doing this is to demonstrate that others in the firm handled the client's representation and that the lawyer's own involvement was at most tangential.

For example, in *Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp.,* 518 F2d 751 (CA 2 1975), Schreiber, a member of the law firm representing the plaintiff automobile dealership, had formerly worked as an associate with the Kelley Drye law firm representing Chrysler Motors Corp., the defendant in this action. Chrysler sought the disqualification of the plaintiff's lawyers on this basis. But the Second Circuit decided that Schreiber had demonstrated that his contact with Chrysler matters at Kelley Drye was so small that it did not deserve to be called a "representation" of Chrysler for conflicts of interest purposes. Schreiber submitted an affidavit showing that the Chrysler matters he had worked on were not substantially related to the present lawsuit and that he had not worked on any matter that was closely related to it. This was backed up with affidavits from two of his former colleagues at Kelley Drye, one of whom was the associate who had handled the bulk of the Chrysler dealer matters. Chrysler's assertion of a substantial relationship, drawn in "largely conclusory terms," was not accepted. The court suggested that Chrysler could have bolstered its argument through time records and affidavits from Schreiber's supervisors.

Cf. *LaSalle National Bank v. Lake County,* 703 F2d 252 (CA 7 1983) (lawyer's denial of knowledge about sewage agreement at issue was outweighed by evidence that lawyer was familiar with similar sewage agreements from his former employment in six-attorney county attorney's office; in deciding whether presumption has been rebutted "court may consider a number of factors, including inter alia, the size of the attorney's law firm, area of specialization of the attorney and his position with the firm"); *Schiessle v. Stephens,* 717 F2d 417 (CA 7 1983) (plaintiff's lawyer admitted working on same case for defendants at his former firm, but denied any "detailed investigation" of case or that he had even met clients; lawyer failed to persuasively contradict affidavit from colleague at former firm that lawyer was "partner in charge" of defendants' case, had discussed case with one of them on repeated occasions, and had participated in numerous discussions about case).

Another way of rebutting the presumption–if the court is willing, and most are not–is, by agreement of the parties, to submit confidential records to the judge for an in camera examination to determine whether confidential information that the lawyer picked up from the

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former client will likely be used in the lawyer's new representation. This procedure was used in *U.S. Football League v. National Football League,* 605 FSupp 1448, 1 Law. Man. Prof. Conduct 740 (DC SNY 1985), with the court deciding that the materials submitted failed to rebut the presumption. Since the purpose of the substantial relationship test is to avoid delving into confidential matters, many judges can be expected to reject requests for in camera examinations.

Of course, if the confidential information about the former client has no relevance to the present representation, the lawyer strictly speaking does not bear the burden of rebutting the presumption, because in such a situation the presumption has not even arisen. Because the information has no bearing on the current representation, the former client has failed to prove a "substantial relationship" between the two matters and thus the lawyer has no disqualifying conflict of interest. E.g. *Merle Norman Cosmetics Inc. v. U.S. District Court, Central District of Calif.* (Kemper), 856 F2d 98 (CA 9 1988); *INA Underwriters Insurance Co. v. Nalibotsky,* 594 FSupp 1199, 1 Law. Man. Prof. Conduct 453 (DC EPa 1984).

Finally–and this is especially relevant where the lawyer did not owe his loyalty soley to the former client during the former representation–the lawyer may be able to persuade the court that any information he gained from the former client (or from someone connected with the former client, such as an insurer) should not be treated as confidential because the client itself had no reasonable expectation of confidentiality. See, e.g., *Christensen v. U.S. District Court for the Central District of Calif.,* 844 F2d 694, 4 Law. Man. Prof. Conduct 131 (CA 9 1988); *Cornish v. Superior Court (Capital Bond & Insurance Co.m* 257 CalPrtr 383, 5 Law. Man. Prof. Conduct 149 (Calif CtApp 1989).

