IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2009-CA-00599

SHARON DUNN
Plaintiff / Appellant

versus

DR. JOHN YAGER
Defendant / Appellee

PLAINITIFF/APPELLANT'S REPLY BRIEF; CROSS-APPELLEE BRIEF and

CROSS-APPELLANT BRIEF

On Direct Appeal from the Circuit Court
of Jackson County, Mississippi
NO. CI-96-0124(3)

ORAL ARGUMENT REQUESTED

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II. Whether the trial court erred in precluding Sharon Dunn from establishing the standard of care owed by a neurologist by introducing the video deposition of defendant's neurologist, Dr. Harry Gould: (1) who had been designated by the defendant as an expert; (2) who had been deposed by all parties regarding the standard of care owed by a neurologist; (3) whose deposition had been used by both Dr. Yager and Sharon Dunn in support of Motions for Summary Judgment; and (4) who was never withdrawn or released by Dr. Yager as a defense expert.

III. Whether the trial court erred in precluding Sharon Dunn from impeaching the defendant, Dr. Yager, at trial with the video deposition of defendant's neurology expert, Dr. Harry Gould, when the defendant, Dr. Yager: (1) was qualified, tendered and accepted by the court as a neurology expert at trial; (2) offered opinions at trial as to the proper standard of care required of a neurologist, and (3) acknowledged reading the deposition of Dr. Harry Gould and his opinions regarding the proper standard of care.

IV. Whether the trial court erred in precluding Sharon Dunn from introducing excerpts from the 2009 PDR to impeach the defense experts and to quantify well known material risks of carbamezapine (generic Tegretol), including severe dermatological reactions, such as Stevens Johnson Syndrome, which would have mandated disclosure of those risks

to a patient like Sharon Dunn in order to obtain her informed consent.

V. Whether the trial court erred in instructing the jury that in order to obtain a patient's "informed consent," a doctor need not disclose all the material risks associated with taking Tegretol, only those risks that are customarily and routinely disclosed by a physician pursuant to the "alleged" standard of care.

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VII. Whether the trial court erred in disclosing to the jury the fact that the plaintiff, Sharon Dunn, had settled with former defendants without establishing the relevance of the settlements.

Defendant's Cross Appeal

VIII. Whether a Mississippi court, pursuant to Mississippi's Long Arm Statute, Miss Code Ann. § 13-3-57, and the Due Process Clause of the Fourteenth Amendment, may properly exercise personal jurisdiction over an Alabama physician, located less than 50 miles from the courthouse, who regularly and systematically solicited and treated Mississippi residents, who entered into a Mississippi contract with Ingalls for the treatment of Sharon Dunn, who sustained all of her injuries and damages in Mississippi, especially in light of Dr. Yager's destruction of his records of Mississippi patients after they were requested in jurisdictional discovery propounded to Dr. Yager.

IX. Whether the trial court was correct in refusing to disqualify Gregg L. Spyridon and Michael Rutledge because of the association of Donald Dornan who had previously served as a mediator in this case where adequate safeguards were initiated to protect

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XII. Whether the trial court erred in denying Sharon Dunn's spoliation Motion to Strike, or in the alternative, for a Negative Inference due to the destruction of patient records by Dr. Yager after discovery of those jurisdictional records was propounded on Dr. Yager.

SUMMARY OF PLAINTIFF'S REPLY ARGUMENT

Sharon Dunn has contended throughout this litigation that Dr. Yager breached the standard of care of a neurologist by (1) failing to inform Sharon Dunn of all the material risks of Tegretol and obtaining her consent to treatment; (2) failing to advise Sharon Dunn of the signs and symptoms of a severe blood, skin or liver reaction to Tegretol; and (3) failing to conduct proper blood work to monitor the effects of Tegretol on Sharon Dunn including the potential for a severe blood, liver or skin reaction. The trial court erroneously and unfairly restricted Sharon Dunn's ability to prove her claims against Dr. Yager and, as a result, a defense verdict in favor of Dr. Yager was predictable. In particular, the trial court precluded Sharon Dunn from proving her case with either her neurologist of choice, board certified neurologist, Dr. Stanley Malkin, or through Dr. Yager's neurology expert, Dr. Harry Gould, who had been used against Sharon Dunn in pretrial dispositive motions, but who had nevertheless rendered opinions supporting Sharon Dunn's claims. The trial court also accepted Dr. Yager as an expert in the field of neurology, but prohibited Sharon Dunn from impeaching his opinions with his own retained expert, who he had reviewed in forming his opinions. In addition to impeaching Dr. Yager with the testimony of Dr. Gould, Sharon Dunn was also precluded from impeaching Dr. Yager and his experts with the 2009 PDR which substantiated that the material risks of Tegretol were 100 times greater than Dr. Yager and his experts had claimed.

