

IN THE STATE OF SOUTH CAROLINA

In The South Carolina Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833
Appellate Case No. 2013-001645

D&C Builders, Inc. Appellant,

v.

Richard M. Buckley and Wells Fargo National Association Defendants,
And Richard M. Buckley Third-Party Plaintiff,

v.
Scott Dodenhoff Third-Party Defendant,

Of Whom,
Richard M. Buckley Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err in Ordering Appellant to reveal specific confidential information learned or likely learned by Counsel for Respondent through confidential attorney-client communications in its prior representation of Appellant in order to substantiate the disqualification of Counsel for Respondent under Rule 1.9 of the South Carolina Rules of Professional Conduct?

- II. Did the Circuit Court err in refusing to grant an Injunction preventing Respondent and Counsel for Respondent from accessing the specific confidential information Appellant was ordered to provide to the Court to substantiate the disqualification of Counsel for Respondent under Rule 1.9 of the South Carolina Rules of Professional Conduct?

- III. Did the Circuit Court err in failing to find that the matters involved in the prior representation and current representation were “substantially related” and disqualify Respondent’s Counsel?

STATEMENT OF CASE

This appeal involves Rule 1.9 of the Rules of Professional Conduct for attorneys and the rights associated with attorney-client confidential information in the course of seeking disqualification of an attorney under Rule 1.9. D&C Builders, Inc. (“D&C Builders”) served and filed a Notice and Certificate of Mechanic’s Lien against Richard M. Buckley (“Buckley”) and Wells Fargo Bank, N.A. (“Wells Fargo”) on February 11, 2013 in the amount of \$29,389.00. (R. pp. 7-11). D&C Builders then filed an action in Greenville County Court of Common Pleas on April 1, 2013 seeking to foreclose that Mechanic’s Lien. (R. pp. 12-19). Wells Fargo filed an Answer and Consent to Reference on or about April 25, 2013. (R. p. 20). Richard M. Buckley, through his counsel M. Stokely Holder and the law firm of Kenison, Dudley & Crawford, LLC, (collectively “Kenison Firm”) filed an Answer, Counterclaims and Third-Party claims against Third-Party Defendant Scott Dodenhoff (“Dodenhoff”) on May 15, 2013. (R. pp. 25-61)

On May 15, 2013, Kenison Firm served both D&C Builders and Dodenhoff with Interrogatories, Request for Production of Documents and Requests to Admit. (R. pp. 184-216). Also on May 15, 2013, the Kenison Firm filed a Motion to Dismiss on behalf of Buckley. (R. pp. 23-24).

A Motion to Disqualify Attorney and Law Firm with supporting Affidavit was filed by D&C Builders on June 19, 2013 and served on Buckley and the Kenison Firm on June 20, 2013. (R. pp. 62-64). A hearing was scheduled on Buckley’s Motion to Dismiss on June 20, 2013 before the Honorable Letitia Verdin. (R. pp. 70-75).

The hearing on the Motion to Dismiss was continued to give Buckley time to respond to the Motion to Disqualify and pending final resolution of the Motion to Disqualify. (R. p. 74, line 2). Judge Verdin stayed the time for D&C Builders and Dodenhoff to Reply to Counterclaims, Answer Third Party Claims, Respond to Interrogatories, Requests to Produce and Requests to Admit pending final resolution of the Motion to Disqualify. (R. p. 73, lines 17-21).

Buckley filed an Amended Answer, Counterclaims and Third-Party Claims on July 8, 2013. (R. pp. 76-109). The hearing on the Motion to Disqualify was also held on July 8, 2013 before the Honorable Edward Miller. (R. pp. 130-155). An Order was filed on July 16, 2013 requiring D&C Builders to submit a privilege log to the Court, Buckley and to the Kenison Firm to support its Motion to Disqualify “containing the specific information and knowledge it contends that KDC acquired through its prior representation of Plaintiff which will injuriously affect Plaintiff in this 2013 Action.” (R. p. 5, ¶ 4). The Motion to Disqualify was held in abeyance by the Court pending receipt of this information. (R. p. 6, ¶ 3).

On July 16, 2013, D&C Builders filed a Motion to Reconsider, Clarify and Amend Order to Issue Injunction with supporting Exhibits as to the Court Order of July 16, 2013. (R. pp. 156-160). A hearing was held on the Motion to Reconsider, Clarify and Amend Order to Issue Injunction on July 23, 2013 before the Honorable Edward W. Miller. (R. pp. 175-183).

An Order denying the Motion to Reconsider, Clarify and Amend Order to Issue Injunction was filed on July 25, 2013. (R. pp. 1-2). D&C Builders filed its Notice of Appeal on July 26, 2013. (R. pp. 248-249).

STATEMENT OF FACTS

This matter arises out of a motion to disqualify attorney Holder and the Kenison Firm from representing Defendant Buckley in this matter due to a conflict of interest. The Kenison Firm was actively representing Plaintiff D&C Builders, Inc. in a substantially related matter during the time that the actions giving rise to the current claims between D&C Builders and Buckley were arising. The Kenison Firm did not consult with D&C Builders to obtain consent prior to undertaking the current representation of Buckley. D&C Builders did not waive the conflict. (R. p. 68, ¶ 29).

Representation of D&C Builders.

D&C Builders is a construction company. Dodenhoff is a licensed contractor, shareholder, director and Vice President with the company. (R. p. 65, ¶ 2). On July 1, 2011, Dodenhoff retained the Kenison Firm to represent D&C Builders with regard to a large outstanding debt owed by a company called TMKG, Inc. for a construction job. (R. p. 65, ¶ 4). John T. Crawford, Jr. and Townes B. Johnson were the attorneys with the Kenison Firm representing D&C Builders in that case. (R. p. 65, ¶ 4). Dodenhoff was the sole contact with the Kenison Firm at all times on behalf of D&C Builders. (R. p. 66, ¶ 7).

During the course of the representation of D&C Builders by the Kenison Firm against TMKG, Inc., Dodenhoff provided confidential information to the Kenison Firm regarding the corporate structure and internal operations of D&C Builders. (R. p. 66, ¶ 9). Dodenhoff also provided confidential financial information related to the company

(R. p. 66, ¶ 11), as well as confidential information regarding his authorization and actions as an agent of the company. (R. p. 66, ¶ 12). Although some confidential information was provided in a written form such as e-mail communication, much of the information was provided to the attorneys at the Kenison Firm through verbal attorney/client communications. (R. p. 66, ¶ 8).

The Kenison Firm engaged in lengthy and extensive actions during its representation of D&C Builders against TMKG, Inc. It filed a Notice and Certificate of Mechanics' Lien on August 8, 2011 asserting a lien for services, materials and labor furnished in the amount of \$74,123.40. (R. pp. 269-270). On September 27, 2011, it filed a Lis Pendens, Summons and Complaint to foreclose the mechanics' lien on behalf of D&C Builders asserting claims for breach of contract, quantum meruit, and foreclosure of mechanics' lien (R. p. 256, ¶ 12 – p. 260, ¶ 35) and served interrogatories and requests for production of documents. (R. pp. 324-332). The Kenison Firm also filed a motion for partial summary judgment on behalf of D&C Builders on September 27, 2011. (R. pp. 278-280).

TMKG, Inc. filed an Answer and Counterclaims on November 22, 2011, denying the allegations of D&C Builders and asserting its own counterclaims against D&C Builders for breach of contract and quantum meruit. (R. p. 287, ¶ 12 – p. 288 ¶ 20).

The Kenison Firm filed a Reply to Counterclaims for D&C Builders on December 22, 2011 denying the allegations of the counterclaims and asserting affirmative defenses. (R. pp. 300-310). TMKG, Inc. filed a Memorandum in Opposition to D&C Builders' Motion for Partial Summary Judgment on February 29, 2012. (R. p. 311-315). The Kenison Firm filed a Motion to Compel Discovery with supporting

Exhibits on March 2, 2012. (R. pp. 321-339). On March 5, 2012, TMKG, Inc. filed a Petition to Vacate Mechanic's Lien and its own Motion for Partial Summary Judgment. (R. pp. 340-345). An offer of settlement was filed by the Kenison Firm on April 13, 2012. (R. pp. 356-357).