This is a tricky issue, however, because the lawyer must establish not only that the information was not *privileged,* but also that it was never intended to be *confidential* and could be used freely by the lawyer in other settings. See *West-*

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RECENT DECISIONS

State of South Carolina
In The Court of Common Pleas
Fourth Judicial Circuit
County of Darlington
Toyota of Florence, Inc.,
Plaintiff,
versus
Danny Ray Lynch, et al,
Civil Action No. 89-CP-16091
Defendents
Richard L. Beasley,
Plaintiff,
versus
Danny Ray Lynch, et al,
Defendants.
Civil Action No. 89-CP-16-092

ORDER AMENDING JUDGMENT

This matter came for a hearing in Sumter, South Carolina pursuant to the defendants Southeast Toyota (SET) and the JM Family Enterprises (JMFE) motion to alter or amend the judgment, as set forth by this Court's order dated August 18, 1992. In that Order, the Court held defendants SET and JMFE and their counsel in contempt for post-trial activities. Specifically, these defendants, through their counsel, engaged the services of Mr. William Coggin, a former FBI agent, to conduct post-trial interviews of the jurors in this case. The Court deemed these activities, due to the nature of the questions, to be contempt of court, and fined these defendants and their counsel $15,422.45. The matter was argued by counsel and the Court has carefully considered all arguments. The portion of the previous order of this Court holding defendants SET and JMFE in contempt and assessing a fine of $15,422.45 is hereby vacated with costs assessed to defendants. This decision has been reached after a full evaluation of not only the particular events here but also jurors as they fit in our judicial process.

The Court, after becoming aware of the activities of Mr. Coggin, called as many jurors as possible into Court in Florence County, South Carolina. Substantially all jurors showed up (Mr. Truett had died since the verdict was rendered). The Court did not permit counsel to question the jurors, but the Court informally queried them about the post-trial interviews. It became clear that further examination would be appropriate and SLED was requested to make a full that investigation was complete, all parties were given an opportunity to review the report. A hearing was scheduled on July 1, 1992 for the Court to determine what action should be taken, if any, in regard to post-trial interviews as well as other issues in the case.

As a result of the hearing, the defendants, JMFE and SET, and their counsel were held in contempt of court and were fined $11,922.45 (an amount equal to what the Clerk of Court of Darlington County reported was the costs of the trial to the County) plus $3,500.00 (the cost of SLED investigation), for a total of $15,422.45.

At the hearing, no testimony was given and only arguments of counsel were heard. The record does not reflect that anyone made a specific request to examine any juror as to statements regarding their encounters with Mr. Coggin.

Defendants now move that the order of contempt and fines be vacated. The main basis of this motion is two-fold: (1) that the order was unclear as to which counsel were subject to contempt and (2) that the defendants did not have an opportunity to confront witnesses, i.e. jurors, against them.

The first basis can easily be addressed by specifically naming the attorneys to be held in contempt. It was never the Court's intention to hold all counsel, their law partners, and associates to the same degree of responsibility as those who were actually involved in procuring and directing the activities of Mr. Coggin. However, the Court must examine closely the second part of the motion to determine it if persuades the Court to alter or vacate its order. Before the Court addresses whether the defendants should have been allowed to examine the jurors under oath, consideration should be given to the essence of the role of the juror in today's judicial system.

Normally a juror is notified several days ahead of time that his/her presence is required in court. The juror has no idea if the service is for one day, one

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week, or, as in this case, several weeks. All plans for work or home must stop to answer the call of the Court. When jurors report, they are informed they will receive pennies for mileage and as little as $8.00 a day for their service. Virtually all end up receiving a lot less than their employment check, which may cause debt problems. This Court remembers one juror in another case who drove a taxi all night to earn his wages while serving on a multi-week case. Once he fell asleep and received a warning from the Court not to work during the trial. The next day he looked tired and the Court ordered him to stand while the witnesses testified. All seemed well as he stood against the wall wearing what the Court considered prescription dark glasses. All hope ended when his relatively large mouth fell open and what can only be described as a loud snore permeated the Courtroom. The Court, admittedly concerned with his stand-up sleep routine, had him isolated while it considered a motion by both counsel to excuse who they termed "Rip Van Juror" from the panel. While the Court deliberated as to whether or not to penalize him, the juror wrote a very moving letter detailing his pending bankruptcy, pending law suits from creditors, and his numerous children for whom he was ordered to pay weekly child support equal to almost 6 times the juror pay. Another multi-week case resulted in the sheriff waiting for the jury to return a verdict while he held a warrant for the arrest of a juror for delinquent child support.

