CERTIFICATION BY COUNSEL OF INTERESTED PARTIES

John J. Mueller certifies that:

1. Lisa Edmonds, appellant,

2. Larry Edmonds, appellant;

3. Edward A. Williamson, appellee;

4. Edward A. Williamson, P.A., appellee;

5. George W. Healy, IV, appellee; and

6. George W. Healy, IV & Associates, appellee,

each has an interest in the outcome of this case. Michael Miller, appellee, also has an interest in this appeal.

On August 9, 2007, Miller commenced a bankruptcy proceeding and 11 U.S.C. §§ 1101, *et seq.* Miller's filing of that bankruptcy petition automatically stays proceedings against Miller, as a debtor. Consequently, Miller does not participate in this appeal.

John J. Mueller makes these representations to permit the justices of the Supreme Court or the judges of the Court of Appeals, as the case may be, to evaluate issues involving disqualification or recusal.

John J. Mueller
(No Miss Bar Reg. No. – admitted *pro hac vice*)
John J. Mueller, LLC
The Provident Building, Suite 800
632 Vine Street
Cincinnati, Ohio 45202-2441

Telephone: (513) 621-3636
Telecopier: (513) 621-2550

E-mail: johnjmueller@legalmalpractice.net

Counsel for Appellants, Lisa Edmonds and Larry Edmonds

TABLE OF CONTENTS

Addenda

TABLE OF AUTHORITIES
(Cases, Statutes, and Other Authorities Cited in Brief)

Cases

Other Authorities

STATEMENT SUPPORTING REQUEST FOR ORAL ARGUMENT

In this appeal, the Edmondses present this Court with an issue of apparent first impression: where an injured married person employs a lawyer to prosecute claims and the spouse of the injured married person never signs the agreement between the lawyer and the injured married person, can the non-injured spouse assert claims of lawyer malpractice against the lawyer?

This issue is of great interest to the general public. Even though the Edmondses have no statistics on the number of married persons in Mississippi who suffer injuries in any given year, the Edmondses guess the number totals in the tens of thousands. Consequently, a substantial number of the general public potentially have an interest in the answer to this question.

Additionally, in answering this question, this Court will have the opportunity to advance, substantially and significantly, the common law governing lawyer malpractice in Mississippi. The Court should hear oral argument, to assure that it hears argument on every question relating to and on every aspect of this issue.

Likewise, the issues the Edmondses raise concerning ownership of the "case file" present matters of significance to the Bar and to the public in Mississippi. The Court should hear arguments by those with a stake in the outcome of a particular dispute involving the issue before deciding the issue.

No brief by any lawyer can anticipate every question a court could ask when deciding complex, important issues such as these. This is especially true where the lawyer writing the brief faces constraints on the time within which he has to submit the brief and on the length of the brief. In these circumstances, the time-honored process of oral argument fills the gap

between the written argument and the questions a court has after reading a brief on an issue. This Court should allow the Edmondses and Williamson to argue the issues orally to this Court and this Court should provide the Edmondses and Williamson the opportunity to answer unaddressed matters in oral argument.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal of the trial court's grant of summary judgment in favor of Edward A. Williamson and Edward A. Williamson, P.A.[1] generally raises the issue whether the trial court erred in granting summary judgment. That general issue actually involves five specific issues. So, for purposes of this appeal and this brief, the Edmondses will state the specific issues on which the Edmondses generally assert that the trial court erred in granting summary judgment in favor of Williamson.

Issue No. 1

On behalf of 31 clients, including Lisa Edmonds, Williamson negotiated a settlement of claims against American Home Products Corp.[2] The Edmondses disputed the amount of the settlement Williamson allocated to them. Williamson adjusted the amount of settlement allocated to the Edmondses. After this adjustment, the Edmondses signed a release in favor of AHP and they received the adjusted amount of the settlement. Did the Edmondses waive the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson?

---

[1] In this brief, Appellants, Lisa Edmonds and Larry Edmonds, will refer to Edward A. Williamson and Edward A. Williamson, P.A. jointly as "Williamson."

Also, in this brief, Appellants, Lisa Edmonds and Larry Edmonds, will refer to themselves jointly as "the Edmondses."

[2] In this brief, the Edmondses will refer to American Home Products Corp. as "AHP."

Issue No. 2

On behalf of 31 clients, including Lisa Edmonds, Williamson negotiated a settlement of claims against AHP. The Edmondses disputed the amount of the settlement Williamson allocated to them. Williamson adjusted the amount of settlement allocated to the Edmondses. After this adjustment, the Edmondses signed a release in favor of AHP and they received the adjusted amount of the settlement. Are the Edmondses estopped from prosecuting the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson?

Issue No. 3

In effecting the settlement with AHP, the Edmondses signed an acknowledgment and a separate agreement that Williamson presented them. The acknowledgment concerned certain amounts that Williamson would deduct from the settlement. The agreement provided that the Edmondses would execute and deliver the release of AHP and all other settlement documents AHP required. By signing the acknowledgment and separate agreement, did the Edmondses release the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson?

Issue No. 4

In effecting the settlement with AHP, the Edmondses signed an acknowledgment and a separate agreement that Williamson presented them. The acknowledgment concerned certain amounts that Williamson would deduct from the settlement. The agreement provided that the Edmondses would execute and deliver the release of AHP and all other settlement documents AHP required. By signing the acknowledgment and separate agreement, did the Edmondses enter into an accord and satisfaction with Williamson?

Issue No. 5

Larry Edmonds never directly asserted a claim against AHP related to the use of the diet drug "Fen-phen." But, Larry Edmonds had derivative claims against AHP for loss of consortium. In effecting the settlement with AHP, Larry Edmonds released AHP from liability on his claims for loss of consortium. Larry Edmonds received none of money that AHP paid in settlement of the claims Lisa Edmonds asserted against AHP. Can Larry Edmonds have claims against Williamson for lawyer malpractice and breach of fiduciary duty?

This appeal also involves a ruling by the trial court on a dispute concerning the ownership of and rights to the "case file" that developed between the Edmondses and George W. Healy, IV, and George W. Healy, IV, & Associates.[3] The trial court's ruling raises a single issue on appeal. But that issue itself implicitly involves four issues.

Issue No. 6

Do the Edmondses own the "case file" Healy created concerning *Edmonds v. Williamson*, or does Healy, the lawyer, own the "case file?"

Issue No. 7

If the Edmondses own the "case file" and if Healy wants to retain a copy of the file, do the Edmonds have to pay for the copy for Healy's benefit or does Healy have to pay for the copy?

Issue No. 8

If the Edmondses own the "case file," does Healy have a duty to provide all of the contents of the "case file" to the Edmondses or may Healy withhold "work product" or other documents?

---

[3] In this brief, the Edmondses will refer to George W. Healy, IV, and George W. Healy, IV, & Associates jointly as "Healy."

Issue No. 9

During the course of representing the Edmondses in *Edmonds v. Williamson*, Healy provided to the Edmondses copies of documents that form bits and pieces of the "case file." If the Edmondses own the "case file," does Healy have a duty to provide the Edmondses with a document if, in the course of the representation of the Edmondses, Healy previously provided the Edmondses with a copy of the document?

STATEMENT OF THE CASE

I. Nature of the case

This appeal arises out of a civil action. In the civil action, the Edmondses asserted claims of lawyer malpractice and breach of fiduciary duty against Williamson.

II. Course of proceedings

The Edmondses brought an action for declaratory judgment in the Circuit Court of Kemper County, Mississippi, against Williamson. In that action, the Edmondses alleged that Williamson breached the duty of care, contractual obligations, and the duty of loyalty Williamson owed them, as his clients. Subsequent to the filing of the complaint for declaratory judgment, the Edmondses filed an amended complaint against Williamson. In this complaint, the Edmondses demanded damages in the amount of $1,000,000, lawyer's fees, and other relief.

During the course of the proceedings in the trial court, the Edmondses and Williamson disagreed over the right of the Edmondses to discover certain information and documents that related to the claims Williamson prosecuted against AHP for the Edmondses and for other clients Williamson represented. The Edmondses filed motions to compel the discovery of the information and documents Williamson refused to provide on claims of privilege and

confidentiality.

Also during the course of the proceedings in the trial court, Williamson filed a motion to dismiss or to transfer the case to the Circuit Court of Holmes County.

Following a hearing on the discovery and venue issues, the trial court granted the motion by the Edmondses and compelled Williamson to provide the discovery in dispute. The Trial court also ordered the Edmondses and Williamson to ask the Circuit Court of Holmes County to relieve them from the operation of the confidentiality provisions of an order establishing a qualified settlement fund. The Circuit Court of Holmes County had entered the order establishing a qualified settlement fund in conjunction with the settlement of the claims Williamson prosecuted against AHP.

Williamson asked the trial court to reconsider its ruling on the discovery issue or to certify the issues for interlocutory appeal to this Court. The trial court certified the issues for interlocutory appeal. This Court permitted Williamson to appeal the order and, thereby, to address the discovery and venue issues.

That appeal proceeded as Docket No. 2003-IA-01099-SCT. This Court decided that appeal on August 12, 2004. The Court published its opinion. *Williamson v. Edmonds*, No. 2003-IA-01099-SCT, 880 So.2d 310 (Miss. 2004). This Court affirmed the trial court and remanded the case with instructions for further proceedings consistent with the opinion. *Williamson v. Edmonds*, No. 2003-IA-01099-SCT (¶ 33).

Sometime after remand, the trial court set the case for trial in early October, 2005. In late September, 2005, Healy filed a motion asking the trial court to allow him to withdraw as counsel for the Edmondses.

Following a hearing on that motion, the trial court allowed Healy to withdraw as counsel

for the Edmondses. The trial court allowed the Edmondses 120 days to employ substitute counsel.

The Edmondses ultimately employed substitute counsel.

But before the Edmondses did so and while they were attempting to find substitute counsel, the lawyer who ultimately substituted as counsel for the Edmondses attempted to secure the "case file" from Healy. Healy declined to deliver the original "case file" to that lawyer. Healy offered to provide that lawyer copies of the entire "case file," if that lawyer or the Edmondses paid the cost of photocopying and duplicating the contents of the "case file."

After the Edmondses employed substitute counsel, substitute counsel filed a motion asking the trial court to compel Healy to produce the entire "case file." Healy opposed the motion. Healy also filed a motion asking the trial court to determine which documents from the "case file" Healy needed to provide to the Edmondses.

Following a hearing on those motions, the trial court entered an order ruling on the dispute concerning the "case file." The trial court declined to order Healy to deliver all of the original contents of the "case file" to the Edmondses. Instead, the trial court ordered Healy to allow the Edmondses access to the file to copy whatever portions of the "case file" the Edmondses wanted, at their expense. The trial court also ordered Healy to return all original papers and property the Edmondses had delivered to Healy.

In January, 2007, the trial court heard Williamson's motion for summary judgment.

On March 19, 2007, the trial court entered a memorandum setting out its opinion. The trial court granted summary judgment in favor of Williamson on all claims. On March 29, 2007, the trial court then entered a judgment dismissing the claims by the Edmondses.

The Edmondses timely appealed.

III. Disposition in the trial court

On March 29, 2007, the trial court entered summary judgment in favor of Williamson on all claims asserted in the action.

IV. Statement of facts[4]

Williamson represented 31 clients and their spouses in litigation against AHP. All of the claims in that litigation related to the diet drug Phentermine Fenflurarnin/Dexfenfluramine ("Phen-Fen"). The Edmondses were among Williamson's clients.

On November 12, 2000, Lisa Edmonds first met with Williamson at his law office in Philadelphia, Neshoba County, Mississippi. Five days later, Lisa Edmonds returned to Williamson's law office in Philadelphia to sign a contract of representation.[5] Williamson filed suit in the Circuit Court of Holmes County on behalf of 14 of the 31 clients whom Williamson represented in asserting product-liability claims relating to the use of Phen-Fen. The 14 clients on whose behalf Williamson filed suit were the plaintiffs named in Annette Williams, et al. v. American Home Products Corp. Williamson never named the Edmondses as plaintiffs in *Annette Williams, et al. v. American Home Products Corp.*, or in any other litigation against AHP in any court or jurisdiction. But, Williamson did prosecute the claims of all 31 clients, whether named or unnamed in the litigation.

---

[4] The Edmondses extract this statement of facts from *Memorandum Opinion* that the trial court entered in this proceeding on March 19, 2007. The Edmondses and Williamson disagree strongly about the overwhelming majority of the facts material to the outcome of the claims in this action. Because the Edmondses pursue this appeal on claims that the trial court erred as a matter of law, the Edmondses see no need to detail the many disputes concerning material facts.

The Edmondses include the Memorandum Opinion in the Record Excerpts they file with this brief (Excerpts Page 000035).

[5] The Edmondses include the fee contract in the Record Excerpts they file with this brief (Excerpts Page 000065).

On April 24, 2001, Williamson negotiated an aggregate settlement on behalf of the 31 clients and their spouses in *Annette Williams, et al v. American Home Products Corp.* in the Circuit Court of Holmes County.

Even though Williamson had never named the Edmondses as plaintiffs in *Annette Williams, et al. v. American Home Products Corp.*, Williamson advised the Edmondses that he had "informally grouped" their claim with the *Williams* claims for purposes of settlement negotiations. Williamson also advised the Edmondses that he had settled their claims as part of the settlement of all claims in *Annette Williams, et al. v. American Home Products Corp.* Confidentiality agreements and a confidentiality order cover, and apply to, the terms of that settlement.

The Edmondses claim in this case that Williamson failed to negotiate individual settlements for the claimants against AHP. The Edmondses assert that instead of individual settlements for each claimant Williamson represented, Williamson negotiated a lump-sum settlement in a fixed amount with AHP that covered the claims of all clients Williamson represented.

Williamson did not disclose to Ms. Edmonds how the settlement fund would be distributed among his clients nor the basis for the determination of who would receive what amount.

The Edmondses contend in this case that Williamson decided, on a discretionary basis, how much each claimant he represented would receive from the settlement fund. The Edmondses also contend in this case that Williamson took this action without advising them of the manner in which he was handling the settlement and without advising them of the amount of the settlement each other claimant was receiving.

The Edmondses also contend in this case that Williamson charged excessive fees. According to the fee agreement, Williamson would earn a fee based upon a graduated percentage, depending on the stage of the representation. The contract called for a fee of 33⅓% of any recovery by way of a settlement, by negotiation, mediation, or arbitration, before Williamson filed suit. The contract called for a fee of 40% of any recovery by way of a settlement, by negotiation, mediation, or arbitration, after Williamson filed suit, but before the earlier of the closing of discovery, the time of a final pretrial hearing, or the time Williamson commenced trial preparation.

Williamson charged the Edmondses 45% of the settlement amount. The Edmondses objected to this charge because Williamson had never filed suit for the Edmondses. Williamson informed the Edmondses that under the fee agreement, he had the right to the higher fee because he had obtained the settlement by pursuing some type of mediation process in an out-of-state forum. Williamson advised the Edmondses that even though they were never named as plaintiffs in *Annette Williams, et al. v. American Home Products Corp.*, they benefitted from the work he performed in connection with that case and, therefore, they should pay a fee as if they had participated as plaintiffs in that action.

Williamson deducted an additional 3% from the amount of the settlement he allocated to the Edmondses. Williamson advised the Edmondses that they owed this amount because they had an obligation to compensate the plaintiffs in a federal class action (In re: Diet Drugs (Phentermine Fenluramine/Dexfenfluramine) Products Liability Litigation, MDL Docket No. 120300-CV-20147, Eastern District of Pennsylvania), for costs those plaintiffs incurred in developing discovery materials in that suit that other claimants against AHP later used against AHP. The fee agreement contains no grant of authority to Williamson to deduct the additional

3% fee.

The Edmondses and Williamson disputed concerning the amount of the total settlement with AHP that the Edmondses should receive, in gross, and the amount Williamson should deduct from that gross settlement for lawyer's fees and costs. After some discussions, Williamson increased the amount of the settlement he allocated to the Edmondses. After Williamson increased the amount of the settlement he allocated to the Edmondses, each of the Edmondses signed a Confidential Release, Indemnity and Assignment that AHP required as part of the settlement Williamson had negotiated. Each of the Edmondses also signed a document Williamson drafted and entitled "Acknowledgment of Expenses."[6] That document reads, in relevant part:

> I, Lisa Edmonds ... acknowledge that it cannot be determined with exact specificity at this time, the full extent of expenses incurred in the prosecution of this litigation and do realize that they have been very substantial. Further, I/we realize that the following categories of expenses will be deducted from my/our net proceeds.
>
> 1. Three percent of the gross recovery for expenses ordered to be deducted from each settlement by the multidistrict authority and an additional three percent is to be deducted from attorney's fees, making a total of six percent.
>
> 2. Common benefit expenses incurred in the prosecution of the lead case, Williams v. American Home Products, et al to the litigation. These expenses will be assessed on the percentage of the total recovery;
>
> 3. All expenses directly attributable to my/our specific case ...
>
> I/we sign this with the understanding and acknowledgment so that the settlement proceeds may be expedited; releases signed, obtained and tendered to American Home Products and disbursement of monies made as soon as possible.