A hearing was held on the cross motions for summary judgment on April 19, 2012. (R. p. 355). An Affidavit of Scott Dodenhoff with supporting Exhibits was filed on April 19, 2012. (R. pp. 358-359). Following the hearing, an Order was entered on May 3, 2012 denying both motions for summary judgment. (R. p. 378-379). Subsequent to the denial of summary judgment, the parties engaged in extensive negotiations between April and July 2012 ultimately resulting in a settlement. (R. p. 67, ¶ 15). A Stipulation of Dismissal was filed on July 20, 2012. (R. p. 380).

Representation of Buckley.

In December of 2011, during the exact time the case against TMKG, Inc. was pending and the above-referenced discovery and motions were taking place, Dodenhoff was contacted by Buckley's son, Matt Buckley, about renovating Buckley's home. On January 4, 2012, Buckley and D&C Builders entered into an agreement to renovate Buckley's home located at 105 Cammer Ave. in Greenville (the "Buckley Project"). (R. p. 67, ¶ 14).

Construction on the Buckley Project began on February 5, 2012, two months prior to the TMKG summary judgment hearing, and continued through November 16, 2012. (R. p. 67, ¶ 15). The Certificate of Occupancy for the Buckley Project was issued on July 31, 2012. (R. p. 67, ¶ 16).

Upon the completion of the project, Buckley refused to pay the remaining balance due to D&C Builders for the renovations. (R. p. 67, ¶ 18). D&C Builders filed a Notice and Certificate of Mechanics' Lien to preserve its rights and then filed the current action to foreclose that Mechanics Lien. (R. p. 16, ¶ 4).

Buckley hired the Kenison Firm to defend the foreclosure action brought by D&C Builders. (R. p. 112, ¶ 7). On behalf of Defendant Buckley, the Kenison Firm filed an Answer, Counterclaims and Third-Party Claims against Dodenhoff individually. This Answer asserts fourteen (14) affirmative defenses, and although numbered differently, thirteen (13) of those defenses asserted in the Buckley Answer against D&C Builders were defenses also asserted by the Kenison Firm on behalf of D&C Builders in the Reply to the counterclaims in the TMKG, Inc. case. (Compare R. pp. 28-33 with R. pp. 306-309).

The initial Complaint filed by the Kenison Firm in the TMKG case on behalf of D&C Builders included causes of action for breach of contract (R. p. 256, ¶ 12 – p. 257, ¶ 16), quantum meruit (R. p. 257, ¶ 17 – p. 258, ¶ 20) and foreclosure of mechanics' lien. (R. p. 259, ¶ 28 – p. 260, ¶ 35). The Answer by TMKG asserted counterclaims against D&C Builders of breach of contract (R. p. 290, ¶ 37 – p. 291, ¶ 45), quantum meruit (R. p. 292, ¶ 53 – p. 293, ¶ 58) and vacation of mechanics' lien. (R. p. 291, ¶ 46 – p. 292, ¶ 52).

The D&C Builders complaint against Buckley simply asserts a cause of action of foreclosure of the mechanics' lien. (R. pp. 13-17). However, the Buckley Answer filed by the Kenison Firm includes eight (8) counterclaims against D&C Builders including

breach of contract, negligence, conversion, fraud, negligent misrepresentation, constructive fraud, and slander of title. (R. p. 39 ¶ 68 – 50 ¶ 114).

The Kenison Firm crossed the ethical line in alleging that its former client (1) **“did not have a functioning corporate structure, was incapable of making independent decisions, and did not follow the corporate formalities applicable to a South Carolina corporation at all pertinent times herein,”** (R. p. 50, ¶ 116); (2) **“was insolvent prior to and/or during construction of the Project”** (R. p. 51, ¶ 117); and (3) **“was grossly undercapitalized prior to and during construction of the Project.”** (R. p. 51, ¶ 118; R. p. 67, ¶ 20). Additionally, the **Kenison Firm asserted Third-Party claims against Dodenhoff**, the corporate representative for D&C, individually, that he (1) **treated debts and assets of D&C as his own personal debts** (R. p. 51, ¶ 120); (2) **dominated the finances, policies and business practices of D&C such that it was operated as a façade for his own personal operations** (R. p. 51, ¶ 121); and (3) **used his control of D&C to commit fraud against Buckley.** (R. p. 51, ¶ 122 – p. 52, ¶ 125; p.29, ¶131 – p.32, ¶148; R. p. 67, ¶ 20). **The Kenison Firm also alleged that D&C Builders and Dodenhoff breached fiduciary duties by not properly maintaining, accounting, paying or applying funds paid to them in trust.** (R. p. 59, ¶ 162).

In addition to the filing of the Answer, Counterclaims and Third-Party Claims, the Kenison Firm also served interrogatories and requests to produce on D&C Builders seeking information as to the corporate structure (R. p. 191, ¶ 16; p. 192, ¶ 18 ; p. 196, ¶ 17; p. 197, ¶18, 20), financial status (R. p. 190, ¶ 13 – p. 192, ¶ 20, p. 197, ¶ 18, 19) and information related to all jobs since January 1, 2011 (R. p. 192, ¶ 22), which would necessarily include all of the TMKG records. (R. p. 68, ¶ 21, 22). The Kenison Firm

also served Requests to Admit requesting D&C and Dodenhoff to admit that they do not maintain proper accounting records or appropriate tax records. (R. p. 198, ¶ 2; p. 199, ¶ 4-8; p. 68, ¶ 23).

Assertion of conflict of interest.

Based upon the allegations asserted by the Kenison Firm on behalf of Buckley, D&C Builders believed that confidential information obtained by the Kenison Firm in its representation of D&C Builders against TMKG, Inc. was being used, or was very likely to be used, against D&C Builders in the furtherance of the defenses and counterclaims of Buckley in this matter. (R. p. 68, ¶ 27, 28).

Prior to undertaking the representation of Buckley in this matter, the Kenison Firm was aware that it had previously represented D&C Builders in a prior mechanics' lien and foreclosure action against TMKG, Inc. (R. p. 111, ¶ 3). The Kenison Firm was also made aware of the conflict by Counsel for D&C Builders prior to the filing of the Motion to Disqualify. (R. p. 140, lines 4-12).

At the hearing on the Motion to Disqualify, D&C Builders presented the information referenced above and argued that the TMKG case and the Buckley case were "substantially related" under Rule 1.9 of the Rules of Professional Conduct and the representation of Buckley was prohibited. (R. p. 137, line 12 – p. 138, line 3). The Kenison Firm challenged the Motion to Disqualify on the basis that the facts of the Buckley case and the TMKG case are not "substantially related" and are "totally opposite," (R. p. 145, ll. 2-3), that they are unaware of any specific confidential matter at issue in the Buckley case, (R. p. 145, ll. 19-20), and have not been provided any specific

alleged confidential information that could potentially create a conflict. (R. p. 146, line 22 – p. 147, line 2). In support of these assertions, Attorneys Holder, Johnson and Crawford all state in their respective affidavits that they are “unaware of” or “do not remember” any confidential information provided by D&C Builders, Inc. to them in connection with their prior representation against TMKG, Inc. (R. p. 114, ¶13; p. 117, ¶4; p. 120, ¶4).

In addition to the above referenced Affidavits, the Kenison Firm also attempted to address the matter by filing an Amended Answer, Counterclaims and Third-Party claims removing some of the allegations against D&C Builders and Dodenhoff. (R. pp. 76 – 109).

During argument at the hearing, the Circuit Court requested D&C Builders provide the specific information it contended the Kenison Firm learned in its representation in the TMKG case that would be injurious to D&C Builders in the current case. (R. p. 150, lines 19-22). D&C Builders argued that such specific disclosure was not required by the ethical rule given the cases were “substantially related.” D&C Builders also objected to disclosing such information due to the client confidentiality. (R. p. 150, line 23 – p. 153, line 9). The Circuit Court nevertheless ordered D&C Builders to prepare and submit a privilege log to both the Court *and* the Kenison Firm of the information claimed to be confidential that the Kenison Firm could potentially use in the Buckley case. (R. p. 153, line 10 – p. 154, line 17).