We ask our jurors to tell in an open packed courtroom of their friends, acquaintances and peers, things they normally hold very private. Things like:

(1) Have you ever been convicted of a crime for which you could have received more than 1 year?
Court: Yes sir, Mr. Sunday School Teacher.
Juror: Your Honor, I'm not sure if this qualifies, but 20 years ago as a teenager I was convicted of public drunk one weekend at the beach.
Court: That will not disqualify you.
Juror: I wish I'd known that; I wouldn't have mentioned it, especially since members of my Sunday School class came here to jury duty today.
Courtroom: Laughter as the embarrassed juror sits down.
Court: Yes sir, Mr. Banker.
Juror: Do bad checks count?
Court: Not small ones.
Juror: Good, I won't mention it since I'm up for a promotion at the bank.
Courtroom: Laughter. Local reporter writes notes for his paper.

(2) Is anyone unable to read or write?
Court: Yes sir, Mr. Mechanic.
Juror: I can not read or write.
Court: Well, how do you perform your work and read the directions on parts? Do your customers have concern with this?
Juror: I manage, Your Honor, and I have an assistant. My customers don't know this; my children don't even know-until now.
Courtroom: An uneasy hush and loss of potential customers.

(3) Does anyone have any mental or physical problems which would hinder their jury service?
Court: Yes, Mrs. Small Business Owner.
Juror: Yes, Your Honor, I had a mastectomy 2 years ago and I have a check up scheduled for Tuesday.
Courtroom: A detailed gaze by several spectators as the Court excuses the juror who walks out in tears.
Court: Yes, Mr. Dentist.
Juror: Your Honor, I see a Psychiatrist for my nerves and depression. I am presently on Prozac.
Court: Do you feel you could listen attentively to the testimony and evidence in a case without interference of your nerves or medication?
Juror: Yes sir.
Court: You're qualified.
Courtroom: Mumbling, as the juror slowly sits down among his potential patients.

In this case the jurors, in addition to rather extensive voir dire (which was understandable in litigation of this magnitude), also had to endure three weeks, including most weekends, of a very intense and complicated trial. The last several days they were sequestered until their verdict on Sunday afternoon.

After all this, they were subjected to what has been characterized as intimidating post-trial questions that some believed came from a government official. They were called back in before the Court several weeks later in another county for a preliminary inquiry by the Court. Virtually all the jurors came voluntarily, though the mileage was great and it required many to miss work. One juror, Mr. Truett, who interestingly enough was the first to get suspicious about the activities of Mr. Coggin, and had contacted the FBI office, had died since the trial.

It is highly probable that if these jurors were now forced to come back to court and testify under oath about the post-trial interviews, that sufficient evidence would be present to hold the defendants and its principal counsel in contempt. However, after all these citizens have been through, the question is does the Court deem it appropriate to further subject them to Court-sanctioned interrogation? What would be the point? To sustain the previous contempt order issued by the Court? To make it clear that this type of activity is inappropriate? The publicity and comments this Court has seen and heard indicate the latter has been made clear. The former is far less important and, certainly when balanced out with the inconvenience and concerns of the citizen jurors, would not justify a new hearing with these people again being called. The former is a means to reach the latter and if the bar and litigants across the state, through various dissemination mechanisms which have been at work since this trial, understand the perils of this conduct and how it reflects adversely on the legal profession, then the Court feels no regret in lifting its contempt decision.

Therefore, this Court finds in order to cite the defendants and their counsel for contempt, they have a right to confront the witnesses, i.e., jurors, that allege wrongdoing. After full consideration as detailed above, this Court is unwilling to subject the jurors to that, and the order of contempt is vacated.