---

[6] The Edmondses include the document Williamson entitled "Acknowledgment" in the Record Excerpts they file with this brief (Excerpts Page 000147).

Both Lisa Edmonds and Williamson executed another agreement in conjunction with the consummation of the settlement with AHP.[7] That agreement states, in its entirety:

> The Williamson Law Firm will see to it that Lisa Edmonds receives $1,500,000.00 after applicable expenses as per the acknowledgment and attorneys' fees in the amount of FORTY-FIVE PERCENT (45%) ...
>
> I, Lisa Edmonds, will provide to the Williamson Law Firm all properly executed documents required by American Home Products including signature of my husband on any release required by American Home Products or disbursement sheets in accordance with the above and the acknowledgment.

The Edmondses collected settlement funds from Williamson in January, 2002.

In July, 2002, through Healy, the Edmondses sued Williamson. In that civil action, the action on appeal, the Edmondses asserted claims that Williamson breached the duty of care he owed them as his clients, that he breached the fee agreement, and that he breached the fiduciary duty of loyalty he owed them, in representing them on the claims against AHP.

SUMMARY OF ARGUMENT

The trial court erred as a matter of law in granting summary judgment in favor Williamson. Erroneously and contrary to law, the trial court concluded that the Edmondses waived their claims against Williamson by accepting the settlement with AHP. Contrary to the judgment of the trial court, even though the Edmondses accepted settlement funds from AHP, they have the right to maintain their claims against Williamson. The Edmondses never waived their claims against Williamson by accepting the settlement funds from AHP. Erroneously and contrary to law, the trial court concluded that the acceptance by the Edmondses of the settlement with AHP, operated to estop the Edmondses from prosecuting their claims against Williamson.

---

[7] The Edmondses include this other agreement, a document Williamson entitled "Agreement," in the Record Excerpts they file with this brief (Excerpts Page 000149).

But, the acceptance by the Edmondses of the settlement funds from AHP in no way operates to estop them from prosecuting claims against Williamson. Erroneously and contrary to law, the trial court concluded that the Edmondses released their claims against Williamson. The trial court also concluded, erroneously and contrary to law, that the release the Edmondses gave to AHP extended to or covered Williamson. The Edmondses never released the claims they assert against Williamson. The release the Edmondses executed in favor of AHP fails to extend to, or to include, Williamson, so the release of AHP fails to release Williamson. Last, erroneously and contrary to law, the trial court concluded that the settlement the Edmondses made with AHP operated as a settlement of claims the Edmondses had against Williamson at the time the Edmondses consummated the settlement with AHP. But, the settlement the Edmondses made with AHP in no way operates as a settlement of claims the Edmondses had against Williamson at the time the Edmondses consummated the settlement with AHP.

A "case file" belongs to the client, as opposed to the lawyer who created the file while representing the client. A lawyer has no right to assert against a client lawyer-client privilege or the protection of "work product." So, before the lawyer delivers to the client the contents of the "case file," a lawyer has no right to "cull" from that file documents or papers as to which the lawyer claims lawyer-client privilege or the protection of "work product." Therefore, on termination of the lawyer's employment, the lawyer has a duty to deliver to the client all original contents of the "case file."

If the lawyer wants to retain a copy of the any of the contents of the "case file," unless the lawyer and client have executed a fee agreement clearly and unambiguously obligating the client to pay the costs of photocopying or duplicating the "case file," the lawyer bears the expense of photocopying or duplicating the "case file."

ARGUMENT

I. STANDARD OF REVIEW

A. The standard this Court applies when reviewing the grant by the Circuit Court of Kemper County of a summary judgment on the claims by the Edmondses against Williamson

In this case, the Edmondses, through Healy, brought claims of lawyer malpractice, breach of contract, and breach of fiduciary duty against Williamson and Miller. Those claims arose out of underlying litigation involving claims the Edmondses asserted against American Home Products, Inc. ("AHP"). The claims the Edmondses asserted against AHP related to the use by Lisa Edmonds of the diet drug "Fen-phen." Williamson and Miller represented the Edmondses on the claims against AHP. Williamson and Miller handled the claims by the Edmondses in conjunction with multi-district class-action litigation against AHP that Williams and Miller were involved in on behalf of other clients. Williamson and Miller negotiated a settlement of the claims in the multi-district class-action litigation that encompassed or extended to the claims by the Edmondses. After the settlement, the Edmondses, through Healy, brought claims of lawyer malpractice, breach of contract, and breach of fiduciary duty against Williamson and Miller in connection with the settlement of the claims the Edmondses have asserted against AHP. The Circuit Court of Kemper County granted motions by Williamson and Miller for summary judgment. The Edmondses have appealed the grant of summary judgment.

This Court should review the trial court's grant of summary judgment case *de novo*. When this Court reviews grants by trial courts of summary judgment, this Court reviews the case *de novo*. *One South, Inc. v. Hollowell*, No. 2006-CA-01048-SCT (¶ 6) (Miss. 2007) ("In reviewing a trial court's grant or denial of summary judgment, our well-established standard of

review is de novo."). Earlier this year, this Court reviewed *de novo* the grant by the Circuit Court of Hinds County of a summary judgment in a lawyer-malpractice action having remarkable similarities to this case, *Channel v. Loyacono*, No. 2005-CA-01395-SCT (Miss. 2007). In *Channel*, plaintiffs in a mass-tort action against a pharmaceutical company brought claims of lawyer malpractice and fraud against the law firm which represented those plaintiffs in connection with the settlement of the mass-tort action that the law firm had negotiated. This Court reviewed the case *de novo*, stating that "[i]t is well settled that this Court applies a de novo standard of review to the grant or denial of summary judgment by a trial court." *Channel*, 2005-CA-01395-SCT (¶ 12).

B. The standard this Court applies when reviewing a legal issue involved in interpretation and application of a rule in the Mississippi Rules of Professional Conduct, the rule involved in determining the dispute between the Edmondses and Healy concerning the ownership of and right to the "case file"

The Edmondses also appeal an order the trial court entered before granting summary judgment in favor of Williamson and Miller. In that earlier order, the trial court interpreted and applied Rule 1.16(d), MISSISSIPPI RULES OF PROFESSIONAL CONDUCT (2006). The court stated, and concluded, that:

> [t]he client file in this case involves many documents which have been generated in similar cases involving many other clients. It also involves another client who filed suit against Mr. Williamson in Federal Court. The Court does not believe the above referenced Rule requires the former attorney to copy a client file for the client, nor does it require the attorney to totally turn over the file in which other clients have an interest. Therefore, this Court finds that the entire client file shall be made available to the Edmonds' for inspection.

Order entered July 31, 2006, second unnumbered-page, in order.

The appeal by the Edmondses on this issue raises a matter of rule construction. Matters of rule construction necessarily involve issues of law.

This Court should review the trial court's ruling and determination on the construction of Rule 1.16(d), MISSISSIPPI RULES OF PROFESSIONAL CONDUCT (2006), *de novo*. As a matter of first impression, in *Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 747 A.2d 1017 (2007), the Supreme Court of Connecticut decided the proper standard of review a court should apply when reviewing an arbitration decision involving the interpretation and application of a rule of the Connecticut Rules of Professional Conduct. The Connecticut court concluded that in such a case, de novo review, rather than the traditional, more deferential review afforded to arbitration decisions, is proper." *Schoonmaker*, 252 Conn. at 418, 747 A.2d at 1020. The Connecticut court reviewed the case *de novo*, at least in part, because the decision-on-review implicated public policy. *Schoonmaker*, 252 Conn. at 425, 747 A.2d at 1023.

In this case, the trial court's decision implicates public policy. The trial court's decision implicates at least two policy matters. First, whether the lawyer owns the file and the client has merely a right of access to the file or the client owns the "case file." Second, if the client owns the file, whether the lawyer must pay for a copy of the "case file" for the lawyer's use. Thus, this Court should decide, as a matter of law, based on a review *de novo*, whether the trial court correctly interpreted and applied Rule 1.16(d), MISSISSIPPI RULES OF PROFESSIONAL CONDUCT (2006).

The decisional law concerning the standard of review involving interpretation of statutes provides further support for this standard of review. "The law is settled that '[s]tatutory interpretation is a matter of law which this Court reviews de novo.'" *Franklin Collection Service, Inc. v. Kyle*, No. 2005-IA-00988-SCT (¶ 8) (2007) (citations omitted). And in *Mississippi Ethics Comm'n v. Grisham*, No. 2006-CA-00902-SCT (¶ 8) (2007), this Court stated that its "review of a trial court's interpretation of a statute presents a question of law [and this

Court reviews] questions of law de novo." This Court has consistently held that in cases involving issues of law, particularly, issues of statutory construction, this Court reviews *de novo*. *E.g.*, *Citizens Nat'l Bank v. Dixieland Forest Products, LLC,* No. 2005-IA-00384-SCT (¶ 13) (Miss. 2006) ("For issues of law...this Court employs de novo review."); *J & J Timber Co. v. Broome*, No. 2004-IA-01914-SCT (¶ 8) (Miss. 2006) ("When reviewing issues of law, this Court engages in *de novo* review."); and *Jackpot Mississippi Riverboat, Inc. v. Smith*, No. 2001-IA-01817-SCT (¶ 4) (Miss. 2004) ("This Court applies a de novo standard of review when deciding issues of law.").

Last, in this case, Rule 1.16(d), MISSISSIPPI RULES OF PROFESSIONAL CONDUCT (2006), plays a material role in the trial court's analysis and determination of the issues relating to the "case file." Determining the issues on this part of the appeal, therefore, will require this Court to read and to interpret Rule 1.16(d), MISSISSIPPI RULES OF PROFESSIONAL CONDUCT, applying principles of rule construction similar to principles of statutory construction. *Cf. Sturdivant v. Sturdivant*, 367 Ark. 514, —, — S.W.3d — , —, 2006 WL 3030681, *2 ("As this case involves the interpretation of the rules of professional conduct, our standard of review is to read the rules as they are written, and interpret them in accordance with established principles of rule construction.").[8] In interpreting Rule 1.16(d), MISSISSIPPI RULES OF PROFESSIONAL CONDUCT, this Court will necessarily have to decide what the rule means. *Sturdivant*, 2006 WL 3030681 at *2 ("It is our responsibility to decide what a rule means..."). Deciding what the rule means, implicitly involves deciding whether the trial court correctly interpreted the rule, a *de novo* review. *Id.* ("[W]e will review the circuit court's construction de novo.").

---

[8] The Edmondses include in an appendix to this brief a true copy of *Sturdivant v. Sturdivant*, 367 Ark. 514, —, — S.W.3d — , —, 2006 WL 3030681.

Accordingly, this Court should review the trial court's ruling and determination on the construction of Rule 1.16(d), MISSISSIPPI RULES OF PROFESSIONAL CONDUCT (2006), *de novo*.

II. ISSUE NO. 1: Did the Edmondses waive the claims of lawyer malpractice, breach of contact, and breach of fiduciary duty they have asserted against Williamson?

On behalf of 31 clients, including Lisa Edmonds, Williamson negotiated a settlement of claims against AHP. The Edmondses disputed the amount of the settlement Williamson allocated to them. Williamson adjusted the amount of settlement allocated to the Edmondses. After this adjustment, the Edmondses signed a release in favor of AHP and they received the adjusted amount of the settlement.

In these circumstances, the trial court found that the Edmondses waived the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson. Based, at least in part, on that finding, the trial court entered summary judgment in favor of Williamson.

The trial court erred on the law in finding that the Edmondses waived the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson by accepting the proceeds of the settlement with AHP. Accordingly, in entering summary judgment in favor of Williamson on the ground that the Edmondses waived their claims against Williamson by accepting payment of a settlement of claims the Edmondses asserted against AHP, the trial court erred.

"Waiver is voluntary surrender or relinquishment of some known right, benefit or advantage..." *Channel*, 2005-CA-01395-SCT (¶ 36) (internal quotation marks omitted). In this case, the trial court erred on the law in finding that the Edmondses waived the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against

Williamson because the mere acceptance by a client of the proceeds of a settlement with someone other than the client's lawyer, in no way operates to waive the client's right to sue the lawyer for malpractice, breach of contract, and breach of fiduciary duty. *Id.* (¶ 38) ("Nor does this Court accept the proposition that, simply because the plaintiffs accepted the settlement funds, that they waived any right to sue for malpractice.").

Moreover, because "[w]aiver is the voluntary surrender of a right," *Union Planters Bank, Nat'l Ass'n v. Rogers*, No. 2003-CA-02221-SCT (¶ 8) (2005), "[w]aiver presupposes full knowledge of a right existing, and an intentional surrender or relinquishment of that right." *Id.* The legal doctrine of waiver "contemplates something done designedly or knowingly, which modifies or changes existing rights or varies or changes the terms and conditions of a contract." *Id.* So, "[t]o establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived." *Id.*

Here, even if one assumes the Edmondses had "full knowledge" that they had claims against Williamson at the time they executed the settlement with AHP, no evidence supports that the Edmondses intentionally surrendered or relinquished their right to sue Williamson for breaches of duty he owed them. Williamson can prove no set of facts establishing that by settling with AHP, the Edmondses knowingly and designedly acted to modify their right to sue Williamson for breaches of duty he owed them. And Williamson can prove no set of facts establishing that the Edmondses intended by settling with AHP to surrender permanently their right to sue Williamson for breaches of duty he owed them.

So, in this case, even assuming that at the time the Edmondses accepted the proceeds of a settlement with AHP, they knew they had claims against Williamson, the Edmondses never

waived their claims against Williamson merely because the Edmondses accepted the proceeds of the settlement with AHP. Consequently, the Edmondses "maintain their right to sue for malpractice even after accepting settlement funds." *Id.* And the trial court erred in entering summary judgment in favor of Williamson.

III. ISSUE NO. 2: Are the Edmondses estopped from prosecuting the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson?

In the same circumstances as the trial court found that the Edmondses waived the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson, the trial court found that estoppel precluded the assertion by the Edmondses of the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson. Based, at least in part, on that finding, the trial court entered summary judgment in favor of Williamson.

The trial court erred as a matter of law in finding that estoppel precluded the assertion by the Edmondses of the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson. And in entering summary judgment in favor of Williamson on the ground that estoppel precluded the assertion by the Edmondses of the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson, the trial court erred.

The trial court erred because "estoppel is the inhibition to assert [some known right, benefit or advantage]." *Channel*, 2005-CA-01395-SCT (¶ 36) (internal quotation marks omitted). To qualify for estoppel, a party must demonstrate three elements. *Id.* ("In order to establish that a claim is barred by estoppel, three essential elements must be proven..."). First, the party asserting estoppel must prove "a representation that later proves to be untrue..." *Id.*

Second, the party asserting estoppel must prove that based on the representation by the other party, he took action. *Id.* ("In order to establish that a claim is barred by estoppel...[the party asserting estoppel must prove that he took] action in reliance on the representation..."). Last, the party asserting estoppel must prove that he suffered a detriment from the action taken on the basis of the other party's representation. *Id.* ("In order to establish that a claim is barred by estoppel...[the party asserting estoppel must prove] a resulting detriment to that person arising from his action.").

"[O]ne could conclude that the [Edmondses] represented to [Williamson] that they wanted to settle and that [Williamson] took action relying on that representation to [conclude the] settlement agreement with AHP." *Id.* (¶ 37). "This would satisfy the first two requirements for estoppel to apply. *Id.* But, Williamson can prove no set of facts that would establish Williamson suffered any detriment from concluding the settlement with AHP. *Id.* ("However, there are no facts stated to show, and there are no specific allegations asserting that Loyacono and Verhine suffered any detriment by negotiating the settlement agreements with AHP on behalf of the plaintiffs. On the contrary, Loyacono and Verhine were paid a fee and actually prospered from the negotiations and settlements.").

So, in this case, even assuming that the Edmondses represented to Williamson that they wanted to settle with AHP and that in reliance on that representation, Williamson concluded the settlement with AHP, nothing estops the Edmondses from prosecuting the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson. *Id.* ("Therefore, the third requirement not being met, the plaintiffs' claims were not barred by estoppel."). Consequently, the Edmondses "maintain their right to sue for [lawyer malpractice, breach of contract, and breach of fiduciary duty] even after accepting settlement

funds." *Id.*

IV. ISSUE NO. 3: By signing the acknowledgment and separate agreement, did the Edmondses release the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson?