Prior to the entry of the Order of July 16, 2013, counsel for D&C Builders requested clarification from the Circuit Court on the preparation of the privilege log and potential ethical issues implicated by the mere creation of the privilege log, as well as

requesting that the privilege log not be provided to the Kenison Firm. (R. p. 161 - 167). Specifically, Counsel expressed concern that complying with the Circuit Court's directive to produce the privilege log would arguably force Counsel to violate ethical obligations to his client. Counsel requested specific instruction as to how to address matters relayed in confidential attorney/client communications. (R. p. 166, lines 1-40). The Kenison Firm objected to this request and provided a proposed Order to the Circuit Court, which Order was signed by the Circuit Court without discussion and filed on July 16, 2013. (R. p. 168).

Having not received receiving further direction from the Circuit Court on the ethical issues raised in its letter, D&C Builders filed a Motion to Reconsider, Clarify and Amend Order to include Injunction again seeking clarification on the ethical issues. On July 18, 2013, the Kenison Firm forwarded a letter to the Court responding to the Motion to Reconsider and specifically stating unequivocally that **"no confidential information was gained by my firm in its prior representation of Plaintiff."** (R. p. 246, lines 27-29). The letter further states that **"The Plaintiff has failed to provide any "specific" confidential facts to counter this position."** (R. p. 246, lines 31-33).

A brief hearing was held on July 23, 2013 on the Motion to Reconsider wherein the Circuit Court expressed that it would not disqualify a law firm without some kind of basis (R. p. 178, lines 19-22), that if the Kenison Firm has confidential privileged information, and needed to have the opportunity to respond and explain whether it is or isn't privileged (R. p. 178 line 23 – p. 179, line 3). The Circuit Court admonished *Counsel for D&C Builders* that the only potential ethical violation would be Counsel failing to comply with the Order to produce the privilege log! (R. p. 180, lines 23-25).

Despite D&C Builder's position that a decision should be made based on the cases being "substantially related" and the likelihood that the Kenison Firm obtained confidential information rather than requiring disclosure of specific confidential attorney/client communications, the Circuit Court denied the motion to reconsider and upheld the Order for D&C Builders to provide a privilege log of the confidential privileged information it had provided to the Kenison Firm in the prior representation. This appeal followed.

STANDARD OF REVIEW

Whether a law supersedes the Rules of Professional Conduct is a question of law. Rule 1.6 Cmnt. 13, RPC, Rule 407 SCACR. An appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard. Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011)(citation omitted). "In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court." Hagood v. Sommerville, 362 S.C. 191, 191, 607 S.E.2d 707, 708 (S.C. 2005).

The determination of whether a party may immediately appeal an order issued before final judgment is governed by S.C. Code Ann. § 14-3-330 and must fall into one of those categories to be immediately appealable. Id. "The denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)." Id. at 709 [citing Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000)]. The attorney-client relationship is extremely important in our adversarial system and the rights related to representation by a particular attorney are

closely related to a particular mode of trial. Id. at 710. An order granting, continuing, modifying, or refusing an injunction is also immediately appealable. S.C. Code Ann. § 14-3-330(4), Curtis v. State of South Carolina, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (S.C. 2001).

ARGUMENT

A simple and logical rule is hammered into every law student in law school -- “You cannot represent a new client against an old client without there being a conflict of interest.” There are limited exceptions to this rule and sometimes it is permissible for an attorney to represent a new client against a former client. This case at bar between D&C Builders and Buckley does not fall into one of the narrow exceptions.

As the Supreme Court stated in State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (S.C. 2000):

Every South Carolinian has a vital interest in the fair administration of justice. This Court bears the ultimate responsibility for maintaining judicial integrity and the high standards of professional conduct among the members of the bar.

Id. at 449, S.E.2d at 109. The issues presented by this appeal are both “ethical” and “procedural” in nature. The right to choose one’s own counsel must be considered in light of the fair administration of justice. The novel question before this Court is “Through which lens should this matter be viewed?” From the facts and law presented, the Appellant contends that the ethical standards and the fair administration of justice should prevail over one client’s desire to choose its lawyer.

The federal courts agree as the United States Court of Appeals for the 8th Circuit, citing authority from the 5th Circuit has held, “**Disqualification is an ethical, not a legal**

matter.” State of Arkansas v. Dean Foods Products Company, Inc., 605 F.2d 380, 384 (8th Cir. 1979)(citing American Can Company v. Citrus Feed Company, 436 F.2d 1125, 1127 (5th Cir. 1971)). The New Jersey Supreme Court probably said it best:

The dynamics of litigation are far too subtle, the attorney’s role in that process is far too critical and the public’s interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyers’ representation in a given case.

Reardon v. Marlayne, Inc., 83 J.J. 460, 469, 416 A.2d 852, 857 (N.J. 1980).

The Kenison Firm was representing D&C Builders against TMKG, Inc. in a dispute over money and quality of work in a construction case at the same time D&C Builders was renovating Buckley’s home. The Kenison Firm’s representation lasted for over a year in that matter during which time D&C Builders provided a plethora of information about its company, its finances and its operations to the Kenison Firm in order to defend D&C Builders against TMKG.

Six months later, the Kenison Firm changed sides to represent Buckley against D&C Builders in their dispute over money and quality of work in a construction case.

The Kenison Firm claims there is no conflict representing Buckley because the individual attorneys “don’t remember” any confidential information learned from D&C Builders in the prior case. These attorneys also claim even if they did learn anything, what they learned either would not be relevant in this case or is no longer confidential because it was shared with a third party. The issue of whether they do or do not remember confidential information is not the standard for assessing whether there exists a conflict of interest under the Rules of Professional Conduct. There is the very real potential that, during the course of representation, the Kenison Firm will recall something

that is confidential or even that they use non-confidential information learned in the prior representation against their former client.

Rule 1.9 of the Rules of Professional Conduct states:

- (a) A lawyer who has formerly represented a client in a matter *shall not* thereafter represent another person in the same or *substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- ...
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter *shall not* thereafter:
 - (1) *use information relating to the representation to the disadvantage of the former client* except as these Rules would permit or require with respect to a client or when the information has become generally known...

Rule 1.9, RPC, Rule 407, SCACR. (Emphasis added).

D&C Builders sought disqualification of the Kenison Firm because it undoubtedly obtained information in its prior representation that would be relevant to the Buckley matter. A conflict of interest therefore exists under Rule 1.9(a) and under Rule 1.9(c) where former attorneys are prohibited from using not only confidential information, but **any information** to the disadvantage of a former client.

The Kenison Firm's defense is that its attorneys don't recall anything that would be relevant so they cannot use any information against its former client and that D&C Builders hasn't provided any specifics to refute their position. The disclosure of "specifics" necessarily requires disclosure of information that was, or may have been, provided through confidential verbal attorney-client communications. The Circuit Court's Order improperly placed the burden of proof on D&C Builders.

I. The Circuit Court erred in Ordering Appellant to reveal specific confidential information learned or likely learned by Counsel for Respondent through confidential attorney-client communications in its prior representation of Appellant in order to substantiate the disqualification of Counsel for Respondent under Rule 1.9 of the South Carolina Rules of Professional Conduct.

The attorney-client relationship is of paramount importance in the legal profession. It demands a confidential trusting relationship that often develops over time. Hagood, at 710. In preserving client confidences, a lawyer serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. (Preamble ¶8, RPC, Rule 407, SCACR & Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR). Rule 1.6(a) more specifically addresses this concept by requiring that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.” Rule 1.6(a), RPC, Rule 407, SCACR. “A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.” Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR. **“Confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship.”** Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR.

In this regard, it must be construed that the confidential nature of the attorney-client relationship constitutes a substantial right under S.C. Code §14-3-330(2). In this particular case, ordering D&C Builders to provide confidential information from attorney-client communications to the very attorneys being sought to be disqualified would be irreparable. This harm could not be corrected by an appeal from final judgment. Once the information is disclosed, it can’t be undisclosed. A bell cannot be unrung.

