IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas



Edward W. Miller, Presiding Judge

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

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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,

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**PETITION FOR REHEARING AND/OR REHEARING *EN BANC* WITH SUPPORTING MEMORANDUM**

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Appellant, D&C Builders, Inc., by and through its undersigned attorney, hereby respectfully petitions the Court for rehearing or for a rehearing *en banc* pursuant to Rules 221(a) and 219(a), SCACR, based on points overlooked or misapprehended by this Court. The basis for the petition is as follows:

In its Unpublished Opinion No. 2016-UP-184, this Court dismissed the appeal of the trial court's order requiring Appellant to provide specific confidential information to support its Motion to Disqualify Respondent's Counsel in direct contradiction of Rule 1.9 of the South Carolina Rules of Professional Conduct and Comment 3 thereto based on a finding that the order was not immediately appealable. The Court's Opinion was based on a determination that the order appealed does not involve the issuance or denial of an injunction as defined in Black's Law Dictionary, and therefore meets no provision of South Carolina Code Section 14-3-330. The Court further found that the trial court's order was more like a discovery order, which is generally not appealable.

In comparing the trial court's order to a discovery order, the Court is viewing this case from a strictly procedural viewpoint. However, this trial court's order is directly contrary to the requirements of the Rules of Professional Conduct related to the situation presented and therefore makes it an ethical issue rather than a procedural issue. It is the ethical issue presented, **and** the substantial rights affected by the order and its precedent that make the trial court's order immediately appealable.

Disqualification is an ethical issue, not a procedural issue. See 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 order of the trial court requires the disclosure of confidential client information to support disqualification which is directly contrary to the ethical requirements of Rule 1.9 and Comment 3 thereto of the Rules of Professional Conduct.

At oral argument, Appellant did agree that it was presented to the trial court as part of its Motion to Reconsider that Appellant was not opposed to providing the confidential information for the Court's review. To the trial court, Respondent was adamantly opposed to this request; however, on appeal, Respondent consents to the review of the information by the court only. Despite Respondent's change of position and consent, the controversy of this appeal still exists in that the trial court's order and the position taken by Respondent are directly contrary to the Rules of Professional Conduct leaving Appellant and Appellant's attorneys in limbo as to the priority of a trial court order that directly conflicts with the Rules of Professional Conduct. The dismissal of the appeal without further clarification or direction as to this conflict leaves Appellant in the same dilemma and will only result in the matter returning to this Court for further clarification.

In its unpublished opinion, the Court found that the appeal did not involve the issuance or denial of an injunction pursuant to South Carolina Code §14-3-330(4), however, the opinion does not address appellate jurisdiction under South Carolina Code §14-3-330(2) as the appeal of an order affecting a substantial right.

The Court makes reference in the unpublished opinion that even if the trial court's order could be construed as denying the motion to disqualify, Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d (2013) dictates that such denial is not immediately appealable. However, the trial court's order does not deny the motion to disqualify; the trial court ***refused to consider*** the motion to disqualify without the disclosure of specific confidential information. This situation is completely different from both Enersys and the opposite holding in Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (S.C.

2005) that an order granting a motion to disqualify is immediately appealable under S.C. Code § 14-3-330(2) as it does affect a substantial right. Neither holding is directly applicable in the present case which presents an issue of first impression for this Court, namely, does an order to disclose confidential information to support disqualification, contrary to the Rules of Professional Conduct, affect a substantial right supporting appeal of that order?

In Enersys, the Court recognized that the trial Court used the appropriate "substantially related" assessment of both representations as the basis for denying disqualification, stating

> **The circuit court denied the motion [to disqualify] concluding that Harper's previous assistance in developing Enersys' litigation strategy was insufficient grounds upon which to disqualify him due to the *dissimilarities* of his previous representations and the current suit. (Emphasis added).**

Id. at 615, S.E.2d at 479. Harper had previously represented Enersys in five employment related lawsuits seven (7) to nine (9) years before the alleged conflicting representation as compared to the breach of contract action Harper was pursuing against Enersys on behalf of Hopkins. Id. at 615, S.E.2d at 478-479. In the present case, however, the time between representations by Respondent's attorneys was just a few months.