In effecting the settlement with AHP, the Edmondses signed an acknowledgment and a separate agreement that Williamson presented them. The acknowledgment concerned certain amounts that Williamson would deduct from the settlement.[9] The agreement provided that the Edmondses would execute and deliver the release of AHP and all other settlement documents AHP required.[10]

In this acknowledgment, the Edmondses:

> acknowledge that it cannot be determined with exact specificity, at this time, the full extent of expenses incurred in the prosecution of this litigation and do realize that they have been very substantial.

Williamson then identified in the acknowledgment the "categories of expenses" that the Edmondses were acknowledging Williamson would deduct from the settlement proceeds payable to the Edmondses. Last, in the acknowledgment, the Edmondses confirmed by signing the document that:

> [they signed the document] with the understanding and acknowledgment so that the settlement proceeds may be expedited; (sic) releases signed, obtained and tendered to American Home Products and disbursement of monies made as soon

---

[9] The Edmondses include in an appendix to this brief a true copy of the acknowledgment. Williamson attached the acknowledgment to "Williamson Defendants' Motion for Summary Judgment," filed August 16, 2005. Williamson identified the acknowledgment as Exhibit 6 to that motion. The Edmondses use Exhibit 6 to "Williamson Defendants' Motion for Summary Judgment," for the appendix to this brief.

[10] The Edmondses include in an appendix to this brief a true copy of the agreement. Williamson attached the agreement to "Williamson Defendants' Motion for Summary Judgment," filed August 16, 2005. Williamson identified the acknowledgment as Exhibit 7 to that motion. The Edmondses use Exhibit 7 to "Williamson Defendants' Motion for Summary Judgment," for the appendix to this brief.

as possible.

The separate agreement stated this promise or agreement by Williamson:

> [t]he Williamson Law Firm will see to it that LISA EDMONDS receives $1,500,000.00 after applicable expenses as per the acknowledgment and attorneys' fees in the amount of FORTY-FIVE PERCENT (45%).

And the document sets out this promise or agreement by Lisa Edmonds:

> I, LISA EDMONDS, will provide to the Williamson Law Firm all properly executed documents required by American Home Products including signature of my husband on any release required by American Home Products or disbursement sheets in accordance with the above and the Acknowledgment.

Based on those facts and circumstances, the trial court found that:

> [Lisa Edmonds] understood fully that she was settling her claim for $1.5 million net and that she was to sign a release. [Lisa Edmonds] knew that she was releasing any claim that she may have had against Mr. Williamson by signing the Acknowledgment and the Agreement.

Thus, the trial court treated the acknowledgment and separate agreement as a release.

The trial court erred as a matter of law in treating the acknowledgment and separate agreement as a release.

A release is a contract. *E.g., Kelliher v. Herman*, 701 P.2d 1157, 1159 (Wyo. 1985) ("A release is contractual in nature and is a contract or a species of contract."). The "intention of the parties as expressed in the terms of a particular instrument considered in the light of all facts and circumstances," determines the scope of a release. *Economou v. Economou*, 136 Vt. 611, 619, 399 A.2d 496, 500 (1979). In addition, a release requires the party purportedly releasing a claim to act unequivocally in a way that expressly or impliedly shows an intention to release. *West Virginia ex rel. Ashworth v. West Virginia Road Commission*, 147 W.Va. 430, 442, 128 S.E.2d 471, 479 (1962) ("There can not be a release without unequivocal acts showing expressly or by implication an intention to release. 45 Am.Jur., Release, § 28."). And Mississippi disfavors

releases. Mississippi subjects releases to close scrutiny, enforcing them only when the releasing party knowingly entered into the release, understanding the nature and the scope of the release. *Farragut v. Massey*, 612 So.2d 325, 330 (1992) ("According to 17 Am.Jur.2d Contracts § 297 n. 74 (1991): 'Clauses limiting liability are given rigid scrutiny by the courts, and will not be enforced unless the limitation is fairly and honestly negotiated and understandingly entered into.'").

Because a release is a contract, courts apply general rules of contract construction when considering a particular release. *See, e.g., Farragut*, 612 So.2d 325. So, a court construing a release must determine, and then carry into effect, the intent of the parties to the release. *One South, Inc.*, No. 2006-CA-01048-SCT (¶ 10) ("We are reminded that '[t]he primary purpose of all contract construction principles and methods is to determine and record the intent of the contracting parties.'") (citations omitted). "In order to determine and record the intent of the contracting parties, [this Court] focus upon the objective language of the contract." *Id.* In construing a contract or a release, this Court concerns itself with "the objective fact – the language of the contract." *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, No. 2003-CT-00856-SCT (¶ 6) (Miss. 2005). And in construing a contract or a release, this Court concerns itself with what the contracting parties have said to each other, not some secret thought of one not communicated to the other." *Id.* (citations and internal quotation marks omitted).

This Court uses "a three-tiered approach to contract interpretation." *Id.* (¶ 7). This Court first reads the words of the agreement or release objectively. *Id.* ("Legal purpose or intent should first be sought in an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence."). "First, the 'four corners' test is applied, wherein the reviewing court looks to the language that the parties used in expressing their agreement. " *Id.* "When

construing a contract, we will read the contract as a *whole,* so as to give effect to all of its clauses." *Id.* (italics in original). In this reading, this Court " is not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy." *Id.* Based on this reading, this Court must construe the intent consistent with the words used in the agreement or release itself. *Id.* ("Thus, the courts are not at liberty to infer intent contrary to that emanating from the text at issue."). This Court has "long held that when a contract is clear and unambiguous to its wording, its meaning and effect are matters of law." *Farmland Mut. Ins. Co. v. Scruggs*, No. 2003-CA-00874-SCT (¶ 10) (Miss. 2004).

"Only if the contract is unclear or ambiguous can a court go beyond the text to determine the parties' true intent." *Facilities, Inc.,* No. 2003-CT-00856-SCT (¶ 7). And a determination that a contract or release is ambiguous requires more than disagreement over the meaning of the agreement or release. *Farmland Mut. Ins. Co.* (¶ 13) ("Simply because the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law."); and *Facilities, Inc.,* No. 2003-CT-00856-SCT (¶ 7) ("'[T]he mere fact that the parties disagree about the meaning of a contract does not make the contract ambiguous as a matter of law.'").

In construing an ambiguous contract or release, this Court applies general rules of contract construction. *Id.* ("[I]f the court is unable to translate a clear understanding of the parties' intent, the court should apply the discretionary 'canons' of contract construction."). "Where the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party." *Id.* Last, "if the contract continues to evade clarity as to the parties' intent, the court should consider

extrinsic or parol evidence." *Id.*

In this case, this Court has no need to consider any extrinsic or parol evidence concerning the meaning of the acknowledgment and the separate agreement. An objective reading of the words of the acknowledgment and agreement leads the reader to conclude that the Edmondses and Williamson clearly and unambiguously conveyed their intentions. By signing the acknowledgment, the Edmondses acknowledged that Williamson was unable to tell them at that time the exact amount of the litigation costs Williamson intended to charge against the share of the settlement payable to the Edmondses. And by signing the acknowledgment, the Edmondses confirmed they were signing the acknowledgment to permit Williamson to consummate the settlement with AHP. By signing the agreement, Williamson agreed to assure that Lisa Edmonds received "$1,500,000.00 after applicable expenses as per the acknowledgment and attorneys' fees in the amount of FORTY-FIVE PERCENT (45%)." And by signing the agreement, Lisa Edmonds agreed that she would "provide to the Williamson Law Firm all properly executed documents required by American Home Products including signature of my husband on any release required by American Home Products or disbursement sheets..."

The words of the acknowledgment and agreement convey that Williamson and the Edmondses intended only to consummate the settlement with AHP.

No reasonable, objective reading of the words of the acknowledgment and agreement allows one to conclude that by signing the acknowledgment and agreement, the Edmondses intended to release Williamson from liability on claims of lawyer malpractice, breach of contract, and breach of fiduciary duty. The acknowledgment contains no mention of the word "release." The agreement mentions the word "release," but uses that word only in conjunction with "any release required by American Home Products..." No words in either the acknowledgment or the

agreement manifest, to any degree, an knowing intent by the Edmondses to release Williamson from anything, let alone from liability on claims of lawyer malpractice, breach of contract, and breach of fiduciary duty. In these circumstances, because Mississippi subjects releases to close scrutiny, enforcing them only when the releasing party knowingly entered into the release, understanding the nature and the scope of the release, *Farragut*, 612 So.2d at 330, and based on an objective reading of the words in the acknowledgment and separate agreement, the trial court erred, as a matter of law, in finding that "[Lisa Edmonds] knew that she was releasing any claim that she may have had against Mr. Williamson by signing the Acknowledgment and the Agreement." And the trial court erred in entering summary judgment in favor of Williamson.

Consequently, even though the Edmondses signed the acknowledgment and agreement, they maintain their right to sue for Williamson for lawyer malpractice, breach of contract, and breach of fiduciary duty.

V. ISSUE NO. 4: By signing the acknowledgment and separate agreement, did the Edmondses enter into an accord and satisfaction with Williamson?

In the same circumstances as the trial court found that the Edmondses released Williamson from liability on the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty they have asserted against Williamson, the trial court found that the acknowledgment and agreement constitute an accord and satisfaction and that, consequently, the accord and satisfaction bars the Edmondses from prosecuting the claims of lawyer malpractice, breach of contract, and breach of fiduciary against Williamson. Based, at least in part, on that finding, the trial court entered summary judgment in favor of Williamson.

The trial court erred as a matter of law in finding that the acknowledgment and agreement constitute an accord and satisfaction and that, consequently, the accord and satisfaction bars the

Edmondses from prosecuting the claims of lawyer malpractice, breach of contract, and breach of fiduciary against Williamson. And in entering summary judgment in favor of Williamson on the ground that accord and satisfaction bars the Edmondses from prosecuting the claims of lawyer malpractice, breach of contract, and breach of fiduciary against Williamson, the trial court erred.

Accord and satisfaction requires the existence of four elements. *Channel*, 2005-CA-01395-SCT (¶ 39) ("Under Mississippi law, there are four elements of accord and satisfaction..."). First, a party must accept "something of value offered in full satisfaction of a demand..." *Id.* Second, the party offering the value must accompany the offer by such "acts and declarations as amount to a condition that if the thing is accepted, it is accepted in satisfaction...". *Id.* Third, the party accepting the value must " understand that if he takes it, he takes subject to such conditions..." *Id.* Last, the party offered the value must accept the offered value. *Id.*

Here, AHP offered the group of Williamson clients that included the Edmondses something of value to settle the claims those claimants had asserted against AHP. AHP clearly declared by its offer and the released it demanded in exchange for the value it was offering each claimant that if the claimant accepted the value, the claimant accepted the value in satisfaction of the claim the claimant had asserted against AHP. The Edmondses understood that if they accepted the offer by AHP, they took the settlement subject to the conditions of the settlement, including the release. The Edmondses accepted the settlement that AHP offered.

The trial court concluded that these circumstances amounted to an accord and satisfaction between the Edmondses and Williamson.

This Court rejected just such a contention in *Channel*. In *Channel*, "the plaintiffs were offered settlements of various amounts in satisfaction of the demands that were made against

AHP." *Channel*, 2005-CA-01395-SCT (¶ 40). "They signed settlement agreements releasing AHP and agreeing that the settlements were in full satisfaction of those demands. *Id.* The plaintiffs accepted the AHP offers. *Id.* When the plaintiffs sued the lawyers who had represented them on the claims against AHP, those lawyers contended "that this set of circumstances meets the criteria for accord and satisfaction." *Id.* But, in responding to the contention by those lawyers, this Court stated that the lawyers were asserting an argument based on flawed logic. *Id.* (" However, Loyacono and Verhine's logic is flawed.").

This Court then explained the flaw in the logic of the argument the lawyers were using. "The plaintiffs did not demand anything of [the lawyers] except reasonable care in legal service." *Id.* (¶ 41). "The settlements released AHP, not [the lawyers], from liability and future claims." *Id.* "Furthermore, [the lawyers] provided nothing of value to the plaintiffs." *Id.* This Court concluded that "[t]herefore, accord and satisfaction does not bar the plaintiffs' claims." *Id.*

Here, the trial court exercised flawed logic in concluding that the circumstances in this case amounted to an accord and satisfaction between the Edmondses and Williamson. The Edmondses demanded nothing from Williamson "except reasonable care in legal service." *Id.* To discharge the reasonable care Williamson owed the Edmondses, Williamson had an obligation represent the Edmondses on the claims, including presenting to the Edmondses any offer AHP presented. The trial court erroneously concluded that "[Lisa Edmonds] was offered something of value in satisfaction of her demand by Mr. Williamson offering her $1.5 million net in satisfaction of her demand." *Memorandum Opinion*, twenty-fifth unnumbered page, in order. Williamson did nothing more than his duties as Lisa Edmonds's lawyer and agent: Williamson relayed an offer AHP made to Lisa Edmonds. Just as "[the lawyers] provided nothing of value to the plaintiffs" in *Channel*, *Id.*, by presenting the plaintiffs with the offer AHP made to the

plaintiffs, Williamson provided nothing to Lisa Edmonds in presenting her with an offer of her share of the total settlement that AHP offered. Consequently, " accord and satisfaction does not bar the [claims of lawyer malpractice, breach of contract, and breach of fiduciary duty that the Edmondses have asserted against Williamson]." *Id.* Because accord and satisfaction does not bar the claims of lawyer malpractice, breach of contract, and breach of fiduciary duty that the Edmondses have asserted against Williamson, the Edmondses "maintain their right to sue for [lawyer malpractice, breach of contract, and breach of fiduciary duty] even after accepting settlement funds." *Id.* (¶ 38).

VI. ISSUE NO. 5: Can Larry Edmonds have claims against Williamson for lawyer malpractice and breach of fiduciary duty?

Larry Edmonds never directly asserted a claim against AHP related to the use of the diet drug "Fen-phen." But, Larry Edmonds had derivative claims against AHP for loss of consortium. In effecting the settlement with AHP, Larry Edmonds released AHP from liability on his claims for loss of consortium. Larry Edmonds received none of money that AHP paid in settlement of the claims Lisa Edmonds asserted against AHP. In these circumstances, the trial court concluded that "[Larry Edmonds] may not maintain this action against his wife's former attorneys, Edward Williamson and Michael Miller." *Memorandum Opinion*, twenty-fifth and twenty-sixth unnumbered pages, in order. In essence, then, the trial court concluded that Larry Edmonds simply failed to state a claim against Williamson on which the trial court could grant relief. The trial court basically found that Larry Edmonds had, and could have, no claim against Williamson.

The trial court erred, as a matter of law, in concluding that Larry Edmonds can have no claim for lawyer malpractice or breach of fiduciary duty against Williamson.

To establish a claim of lawyer malpractice against Williamson, Larry Edmonds must

prove three elements. First, Larry Edmonds must establish that he had a lawyer-client relationship with Williamson. *Byrd v. Bowie*, No. 2005-IA-00321-SCT (¶ 15) (Miss. 2006) ("[O]ne claiming negligence in a legal malpractice action must prove by a preponderance of the evidence ... the existence of an attorney-client relationship..."). Next, Larry Edmonds must establish that Williamson acted negligently in representing Larry Edmonds on the legal matter that Williamson undertook for Larry Edmonds. *Id.* (""[O]ne claiming negligence in a legal malpractice action must prove by a preponderance of the evidence ... negligence on the part of the lawyer in handling his client's affairs entrusted to him..."). As to this element, "a lawyer owes his client the duty to exercise the knowledge, skill, and ability ordinarily possessed and exercised by the members of the legal profession similarly situated." *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1215 (Miss. 1996). "Failure to do so constitutes negligent conduct on the part of the lawyer." *Id.* Last, Larry Edmonds must establish that Williamson's negligence proximately caused Larry Edmonds some legal injury or damage. *Id.* ("[O]ne claiming negligence in a legal malpractice action must prove by a preponderance of the evidence ... proximate cause of the injury."). These elements apply to a claim of negligence (*i.e.*, an adverse deviation from the applicable standard-of-care) and to a claim for breach of fiduciary duty. *Id.* ("[L]egal malpractice may be a violation of the standard of care of exercising the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, or the breach of a fiduciary duty.").

"Loss of consortium is similarly derivative, and Mississippi law dictates that if the underlying personal injury claim is disposed of, the loss of consortium claim cannot be maintained on its own." *J & J Lumber Co.*, No. 2004-IA-01914-SCT (¶ 19). "A cause of action accruing to a party for loss of consortium is separate and distinct from that party's spouse

suffering personal injury." *Coho Resources, Inc. v. McCarthy*, No. 97-CA-01447-SCT (¶ 66) (2002). "The spouse seeking compensation for loss of consortium must show that he or she suffered damages arising out of the other's injuries." *Id.*

This issue, then, raises the question whether Larry Edmonds can have a claim against Williamson even though Larry Edmonds never signed a representation agreement with Williamson and Larry Edmonds only had a claim against AHP for loss of consortium. This appears to present an issue of first impression in Mississippi.