The Kenison Firm currently represents Buckley and will necessarily share the information to determine its relevance, or confidential nature. Accordingly, if the Kenison Firm is disqualified, the information would still be usable by Buckley with subsequent counsel who would otherwise not have that knowledge. As the Order appealed affects a substantial right that could not be corrected by an appeal from final judgment, this Court has jurisdiction to address this matter under S.C. Code §14-3-330(2).

Rule 1.9(a) recognizes the continuation of the confidentiality obligation once representation is terminated by the mandate that:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Rule 1.9(a), RPC, Rule 407, SCACR (Emphasis added). Rule 1.9(c) offers further protection to the client by prohibiting a lawyer who has formerly represented a client from using any information to the disadvantage of that client. Rule 1.9(c)(1), RPC, Rule 407, SCACR. These protections are in place for the former clients, not for the attorneys.

D&C Builders has sought to disqualify the Kenison Firm and its attorneys from representing Buckley in this matter because the firm was actively representing D&C Builders in another collection/foreclosure matter during the time D&C Builders was renovating Buckley's home. During its attorney-client relationship, which lasted for over a year and involved extensive confidential attorney-client communications, D&C Builders provided the Kenison Firm with information related to its corporate structure, financial status, internal operations and actions related to the TMKG matter. This

information is now relevant in the Buckley matter based on the defenses and counterclaims asserted by the Kenison Firm against D&C Builders. The request for disqualification was mandated because the matters being “substantially related” in light of similar facts, claims and defenses of both cases.

Although contending that the cases are not “substantially related,” the Kenison Firm actually challenged the disqualification on the theory that it does not remember obtaining any confidential information during the prior representation and D&C Builders had not provided any specific confidential information to them to justify disqualification. Despite the guidance contained in the Rules, the Circuit Court agreed with this strained logic and ordered D&C Builders to provide specific information that the Kenison firm obtained in the TMKG case that could now be used in the Buckley case.

The Court’s Order that D&C Builders provide specific confidential information is error and entirely improper under Rule 1.9, where Comment 3 to the Rule clearly states:

A former client *is not required* to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Rule 1.9 Cmnt. 3, RPC, Rule 407, SCACR (Emphasis added).

The Order of the Circuit Court is directly at odds with the ethical rule. The Circuit Court is ordering D&C Builders to reveal specific confidential information to prove the Kenison Firm has such information to thereby justify disqualification. The Court specifically stated, “I’m not going to automatically disqualify a law firm from

representation. If you want me to do something of that significant of nature, then there has to be some kind of basis.” (R. p. 178, lines 19-22).

As argued to the Circuit Court, the “basis” for disqualification under Rule 1.9 is whether the prior and current case are “substantially related.” (R. p. 179, line 18 – p. 180, line 4). The “substantially related” analysis is the only way to protect the attorney-client relationships in this type of situation. The rule was written this way on purpose and the Comments to the Rule further bear this out.

The Circuit Court, however, adamantly refused to consider this argument ordering the privilege log, stating, “Mr. Martin, you are just rehashing the argument you made before. *I’m not going to throw somebody out based on – without some reason to do it.*” (R. p. 180, lines 5-7). The Circuit Court further added:

Where’s the problem? I have made – let me just put it this way. I’ve made the ruling and argument is over. Okay? I normally don’t like to do that, but I’ve heard all this, I’ve examined it, read your motion, read everything. Turn over the privilege log.

I can’t make a determination if they’re disqualified or not without knowing about it. And I’m not going to know if the information is privileged unless they can show me – you could claim anything, that this – you could claim this is a secret and the other side doesn’t know about it. How can they respond? It’s called due process.

(R. p. 181, lines 14-24).

The Circuit Courts’ reasoning is contrary to the weight of existing legal authority. Courts that have addressed this issue in other jurisdictions unanimously agree that confidential information does not have to be disclosed to determine whether the conflict exists. The most similar case to the present matter is the case of Foulke v. Knuck, 784 P.2d 723, 162 Ariz. 517 (Ariz.App.Div. 2 1989). In Foulke, the attorney to be disqualified made the exact same claims as the Kenison Firm that no confidential

information had been obtained except what is now publicly known. In response the Court stated that this:

...contention fails to recognize the mandatory nature of ER 1.9(a). The rule does not require that confidences and secrets be divulged in order for a conflict to exist or for disqualification to be proper. State v. Allen, 539 So.2d 1232, 1234-35, (La. 1989); see also Arkansas v. Dean Foods Products Co., 605 F.2d 380, 383 (8th Cir. 1979); United States v. Kitchin, 592 F.2d 900, 904 (5th Cir.), cert. denied, 444 U.S.843, 100 S.Ct 86, 62 L.Ed.2d 56 (1979). Regardless of what was communicated during the representation of the former client, the rule prohibits subsequent representation of an individual whose interests are substantially adverse to those of the former client.

Id. at 522, P.2d at 728. [citing T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F.Supp. 265, 268-69 (S.D.N.Y. 1953)]. The court elaborated by holding:

The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

Foulke at 522, P.2d at 728 (emphasis added). See also Cord v. Smith, 338 F.2d 516, 524-25, (9th Cir. 1964); Matter of Evans, 113 Ariz. 458, 462, 556 P.2d 792, 796 (1976).

The Supreme Court of Iowa followed the same reasoning in Richers v. Marsh & McLennan Group Associates, 459 N.W.2d 478 (Iowa 1990), finding that the test is whether the relationship between the two cases are “substantially related.”

If such a relationship is found then the court will assume that the attorney obtained information in the first representation that is relevant to the subsequent litigation. Emle Indus., Inc. v. Pantentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973); Killian v. Iowa District Court for Linn County, 452 N.W.2d 426, 430 (Iowa 1990); Alexander v. Superior Court, 141 Ariz. 157, 164, 685 P.2d 1309, 1316 (1984). The movant need not show that confidences and

secrets were divulged in order for a conflict to exist. Foulke v. Knuck, 162 Ariz. 517, 522, 784 P.2d 723, 728 (Ariz.App. 1989).

Richers, 459 N.W.2d at 481 (emphasis added).

The Washington Court of Appeals analyzed existing cases on the issue and stated:

The plain language of RPC 1.9 indicates *actual proof of disclosure of confidential information is not necessary* if the matters are substantially related. The weight of authority from other jurisdictions similarly interprets the rule as not requiring proof of disclosure of confidential information.

Teja v. Saran, 68 Wn.App. 793, 846 P.2d 1375 (Wash.App. Div. 1 1993)(emphasis added)[citing Foulke v. Knuck, 162 Ariz. 517, 522, 784 P.2d 723, 728 (1989); Brent v. Smathers, 529 So.2d 1267 (Fla.Dist.Ct.App. 1988); United States ex rel. Lord Elec. Co. v. Titan P. Constr. Corp., 637 F.Supp. 1556 (W.D.Wash. 1986); Junger Util. & Paving Co. v. Myers, 578 So.2d 1117 (Fla.Dist.Ct.App. 1989); Martindale v. Richmond, 301 Ark. 167, 782 S.W.2d 582, 584 (1990); Oxford Dev. Minn., Inc. v. Ramsey, 428 N.W.2d 434 (Minn.Ct.App. 1988); Reading Anthracite Co. v. Lehigh Coal & Nav. Co., 771 F.Supp. 113 (E.D.Pa. 1991); Green v. Montgomery Cy., Ala., 784 F.Supp. 841 (M.D.Ala. 1992)].

North Carolina follows this rationale as well. Under Canon 4 that requires an attorney to preserve the Confidences and Secrets of a client, EC4-4 states:

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge....

Lowder v. All Star Mills, Inc., 60 N.C.App. 275, 280, 300 S.E.2d 230, 233 (N.C.App. 1983). Interpreting this Canon, the Lowder Court further held:

It is not necessary to show the attorney received confidential information. The ethical duty of an attorney under EC4-4 is broader than the attorney-client evidentiary privilege.