The Court, however, feels that even short of contempt, it has a right to assess costs for the necessity of these post-trial proceedings by the admitted actions of the defendants and counsel. It is clear that in Matter of Delgado 279 S.C. 293, 306 S.E.2d 1591 (1983), our Supreme Court indicated the perilous nature of post-trial interviews with jurors. This decision, without even considering the likelihood of the uproar the defendants' post-trial actions caused, should have persuaded the defendants and counsel not to engage in this conduct without notification to the Court. The Court is

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RECENT DECISIONS

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where this process should have emanated to ensure fairness to the litigants and the citizen jurors.

Defendants chose not to do this, and these proceedings since have resulted. Additional court hearings, SLED investigations, US Attorney and Solicitor involvement, and, very importantly, more inconveniences and time to innocent people, some of whom say their view of the judicial process is now tainted, have all been required. It appropriate the defendants should pay the costs involved with these proceedings, save those of the Solicitor and US Attorney. Therefore, this Court finds that defendants Southeast Toyota and the JM Family Enterprises should pay the costs of the additional court proceedings and SLED investigations. The Court finds from previous information that the SLED investigations cost $3,500.00. Although the several hearings concerning the post-trial questioning were not held in Darlington County, that County was the central supplier of all records and basically coordinated all the hearings. Therefore, any costs paid should be paid to that County. In totality, the hearings took about a week of the Court's time. Based on information regarding the cost of court proceedings supplied to the Court, which was previously made available to the parties, this Court finds the sum of $3,000.00 would be appropriate for the cost of the post-trial hearings.

It should be noted that counsel for the defendant Nardelli suggested this matter be referred to The Board of Commissioners and Grievances and Discipline. This Court does not deem it appropriate that it issue a complaint or start an investigation in this regard. In fact, this Court does not make an opinion or finding regarding defendants' or counsels' activities as it applies to the conduct considered by this Board. Further, nothing in this Order prohibits reporting by any party, counsel or interested individual.

IT IS THEREFORE ORDERED that the previous Order of the Court holding defendants and counsel in contempt and assessing the sum of $15,422.45 as payment is hereby vacated. FURTHER, the defendants Southeast Toyota and the JM Family Enterprises, Inc. are hereby assessed costs of the post-trial proceedings concerning questioning of jurors of $3,500.00 to SLED and $3,000.00 to the Darlington County Clerk of Court. *

AND IT IS FURTHER ORDERED that, except as herein modified, this Court's Order of August 18, 1992 is reconfirmed and the remainder of defendant's motion pursuant to SCRCP 59 (e) is denied.
AND IT IS SO ORDERED.
JAMES E. LOCKEMY
PRESIDING JUDGE
Dillon, S.C. December 28,1992

* All costs shall be paid within ninety days of this Order.

SEVEN-GUIDELINES

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ern Continental Operating Co. v. Natural Gas Corp. of Calif., 261 CalRptr 100, 5 Law. Man. Prof. Conduct 283 (Calif CtApp 1989); *Rosman v. Shapiro,* 653 FSupp 1441, 3 Law. Man. Prof. Conduct 60 (DC SNY 1987) (although shareholders of close corporation who jointly sought advice from lawyer had no expectation of confidentiality and thus Canon 4 of Model Code did not require disqualification, appearance of impropriety was so strong that disqualification under Canon 9 was appropriate where lawyer now represented on shareholder against the other).

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WANT OF EQUITY

Justice LOGAN E. BLECKLEY, in Patterson v. Turner, 62 Ga. 674.

Opinion: "Want of equity" is a phrase which has two meanings. A bill may want equity because it presents a good case for a court of law, or because it presents no case at all. Used in the former sense, the point is made that the complainant, by his own showing, does not need the aid of a court of equity; used in the latter, it signifies that he is entitled to no redress in any court. A somewhat analagous instance of ambiguity in common speech may be specified: We may say "this purse contains no gold," when it is full of silver, or when it is empty; or "this vessel contains no wine," when it is full of oil, or when it contains neither wine nor oil. In English practice, and also in our own until it was made optional to resort to the superior court as a court of law for the adjudication of equitable as well as legal rights, if a bill wanted equity in either sense, a court of equity would not entertain it.