But, the courts in other states have addressed this issue. The Court of Appeal of California, Second District, extended the duty of a lawyer for a married person to that person's spouse in rather limited circumstances. *Meighan v. Shore,* 34 Cal.App.4th 1025, 40 Cal.Rptr.2d 744 (Cal.App. 1995). In that case, the trial court granted a summary judgment in favor of the lawyer on claims of lawyer malpractice that the non-represented spouse asserted against the lawyer. *Meighan*, 34 Cal.App.4th at 1030, 40 Cal.Rptr.2d at 746. "The principal issue framed in respondent's motion and the opposition was whether respondent owed a duty to inform appellant of her right to pursue a cause of action, or to alert her to the need to consult another attorney about it." *Id.* The appeals court said that "[t]he trial court erred in ruling that he did not." *Id.* The appeals court held:

> that when a husband and wife consult an attorney about a personal injury action against a third party on account of personal injury to one of them, and the other spouse has a potential claim for loss of consortium of which the attorney is or ought to be aware, the attorney has a duty to inform that spouse of the consortium cause of action.

Id., 34 Cal.App.4th at 1029, 40 Cal.Rptr.2d at 745-746.

The United States District Court for the Southern District of New York applied New York law in a ruling on a motion for summary judgment in *Jordan v. Lipsig, Sullivan, Mollen &*

Liapakis, P.C., 689 F.Supp. 192 (S.D.N.Y. 1988), that raised the question whether a husband could assert a claim of lawyer malpractice against the lawyers representing the man's wife based on a claim of loss of the husband's consortium claim. In *Jordan*, "plaintiffs never instituted an action allegedly as a direct result of defendants' alleged malpractice." *Id.*, 689 F.Supp. at 197. The lawyers attempted "to avoid liability for their alleged negligence by arguing that Mr. Jordan should have independently contacted them to institute a loss of consortium action." *Id.* "Although Mr. Jordan was not a client of defendants, his claim was intricately interwoven with that of Mrs. Jordan." *Id.* Because "New York law [was] clear that he could not bring an action separate and apart from that of his wife once his wife's action was terminated by the running of the statute of limitations," the district court found the lawyer's position unreasonable. *Id.* The district explained that "[a] spouse should reasonably be able to rely on the representation afforded to the injured spouse to inform him or her of his or her potential derivative claims for loss of consortium." *Id.* So, the district court found "that to the extent that defendants were negligent in not timely filing suit on behalf of Mrs. Jordan, Mr. Jordan may seek to recover against defendants for his potential claim of loss of consortium." *Id.*

Here, even though Larry Edmonds never signed a representation agreement with Williamson, Larry Edmonds may have a claim against Williamson. That is, Larry Edmonds may be able to establish the first element of a claim for lawyer malpractice.

Larry Edmonds may also be able to establish the second element of a claim for lawyer malpractice, breach of a duty. Larry Edmonds's loss-of-consortium claim against AHP and Lisa Edmonds's claim against AHP relating to her use of the diet drug "Phen-Fen" were inextricably intertwined. The record fails to disclose whether Williamson advised Larry Edmonds about the existence of his loss-of–consortium claim against AHP. The record fails to disclose whether

Williamson advised Larry Edmonds concerning the limitations period within which Larry Edmonds had to assert that claim or face a legal bar to asserting the claim. If Larry Edmonds can establish that Williamson failed to advise Larry Edmonds about the existence of his loss-of–consortium claim against AHP, Larry Edmonds may be able to establish that Williamson breached a duty Williamson owed Larry Edmonds. And if Larry Edmonds can establish that Williamson failed to advise Larry Edmonds about the limitations period within which Larry Edmonds had to assert his loss-of-consortium claim, Larry Edmonds may be able to establish that Williamson breached a duty Williamson owed Larry Edmonds.

Last, Larry Edmonds may be able to prove that he suffered damages from a breach by Williamson of a duty Williamson owed Larry Edmonds. If Larry Edmonds establishes this his loss-of-consortium claim had a value, because Larry Edmonds received nothing on his claim, and the bar of the statute-of-limitations has now attached to the claim, Larry Edmonds may be able to establish that Williamson's breach of duty proximately damaged Larry Edmonds.

The trial court simply erred, as a matter of law, in ruling that Larry Edmonds had no claim against Williamson. And the trial court erred, as a matter of law, in entering summary judgment in favor of Williamson on Larry Edmonds's claim.

VII. ISSUE NO. 6: Do the Edmondses own the "case file" Healy created concerning *Edmonds v. Williamson*, or does Healy, the lawyer, own the "case file?"

In ruling on the dispute between the Edmondses and Healy concerning the ownership of the file, the trial court cited to Rule 1.16(d), Mississippi Rules of Professional Conduct (2006). The trial court acknowledged that under the rule, "the client is entitled to the contents of his or her file that is maintained by the attorney." *Order* entered July 31, 2006, second unnumbered-page, in order. Yet, the trial court limited Healy's duty to deliver the contents of the "case file"

to the Edmondses. The trial court stated that "the Edmonds are entitled to the return of any original papers and property they delivered to Mr. Healy." *Id.*

The trial court erred in deciding the issue concerning the ownership of the file.

The Edmondses have found no reported or published decisional law in Mississippi addressing whether the lawyer or the client owns the "case file" relating to the lawyer's representation of the client. The Edmondses have found no decision of the Supreme Court of Mississippi deciding the issue. The Edmondses have likewise found no decision of the Court of Appeals of the State of Mississippi deciding the issue. Consequently, this appeal appears to present an issue of first impression in Mississippi.

Courts of other jurisdictions have decided whether the lawyer or the client owns the "case file." Some have decided the issue in the context of civil actions. Some have decided the issue in disputes concerning the rights of successors-in-interest. Others have decided the issue in disciplinary proceedings.

The Supreme Court of New Hampshire addressed the issue as a matter of first impression in 2000. In analyzing the issue, the New Hampshire court "look[ed] to other jurisdictions to guide [it] in [its] determination." *Averill v. Cox*, 145 N.H. 328, 339, 761 A.2d 1083, 1092 (N.H. 2000). The New Hampshire court said, "[a] majority of jurisdictions follow the rule that once the attorney-client relationship has ended, the client's case files are the property of the client and should be turned over." *Id.* The court adopted the majority position for New Hampshire. *Id.* ("Thus, we conclude that a client's file belongs to the client, and upon request, an attorney must provide the client with the file.").

The court adopted this majority position because "[New Hampshire's] Rules of Professional Conduct support this approach. New Hampshire's Rule 1.16(d) states [that] "[u]pon

termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled...." *Id.*

Rule 1.16(d), Mississippi Rules of Professional Conduct, tracks New Hampshire's Rule 1.16(d) exactly. New Hampshire's rule states that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled...." Likewise, Mississippi's Rule 1.16(d) also states that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled...."

Because the New Hampshire court adopted the majority rule on client ownership of "case files," based on the applicable rule of professional conduct and New Hampshire follows the same rule of professional conduct on this point as Mississippi follows, this Court should conclude that Mississippi follows the majority rule concerning ownership of the file. This Court, then, should decide that under Mississippi law, a client's "case file" belongs to the client, and upon request, a lawyer must deliver to the client or the client's designee the "case file."

The Supreme Court of Missouri also addressed the issue of client ownership of "case files." *Matter of Cupples*, 952 S.W.2d 226 (Mo.1997) (*en banc*). *Cupples* raised the issue in a disciplinary proceeding. The Missouri court decided in *Cupples* that "[t]he client's files belong to the client, not to the attorney representing the client." *Id.*, 952 S.W.2d at 234. The Missouri court also concluded that "[t]he client may direct an attorney or firm to transmit the file to newly retained counsel." *Id.*

In reaching these conclusions, the Missouri court relied on *In re Grand Jury Proceedings*,

727 F.2d 941, 944 (10th Cir.), *cert. denied,* 469 U.S. 819, 105 S.Ct. 90, 83 L.Ed.2d 37 (1984), and *Rose v. State Bar of California*, 49 Cal.3d 646, 262 Cal.Rptr. 702, 706, 779 P.2d 761, 765 (1989). Both of those decisions follow the majority rule on client ownership of "case files." The Missouri court also relied on Robert W. Hillman, *Hillman on Lawyer Mobility*, § 2.3.2.1, a respected authority on lawyer-professional-responsibility issues and on issues involving ownership of "client files" or "case files" in the context of law-firm break-ups and lawyer moves between firms. Hillman advocates the majority rule on client ownership of "case files."

The Supreme Court of Minnesota likewise decided the issue of ownership of client "case files" in a disciplinary proceeding. *In re Admonition of X.Y.*, 529 N.W.2d 688 (Minn.1995). In that disciplinary proceeding, a Minnesota lawyer charged a former client for copying the file the lawyer delivered to successor counsel. In deciding that the lawyer acted inappropriately – and incidentally violated Rule 1.16(d) of the Minnesota Rules of Professional Conduct – the Minnesota court said, "[t]he file belonged to the client and was appropriately returned to her upon her request." *Id.*, 529 N.W.2d at 690. On this issue, Rule 1.16(d), Minnesota Rules of Professional Conduct, reads identically to Rule 1.16(d), Mississippi Rules of Professional Conduct. *Compare Minn.R.Prof.Conduct 1.16(d), with Miss.R.Prof.Conduct 1.16(d).* Relying on Rule 1.16(d), Mississippi Rules of Professional Conduct, the Minnesota court adopted the majority rule.

Just as the Supreme Court of New Hampshire, the Supreme Court of Missouri, and the Supreme Court of Minnesota have done, this Court should adopt the majority rule on ownership of client "case files." This Court should rule that "[t]he client's files belong to the client, not to the attorney representing the client" and the lawyer should deliver the "case file" to the client upon request.

VIII. ISSUE NO. 7: If the Edmondses own the "case file" and if Healy wants to retain a copy of the file, do the Edmonds have to pay for the copy for Healy's benefit or does Healy have to pay for the copy?

In ruling on the dispute between the Edmondses and Healy concerning the ownership of the file, the trial court found "that the entire client file shall be made available to the [Edmondses] for inspection." *Order* entered July 31, 2006, second unnumbered-page, in order. Based on that finding, the trial court order that "[t]hereafter, the [Edmondses] or their representative may copy as much or as little of the file as they wish at their expense." *Id.*

The Edmondses contend the trial court erred, as a matter of law, in ordering them to pay for copying any part of the "case file."

As was the case with the issue of the ownership of the "case file," the Edmondses have found no reported or published decisional law in Mississippi addressing whether a client or the lawyer must pay for copying documents or papers in a "case file." The Edmondses have found no decision of the Supreme Court of Mississippi deciding the issue. The Edmondses have likewise found no decision of the Court of Appeals of the State of Mississippi deciding the issue. Consequently, this appeal appears to present a second issue of first impression in Mississippi.

In 2000, the Supreme Court of New Hampshire decided the issue whether a client or the lawyer must pay for copying documents or papers in a "case file." *Averill*, 145 N.H. at 328, 761 A.2d at 1083. When that court did so, it decided the issue the same way the majority of courts that have addressed the issue have decided the issue. The New Hampshire court decided in favor of the client. The lawyer must pay for a copy of the "case file."

Interpreting a lawyer's duty under Rule 1.16(d), New Hampshire Rules of Professional Conduct, the New Hampshire court required the lawyer to bear the cost of a copy of the file. *Averill*, 145 N.H. at 328, 761 A.2d at 1083. Citing a decision by the Supreme Court of

Minnesota, *Admonition of X.Y.*, 529 N.W.2d at 688, the New Hampshire court said, "[w]e agree with those jurisdictions that require the attorney to bear the expense of retaining a copy." *Averill*, 145 N.H. at 339, 761 A.2d at 1092.

The New Hampshire court began its analysis of this issue by noting that in *Averill*, "[t]he real debate focuses on who must pay to duplicate the plaintiff's file so that all parties may have a copy." The court proceeded by saying, "[i]n resolving this dispute, we must first determine who owns the file." *Id.* After concluding that "a client's file belongs to the client, and upon request, an attorney must provide the client with the file," *Id.* the court explained, "[t]hat the plaintiff owns his file does not end the analysis, however, because jurisdictions differ on whether the attorney or the client pays for copying." *Id.* The New Hampshire court "agree[d] with those jurisdictions that require the attorney to bear the expense of retaining a copy." *Id.*

The New Hampshire required the lawyer to bear the expense of retaining a copy of the "case file" for policies reasons. "This approach has the benefit of ease of administration and is consistent with our rules of professional conduct." *Id.* Based on Rule 1.16(d), New Hampshire Rules of Professional Conduct, the New Hampshire court concluded that "absent a written agreement requiring the client to pay reasonable costs of copying his or her file, if an attorney wishes to retain a copy of the client's file, the attorney must pay the associated costs." *Id.*

Here, the Edmondses asks this Court to decide that Healy must bear the cost of any copy of the "case file" he may wish to retain. As the Edmondses discussed earlier in this memorandum, Rule 1.16(d), Mississippi Rules of Professional Conduct, reads exactly as New Hampshire's Rule 1.16(d) reads. *Compare N.H.R.Prof.Conduct 1.16(d), with Miss.R.Prof.Conduct 1.16(d).* The fee agreement the Edmondses executed at the time they employed Healy, contains no express provision imposing on the Edmondses the obligation to pay

for any copy of the "case file" Healy might wish to retain. Instead, that agreement merely says, "[the Edmondses agree] to pay all costs and expenses associated with efforts made on my behalf, regardless of whether I obtain any recovery."[11] Simply stated, this provision fails to state clearly and unequivocally that the Edmondses bear the cost of any copy of the "case file" Healy may wish to retain. "[A]ny provision in a written agreement to have a client pay for the costs of copying his or her file upon termination of representation should be clearly indicated." *Averill*, 145 N.H. at 340, 761 A.2d at 1092. Just as "[t]he fee agreement in [*Averill*] only require[d] that the plaintiff pay out-of-pocket expenses, including the cost of photocopies," *id.*, the fee agreement in this case, only requires Edmonds "to pay all costs and expenses associated with efforts made on my behalf" in prosecuting *Edmonds v. Williamson*. The fee agreement in *Averill* "[did] not clearly indicate that the plaintiff must pay for the cost of copying his own file; rather, it indicates that the plaintiff must pay for copies related to the work that the defendants perform." *Id.* Likewise, the fee agreement in this case, contains no clear, unequivocal undertaking by the Edmondses to pay the costs Healy would incur in copying the "case file." Instead, the fee agreement in this case, merely requires the Edmondses to pay the costs, presumably including photocopy costs, Healy would incur when prosecuting *Edmonds v. Williamson*. In these circumstances, the Edmondses contend that this Court should join "with those jurisdictions that require the attorney to bear the expense of retaining a copy," *Id.* This Court should declare that as a matter of law, the trial court erred in finding that Healy had the right to retain the "case file" and Healy had only an obligation to give the Edmondses access to the "case file" to permit them

[11] The Edmondses include in an appendix to this brief a true copy of the signed fee-agreement. Healy entitled that agreement "Authorization to Represent Client and Contingency/Hourly Fee Agreement."

to copy, at their expense, any of the contents of the "case file" the Edmondses selected.

IX. ISSUE NO. 8: If the Edmondses own the "case file," does Healy have a duty to provide all of the contents of the "case file" to the Edmondses or may Healy withhold "work product" or other documents?

On this issue of first impression in Mississippi, the Edmondses ask this Court to declare that the client owns the entire "case file" the lawyer creates during the representation of the client and the lawyer has no right to refuse to turn over any part of the "case file."

This is precisely what the United States Bankruptcy Court for the Northern District of Georgia ruled in the leading case addressing this issue. *Matter of Kaleidoscope, Inc.*, 15 B.R. 232, 241 (Bankr.N.D.Ga. 1981), *rev'd on other grounds,* 25 B.R. 729 (N.D.Ga.1982).