Id. at 282, S.E.2d at 234.

Perhaps the Court in Arkansas v. Dean Foods summed it up best when it stated:

To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule (protecting client confidences).

Dean Foods, 605 F.2d at 383.

The attorney-client relationship, both current and former, are of such importance that maintaining confidentiality and obligations to all clients is necessary for clients to trust their attorneys not to reveal confidential information and to never use information they obtained from the client against that client. When an attorney chooses to change sides and represent someone against a former client, the interests of justice are not served when the attorney can simply claim “I don’t remember anything confidential” or “I didn’t receive any confidential information.” Requiring the former client to prove the lawyer has information he could possibly defeats the very purpose of the ethical rules.

Consistent with the overwhelming legal authority cited above, Rule 1.9 provides the answer as to what “basis” the Court needs before disqualifying an attorney. The inquiry is imply whether the cases are “substantially related.” Comment 3 provides in no uncertain terms:

Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would

normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

Rule 1.9 Cmnt. 3, RPC, Rule 407, SCACR (Emphasis added). The example used in the Rule underscores the Rule's applicability in the case at bar:

For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse seeking a divorce.

Rule 1.9 Cmnt. 3, RPC, Rule 407, SCACR.

Both the TMKG case and the Buckley case involve the collection and accounting of money. The Kenison Firm obtained financial information from D&C Builders in the TMKG case and then turned around in the Buckley case and alleged D&C Builders was **"insolvent prior to and/or during construction of the Project"** (R. p. 51, ¶ 117) and **"grossly undercapitalized prior to and during construction of the Project."** (R. p. 27, ¶ 118; p. 67, ¶ 20).

The Kenison Firm contends the two cases are not "substantially" related and that **"no confidential information was gained by my firm in its prior representation of Plaintiff."** (R. p. 246, lines 27-29). Our Supreme Court has already held that this argument is without merit. Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996).

In Townsend, the attorney argued that his representation of a child as a guardian-ad-litem in a family court case was not "substantially related" to his representation of the child's father later in a support action involving the same child, and that he didn't use any information from the first case in the second. The South Carolina Supreme Court specifically rejected those arguments holding the standard for "substantially related" is:

...whether the affected lawyer "would have or reasonably could have learned confidential information in the first representation that would be of significance in the second."

Id. at 315, S.E.2d at 429 [citing Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.9:104, at 293 (1996)(emphasis added)]. Regarding the attorney’s claim that he does not actually use any information, the Court held:

Here, although he claims none of the same information was actually used in the two matters, Lawyer should have recognized the risk that information he gained during the custody matter in which he was the Daughter’s guardian ad litem might prove relevant to the child support claim and particularly to the college support claim in the action in which he represented Father.

Id. at 317, S.E.2d at 429(emphasis added). The Court found the attorney had a conflict of interest based upon these circumstances.

After arguing that it has no information that could be used in violation of Rule 1.9, the Kenison Firm takes their defense a step further by shifting the burden of proof onto their former client by asserting **“the Plaintiff has failed to provide any specific confidential facts to counter this position.”** (R. p. 246, lines 31-33). The Rules of Professional Conduct are written to guide attorneys, not clients. The burden of proof in seeking disqualification is on the person seeking it, but only to the extent of demonstrating that the prior case and the present case are “substantially related” such that, under Townsend, the attorney **“would have or reasonably could have learned confidential information in the first representation that would be of significance in the second.”** Id. at 317, S.E.2d at 429 (emphasis added). The Circuit Court erroneously adopted this shifting of the burden in ordering D&C Builders to disclose specific information provided to the Kenison Firm that could be used against it.

The Circuit Court apparently attempts to lessen the impact of requiring D&C Builders to provide specific confidential information by placing the privilege log under a protective order. (R. p. 6 ¶ 3). Unfortunately, a protective order does not protect D&C Builders at all in this case because the Order requires the information to be provided to the very people from whom it needs to be protected, Buckley and the Kenison Firm. (R. p. 178, line 23 – p. 179, line 3).

The entire reason for seeking disqualification of the Kenison Firm is to prevent the use of information obtained in the prior representation from being used against D&C Builders. (R. p. 158 ¶ 6). The Kenison Firm has already claimed it doesn't have any confidential information or its attorneys "don't remember" any confidential information. (R. p. 246, ll. 27-29; p. 114, ¶ 13; p. 117, ¶ 4; p. 120, ¶ 4). Therefore, any information provided in the ordered privilege log will either (1) refresh their memory, (2) be information they will now contend is no longer confidential, or (3) be new information that D&C Builders thought it had provided but had not actually provided. (R. p. 158, ¶ 7, 8). In either event, the providing of this information to Buckley and the Kenison Firm would clearly be giving the adversary more ammunition to use against D&C Builders. (R. p. 159, ¶ 12).

The Circuit Court's Order also would necessarily require Counsel for D&C Builders to turn over attorney work product. The Order requires providing information that is factually important to the case in counsel's opinion and would necessarily include facts that would be detrimental to D&C Builder's case against Buckley.

An additional ethical dilemma arises in that D&C Builders has not provided its current counsel the same information previously provided to the Kenison Firm in the

TMKG case. Therefore, to comply with the Circuit Court's order to prepare the privilege log, D&C Builders is required to reveal confidential information related to the TMKG case to current counsel who is then required to turn it over to the very party current counsel was retained to prevent using such information against D&C Builders. Since D&C Builders does not consent to the release of this information, compliance by current counsel would be in violation of Rule 1.6(a) of the Rules of Professional Conduct. Rule 1.6(a), RPC, Rule 407, SCACR. (R. p. 166).

Although Rule 1.6(b)(7) allows for an attorney to reveal confidential information when the lawyer reasonably believes necessary to comply with a court order (Rule 1.6(b)(7), RPC, Rule 407, SCACR), Comment 14 addresses this situation clearly:

A lawyer may be ordered to reveal information relating to the representation of a client by a court ...claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.

Rule 1.6 Cmnt. 14, RPC, Rule 407, SCACR. In attempting to raise this issue with the Circuit Court, counsel was admonished that the only ethical violation would be his failing to comply with an order of the Court. (R. p. 158, ¶ 5, 6; p. 166, lines 18-28; p. 180, lines 23-25).

If "confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship" (Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR), then this Court must protect that confidentiality, the sanctity of confidential attorney-client communications, and the fair administration of justice. If an attorney may avoid a conflict under Rule 1.9 by simply saying "I don't remember anything you told me," or "nothing you told me was or

is still confidential,” the whole foundation of client protection crumbles. The Rules of Professional Conduct which expressly provide that a client does not have to reveal specific confidential information to support disqualification, cannot be ignored simply because an attorney asks for it.

Although Buckley certainly has the right to choose his attorney, that right to counsel is not absolute. “This court has a duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar.” H&C Corporation, Inc. v. Puka, No. 4:12-cv-00013-RBH , Lawyers Weekly No. 002-175-13, 4 pp. (R. Bryan Harwell, J.)(D.S.C. October 11, 2013). The Puka Court, citing Donaldson v. City of Walterboro Police Dept., No. 2:06-cv-02492-PMD, 2008 WL 906707 (D.S.C. March 31, 2008), went on to hold:

As noted by Judge Duffy in Donaldson, “the court acknowledges that granting this Motion to Disqualify deprives the Plaintiff of his chosen counsel and increases the length of time this case will remain pending. However, the court is mindful of its responsibility to uphold the South Carolina Rules of Professional Conduct...”

Puka, at p. 4 (citing Donaldson 2008 WL at *4)(emphasis added).

See also United States v. Ross, 33 F.3d 1507, 1523 (11th Cir. 1994), wherein the Court held:

The need for fair, efficient, and orderly administration of justice overcomes the right to counsel of choice where an attorney has an actual conflict of interest, such as when he has previously represented a person who will be called as a witness against a current client...

Id. (citing United States v. Casiano, 929 F.2d 1046, 1052 (5th Cir. 1991)).