WORKER'S COMPENSATION COMMISSION

The South Carolina Employment Security Commission has recently certified that the average weekly wage in South Carolina for the period July 1, 1991 through June 30, 1992, was $393.06. Accordingly, beginning January 1, 1993, the **maximum weekly compensation rate,** which according to § 42-9-10 is to be no "more than the average weekly wage in this state for the preceding fiscal year," shall be **$393.06.**

This most recent increase raises the maximum weekly compensation rate by $13.24 (3.49%) over the 1992 rate of $379.82. An individual's compensation rate equals sixty-six and two-thirds percent of an individual's average weekly wage not to exceed the average weekly wage in South Carolina as determined by the South Carolina Employment Security Commission. In terms of total disability for 500 weeks, the maximum compensation award for 1993 will be $196,530. Generally, an individual must have earned $30,501 ($586.56 weekly) or more during the fifty-two week period prior to an accident in order to be paid at the maximum compensation rate.

TEN YEARS AGO

President ROBERT R. CARPENTER completed a successful term and was replaced by ERNEST J. "ERNIE" NAUFUL, JR. of Columbia. SAUNDERS "BAGGY" BRIDGES was elected President-Elect, WAYNE LOGAN Treasurer and GENE ALLEN Secretary. The Claims Management Association reported annual officers JERRY TARLETON, Farm Bureau President, TONY STOKES, National Grange Vice President, JIM WATTS Crawford & Company Secretary, C.L. MATTHEWS T.M. Mayfield Company Treasurer, E.B. MCCONKEY UAC Past President, CURTIS HIPP of State Farm Recorder. Also at its meeting, SAMUEL M. BLACK of the United States Fidelity and Guaranty was elected "Claims Manager of the Year for South Carolina". The Defense Line paid tribute to Judge ROY WANT, a long time member of our association who passed away on November 9, 1982. He was a brother of our good friend ISADORE BOGOSLOW.

TWENTY YEARS AGO

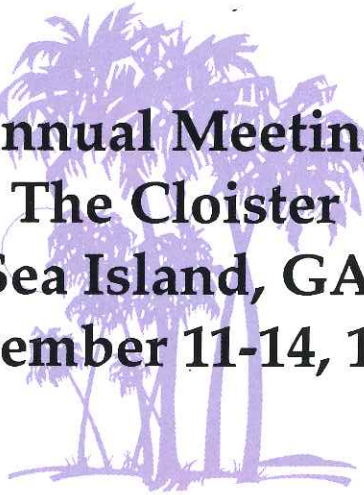
1972 saw the membership rise to 161 members. Annual Meeting was at the Adventure Inn at Hilton Head was very successful. LADSON HOWELL and JIM SHUMAKER were program chairmen. Friday's program was a seminar on Environmental Law and Saturday Medical Malpractice and recent changes in the Worker's Compensation Law. Membership dues raised from $25.00 to $30.00. It was noted that in July our association had sponsored a cocktail party for the Southern Association of Worker's Compensation Administrators at the Mills Hyatt House in Charleston. The South Carolina Commission was the host and Commissioner Paul McMillan was Chairman of the Southern Association. EDWARD W. MULLINS, JR. was elected President, DEWEY OXNER, JR., President-Elect, JAMES W. ALFORD, Secretary-Treasurer; Executive Committeemen elected were JACKSON L. BARWICK, JR., ISADORE BOGOSLOW, and C. DEXTER POWERS. The bank balance was $181.37.

SOUTH CAROLINA
DEFENSE TRIAL ATTORNEYS' ASSOCIATION
3008 MILLWOOD AVENUE, COLUMBIA, SC 29205

ADDRESS CORRECTION REQUESTED

SCDTAA 1993 DATES

Joint Meeting
Asheville, NC
Grove Park Inn
July 29-31, 1993



Annual Meeting
The Cloister
Sea Island, GA
November 11-14, 1993