In *Kaleidoscope*, the court faced a dispute between a trustee-in-bankruptcy and the law firm that had represented the debtor pre-bankruptcy concerning the rights of a trustee-in-bankruptcy to the contents of the files relating to Kaleidoscope, Inc. *Id.*, 15 B.R. at 234. The trustee repeatedly demanded the file. *Id.*, 15 B.R. at 236. The law firm "offered to make substantial portions of these legal files available to the Trustee and his counsel for inspection, but have refused to turn over the originals of these files." *Id.*, 15 B.R. at 237. The law firm "offered to make available for inspection and copying by the Trustee all of these legal files except" documents the law firm classified as it own "work product" and documents the law firm claimed qualified for protection under a "lawyer-client privilege" belonging to other clients of the law firm. *Id.* The law firm refused to deliver the original "case files," because it "asserted, in its own right, that it has title to all of these files, and its former client, Kaleidoscope (or the legal successor to the property rights of Kaleidoscope, the Trustee), has no proprietary interest in these legal files." *Id.* The law firm also argued that "even if title to the legal files might otherwise reside with the Trustee, as a factual matter Powell, Goldstein has co-mingled these legal files

with the legal files of its other former clients..." *Id.* Consequently, law firm argued, "it is virtually impossible to separate the 'Kaleidoscope' files from the other files." *Id.* "In addition to Powell, Goldstein's general claim of title, and the asserted problem of "co-mingling" of original documents which may belong to other clients represented by it, Powell, Goldstein also asserts that it has the power to exclude from the examination of the Trustee certain portions of the legal files sought by the Trustee on the ground that these portions constitute 'work product' which contain mental impressions, conclusions, legal opinions or legal theories of Powell, Goldstein." *Id.*, 15 B.R. at 238.

In analyzing the issues involved in the dispute over the ownership of the "case file" and the composition of the "case file," the court observed that in "modern commercial practice, the intellectual capacity, experience, and knowledge of the lawyer will be manifested in tangible form, either by correspondence, legal research, internal memoranda, notes, and the like, which the lawyer will file away in the 'client's file'. Regardless of whether the lawyer's efforts remain, as in simple matters, intangible thoughts in his head, or, in more complicated matters, take on tangible form as correspondence, memoranda, notes and the like, the fee which is charged by the lawyer, and paid by the client, is based upon the 'fruits of the attorney's labor'. That is what the client pays for, and it is that to which he is entitled." *Id.*, 15 B.R. at 240-241.

The court rejected the law firm's claim that it owned any part of the file. The court concluded that "[s]imply put, the client is entitled to the entire file of his attorney, and, on the contrary, the attorney is not entitled to refuse to turn over that file or any portion thereof." *Id.*, 15 B.R. at 241.

The court also considered the law firm's "claim to parts of those files as their own 'work product.'" *Id.* In rejecting the claim of a right to withhold any part of the "case file" as "work

product," the court concluded "that the doctrine of 'work product' has no application to the situation in which a client, or the legal successor-in-interest to a former client, seeks to obtain documents and other tangible things created or amassed by an attorney during the course of that attorney's representation of that client." *Id.*, 15 B.R. at 242. The court also "conclude[d] that all legal files created or amassed by Powell, Goldstein during the course of its representation of Kaleidoscope, Inc., including all legal files created or amassed while Powell, Goldstein jointly represented Kaleidoscope and ...any other person, and including any legal memoranda, correspondence, inter-office memoranda, notes, and the like pertaining to matters embraced within the scope of the representation of Kaleidoscope, Inc., or the joint representation of Kaleidoscope and any other person, as the case may be, are the property of Kaleidoscope, Inc...." *Id.*, 15 B.R. at 245. The court explained "that title to that property has passed to the Trustee, and ... Powell, Goldstein should be required to turn over all of that property to the Trustee, instanter." *Id.*, 15 B.R. at 245.

The United States District Court for the Northern District of Texas considered essentially the same issue the court in *Resolution Trust Corp. v. H—, P.C.*, 128 F.R.D. 647 (N.D.Tex.1989). The district court in *Resolution Trust* examined the issue under Texas law. The district court reached the same conclusion that the bankruptcy court reached in *Kaleidoscope*.

Resolution Trust "began when [Resolution Trust Corporation ("RTC"), as Conservator for Caprock Savings and Loan] requested a temporary restraining order against [a law firm], asserting that [the law firm] might be altering documents in its files." *Id.* After the law firm transferred the files to the lawyers representing RTC, RTC withdrew its request for a temporary restraining order. *Id.* But, the fight over the files continued because "the parties could not agree on access to or the ultimate ownership of the files..." *Id.* "[T]he Court...determined...that the

entire contents of the files belong to [RTC]." *Id.*

The court began the analysis that led it to conclude RTC owned "the entire contents of the files" by looking at the professional-responsibility provisions of the rules governing the Texas Bar. "The Texas State Bar rules provide that a lawyer must 'promptly pay or deliver to the client as requested by a client, the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.'" *Id.*, 128 F.R.D. at 648 (citing to DR 9-102(B)(4), the predecessor to Rule 1.15(a)). The court then observed that "[b]oth the Texas Bar and the Houston Court of Civil Appeals have held that this rule applies to documents in an attorney's files." *Id.* The law firm contended those holdings failed to dispose of the issue before the court because those holdings "appl[y] only to materials that the client had previously given to the attorney." *Id.* The law firm essentially contended that "[d]ocuments created by the attorney are not the client's property..." *Id.* The law firm also argued that certain of the materials in the files "– attorneys' notes and legal memoranda – are 'the personal property of the individual attorneys who drafted and prepared documents.'" *Id.* Thus, law firm argued, "such material may be protected by the work product doctrine and/or the attorney-client privilege." *Id.*

The court rejected the claim of lawyer-client privilege. The court said, "[t]he attorney-client privilege clearly is inapplicable in this situation, since it belongs to the client..." *Id.*, 128 F.R.D. at 649. "Thus, an attorney may not raise [claims of lawyer-client privilege] against his own client." *Id.*

The court also rejected the claim of protection from disclosure of documents based on protections afforded lawyer "work product." In rejecting this position, the court said that "[t]he work-product doctrine is equally inapplicable." *Id.* The court explained that "[t]he doctrine protects materials that are not covered by the attorney-client privilege but are prepared in

anticipation of litigation and contain material revealing attorney's thoughts or strategies..." *Id.* In *Resolution Trust*, "[n]one of the materials at issue here were prepared in anticipation of litigation...," so none of the materials qualified for protection from disclosure as work product. *Id.* This result followed even if "H— claims that it created materials in anticipation of litigation with its own client." *Id.* If H— were to make "[s]uch a statement...," H— would be admitting "a breach of the fiduciary duty owed by H— to Caprock, and it could hardly serve as a basis for this Court to allow H— to prohibit Plaintiff from obtaining those documents." *Id.* The court then continued with its reasoning on the invalidity of a claim of protection of lawyer work-product, saying "the protection afforded by the doctrine is for the benefit of the client, and thus cannot be used by his own attorney against him." *Id.* Citing supporting decisional law, the court said, "'the work product doctrine does not apply to the situation in which a client seeks access to documents or other tangible things created or amassed by his attorney during the course of the representation.'" *Id.* Then, referring to and relying on *Kaleidoscope*, the court continued its comments on this particular issue, saying "[i]t appears that only one other court has considered this issue, and its reasoning and conclusion fully support this Courts analysis." *Id.* The court also said, "[the *Kaleidoscope* court] exhaustively analyzed very similar claims and defenses as those presented here." *Id.* Characterizing the bankruptcy court's opinion as "impressive in the depth and breadth of its analysis," the court concluded that the bankruptcy court's discussion "of the effect of this question on the relationship between a client and an attorney is most compelling." *Id.* Quoting the bankruptcy court, the court emphasized "the simple and all-important fact in this situation – an attorney is in a *fiduciary* relationship to his client, owing the highest duty of good faith and diligence, and has no right or ability to unilaterally cull or strip from the files created or amassed during his representation of that client documents which he

determines the client is not entitled to see. The client is either entitled to all of the file or none of it." *Id.* (emphasis in original).

The court then concluded, "[a]n attorney is hired to represent the interests of his client, and every service provided by the attorney, including the creation of legal memoranda and attorney's notes and the copying of documents, is paid for by the client." *Id.* Thus, "[t]o allow the attorney to decide which materials may or may not be revealed to the client from its files would deny the client the full benefit of the services for which he paid, often dearly." *Id.* So, the court ordered the law firm to deliver to the trustee-in-bankruptcy all of the contents of the "case files."

Mississippi law recognizes and follows the policies that underlie the decisions in *Kaleidoscope* and *Resolution Trust*. In *Hewes v. Langston*, No. 1999-IA-00646-SCT (Miss. 2003), this Court recognized the doctrine affording lawyer's work-product protection. In recognizing the doctrine, this Court said, "[t]he work product doctrine protects an attorney's thoughts, mental impressions, strategies, and analysis from discovery by opposing counsel." *Id.*, ¶ 30. This Court relied on *Hickman v. Taylor*, 329 U.S. 495 (1947), and other federal cases interpreting the nature, scope, and purpose of the doctrine.

The Edmondses ask this Court to adopt the position in *Spivey v. Zant*, 683 F.2d 881, 885 (5th Cir.1982), and *Resolution Trust*, 128 F.R.D. at 649. The Edmondses ask this Court to declare that under Mississippi law, the work product doctrine does not apply to the situation in which a client seeks access to documents or other tangible things created or amassed by his attorney during the course of the representation. The Edmondses also ask this Court to declare that under Mississippi law, a lawyer possesses no right to withhold from a client a document the lawyer created when representing the client on a claim of lawyer-client privilege. Miss.R.Evid.

502 governs lawyer-client privilege. That rule allows "[t]he person who was the lawyer or the lawyer's representative at the time of the communication ... to claim the privilege..." *Miss.R.Evid. 502(c).* The rule allows the lawyer to assert the privilege "only on behalf of the client." *Id. Accord, Barnes v. Mississippi*, 460 So.2d 126, 131 (Miss.1984) ("Only the client may invoke the privilege...The attorney has no standing to invoke the privilege if the client does not wish to."). "Thus[, in Mississippi,] an attorney may not raise [a claim of lawyer-client privilege] against his own client" to justify withholding from the client any document that forms a part of the "case file." *Kaleidoscope*, 15 B.R. at 242.

The Edmondses ask this Court to overrule the trial court concerning Healy's obligation to deliver to the Edmondses the entire contents of the "case file." The Edmondses ask this Court to rule that because a lawyer in Mississippi has no right to withhold from a client documents forming a part of a "case file" on either a claim of work-product protection or lawyer-client privilege, Healy must deliver the entire "case file" to the Edmondses, retaining at his own cost a copy of the "case file."

X. ISSUE NO. 9: During the course of representing the Edmondses in *Edmonds v. Williamson*, Healy provided to the Edmondses copies of documents that form a part of the "case file." If the Edmondses own the "case file," does Healy have a duty to provide the Edmondses with a document if, in the course of the representation of the Edmondses, Healy previously provided the Edmondses with a copy of the document?

On this issue, apparently never before this case litigated in Mississippi, the Edmondses ask this Court to declare that because the client owns the "case file," a lawyer has a duty to provide a client with a document in the "case file," even when, in the course of representing the client, the lawyer has previously provided the client with a copy of the document. The court in *Resolution Trust* issued precisely that ruling. The court decided that a lawyer has a duty to

provide his client (or former client) with all of the documents forming a part of the "case file," even though during the course of the relationship, the lawyer provided the client with copies of the documents.

The law firm disputing with RTC in *Resolution Trust* had "already delivered to [its client, the financial institution under conservatorship by RTC], during the course of its representation, virtually all of the documents contained in the current files." *Resolution Trust*, 128 F.R.D. at 650. The law firm refused to deliver to the trustee-in-bankruptcy some of the contents of the original "case file." The law firm "assert[ed] that photocopying the entire file would cost between $70,000 and $80,000, an unfair burden [because RTC was] simply trying to fill in the gaps in [the client's] own carelessly-kept files." *Id.* The court rejected this argument, calling the argument a "red herring." *Id.*

The court went on to explain why the "argument [was] a red herring." *Id.* "First, [law firm] is not obligated to copy the files, only to turn them over." *Id.* "Second, most, if not all, of the documents in [law firm's] files were copied at [the client's] expense from the originals given to [the client]." *Id.* The court then concluded, "[because] the files were paid for by [the client], they belong to [the client]." *Id.* Hence, "[a]ny documents [law firm] wishes to keep may be copied at its own expense." *Id.*

Here, during the time Healy represented the Edmondses in *Edmonds v. Williamson*, the Edmondses paid Healy on an hourly rate basis. The Edmondses paid Healy more than $210,000 in fees. In addition to paying Healy more than $210,000 in fees, the Edmondses paid all costs and expenses associated with *Edmonds v. Williamson*. The Edmondses paid those items either directly or by reimbursing Healy for amounts Healy paid. The Edmondses paid more than $30,000 in costs and expenses.

The "case file" relating to *Edmonds v. Williamson* represents part of the package of goods and services the Edmondses purchased when they employed Healy. Here, the Edmondses have paid more than $240,000 for the "package of goods and services" they purchased when Healy represented them in *Edmonds v. Williamson*. Consequently, "once [the Edmondses paid] for the creation of a legal document, and [Healy placed] it ...in the [the "case file"], it [was Edmonds], rather than [Healy] who [held] a proprietary interest in that document." *Maleksi by Chronister v. Corporate Life Ins. Co.*, 163 Pa.Cmwlth. 36, 46-47, 641 A.2d 1, 6 (Cmwlth.Ct., 1994).

Additionally, as is true with all clients who pay a lawyer, the Edmondses paid Healy for the "fruits of his labor." In this case, the Edmondses has paid more than $240,000 for the "fruits of [Healy's] labor." The "case file" constitutes the tangible "fruit of Healy's labor." The Edmondses have paid for that fruit. Consequently, the Edmondses have the right to all of the fruit, and to the original fruit.

The Edmondses have the right to the original papers constituting or forming the "case file" even if, previously in the course of representing the Edmondses, Healy provided the Edmondses with copies of the documents. Healy must deliver the "case file" regardless of the number of times he may have provided the Edmondses copies of those documents because "[Healy] is not obligated to copy the files, only to turn them over." *Resolution Trust*, 128 F.R.D. at 650.

The Edmondses ask this Court to declare that "[because] the files were paid for by [Edmonds], they belong to [Edmonds]." Additionally, the Edmondses ask this Court to rule that if Healy wishes to copy any documents forming a part of the "case file," he may copy the documents at his own cost or expense.

CONCLUSION

The trial court erred as a matter of law in granting summary judgment in favor Williamson. Consequently, the Edmondses ask this Court to reverse the judgment of the trial court. Based on that reversal, the Edmondses ask this Court to remand this case to the trial court for further proceedings (trial of the claims).

The trial court also erred, as a matter of law, when it refused to order Healy to deliver to the Edmondses the original of all contents of the "case file" relating to *Edmonds v. Williamson.* The trial court erred, as a matter of law, in ruling that the Edmondses only had a right of access to the papers and documents forming the "case file" relating to *Edmonds v. Williamson.* And the trial court erred, as a matter of law, in ruling that the Edmondses had to pay any costs associated with obtaining documents from the "case file" relating to *Edmonds v. Williamson.*

Accordingly, the Edmondses ask this Court to reverse the ruling by the trial court concerning the "case file" and, in the process, to declare that the "case file" relating to *Edmonds v. Williamson* belongs to the Edmondses, as opposed to Healy, and that Healy should deliver the "case file" to the Edmondses upon request. The Edmondses also ask this Court to declare that a lawyer in Mississippi has no right to withhold from a client documents forming a part of a "case file" on either a claim of work-product protection or lawyer-client privilege, and, accordingly, Healy must deliver the entire "case file" to the Edmondses, retaining at his own cost a copy of the "case file." Last, the declare that if Healy wishes to copy any documents forming a part of the "case file," he may copy the documents at his own cost or expense. Based on that reversal, the Edmondses ask this Court to remand this case to the trial court for further proceedings (issuance of an order by the trial court consistent with the Court's opinion).

John J. Mueller
(No Miss. Bar. Reg. Number – admitted *pro hac vice*)
John J. Mueller, LLC
The Provident Building, Suite 800
632 Vine Street
Cincinnati, Ohio 45202-2441

Telephone: (513) 621-3636
Telecopier: (513) 621-2550

E-mail: johnjmueller@legalmalpractice.net

Counsel for Appellants, Lisa Edmonds and Larry Edmonds

Joseph W. Hutchinson, III as authorized
(Miss. Bar Reg. No. [redacted])
Joseph W. Hutchinson, III, Attorney at Law
405 Young Street
Butler, Alabama 36904-2832

Telephone: (205) 459-2050
Facsimile: (205) 459-4404

Co-counsel for Appellants, Lisa Edmonds and Larry Edmonds

CERTIFICATION BY COUNSEL OF MAILING OF BRIEF AND RECORD EXCERPTS

John J. Mueller certifies that today, December 14, 2007, I deposited in with DHL Courier a package addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, Gartin Justice Building, 450 High Street, Jackson, Mississippi 39201, containing:

1. the original of Brief For Appellants;
2. four photocopies of Brief For Appellants;
3. the original of Record Excerpts; and
4. four photocopies of Record Excerpts.