The Rules of Professional Conduct are in place for attorneys to follow and recognize potential conflicts of interest before undertaking representation so as not to prejudice either client in the process. The Kenison Firm knew they had represented

D&C Builders before undertaking to represent Buckley. (R. p. 111, ¶ 3). They were also made aware of the conflict by Counsel for D&C Builders. (R. p. 140, lines 4-12). Rather than protect the interests of both clients, recognize the conflict and withdraw, the Kenison Firm has chosen to change sides and try to force D&C Builders to prove it provided confidential information or other information relevant in this matter. The actions by the Kenison Firm do absolutely nothing to protect the interests of their clients, both current and former. The actions of the Kenison Firm are designed to protect the Kenison Firm.

The ability to trust in the confidential nature of attorney-client communications is most certainly a substantial right which will be significantly impacted if the Circuit Court is able to order Appellant to disclose confidential attorney-client communications as a requirement for disqualification of the Kenison Firm. Such a requirement is contrary to the Rules of Professional Conduct and the existing legal authority both expressed by the South Carolina Supreme Court in Townsend, and by most all jurisdictions. The Order of the Circuit Court that D&C Builders provide specific information it contends the Kenison Firm obtained in its prior representation of D&C Builders goes against the fundamental principle in the attorney-client relationship of protecting the interests of clients.

The Order of the Circuit Court of July 16, 2013 should be vacated, the Kenison Firm and all attorneys should be immediately disqualified from further involvement in this matter and all actions and filings of the Kenison Firm in this matter should be vacated.

II. The Circuit Court erred in refusing to grant an Injunction preventing Respondent and Counsel for Respondent from accessing the specific confidential information Appellant was ordered to provide to the Court to substantiate the disqualification of Counsel for Respondent under Rule 1.9 of the South Carolina Rules of Professional Conduct.

Despite the clear consensus in other jurisdictions as detailed above, the Circuit Court solely focused on whether information the Kenison Firm has is privileged, (R. p. 150, line 19 – p. 152, line 24; p. 181, lines 20-23), and refused to consider the appropriate standard under the Rules of Professional Conduct. The proper inquiry is whether there is a “substantial risk” that the Kenison Firm has confidential information (Rule 1.9 Cmmt. 3, RPC, Rule 407, SCACR) or, under Townsend, whether it “would have or reasonably could have learned confidential information in the first representation that would be of significance in the second.” Id. at 315, S.E.2d at 429. (R. p. 137, lines 16-25; p. 138, lines 11-17; p. 150, line 23 – p. 153, line 9; p. 179, line 18 – p. 180, line 7).

As an alternative, to further assist the Court in protecting the interests of both clients, D&C Builders requested the Court to issue an injunction against the Kenison Firm from accessing the information required to be produced for the Court. (R. p. 160). The purpose of an injunction is to “prevent irreparable harm.” AJG Holdings, LLC v. Dunn, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (S.C.App. 2009). If the information is provided to the Kenison Firm, even under a protective order, the providing of that information would be to the distinct disadvantage of D&C Builders and constitute irreparable harm. (R. p. 159, ¶ 12).

Both the TMKG case and the Buckley case involve the collection of money for construction work performed but not paid for. Both cases involve allegations that D&C Builders failed to properly perform work and was trying to collect more than is owed.

(R. p. 290, ¶ 41-42; p. 37, ¶ 57-61; p. 39-41, ¶ 70). Hypothetically speaking, if D&C Builders had provided information to the Kenison Firm during a verbal confidential attorney-client communication about other situations where D&C Builders had cut corners on jobs or other situations where clients accused them of overbilling to assist with defending the claims made by TMKG, that information would certainly be relevant and damaging in the Buckley case. While it is conceivable that the Kenison Firm truly does not remember, forcing the disclosure of that information to the very attorneys sought to be disqualified puts the client in a quandary. Does the client disclose and hope disqualification is granted and the information is somehow protected from use by the new counsel for Buckley, or does the client not disclose and risk the attorneys with the Kenison Firm suddenly “*remembering*” more about the information provided in the prior case than they do now. The entire basis for Rule 1.9 and the interpretation of what is “substantially related” is so attorneys may make the decision without placing clients in this unenviable position.

The Kenison Firm claims that no one in its office was aware of the facts and circumstances that gave rise to the Buckley matter while they were representing D&C Builders in the TMKG matter. (R. p. 145, lines 4-6). D&C Builders was engaged in the construction on Buckley’s house during that representation and discussed ongoing operations and the financial status of the company with the attorneys at the Kenison Firm. (R. p. 66, ¶ 11-13). In that situation, even the seemingly innocuous inquiry by the attorney during a telephone call of “How are things going?” becomes relevant confidential attorney-client information in the Buckley matter if, hypothetically, the response is “We’re so busy I don’t have time to be at all the job sites we’ve got going.”

The Kenison Firm alleged in Buckley's Answer that Dodenhoff "failed to physically appear on site at the Project to supervise and/or coordinate the work." (R. p. 37, ¶ 56). It is irrelevant that the Kenison Firm doesn't remember every communication with D&C Builder during that representation and everybody working there now contends they were not told anything relevant to this case. It is enough that they were representing D&C Builders in another similar matter while D&C Builders was working for Buckley.

The New Jersey Supreme Court stated in Reardon v. Marlayne, Inc., 83 J.J. 460, 416 A.2d 852 (N.J. 1980):

Because an attorney's ethical obligation may often be uncertain, reliance on the good faith of an individual attorney in all its human frailty provides an inadequate safeguard against improper behavior, both actual and imagined.

Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation. Or, out of an excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety.

Id. at 469, A.2d 857.

As demonstrated above by the overwhelming precedent from other jurisdictions and by the South Carolina Supreme Court's analysis in Townsend, D&C Builders should not be required to provide specific confidential information. (R. p. 159, ¶ 13). The Court in Townsend held that the standard for determining a conflict of interest is prospective, not retrospective. The test is whether the lawyer "would have or reasonably could have learned confidential information" not that the lawyer did in fact learn confidential information. Townsend at 315, S.E.2d at 429. How can it be protecting the client's interest or serving the interests of justice and the public's perception of how justice is served to require the client to prove he shared confidential information with the

attorneys? That obligation is placed squarely on the attorneys by the Rules of Professional Conduct.

The Circuit Court erroneously shifted that burden giving the Kenison Firm the benefit of the doubt on the claim they did not have any confidential information. In confirming the requirement of the privilege log, the Circuit Court stated:

“...my basic understanding of all lawyers is they swear an oath to be truthful and honest. And if – and I know Mr. Holder’s law firm. And if they are in possession of privileged information, then they’re not going to want to risk their law license on one case. ...that’s what you’re talking about them doing.”

(R. p. 179, lines 3-10).

The Kenison Firm proposes that the South Carolina Court of Appeals case of Madison v. Graffix Fabrics, Inc., 304 S.C. 321, 404 S.E.2d 37 (S.C. App. 1991) is the controlling authority and is more applicable to this situation than Townsend. (R. p. 142, line 22 – p. 144, line 19). The holding in Madison is that “an attorney is not prevented from representing a subsequent client against a former client where the duties required of him do not conflict with the duties in the first employment.” Id. at 325, S.E.2d at 40. The Kenison Firm claims that their respective duties to both Buckley and D&C Builders do not conflict because they don’t have any confidential information from the prior representation and the facts of these cases are totally different. (R. p. 144, line 20 – p. 145, line 6). Despite Madison being five years before the Court’s more specific clarification of Rule 1.9 in Townsend, even Madison supports D&C Builders position in this situation as the Court further stated:

The test of whether the attorney’s employment is inconsistent with his duty to a former client is whether acceptance of the new retainer will require him, in forwarding the interest of the new client, to do anything that will injuriously affect a former client in any matter in

which he formerly represented him, and also whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship.

Id. at 325, S.E.2d at 40, (Citing 7 Am.Jur.2d *Attorneys at Law* § 186). Most importantly, the Madison Court said “knowledge or information” rather than “confidential knowledge” or “confidential information.” Based on the allegations made in the Answer, Counterclaims and Third-Party Claims filed by the Kenison Firm, there is simply no way the Kenison Firm can forward any interests of Buckley without using information gained in the TMKG matter against D&C Builders in this matter.