In Hagood, the trial Court used Rule 3.7 of the Rules of Professional Conduct which prohibits an attorney from representing a client when the attorney will be a witness in the proceeding to disqualify an attorney where a full-time employee of the attorney would be a witness rather than the attorney.

> **The circuit court concluded it would be improper under the Rules of Professional Conduct for an investigator or accident reconstruction expert who works as a full-time employee for Petitioner's Attorney to testify on Petitioner's behalf at trial.**

Id. at S.E.2d 710. The Court analyzed the matter as a case of first impression just like the present case, and found that disqualifying a party's attorney affects a substantial right and may be immediately appealed under Section 14-3-330(2). Id. The Court went on to hold specifically

> **The right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case. Moreover, the right to be represented by ones preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right.**

Id. Finally, the Court stated, "Deprivation of the right to ones preferred attorney **would affect the attorney-client relationship, which is extremely important in our adversarial system.**" Id. (emphasis added).

In Enersys, the only substantial right examined in that case was the refusal to disqualify an attorney. Specific substantial rights Appellant contends are affected is the right to maintain confidential information relayed through confidential attorney-client communications and the right not to be forced to disclose such communications in order to support disqualification. Such forced disclosure of confidential information from a client must certainly be viewed equally if not more substantial than those examined by the Court in Hagood in that such an order will significantly impact the attorney-client relationship and overall litigation, from which no appeal could undo.

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 Cmmt. 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 Cmmt. 2, RPC, Rule 407, SCACR. **"Confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship."** Rule 1.6 Cmmt. 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).

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 by prohibiting a lawyer from using any information to the disadvantage of a former client. Rule 1.9(c)(1), RPC, Rule 407, SCACR.

As referenced in Appellant's argument above, the trial court's order that Appellant provide specific confidential information directly overrides the mandate to protect a client's confidential information. Comment 3 to Rule 1.9 confirms this where it 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.**

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

The order of the trial court is directly at odds with the ethical rule therefore making this an ethical issue for this Court to review. The trial court's order requires Appellant to reveal specific confidential information to prove the Respondent's attorneys have such information to thereby justify disqualification. The trial 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, ll. 19-22).

As argued to the trial court, the "basis" for disqualification under Rule 1.9 is whether the prior and current cases are "substantially related." (R p. 179, l. 18 – p. 180, l. 4). The "substantially related" analysis is the only way to protect the confidential nature of 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 significance of the confidentiality associated with the attorney-client relationship is demonstrated by the weight of existing legal authority addressing this same situation. Courts in other jurisdictions unanimously agree that confidential information must be protected, particularly in disqualification situations. 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 Respondent's attorneys 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 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 Cannon 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 Cannon, 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.

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 he doesn't remember anything confidential or when the trial court can require disclosure of such confidential information as proof from the client. Such a requirement on the former client defeats the very purpose of the ethical rules and violates the protection of confidentiality upon which all clients rely in their relationship with attorneys.

Further proof of the importance of maintaining the confidential nature of attorney-client communication is the manner in which Rule 1.9 requires the Court to assess disqualification based on cases being "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 Cmmt. 3, RPC, Rule 407, SCACR (Emphasis added).

There is no better example than the facts of the present situation. Both the prior case where Respondent's attorneys represented Appellant and the present case representing Respondent both involve the collection and accounting of money. Respondent's attorneys obtained financial information from Appellant in the prior case and then turned around in the present case and alleged Appellant 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. 51, ¶118, R. p. 67, ¶20). Remember, these statements are being made by the same attorneys representing Appellant ***while*** it was allegedly "insolvent" and "undercapitalized!"

Clearly, the allegation alone against a client you were representing at the time would indicate a conflict exists.

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 trial court is able to order Appellant to disclose confidential attorney-client communications as a requirement to support disqualification of Respondent's Attorneys. Such an order is in direct violation of the Rules of Professional Conduct, but is also contrary to the Supreme Court's holding in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996) and the overwhelming authority from other jurisdictions.

The Supreme Court confirmed that examining a potential conflict prospectively is the test in holding in Townsend 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)). In finding disqualification was warranted, the Supreme 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).