John J. Mueller
(No Miss Bar Reg. No. – admitted *pro hac vice*)
John J. Mueller, LLC
The Provident Building, Suite 800
632 Vine Street
Cincinnati, Ohio 45202-2441

Telephone: (513) 621-3636
Telecopier: (513) 621-2550

E-mail: johnjmueller@legalmalpractice.net

Counsel for Appellants, Lisa Edmonds and Larry Edmonds

CERTIFICATE OF SERVICE

I certify that by ordinary U. S. mail, postage pre-paid, I served a copy of this brief on:

1. Mr. John B. Clark
   Ms. Brandi N. Smith
   Daniel Coker Horton & Bell
   4400 Old Canton Road, Suite 400
   Post Office Box 1084
   Jackson, Mississippi 39215-1084,

   Counsel for Appellees, Edward A. Williamson, Individually, and Edward A. Williamson, P. A.;

2. Mr. Bill T. May
   Bill T. May, Attorney at Law
   205 East Church Street
   P. O. Box 217
   Newton, Mississippi 39345,

   Counsel for Appellee, Michael Miller; and

3. Mr. William B. Carter
   Follett Carter
   1709 23rd Avenue
   P.O. Box 406
   Meridian, Mississippi 39302-0406,

   Counsel for Appellees, George W. Healy, IV and George W. Healy IV & Associates.

Dated: December 14, 2007

John J. Mueller

Counsel for Appellants, Lisa Edmonds and Larry Edmonds

C
Sturdivant v. Sturdivant
Ark.,2006.

Supreme Court of Arkansas.
Sharon J. STURDIVANT, Appellant,
v.
Timothy L. STURDIVANT, Appellee.
No. 05-1305.

Oct. 26, 2006.

Background: In post-divorce custody proceeding, former husband filed motion to disqualify former wife's attorney. The Circuit Court, Pulaski County, Mackie Pierce, J., disqualified attorney and his firm. Former wife appealed.

Holdings: As a matter of first impression, the Supreme Court, Annabelle, Clinton Imber, J., held that:

(1) disqualification was warranted based on finding that attorney received information that could be harmful to former husband when he consulted with her, prior to retaining counsel, and

(2) duty owed to former husband by attorney with whom he had consulted was coextensive with the duty an attorney owed to a former client.

Affirmed.

[1] Appeal and Error 30  949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court

30k949 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases
The Supreme Court reviews a trial court's decision to disqualify an attorney under an abuse-of-discretion standard.

[2] Courts 106 ⚿26

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k26 k. Scope and Extent of Jurisdiction in General. Most Cited Cases
An abuse of discretion may arise by an erroneous interpretation of the law.

[3] Attorney and Client 45 ⚿32(2)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(2) k. Standards, Canons, or Codes of Conduct. Most Cited Cases
The Arkansas Rules of Professional Conduct are material in disqualification proceedings.

[4] Attorney and Client 45 ⚿32(2)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(2) k. Standards, Canons, or Codes of Conduct. Most Cited Cases
In a case involving the interpretation of the Rules of ProfessionalConduct, the Supreme Court's standard of review is to read the rules as they are written, and interpret them in accordance with established principles of rule construction..

[5] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court

30k893(1) k. In General. Most Cited Cases

Attorney and Client 45 ⚿32(2)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(2) k. Standards, Canons, or Codes of Conduct. Most Cited Cases
It is the Supreme Court's responsibility to decide what the Rules of Professional Conduct mean, and the Court will review the circuit court's construction de novo.

It is the Supreme Court's responsibility to decide what the Rules of Professional Conduct mean, and the Court will review the circuit court's construction de novo.

[6] Appeal and Error 30 ⚿842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases

Attorney and Client 45 ⚿32(2)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(2) k. Standards, Canons, or Codes of Conduct. Most Cited Cases
The Supreme Court is not bound by the circuit court's decision interpreting the Rules of Professional Conduct; however, in the absence of a showing that the court erred in its interpretation of a rule, that interpretation will be accepted as correct on appeal.

The Supreme Court is not bound by the circuit court's decision interpreting the Rules of Professional Conduct; however, in the absence of a showing that the court erred in its interpretation of a rule, that interpretation will be accepted as correct on appeal.

[7] Courts 106 85(2)

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k85 Operation and Effect of Rules
106k85(2) k. Construction and Application of Rules in General. Most Cited Cases
Language of a rule that is plain and not ambiguous must be given its obvious and plain meaning.

[8] Courts 106 85(2)

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k85 Operation and Effect of Rules
106k85(2) k. Construction and Application of Rules in General. Most Cited Cases
Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a rule provision.

[9] Appeal and Error 30 1008.1(5)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(5) k. Clearly Erroneous Findings. Most Cited Cases

Appeal and Error 30 1012.1(4)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1012 Against Weight of Evidence
30k1012.1 In General
30k1012.1(4) k. Clearly, Plainly, or Palpably Contrary. Most Cited Cases

In reviewing a circuit court's factual findings, the Supreme Court must determine whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence; a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed.

[10] Attorney and Client 45 ⚿21.20

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k21.20 k. Disqualification Proceedings; Standing. Most Cited Cases
Trial court's finding that attorney with whom former husband consulted received information that could be significantly harmful to him in post-divorce custody proceeding was not clearly erroneous, such that disqualification of firm from representing former wife in the custody proceeding was warranted; former husband testified that he gave attorney a copy of his journal, he also told her about facts that were not in the journal, and he disclosed everything he knew and his concerns about the children and his former wife. Rules of Prof.Conduct, Rules 1.181.9.

[11] Attorney and Client 45 ⚿32(13)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(13) k. Client's Confidences, in General. Most Cited Cases
Duty owed to former husband by attorney with whom he had consulted prior to retaining other counsel was coextensive with the duty attorney owed to a former client under the Rules of Professional Conduct; former husband was a prospective client under the Rules when he consulted with attorney, and as a result of that communication, attorney was prohibited from using or revealing information learned in her meeting with former husband. Rules of Prof.Conduct, Rules 1.18(b), 1.9(c).

[12] Attorney and Client 45 ⚿19

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k19 k. Disqualification in General. Most Cited Cases

In the absence of an ethical violation, disqualification can be warranted; it is an available remedy to a trial court to protect and preserve the integrity of the attorney-client relationship.

[13] Attorney and Client 45 19

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k19 k. Disqualification in General. Most Cited Cases
Attorney disqualification is a drastic measure to be imposed only where the circumstances clearly require it.

Appeal From The Pulaski County Court, No. DV 98-1956; Mackie Pierce, Judge.

Shepherd & Allred, by: Linda D. Shepherd.
Gill Elrod Ragon Owen & Sherman, P.A., by: Judy P. McNeil.
ANNABELLE CLINTON IMBER, Justice.
***1** This is a case of first impression involving the interpretation of the Arkansas Rules of Professional Conduct, more specifically Rule 1.18 (2006). The question raised on appeal is whether the circuit court erred in disqualifying attorney James L. Tripcony and his law firm from representing Appellant Sharon J. Sturdivant in a post-divorce custody proceeding against Appellee Timothy L. Sturdivant. We affirm the order of the circuit court.

A summary of the relevant facts is as follows: On February 15, 2005, the Pulaski County Circuit Court entered an amended decree and order that gave Timothy physical custody of his minor children from Sunday evening of every week until Thursday evening, as well as alternating weekend visitation. At that time, Sharon's attorney of record was Dee Scritchfield and Timothy's attorney of record was Linda Shepherd.

Two months later, on April 25, 2005, James L. Tripcony filed his entry of appearance as Sharon's attorney of record in the divorce proceeding. Timothy's counsel sent a letter to Tripcony, notifying him that the Tripcony Law Firm had a conflict of interest that would require his immediate withdrawal as Sharon's attorney. Specifically, the letter stated that Timothy had consulted with Heather May of the Tripcony Law Firm about a change of custody before he retained the Shepherd Law Firm to represent him in the same matter. After receiving the notice of a potential conflict, Sharon's attorney filed a motion for relief from order.

According to testimony elicited at a hearing on the motion, Timothy retained Linda Shepherd to represent him in the divorce proceeding after a "lengthy consultation" with Heather May of the Tripcony Law Firm about his desire to seek a change of custody. May took notes during the consultation and Timothy gave her a copy of a journal in which he had recorded matters involving him, Sharon, and the children. He also disclosed facts that were not in the journal and told May everything he knew regarding the children and his concerns about his former wife. The journal was eventually disclosed to opposing counsel in the earlier custody proceeding that culminated in the entry of the February 15, 2005 amended decree and order. Finally, Timothy confirmed that he did not retain the Tripcony Law Firm to represent him in the custody proceeding.

Tripcony advised the court that when he was notified of the potential conflict, he and May checked their office files to find out whether Timothy had been in the office. Upon discovering that Timothy had indeed consulted with May, Tripcony consulted the newly revised rules of professional conduct concerning prospective clients. *See* Ark. R. Prof'l Conduct 1.18 (2006). He further stated that he and May reviewed her notes and determined that they had no information that would be harmful to Timothy. Following his review of May's consultation notes and the Arkansas Rules of Professional Conduct, Tripcony concluded that disqualification would not be warranted under Rule 1.18.

***2** The circuit court ruled otherwise in an order entered on September 1, 2005, that disqualified Tripcony and his law firm from representing Sharon. Specifically, the court found that prior to Shepherd being retained by Timothy in the change-of-custody proceeding, Timothy had consulted with, received legal advice from, and provided confidential information to May concerning the custody proceeding. From that order, Sharon filed a timely notice of appeal.

In matters involving the disqualification of attorneys, this court has jurisdiction pursuant to Ark. R.App. P.-Civil 2(a)(8)(2006). Additionally, this case presents significant issues needing clarification and development of the law, as well as significant issues concerning the construction of rules; therefore, jurisdiction is also proper pursuant to Ark. Sup.Ct. R. 1-2(b)(5) & (6)(2006).

[1][2] We review a trial court's decision to disqualify an attorney under an abuse-of-discretion standard. *Craig v. Carrigo,* 340 Ark. 624, 12 S.W.3d 229 (2000). An abuse of discretion may arise by an erroneous interpretation of the law. *Seeco, Inc. v. Hales,* 334 Ark. 134, 969 S.W.2d 193 (1998).

[3][4][5][6][7][8] The Arkansas Rules of Professional Conduct are material in disqualification proceedings. *Berry v. Saline County Memorial Hosp.,* 322 Ark. 182, 907 S.W.2d 736 (1995). As this case involves the interpretation of the rules of professionalconduct, our standard of review is to read the rules as they are written, and interpret them in accordance with established principles of rule

construction. *See Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.* ., 353 Ark. 701, 120 S.W.3d 525 (2003). It is our responsibility to decide what a rule means, and we will review the circuit court's construction *de novo. Id.* We are not bound by the circuit court's decision; however, in the absence of a showing that the court erred in its interpretation of the rule, that interpretation will be accepted as correct on appeal. *Id.* Language of a rule that is plain and not ambiguous must be given its obvious and plain meaning. *Id.* Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a rule provision. *Id.*

[9] Furthermore, in reviewing the circuit court's factual findings, we must determine whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence; a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed.*Chavers v. Epsco, Inc.,* 352 Ark. 65, 98 S.W.3d 421 (2003).

For her sole point on appeal, Sharon asserts that the circuit court erred when it applied Rule 1.9 of the Arkansas Rules of Professional Conduct to disqualify Tripcony and his law firm. She claims that disqualification of her attorney is not warranted under Ark. R. Prof'l Conduct 1.18. As support for that claim, she asserts that the Tripcony Law Firm received no information that could be "significantly harmful" to her former husband.

***3** Recently, we adopted the revised Arkansas Rules of Professional Conduct. *See In Re: Arkansas Bar Association-Petition to Revise the Arkansas Rules of Professional Conduct,* No. 03-1049 (March 3, 2005). The revised rules contain Rule 1.18, which specifies the duties to a prospective client. Rule 1.18 provides as follows:
(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
(1) both the affected client and the prospective client have given informed consent, confirmed in

writing, or:
(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(ii) written notice is promptly given to the prospective client.

Rule 1.9, which deals with duties to former clients, states in pertinent part:(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; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.
In her brief, Sharon points out that Timothy cited the cases of *Gipson v. Brown,* 288 Ark. 422, 706 S.W.2d 369 (1986), and *Martindale v. Richmond,* 301 Ark. 167, 782 S.W.2d 582 (1990), as well as Rules 1.7 and 1.9 of the Arkansas Rules of Professional Conduct, in support of his motion to disqualify the Tripcony Law Firm. She correctly notes that both cases were decided prior to the adoption of Rule 1.18 and that neither case involved prospective clients. Nonetheless, the cited cases merit consideration in our analysis of the instant matter, especially in view of the specific reference to Rule 1.9 in Rule 1.18(b).

***4** In *Gipson v. Brown, supra,* we held that an attorney's previous representation of church elders gave rise to the presumption that confidential disclosures made by them in an earlier matter might be used to their detriment in the current action. We reasoned that if the earlier matter is substantially related to the current action, a presumption arises that confidences of the former client were disclosed to the former attorney. *Gipson v. Brown,* 288 Ark. 422, 706 S.W.2d 369. Moreover, the court will entertain the presumption and will not inquire into the nature and extent of the confidences; the confidential disclosures, whether actual or presumed, command the disqualification of the attorney when he or she represents an adverse interest in a related matter. *Id.*

We addressed a similar situation in *Martindale v. Richmond, supra,* where the attorney representing the former wife in a child-support proceeding had represented his client's former husband five years earlier. In *Martindale,* the attorney claimed that he did not learn about his prior representation of the former husband until five minutes before the scheduled hearing and that such late notice was merely a tactic to force settlement or a delay of the hearing. 301 Ark. 167, 782 S.W.2d 582. The *Martindale* court reaffirmed the appearance of impropriety as the governing standard in matters involving

disqualification:
Here, there is no evidence that [the attorney] actually intended to damage [the former husband's] defense in the present support proceeding with information or confidences he had previously acquired from [him] during their attorney/client relationship. Nevertheless, the appearance exists that such an abuse could occur and for that reason, [the lawyer] should have declined to represent [the former wife] when he learned that he had represented [the former husband] earlier.

301 Ark. 167, 170, 782 S.W.2d 582, 584.

We further noted that disqualification from subsequent representation is for the client's protection and can only be waived by the client. *Martindale v. Richmond, supra.*Indeed, Rule 1.9 specifically states that an attorney who has a conflict of interest cannot represent the adverse party unless the attorney consults with and obtains consent from the former client. Ark. R. Prof'l Conduct 1 .9(a)(2006).

[10] Here, Sharon asserts that Rule 1.18 was adopted in 2005 to give guidance to attorneys in their duties owed to prospective clients, as opposed to Rule 1.9, which deals with former clients. Specifically, she relies upon Rule 1.18(c), which bars an attorney from representing a client with adverse interests to those of a prospective client in a substantially related matter if the attorney "received information from the prospective client that could be significantly harmful to that person in the matter."Sharon suggests that the circuit court erred in applying Rule 1.9 because its decision was based on an assumption that Heather May received information from Timothy that would be harmful to him in the instant matter. According to Sharon, there is no evidence that the Tripcony Law Firm received information from Timothy that could be significantly harmful to him. For that reason, she contends the law firm should not be disqualified from representing her. As further support for her position, Sharon cites Comment 1 to Ark. R. Prof'l Conduct 1.18, which states, "A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients."

***5** [11] In applying the provisions of Rule 1.18 to the facts of this case, it is undisputed that Timothy was a prospective client under the terms of Rule 1.18(a) when he consulted with Heather May of the Tripcony Law Firm. Moreover, as a result of that communication, May was prohibited from using or revealing information learned in her meeting with Timothy, "except as Rule 1.9 would permit with respect to information of a former client."Ark. R. Prof'l Conduct 1.18(b)(2006). Thus, the duty May owed to Timothy as a prospective client under Rule 1.18(b) would be coextensive with the duty an attorney owes to a former client under Rule 1.9(c). Furthermore, the duty to a prospective client exists regardless of how brief the initial conference may have been and regardless of the fact that no

client-attorney relationship ensued. Comment 3 to Ark. R. Prof'l Conduct 1.18 (2006).

As a lawyer subject to the provisions of Rule 1.18(b), May would also be prohibited from representing a client with interests materially adverse to those of her prospective client, Timothy, in the same or a substantially related matter if she received information from Timothy "that could be significantly harmful to [him] in the matter."Ark. R. Prof'l Conduct 1.18(c)(2006). The circuit court correctly concluded that Timothy was a prospective client of the Tripcony Law Firm and that the current action is the same custody proceeding for which Timothy consulted May of the Tripcony Law Firm. Likewise, Sharon does not contest the fact that her interests are materially adverse to those of her former husband, Timothy.