The Kenison Firm cannot advocate zealously for Buckley if it is not able to effectively question Dodenhoff at trial. The Court in United States v. Ross stated:

If the conflict could cause the defense attorney improperly to use privileged communications in cross-examination, then disqualification is appropriate. Indeed, it is also true that disqualification is equally appropriate if the conflict could deter the defense attorney from intense probing of the witness on cross-examination to protect privileged communications with the former client or to advance the attorney’s own personal interest.

Ross at 1523. The Circuit Court determined the decision for limited representation was between Buckley and the Kenison Firm telling Counsel for D&C Builders, “You’ve got no business getting involved in an attorney and their client’s relationship” and “That is between his counsel and the client.” (R. p. 148, lines 1-16). Contrarily, that decision goes to the heart of the fair administration of justice.

Finally, if D&C Builders is required to disclose the information to the Kenison Firm, there would be no other remedy to address the harm. (R. p. 159, ¶ 14). Once that information is disclosed, it can’t be undisclosed. If the Court denies the Motion to Disqualify, D&C Builders has provided ammunition for the Kenison Firm to represent

Buckley. Even if the Court grants the Motion to Disqualify, the information disclosed in the log could be used against D&C Builders by Buckley. If Buckley obtains a new attorney and the Court prohibits the use of any of that information in the proceeding, the knowledge of the information may help shape a better strategy by the new attorney or provide direction to lead to the discovery of other similar information that could be used, all to the disadvantage of D&C Builders.

If the Court had issued an injunction against Buckley and the Kenison Firm from accessing the information, the requested information could be provided to the Court for it to evaluate prospectively whether that information is of the type that would generally be confidential or, based on the circumstances of the two cases, be information that could be used to the disadvantage of D&C Builders in the present case. This procedure would have at least allowed the Circuit Court to conduct the analysis contemplated by the Rules of Professional Conduct and the Court in Townsend without jeopardizing the interests of either former or current client of the Kenison Firm.

Based upon the circumstances that providing the requested information to Buckley and the Kenison Firm would be to the distinct disadvantage of D&C Builders, that the legal standard under Townsend and Madison demonstrate the information is not necessary to make an analysis for disqualification, and the fact that D&C Builders would be left with no other remedy once that information was released, the Circuit Court erred in failing to issue an injunction preventing Buckley and the Kenison Firm from accessing the requested information.

If this Court decides against the well reasoned opinions of other jurisdictions and holds that South Carolina requires disclosure of specific confidential information to

support an attorney disqualification, this Court must nevertheless reverse the Circuit Court's order denying the request for an injunction and remand the matter with instructions to the Circuit Court to protect the fair administration of justice. There is ample information in the Record on Appeal to overwhelmingly support finding that these matters are "substantially related" and this Court should instruct the Circuit Court to immediately disqualify the Kenison Firm from representing Buckley in this matter and vacate all filings and actions taken by the Kenison Firm on behalf of Buckley.

Alternatively, Appellant would ask that the Circuit Court be instructed to issue an injunction on the information provided by D&C Builders pursuant to the Order of July 16, 2013 and for the Circuit Court to assess the information provided pursuant to such Order prospectively under the "substantially related" test promulgated by the Supreme Court in Townsend, to wit: whether the Kenison Firm would have or reasonably could have learned such confidential information in its representation of D&C Builders that may become relevant in representing Buckley against D&C Builders.

III. The Circuit Court erred in failing to find that the matters involved in the prior representation and current representation were "substantially related" and disqualify Respondent's Counsel?

The Kenison Firm was actively representing D&C Builders in a "substantially related" case while D&C Builders was doing the construction for Buckley that gives rise to the current case. The Kenison Firm was attempting to collect \$75,000 that was due to D&C Builders from TMKG during that time and then alleges on behalf of Buckley that during that same time D&C Builders "**was insolvent prior to and/or during construction of the Project**" (R. p. 51, ¶ 117) and "**was grossly undercapitalized prior**

to and during construction of the Project.” (R. p. 51, ¶ 118; p. 67, ¶ 20). There can simply be no clearer situation where disqualification must be ordered, but that is far from the only example in this case.

The Kenison Firm was representing D&C Builders as a corporate entity in the case against TMKG, Inc. Unbelievably, the Kenison Firm alleged on behalf of Buckley against D&C Builders that it **“did not have a functioning corporate structure, was incapable of making independent decisions, and did not follow the corporate formalities applicable to a South Carolina corporation at all pertinent times.”** (R. p. 50, ¶ 116). The Kenison Firm dealt exclusively with Dodenhoff as a representative of D&C Builders, gathering information about the company’s operations to defend it against TMKG, and now allege on behalf of Buckley that Dodenhoff **treated debts and assets of D&C Builders as his own personal debts** (R. p. 51, ¶ 120), **dominated the finances, policies and business practices of D&C Builders such that it was operated as a façade for his own personal operations** (R. p. 51, ¶ 121), and **used his control of D&C Builders to commit fraud.** (R. p. 51, ¶122, 123; p. 52, ¶145, 125; p. 53, ¶131 – p. 56, ¶148; p. 67, ¶ 20).

After this information was brought to light in the Motion to Disqualify, the Kenison Firm filed an Amended Complaint removing all of the above allegations. (R. p. 147, lines 6-12; pp. 76-109). Removing those specific allegations does not alter the fact that, as stated in Rule 1.9 Comment 3, “a substantial risk that confidential factual information as would have normally been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” Rule 1.9 Cmnt. 3, RPC, Rule 407, SCACR. Whether the Kenison Firm has any information upon which to

base these allegations when initially pled is irrelevant as to whether they should be representing Buckley in the first place. The mere assertion of these allegations demonstrate that the information obtained from D&C Builders and Dodenhoff in the TMKG representation would be relevant in forwarding the interest of Buckley under Madison. Id. at 325, S.E.2d at 40. This scenario fits neatly in the definition of “substantially related” matters under Rule 1.9 and Townsend.

Additional comparisons confirm the TMKG case and the Buckley case are “substantially related” when it comes to analyzing this situation under Rule 1.9. Appellant offered to provide the Circuit Court with the documentation from the TMKG case to compare with the Buckley case. (R. p. 152, lines 15-18). In comparing the pleadings, the claims and defenses are virtually identical. (R. p. 134, line 16 – p. 135, line 7). In its Answer for Buckley, the Kenison Firm asserts fourteen (14) affirmative defenses. Although numbered differently in this Answer, thirteen (13) of those defenses against D&C Builders were also asserted by the Kenison Firm on behalf of D&C Builders in the Reply to the counterclaims of TMKG, Inc. (R. pp. 28-33; pp. 292-295). The Complaint filed by the Kenison Firm in the TMKG case on behalf of D&C Builders included causes of action for breach of contract, (R. p. 256), quantum meruit, (R. p. 257), and foreclosure of mechanics’ lien. (R. p. 259). The Answer by TMKG asserted counterclaims against D&C Builders of breach of contract, (R. p. 290), quantum meruit (R. p. 292) and vacation of mechanics’ lien. (R. p. 291). The D&C Builders Complaint in the Buckley action simply asserts a cause of action of foreclosure of the mechanics’ lien. (R. pp. 13-17) However, the Buckley Answer filed by the Kenison Firm includes eight (8) counterclaims against D&C Builders including breach of contract, negligence,

conversion, fraud, negligent misrepresentation, constructive fraud, and slander of title. (R. pp. 39-50). Can there be a better example of changing sides?