Given the standard and test set in Townsend, it cannot 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 it shared confidential information with its former attorneys.

If "confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship" (Rule 1.6 Cmmt. 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 the disclosure of confidential information can be ordered to prove disqualification, the whole foundation of client protection crumbles. The Rules of Professional Conduct are designed to assure the protection of client confidences and the necessary confidential nature of the attorney-client relationship cannot simply be ignored in favor of an attorney that claims no such knowledge was obtained or exists.

In Hagood, the Court examined the impact of granting disqualification has on a client's right to choose their own attorney and determined the right to choose one's own attorney was a substantial right affected to grant appellate jurisdiction under S.C. Code § 14-3-330(2). Id. at S.E.2d 710. If the right to choose one's attorney is considered a substantial right to grant jurisdiction, then the superior right to the fair administration of justice must also be a substantial right conveying appellate jurisdiction.

"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). Citing Donaldson v. City of Walterboro Police Dept., No. 2:06-cv-02492-PMD, 2008 WL 906707 (D.S.C. March 31, 2008), The Puka Court, 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).

The trial court weighed the equities in Appellant's right to keep the information confidential with Respondent's right to have the attorney of his choosing. (R. p. 178, l. 9 – p. 179, l. 12, p. 180, ll. 17 – 21, p. 181, ll. 14-24). But contrary to Puka decision, the trial court erroneously believed that the right to choose one's counsel was superior to the right to maintain confidential information in a disqualification matter and the right to the fair administration of justice. (R. p. 180, ll. 17 – 21).

Dismissal of this appeal creates manifest uncertainty for attorneys as to the priority of the Rules of Professional Conduct when in conflict with an order of the trial court. The order of the trial court in this case requires Appellant to provide confidential information to support disqualification of Respondent's attorneys contrary to Rule 1.9 and Comment 3 thereto. The holdings of Enersys and Hagood use different standards to determine whether a substantial right is affected, but neither deal with the present situation where the trial court **refused to consider** disqualification without disclosure of the alleged confidential information.

If a trial court is able to issue orders directly contrary to the Rules of Professional Conduct, an attorney cannot know whether to follow the order of the trial court or follow the Rules of Professional Conduct. Great peril exists down either path. The unpublished opinion of this Court fails to address whether the order requiring disclosure of confidential information to support disqualification affects a substantial right and is therefore appealable pursuant to South Carolina Code §14-3-330(2).

Because of the significant impact of this decision, as well as and most especially the confusion and uncertainty the decision will inject into the legal profession, and for the above-stated reasons and authorities, Appellant petitions this Court for rehearing or rehearing *en banc.*

Respectfully submitted,

May 2, 2016

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge



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Case Number: 2013-CP-23-1833
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And Richard M. Buckley, Third-Party Plaintiff,
v.
Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley ..... Respondent,

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PROOF OF SERVICE

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I hereby certify that that I have served a true copy of Appellant's Petition for Rehearing and/or Rehearing *en banc* with Supporting Memorandum on Respondent and all parties of record by depositing a copy in the United States Mail, first class postage prepaid, on May 2, 2016, addressed to their attorneys of record as follows:

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May 2, 2016

**VIA OVERNIGHT DELIVERY**
**AND FAX: 803-734-1839**



Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *D&C Builders, Inc. v. Richard M. Buckley, et al.*
Greenville County Case #: 2013-CP-23-1833
Appellate Case No. 2023-001645

Dear Ms. Kitchings:

Please find enclosed for filing in the above referenced matter an original and seven (7) copies each of a Petition for Rehearing and/or Rehearing *en banc* with Supporting Memorandum and Proof of Service in the above referenced matter. I would appreciate your filing the original and returning a clocked copy to me by the enclosed self-addressed stamped envelope. Also enclosed is a check for the filing fee in the amount of $25.00. By copy of this letter, I am serving the same on all other parties via their counsel of record.

Thank you in advance for your assistance. Should you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

Brian A. Martin

Enclosures (Originals by FedEx)

cc: M. Stokely Holder, Esquire
H. Stewart James, Esquire
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