Sharon does, however, contest the circuit court's finding that, due to the nature of a change of custody proceeding, "detrimental or harmful information would have been obtained or gleaned from [his] conference with Ms. May."She relies upon the following colloquy between Timothy and Sharon's attorney:
TRIPCONY: Do you have any correspondence from Ms. May or anyone else in my firm that would contain any information that you believe would be harmful to your case today?
TIMOTHY: No, Sir.
TRIPCONY: Are you saying that you told Ms. May things that would be harmful to your case?
TIMOTHY: No-no, sir.

As further support, Sharon reiterates that the contents of Timothy's journal were disclosed in the earlier litigation between the parties.

Viewing the evidence in the light most favorable to the appellee, as our appellate standard of review requires when a lower court's findings of fact are challenged on appeal, we cannot say that the circuit court clearly erred in finding that harmful information would have been forthcoming during Timothy's conference with Heather May of the Tripcony Law Firm about this change-of-custody proceeding. As stated earlier, Timothy testified that in addition to giving May a copy of his journal, he also told her about facts that were not in the journal, and he disclosed everything he knew and his concerns about the children and his former wife. According to Timothy, he acted upon advice received from May during the consultation with her. As to whether May received information that "could be significantly harmful" to Timothy, we agree with the circuit court that a lawyer who consults with a prospective client about a change-of-custody proceeding will necessarily become privy to information that could be used to the disadvantage of that person in the same proceeding. Similarly, the circuit court could reasonably conclude that a prospective client would not know whether the information disclosed during the consultation "could be significantly harmful."

***6** [12][13] In our holding, we do not deviate from the principle that a litigant, of course, is entitled to an attorney of his or her choosing.*Saline Memorial Hosp. v. Berry,* 321 Ark. 588, 906 S.W.2d 297 (1995). In the absence of an ethical violation, disqualification can be warranted; it is an available remedy to a trial court "to protect and preserve the integrity of the attorney-client relationship."*Craig v. Carrigo,* 340 Ark. 624, 12 S.W.3d 229 (2000)(quoting *Burnette v. Morgan,* 303 Ark. 150, 794 S.W.2d 145 (1990)). However, it is a drastic measure to be imposed only where the circumstances clearly require it. *Id.* The principle is not absolute and must be balanced against other considerations such as the issue we have before us today.*Seeco, Inc. v. Hales,* 334 Ark. 134, 969 S.W.2d 193 (1998).

Based on our review of the record, we conclude that the circuit court's findings of fact were not clearly erroneous or clearly against the preponderance of the evidence; nor did the circuit court abuse its discretion in disqualifying Tripcony and his law firm from representing Sharon in the custody proceeding.[FN1]

Affirmed.

FN1. It is undisputed that May's disqualification would also extend to the other lawyers in the Tripcony Law Firm. Ark. R. Prof'l Conduct 1.18(c).

Ark.,2006.
Sturdivant v. Sturdivant
--- S.W.3d ----, 367 Ark. 514, 2006 WL 3030681 (Ark.)

END OF DOCUMENT

C

WEST'S MISSISSIPPI RULES OF COURT
MISSISSIPPI RULES OF EVIDENCE
ARTICLE V. PRIVILEGES

Current with amendments received through June 1, 2007

RULE 502. LAWYER-CLIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A *"client"* is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A *"representative of the client"* is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or an employee of the client having information needed to enable the lawyer to render legal services to the client.

(3) A *"lawyer"* is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A *"representative of the lawyer"* is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is *"confidential"* if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a

representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of Duty by a Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Comment

Subsection (a) defines pertinent terms: who is a lawyer, who is a client, who are their representatives. These definitions clarify Mississippi law. The only existing statute relating to attorney-client relationship is M.C.A. § 73-3-37 which, among other things, includes a provision that one of an attorney's duties is "to maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients ...."

The term "client" includes individuals, corporations and associations, and governmental bodies. Mississippi decisional law is in accord with Rule 502(a)(1) in that the privilege protects communications between an attorney and one who consults him with a view towards retaining him, but who eventually decides not to employ him. See *Perkins v. Guy*, 55 Miss. 153 (1877). The services provided by the attorney must be legal services in order to be cloaked with the privilege. Services which are strictly business or personal do not enjoy the privilege. See McCormick, Evidence, § 92. The Mississippi court has not recognized the privilege in those cases in which the attorney is merely a scrivener. *Rogers v. State*, 266 So.2d 10 (Miss.1972).

Rule 502(a)(2) defines representatives of a client. This takes on particular significance in regards to corporate clients. This group of employees who may be a client's representatives is larger than the "control group". The "control group" was formerly one of the leading tests for determining which corporate employees had the benefit of the privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), in which the Supreme Court construed the language of the Federal Rules of Evidence as invalidating the control group test and so rejected it.

The definition of lawyer in Rule 502(a)(3) covers any person licensed to practice law in any state or nation. It includes persons who are not lawyers but whom the client reasonably believes are lawyers.

The definition of representative of the lawyer in Rule 502(a)(4) is broadly designed to include the lawyer's employees and assistants. It also includes experts that the lawyer has hired to assist in the preparation of the case. It does not extend to an expert employed to be a witness. This conforms to existing Mississippi practice. Dictum in *Wilburn v. Williams*, 193 Miss. 831, 11 So.2d 306 (1943), indicated that the court might have followed such a definition if the issue was before it.

A communication which takes place in the presence of a third party is not confidential unless it complies with the statement in Rule 502(a)(5). If the third party does not fall within these categories in this subsection, his presence deems the communication not to be confidential. *See Taylor v. State*, 285 So.2d 172 (Miss.1973); *Ferrell v. State*, 208 Miss. 539, 45 So.2d 127 (1950).

The test for confidentiality is intent. Thus, a communication made in public cannot be considered confidential. Intent can be inferred from the particular circumstances.

Subsection (b) is a statement of the rule. The rule is drafted in such a way as to prevent eavesdroppers from testifying about the privileged communication. See the Advisory Committee's Notes to Deleted FRE 503 [which is identical to U.R.E. 502(b)].

The privilege extends to statements made in multiple party cases in which different lawyers

represent clients who have common interests. Each client has a privilege as to his own statements. The FRE Advisory Committee's Notes to Deleted Rule 503 state that the rule is inapplicable in situations where there is no common interest to be promoted by a joint consultation or where the parties meet on a purely adversary basis.

Subparagraph (b) provides that the privilege includes lawyer to client communications as well as client to lawyer communications. *See Barnes v. State*, 460 So.2d 126, 131 (Miss.1984).

Subsection (c) establishes that the privilege belongs to the client or his personal representative. *Barnes v. State*, 460 So.2d 126, 131 (Miss.1984). The lawyer's claim is limited to one made on behalf of the client; he himself has no independent claim. *See United States v. Jones*, 517 F.2d 666 (5th Cir.1975).

Subsection (d) excludes certain instances from the privilege. Rule 502(d)(1) does not extend the privilege to advice in aid of a future crime or fraud. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is mistakenly advised that a proposed action is lawful. See McCormick, Evidence, § 75. Existing law in Mississippi on this point is unclear. Dicta in two 19th century cases suggest that the privilege did apply to protect statements regarding the client's motives in fraudulent schemes. *See Parkhurst v. McGraw*, 24 Miss. 134 (1852); *Lengsfield and Co. v. Richardson and May*, 52 Miss. 443 (1876). Additionally, the federal appellate court in *Hyde Construction Co. v. Koehring Co.*, 455 F.2d 337 (5th Cir.1972), has determined that the Mississippi courts would allow the privilege when an attorney, acting as the client's alter ego, commits a tort or fraud. It is uncertain, if this is an accurate reflection of the scarce Mississippi law on the point, but clearly under Rule 502(d)(1) the privilege in such a case would not apply.

Rule 502(d)(2) permits no privilege when the adversaries in a case claim the privilege from the same deceased client. The general rule is that the privilege survives death and may be claimed by the deceased's representative. However, this rule makes no sense in some cases, for instance, in will contests when various parties claim to be the representative of the decedent. Only at the end of the litigation will the court have determined who is the deceased's successor, and until it has made that determination, neither party is entitled to invoke the privilege.

Rule 502(d)(3) permits the use of statements made between a lawyer and his client when a controversy later develops between them, such as in a dispute over attorney's fees or legal malpractice.

Rules of Evid., Rule 502

MS R REV Rule 502

END OF DOCUMENT

52 M.S.A., Rules of Prof.Conduct, Rule 1.16

C

Minnesota Statutes Annotated Currentness

Minnesota Rules of Professional Conduct (Refs & Annos)

Client-lawyer Relationship

➡Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been

rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred.

(e) Papers and property to which the client is entitled include the following, whether stored electronically or otherwise;

(1) in all representations, the papers and property delivered to the lawyer by or on behalf of the client and the papers and property for which the client has paid the lawyer's fees and reimbursed the lawyer's costs;

(2) in pending claims or litigation representations:

(i) all pleadings, motions, discovery, memoranda, correspondence and other litigation materials which have been drafted and served or filed, regardless of whether the client has paid the lawyer for drafting and serving the document(s), but shall not include pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not served or filed if the client has not paid the lawyer's fee for drafting or creating the documents; and

(ii) all items for which the lawyer has agreed to advance costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses including depositions, expert opinions and statements, business records, witness statements, and other materials that may have evidentiary value;

(3) in non-litigation or transactional representations, client files, papers, and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have

legal effect, where the client has not paid the lawyer's fee for drafting the document(s).

(f) A lawyer may charge a client for the reasonable costs of duplicating or retrieving the client's papers and property after termination of the representation only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge.

(g) A lawyer shall not condition the return of client papers and property on payment of the lawyer's fee or the cost of copying the files or papers.

CREDIT(S)

Adopted June 13, 1985, eff. Sept. 1, 1985. Amended June 17, 2005, eff. Oct. 1, 2005.

COMMENT--2005

2006 Main Volume

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily

should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

HISTORICAL NOTES

52 M.S.A., Rules of Prof.Conduct, Rule 1.16

2006 Main Volume

This rule is similar to provisions of former DR 2-110 of the Minn. Code of Prof. Responsibility.

CROSS REFERENCES

Withdrawal of counsel, see General Rules of Practice, Rule 105.

LAW REVIEW AND JOURNAL COMMENTARIES

Permissive rules of professional conduct. Bruce A. Green and Fred C. Zacharias, 91 Minn.L.Rev. 265 (2006).

Professional responsibility and the bottom line: The ethics of billing. Douglas R. Richmond, 20 S.Ill.U.L.J. 261 (Winter 1996).

Recent changes in the Minnesota Rules of Professional Conduct. Wil Fluegel, 30 Minn.Trial Law. 12 (Fall 2005).

Records management and retention policies for law firms. Myron L. Frans and Christopher J. Kopka, 55 Bench & B.Minn. 29 (April 1998).

What is a client entitled to receive upon conclusion of the representation? Michael J. Hoover. 40 Bench & B.Minn. 33 (Nov. 1983).

LIBRARY REFERENCES

Attorney and Client ⚿76(1).
Westlaw Topic No. 45.
C.J.S. Attorney and Client §§ 265 to 272, 275.

RESEARCH REFERENCES

2007 Electronic Update

ALR Library

1 ALR 5th 874, Misconduct Involving Intoxication as Ground for Disciplinary Action Against

Attorney.

85 ALR 4th 544, Bringing of Frivolous Civil Claim or Action as Ground for Discipline of Attorney.

67 ALR 4th 415, Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Family Law Matters as Ground for Disciplinary Action--Modern Cases.

68 ALR 4th 694, Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Personal Injury or Property Damage Actions as Ground for Disciplinary Action--Modern Cases.

66 ALR 4th 342, Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Estate or Probate Matters as Ground for Disciplinary Action--Modern Cases.

37 ALR 4th 646, Failure to Co-Operate With or Obey Disciplinary Authorities as Ground for Disciplining Attorney--Modern Cases.

26 ALR 4th 995, Mental or Emotional Disturbance as Defense to or Mitigation of Charges Against Attorney in Disciplinary Proceeding.

92 ALR 3rd 288, Conduct of Attorney in Connection With Settlement of Client's Case as Ground for Disciplinary Action.

94 ALR 3rd 846, Attorney's Commingling of Client's Funds With His Own as Ground for Disciplinary Action--Modern Status.

80 ALR 3rd 1240, Failure to Communicate With Client as Basis for Disciplinary Action Against Attorney.

43 ALR 54, Disbarment for Failure to Account for Money of Client.

Encyclopedias

Am. Jur. 2d Attorneys at Law § 47, Frivolous or Unfounded Litigation.

Treatises and Practice Aids

52 M.S.A., Rules of Prof.Conduct, Rule 1.16

3 Minnesota Practice Series R 143, Parties; Substitution; Attorneys.

14 Minnesota Practice Series § 22.6, Declining or Terminating Representation.

23 Minnesota Practice Series § 1.6, Substitution or Addition of Counsel.

23 Minnesota Practice Series § 22.8, Competency of Trial Counsel to Testify.

25 Minnesota Practice Series § 4.15, Mandatory Withdrawal.

25 Minnesota Practice Series § 4.16, Optional Withdrawal.

25 Minnesota Practice Series § 4.17, General Obligations.

25 Minnesota Practice Series § 4.18, Return of Client Files.

3A Minnesota Practice Series R 105, Withdrawal of Counsel.

3A Minnesota Practice Series R 703, Certificates of Representation.

NOTES OF DECISIONS

1. Permissive withdrawal

Although attorney was required to withdraw from representing client in bankruptcy proceeding once he discovered client's fraud, attorney's withdrawal from representation without making a motion to withdraw or filing the proper substitution papers violated local bankruptcy rule governing withdrawal of counsel, as well as disciplinary rules requiring attorneys to follow any local rules for withdrawal employed by a tribunal and to continue to operate in the interests of the client while withdrawing. In re Disciplinary Action Against Fuller, 2001, 621 N.W.2d 460, certiorari denied 122 S.Ct. 69, 534 U.S. 828, 151 L.Ed.2d 35. Attorney And Client 44(1)

52 M.S.A., Rules of Prof.Conduct, Rule 1.16

Receipt by attorney of letter from client regarding matter for which attorney was retained stating that "this whole thing has turned into a bunch of CRAP!" constituted adequate justification for attorney's withdrawal from representation which involved rather simple and straightforward slip-and-fall case in which trial was at least six months away. In re Admonition Issued in Panel File No. 94-24, 1995, 533 N.W.2d 852. Attorney And Client 76(1)

Law firm's withdrawal from representation of client in contingency case was justified and, therefore, firm was entitled to attorney's lien, in view of evidence that client refused to sign authorizations during discovery pursuant to court order, that firm made repeated attempts to get client to sign forms, and that firm warned client that failure to sign would result in withdrawal. Ashford v. Interstate Trucking Corp. of America, Inc., App.1994, 524 N.W.2d 500. Attorney And Client 174

Attorney was properly allowed to withdraw from representation on grounds of potential conflict of interest, client's refusal to accept attorney's assessment of case or advice, and attorney's belief that client wished to pursue various claims in which attorney did not have experience, where attorney gave client case files and informed him approximately one month prior to motion to withdraw that he should obtain other counsel and in granting request, trial court ordered no certificate of readiness be filed for period of 60 days, in order to permit new counsel to represent client. Spearman v. Salminen, App.1986, 379 N.W.2d 627. Attorney And Client 76(1)

2. Client papers and property

Attorney violated rules of professional conduct by failing to place client funds in a trust account failing to refund to the client the unearned portion of client funds, and failing to protect client's interest at the termination of representation, when attorney failed to deposit client's retainer in a trust account and failed to refund the unearned portion of the client's funds when requested. In re Disciplinary Action Against Nelson, 2007, 733 N.W.2d 458. Attorney And Client 44(2)

Attorney's conduct in failing to return two clients' files upon request, and in failing to communicate with one client and return that client's files after withdrawing from representation violated the Lawyers Professional Responsibility board opinion requiring the return of client files and also violated the rule of professional conduct requiring a lawyer to protect a client's interests after terminating representation. In re Disciplinary Action Against Mayrand, 2006, 723 N.W.2d 261. Attorney And Client 44(1)

Disbarment was warranted for attorney who misappropriated $500 in client funds, repeatedly practiced law while suspended for disciplinary reasons, failed to notify clients of his suspension,

failed to return client files, did not participate in the disciplinary process, and could not be found, where attorney had been disciplined twice before for similar misconduct. In re Petition for Disciplinary Action against Day, 2006, 710 N.W.2d 789. Attorney And Client 59.14(1); Attorney And Client 59.14(2)