Although the Buckley matter deals with a different property and a different contract than the TMKG matter, both cases involve the same allegations against D&C Builders by both TMKG and Buckley, including non-performance, (Compare R. p. 291, ¶ 43 with R. p. 39, ¶ 70; p. 48, ¶ 104), unsatisfactory performance, (Compare R. p. 292, ¶ 54 with R. p. 40, ¶ 70(e)), negligence, (Compare R. p. 5, ¶ 40 with R. p. 42, ¶ 74), unlawful demands for payment, (Compare R. p. 291, ¶ 43, 48 with R. p. 37, ¶ 60, 61; p. 46, ¶ 86; p. 47, ¶ 95; p. 53, ¶ 132; p. 55, ¶ 141; p. 57, ¶ 151), insufficient documentation to support payment due (Compare R. p. 291, ¶ 47 with R. p. 38, ¶ 65, p. 59, ¶ 162), and failure to complete the project (Compare R. p. 291, ¶ 43 with R. p. 16, ¶ 40(b)). The Kenison Firm was charged with defending D&C Builders against these claims brought by TMKG, but now wants to change sides to assert these same claims against its former client in representing Buckley. Despite the Kenison Firm's assertion that the two cases are "totally opposites," (R. p. 145, lines 2-3), the cases clearly meet the standard of being "substantially related."

Rule 1.9(a) of the Rules of Professional Conduct prohibits an attorney from representing someone in a "substantially related" matter when that person's interests are materially adverse to the interests of the former client. Rule 1.9(a), RPC, Rule 407, SCACR. "Substantially related" is defined in Comment 3 as when there "is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter," Rule 1.9 Cmnt. 3, RPC, Rule 407, SCACR; by the South Carolina Supreme

Court in Townsend as when “the affected attorney would have or reasonably could have learned confidential information in the first representation that would be of significance in the second,” Id. at 315, S.E.2d at 429; and even by the Court in Madison “whether the attorney will be called on in his new relation to use against a former client any knowledge or information acquired in the former relationship.” Id. at 325, S.E.2d at 40. Based on the pleadings and Affidavit of Scott Dodenhoff, it is clear that these two cases meet the definition of being “substantially related” so as to preclude representation of Buckley by the Kenison Firm.

Disqualification is mandated by Rule 1.9(c) which prohibits a lawyer from using **any information** relating to the representation of the former client to the disadvantage of the former client. Rule 1.9(c)(1), RPC, Rule 407, SCACR. The Circuit Court and the Kenison Firm appear to presume this requirement only applies to the use of confidential information against a former client, and as has already been discussed previously, the Kenison Firm contends it has no confidential information from the prior representation. The Rule does not say “confidential information” but rather just “information.” The Kenison Firm would argue the exception included in the Rule for when information becomes generally known clarifies that the Rule has to be talking about confidential information. “Generally known” and “not confidential” are two very different things. It is “generally known” that McDonalds is fast food restaurant, but it is not generally known where they buy their hamburger buns. It may be “generally known” that D&C Builders does construction work, but not generally known who associated with D&C Builders is a licensed general contractor. That information is readily available on the

Department of Labor's website, but "readily available" and "generally known" are two very different things.

This logic is clearly recognized by other courts such as in North Carolina where it has been held that "an attorney should not use against a former client information he has received while representing that client although the information is not confidential and is available to others." Lowder at 282, S.E.2d at 234.

The Kenison Firm contends that Buckley's daughter-in-law confirms in her affidavit that Dodenhoff told Ms. Buckley about everything he now contends was confidential information in the TMKG matter, including ongoing operations and the financial status of the company. (R. p. 146, lines 3-21). The Kenison Firm then bootstraps this contention into arguing that there is no more confidential information. Even if Dodenhoff talked with the Buckleys about some aspects of the company, which is still denied but for the purposes of this argument, knowledge by one or two people does not constitute "generally known." See Foulke v. Knuck at 523, S.E.2d at 728 (holding the mere fact that such confidences become public record does not change their character). Accordingly, under Rule 1.9(c), the Kenison Firm would still be prohibited from using any information obtained in the prior representation of D&C Builders to advance the interests of Buckley.

The Circuit Court found that if the Kenison Firm and Buckley want to limit how the Kenison Firm advocates for Buckley, that decision is between them. (R. p. 148, lines 1-16). Respectfully, the Circuit Court's approach makes no sense. How can Buckley make an informed decision on staying with the Kenison Firm when he doesn't know what they can't use or if some of that information could be possibly discovered and used to his

benefit by another attorney that did not have the present conflict of interest? Once again, one of the reasons we have the Rules of Professional Conduct is so attorneys recognize the potential for these conflicts and don't make them worse by undertaking a representation when their obligations to a former client restrict their ability to act in the best interests of their new client. It is the reason the standard of "substantially related" is prospective instead of retrospective.

The Kenison Firm is ethically prohibited from representing Buckley in this matter. It was representing D&C Builders in a similar claim at the same time D&C Builders was working on the Buckley Project. The communications between D&C Builders and Kenison attorneys was extensive during that time and the information Dodenhoff claims to have provided them is also the same type of information you would expect an attorney pursuing and defending those claims would need. The pleadings of both the TMKG case and the Buckley case clearly bear out both cases involve the same causes of action, defenses and even the same allegations against D&C Builders by TMKG and by Buckley. The Kenison Firm's claim that it should be allowed to represent Buckley unless D&C Builders provides concrete specific examples of confidential information is outrageous. The Circuit Court's refusal to consider disqualification without the concrete proof the Kenison Firm demands is an obvious error that needs to be corrected by this Court for the benefit of D&C Builders, and all attorneys and former clients of attorneys in South Carolina.

This Court should immediately disqualify the Kenison Firm and all of its attorneys from representing Buckley in this matter and vacate all filings and actions taken by the Kenison Firm on Buckley's behalf.

CONCLUSION

This appeal deals with a clear disagreement between the parties on how the Rules of Professional conduct are interpreted, specifically regarding Rule 1.9 and the duties owed to a former client. A review of the facts, pleadings and transcripts clearly demonstrate that counsel for Appellant and counsel for Respondent have very different interpretations of the requirements placed upon attorneys by these Rules. It seems highly unlikely that both interpretations can be correct, therefore, it is likely that a much broader section of the bar are also misinterpreting the application of this Rule. Therefore, in addition to addressing the specific matters on appeal, it is Appellant's hope the Court takes this opportunity to clarify the correct interpretation for the entire bar on these issues.

For the reasons stated above, the Order of the Circuit Court requiring Appellant to provide specific information pursuant to a privilege log to support disqualification of the Kenison Firm and its attorneys should be vacated, the Kenison Firm and all its attorneys should be immediately disqualified from representing Buckley in this matter and all filings and actions taken by the Kenison Firm on Buckley's behalf should be vacated.

In the alternative, based on the overwhelming information supporting that the matters are "substantially related, the Order of the Circuit Court should be vacated and the matter remanded with instructions for the Circuit Court to immediately disqualify the Kenison Firm and its attorneys from representing Buckley in this matter and to vacate all filings and actions taken by the Kenison Firm on Buckley's behalf.

Should this Court determine disqualification is not warranted on the information presented, and that specific confidential information may be ordered provided to support disqualification, then the Order of the Circuit Court should be vacated and the matter remanded with instructions for the Circuit Court to modify its order to issue an injunction on the information provided by D&C Builders pursuant to the Order of July 16, 2013 and instruct the Circuit Court to assess the information provided prospectively under the “substantially related” test promulgated by the Supreme Court in Townsend, to wit: whether the Kenison Firm would have or reasonably could have learned confidential information in its representation of D&C Builders that may become relevant in representing Buckley against D&C Builders?

Respectfully submitted,

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January 12, 2015

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JAN 12 2015

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

Edward W. Miller, Presiding Judge

Case Number: 2013-CP-23-1833
Appellate Case No. 2013-001645

D&C Builders, Inc.....Appellant,

v.

Richard M. Buckley and Wells Fargo National Association, Defendants,
And Richard M. Buckley, Third-Party Plaintiff,

v.

Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley..... Respondent,

CERTIFICATE

I, Brian A. Martin, Esquire, attorney for Appellant, certify that Appellant's Final Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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v.

Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley Respondent,

PROOF OF SERVICE

I certify that that I have served the Final Brief of Appellant on Respondent and all parties of record by depositing a copy in the United States Mail, first class postage prepaid, on January 12, 2015, addressed to their attorneys of record as follows:

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