Indefinite suspension from practice of law without eligibility to apply for reinstatement for minimum of four months was appropriate discipline for attorney's failure to adequately communicate with clients, failure to diligently pursue several client matters, failure to return client files, failure to cooperate with Director of Office of Lawyers Professional Responsibility in its investigation of client complaints, and failure to provide evidence of compliance with the Supreme Court's prior disciplinary order suspending attorney. In re Disciplinary Action Against Martinez, 2003, 655 N.W.2d 800. Attorney And Client 59.13(7)

Attorney's failure to respond to petition for disciplinary action amounted to admission of pattern of client neglect, history of improper fee agreements, excessive fees, initiation of a frivolous claim, incompetent representation, and failure to supervise subordinate attorneys, in violation of applicable professional responsibility rules. In re Disciplinary Action Against Geiger, 2001, 621 N.W.2d 16. Attorney And Client 52

Cumulative effect of attorney's pattern of client neglect, history of improper fee agreements, excessive fees, initiation of a frivolous claim, incompetent representation, and failure to supervise subordinate attorneys was prejudicial to the administration of justice, resulted in harm to attorney's clients, the public and the legal profession, and warranted indefinite suspension, where violations were aggravated by attorney's past admonitions for essentially the same type of behavior. In re Disciplinary Action Against Geiger, 2001, 621 N.W.2d 16. Attorney And Client 42; Attorney And Client 44(1); Attorney And Client 59.13(7)

Attorney's testimony at disciplinary hearing supported conclusion that he failed to timely surrender a client file and failed to fully cooperate with the disciplinary investigation. In re Disciplinary Action Against Ray, 2000, 610 N.W.2d 342. Attorney And Client 53(2)

Indefinite suspension from practice of law without possibility of reinstatement for two years was warranted by attorney's conduct in potentially causing serious hardship to clients through his neglect of client matters, making misrepresentations to clients, taking four months to transfer client's file to her new attorney, and completely failing to cooperate with disciplinary investigation. In re Disciplinary Action Against Olson, 1996, 545 N.W.2d 35. Attorney And Client 59.13(7)

52 M.S.A., Rules of Prof.Conduct, Rule 1.16

Failing to return abstract of title to client, misrepresenting status as licensed attorney, and repeatedly failing to cooperate with disciplinary authority's investigation of complaints was prejudicial to administration of justice, and violated disciplinary rules that require lawyer to pay or deliver requested property in possession of lawyer which client is entitled to receive, to surrender papers and property which client is entitled to receive upon termination of representation, to cooperate with disciplinary authorities in investigation of client complaints, to not engage in unauthorized practice of law, to not knowingly disobey obligation to tribunal, and to not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. In re Disciplinary Action Against Cowan, 1995, 540 N.W.2d 825. Attorney And Client 42; Attorney And Client 44(1)

Neglecting legal matters, failing to respond to client requests for return of property, and failing to cooperate with Office of Lawyers Professional Responsibility warranted indefinite suspension. In re Disciplinary Action Against Cowan, 1995, 540 N.W.2d 825. Attorney And Client 59.13(7)

Disbarment was warranted by attorney's misconduct which included misappropriation of client funds, neglect of several client matters, violation of the terms of his second public probation, and failure to cooperate with the disciplinary investigation. In re Disciplinary Action Against Weems, 1995, 540 N.W.2d 305. Attorney And Client 59.14(1); Attorney And Client 59.14(2)

Disbarment is appropriate sanction for failing to pay registration fee by due date and continuing to practice law, failing to respond to interrogatories or appear at hearing on contempt motion, failing to disclose prior disciplinary suspension and probation to client, refusing to refund unearned retainers or return client file, failing to respond to client inquiries, and failing to cooperate with investigation of misconduct allegations. In re Disciplinary Action Against Peters, 1991, 474 N.W.2d 164. Attorney And Client 59.14(1)

Failure by attorney to file brief in Court of Appeals, misrepresentations by attorney to his client respecting filing of brief, and failure to refund to client all fees paid for preparation and service of brief never filed would violate rules requiring attorney to protect clients' interests, prohibiting attorney from knowingly disobeying obligation under rules of tribunal, and prohibiting dishonesty or misrepresentation. In re Disciplinary Action Against McGrath, 1990, 462 N.W.2d 599. Attorney And Client 44(1)

Multiple incidents of neglect of client matters, misrepresentations, failure to return client files and papers, failure to respond to court order, and failure to cooperate in disciplinary investigation

warrant disbarment. In re Disciplinary Action against McCoy, 1989, 447 N.W.2d 887. Attorney And Client 59.14(1)

Indefinite suspension is warranted where attorney fails to keep client informed, makes misrepresentations to client, fails to promptly turn over file to successor attorney upon request, lacks diligence with respect to client matters, deducts attorney fees from trust funds of which attorney is trustee, fails to cooperate with Director of Lawyers Professional Responsibility Board after suspension, and fails to notify clients of attorney's suspension. In re Disciplinary Action Against Truelson, 1989, 447 N.W.2d 589. Attorney And Client 59.13(7); Attorney And Client 59.13(9)

Attorney's conduct with respect to clients he agrees to represent on DWI charges, including telling one client he will be unable to appear in court the next day the evening before client's arraignment, failing to respond to client's repeated attempts to contact attorney, and refusing to return client's retainer, and similar behavior with respect to another client, and failure to appear at that other client's trial, violates Rules of Professional Conduct, Rules 1.1, 1.3, 1.4, and 1.16. Matter of Discipline of Henke, 1987, 400 N.W.2d 720. Attorney And Client 44(1)

Attorney's conduct with respect to marital dissolution cases, including failure to respond to interrogatories in timely way, failure to forward court order to client as requested, failure to prepare stipulation for dissolution as requested, failure to communicate with clients, and failure to return retainer fees accepted from clients, as well as failure to return one client's file, violates Disciplinary Rules insofar as conduct occurred before 1985, and violates Rules of Professional Conduct, Rules 1.1, 1.3, 1.4, and 1.16, insofar as conduct occurs after 1985. Matter of Discipline of Henke, 1987, 400 N.W.2d 720. Attorney And Client 44(1)

A lawyer may not condition the return of client files, papers and property on the payment of copying costs. Prof.Resp.Bd., Op. No. 13 (1989).

A lawyer may not condition the return of client files, papers or property upon payment of the lawyer's fee. Prof.Resp.Bd., Op. No. 13 (1989).

A lawyer who has withdrawn from representation or has been discharged from representation, may charge a former client for the costs of copying or electronically retrieving the client's files, papers and property only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge. Prof.Resp.Bd., Op. No. 13 (1989).

A lawyer may withhold documents not constituting client files, papers and property until the

outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents; such circumstances shall include, but not necessarily be limited to, expiration of a statute of limitations or some other litigation imposed deadline. Prof.Resp.Bd., Op. No. 13 (1989).

It is professional misconduct for an attorney to assert a retaining lien, whether statutory, common law, contractual, or otherwise, on the files and papers of a client. Prof.Resp.Bd. Op. No. 11 (1979).

3. Protection of client interest

Evidence supported referee's finding that attorney's conduct violated the professional rule that required, upon termination of representation, a lawyer to take steps to protect a client's interests, such as surrendering papers and property to which the client was entitled and refunding any unearned fees, even though attorney claimed that law clerk, whom client's subsequent lawyer sent to pick up client's file, did not take the entire file and left papers behind; law clerk testified that when he went to attorney's office to pick up client's file, he understood that he had picked up the entire file, and attorney's secretary testified that she was responsible for photocopying the entire file and that law clerk took everything she copied. In re Disciplinary Action Against Holker, 2007, 730 N.W.2d 768. Attorney And Client 53(2)

Charging client for costs of copying client's file after being discharged as client's attorney, absent a written agreement permitting charging of client for costs of copying file, violates professional conduct rule requiring attorney to take steps to the extent reasonably practicable to protect a client's interest and warrants admonition. In re X.Y., 1995, 529 N.W.2d 688. Attorney And Client 44(1); Attorney And Client 59.7

4. Attorney fees and costs

Attorney continues to be entitled to compensation for reasonable value of his or her services after attorney rightfully withdraws from representation. Ashford v. Interstate Trucking Corp. of America, Inc., App.1994, 524 N.W.2d 500. Attorney And Client 134(1)

District court did not improperly base its award of fees to law firm who justifiably withdrew from contingency case based solely on terminated contract between client and firm, where district court properly considered time spent on case, proportion of funds invested, result of each firm's efforts, and amount of recovery finally realized. Ashford v. Interstate Trucking Corp. of America, Inc., App.1994, 524 N.W.2d 500. Attorney And Client 174

52 M.S.A., Rules of Prof.Conduct, Rule 1.16

5. Refund fee payments

Attorney's failure to notify clients of his abandonment of his practice and his failure to return unearned fees violated disciplinary rules governing communication with clients and termination of representation. In re Disciplinary Action Against Orren, 1999, 590 N.W.2d 127. Attorney And Client 44(1)

Indefinite suspension was appropriate discipline for attorney who, while on unsupervised probation for failure to file state and federal personal income and employer withholding tax returns, failed to comply with other conditions of probation, to maintain proper trust account records, to account for client funds, and to cooperate with ethics investigation. In re Disciplinary Action Against Singer, 1996, 541 N.W.2d 313. Attorney And Client 59.13(9)

6. Sanctions

Indefinite suspension from the practice of law, with attorney being ineligible to apply for reinstatement for a minimum of six months, was warranted, in attorney disciplinary case, where attorney failed to file a probate proceeding until 27 months after he was hired by client, he neglected client's legal matter, he did not hire an accountant to file unfiled estate tax returns until more than three years he was retained by client, he failed to provide requested information to accountant, he failed to promptly provide requested information to Director of the Office of Lawyers Professional Responsibility during disciplinary investigation, and he fabricated five documents that were disclosed during the disciplinary investigation, in violation of the professional rules. In re Disciplinary Action Against Holker, 2007, 730 N.W.2d 768. Attorney And Client 59.13(7)

Suspension of attorney indefinitely with no right to apply for reinstatement for minimum of one year, rather than 90-day suspension which attorney and Director of Office of Lawyers Professional Responsibility jointly recommended, was appropriate sanction for attorney's conduct, while on two-year private probation for neglect of client matters, failure to communicate with clients, and failure to cooperate with Director's investigation, in neglecting and failing to adequately communicate with three additional clients, failing to return client documents and file materials, and failing to cooperate with Director's investigation of additional client complaints. In re Disciplinary Action Against Franklin, 2007, 726 N.W.2d 95. Attorney And Client 59.13(7)

Indefinite suspension from the practice of law, for a minimum of 12 months, was appropriate

discipline for attorney's pattern of client neglect, his failure to appear at an administrative hearing, failure to communicate with client, failure to return her file, failure to notify client of suspension, and his failure to cooperate with disciplinary investigation, where attorney had a previous disciplinary record and was suspended from practice of law at time of his misconduct. In re Disciplinary Action Against Plummer, 2006, 725 N.W.2d 96. Attorney And Client 59.13(7)

Attorney's pattern of misconduct during representation of multiple clients over several years, which included dishonesty to clients and tribunals, mishandling of client matters and client funds, and failure to communicate with clients and to return client files, as well as attorney's failure to cooperate with disciplinary investigations and proceedings, warranted attorney's disbarment. In re Disciplinary Action Against Mayrand, 2006, 723 N.W.2d 261. Attorney And Client 59.14(1); Attorney And Client 59.14(2)

Indefinite suspension from practice of law was appropriate discipline for attorney's complete abandonment of a client and refusal to cooperate with the Office of Lawyers Professional Responsibility, where there were no mitigating factors. In re Disciplinary Action Against Monroe, 2003, 659 N.W.2d 779. Attorney And Client 59.13(7)

Indefinite suspension was appropriate discipline for attorney who admitted the appropriateness of that sanction for neglecting a client, failing to keep a client adequately advised, charging an unreasonable fee, failing to make repayment of unearned fees, failing to return client property, and failing to cooperate in a disciplinary proceeding. In re Disciplinary Action Against Crissey, 2002, 645 N.W.2d 141. Attorney And Client 59.13(7)

Disbarment was appropriate sanction for attorney who misappropriated client funds, neglected client matters, made false statements to conceal misappropriation and neglect, did not cooperate with disciplinary process, engaged in criminal conduct, failed to pay court reporter, and failed to satisfy court-imposed sanctions. In re Disciplinary Action Against Samborski, 2002, 644 N.W.2d 402. Attorney And Client 59.14(1); Attorney And Client 59.14(2)

Attorney's neglect of client matters, noncommunication with clients, failure to return client files and unearned fees, failure to provide an accounting of services and bills, failure to inform clients of his suspension, charging unreasonable fees, failure to pay a malpractice judgment, failure to respond to a criminal summons, failure to pay a judgment to a former client, improper trust account practices and record keeping, failure to pay certain federal and state taxes, and failure to cooperate with disciplinary authorities warranted disbarment, given attorney's previous discipline for similar, if not identical, misconduct, and extensive disciplinary history. In re Disciplinary

52 M.S.A., Rules of Prof.Conduct, Rule 1.16

Action Against Brehmer, 2002, 642 N.W.2d 431. Attorney And Client 59.14(1); Attorney And Client 59.14(2)

E

Attorney's conduct in failing to diligently pursue client matters, to keep clients adequately informed as the status of their legal matters, to obtain written retainer agreements, to deposit unearned fees in trust account, to cooperate with investigations of Director of Office of Lawyers Professional Responsibility, and in improperly contacting a represented party and withdrawing from representation of a client in a criminal matter, warranted three-month suspension without reinstatement hearing, and two years of supervised probation following reinstatement. In re Disciplinary Action Against Kadinger, 2002, 641 N.W.2d 1. Attorney And Client 59.13(3); Attorney And Client 59.17(1); Attorney And Client 59.13(4)

Attorney's failure to timely file state and federal income tax returns, to promptly return client documents, and to cooperate with disciplinary investigation, and his improper disclosure of a witness statement in a criminal matter and use of trust funds, warranted 90-day suspension, without reinstatement hearing, and two years of supervised probation following reinstatement. In re Disciplinary Action Against Albright, 2002, 640 N.W.2d 341. Attorney And Client 59.13(3); Attorney And Client 59.17(1); Attorney And Client 59.13(5)

Attorney's neglect of clients' matters, fraudulent execution of clients' affidavits, false statements, frivolous arguments, unauthorized practice of law, probation violations, failure to maintain clients' retainers and cost advances in trust, failure to provide an accounting of clients' funds, failure to return unearned portion of clients' funds, failure to cooperate with the disciplinary investigation, and failure to communicate with clients warranted an indefinite suspension from the practice of law for a minimum of one year. In re Disciplinary Action Against Brehmer, 2001, 620 N.W.2d 554. Attorney And Client 59.13(7); Attorney And Client 59.13(9)

Attorney's neglect of a client's matter, failure to maintain a client's retainer and cost advance in trust, failure to provide an accounting of a client's funds, failure to return the unearned portion of a client's funds, and failure to cooperate with the disciplinary investigation warranted an indefinite suspension from the practice of law. In re Disciplinary Action Against Pucel, 1999, 588 N.W.2d 741. Attorney And Client 59.13(7); Attorney And Client 59.13(9)

52 M. S. A., Rules of Prof. Conduct, Rule 1.16, MN ST RPC Rule 1.16

Current with amendments received through November 1, 2007

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal. A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation of the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge. A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include

SUPPLEMENTAL
CERTIFICATE OF SERVICE

I certify that by ordinary U. S. mail, postage pre-paid, I served a copy of this brief on:

The Honorable Lester F. Williamson, Jr.
Circuit Judge, 10th Judicial District
P.O. Box 86
Meridian, Mississippi 39358,

and that by ordinary U. S. mail, postage pre-paid, I served a copy of this supplemental certificate-of-service on:

1. Mr. John B. Clark
Ms. Brandi N. Smith
Daniel Coker Horton & Bell
4400 Old Canton Road, Suite 400
Post Office Box 1084
Jackson, Mississippi 39215-1084,

Counsel for Appellees, Edward A. Williamson, Individually, and Edward A. Williamson, P. A.;

2. Mr. Bill T. May
Bill T. May, Attorney at Law
205 East Church Street
P. O. Box 217
Newton, Mississippi 39345,

Counsel for Appellee, Michael Miller;

3. Mr. William B. Carter
Follett Carter
1709 23rd Avenue
P.O. Box 406
Meridian, Mississippi 39302-0406,

Counsel for Appellees, George W. Healy, IV and George W. Healy IV & Associates; and

4. The Honorable Lester F. Williamson, Jr.
Circuit Judge, 10th Judicial District
P.O. Box 86
Meridian, Mississippi 39358.

Dated: December 21, 2007

John J. Mueller

Counsel for Appellants, Lisa Edmonds and Larry Edmonds