Sharon Dunn also contends that the trial court failed to properly instruct the jury that informed consent is based on a subjective test of what a reasonably prudent patient would want to know about all the material risks of taking Tegretol and that causation is established

when any of the material risks would have convinced a reasonable patient to forego the suggested treatment. Finally, Sharon Dunn contends that the court committed reversible error by precluding Sharon Dunn from addressing the jury during her closing arguments in violation of the Mississippi Constitution and in allowing Dr. Yager to disclose Sharon Dunn's prior settlements without establishing a proper basis for such evidence. Sharon Dunn contends that the jury verdict should be set aside and the case remanded to the trial court for a new trial.

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PLAINTIFF'S REPLY ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ALLOWING SHARON DUNN TO SUBSTITUTE DR. MALKIN FOR DR. OLSON.

Dr. Yager's entire argument on the trial court's exclusion of Sharon Dunn's neurology expert, Dr. Malkin, is limited to Sharon Dunn's first attempt to designate Dr. Malkin as a rebuttal expert fifteen days after Dr. Yager designated two (2) board certified neurologists in his defense. If that was plaintiff's only attempt to use Dr. Malkin, this issue would not likely have been presented on appeal. However, when Dr. Olson's much discussed "skeletons" were subsequently discovered, Sharon Dunn not only sought to add Dr. Malkin, but also tried to substitute Dr. Malkin for Dr. Olson. It was the trial court's denial of Sharon Dunn's Motion to Substitute Dr. Malkin for Dr. Olson that was an abuse of discretion and the basis of this appeal. Factually, there was no reason not to allow the substitution. At the time the court denied Sharon Dunn's Motion to Substitute: a) the designations of Dr. Malkin and Olson were identical; b) no expert discovery had taken place; c) Dr. Olson had not been deposed; and d) there was no trial date. What was known by the court and all other parties was that Dr. Olson could not give any credible testimony about prescription medication because he had been

disciplined by the State Board of Medical Examiners, who imposed a lifetime restriction on his license for improperly dispersing prescription pain medication. (Trial Transcript p. 2044; Defendant's Trial Exhibit 54) Conspicuously absent from Dr. Yager's brief is any mention of any prejudice they "would suffer", "may suffer", or "could suffer" from the substitution of Dr. Malkin for Dr. Olson. The reason for Dr. Yager's silence on this point is obvious. The substitution of Dr. Malkin for Dr. Olson would have caused no prejudice. The court's denial of the substitution effectively left Sharon Dunn without a competent neurologist to support her contentions and without her neurologist of choice. The denial of Sharon Dunn's Motion to Substitute Malkin clearly meets the abuse of discretion test set forth in *Mississippi Power & Light v. Lumpkin*, 725 So.2d (Miss. 1998). The failure to discover Dr. Olson's shortcomings was inadvertent and brought to the court's attention as soon as they were discovered. There is no doubt that a competent neurologist was critical in a medical malpractice case against a neurologist. At the time, the Motion to Substitute was decided, there was not trial date pending and ample time for Dr. Yager to prepare to meet his testimony.

II. THE DEPOSITION TESTIMONY OF DEFENDANT'S EXPERT, DR. HARRY GOULD, WAS CLEARLY ADMISSIBLE

In his brief (Appellee Brief at pp. 19-26), Dr. Yager claims that the deposition testimony of their board certified neurologist and pain management specialist, Dr. Harry Gould, was properly excluded under *Jackson v. General Motors*, 636 So.2d 310 (Miss. 1994) because: 1) Dr. Gould had been withdrawn as their expert; 2) Dr. Gould's testimony was cumulative; and 3) Dr. Yager's expert opinions on the standard of care were somehow immune from cross-examination on Dr. Gould's deposition.

Dr. Yager's reliance on *Jackson v. General Motors* is not only misplaced, but his

arguments are seriously flawed as demonstrated below.

A. *Jackson v. General Motors*

In *Jackson*, the opinions of the plaintiff's expert were improperly discovered and excluded at trial because: 1) the plaintiff had withdrawn and released his expert before attempting to use those opinions in support of the plaintiff's case, and 2) the plaintiff's expert opinions were identical to the defendant's experts and therefore, cumulative. *Id.* at 314. In affirming the trial court's refusal to allow the defendants to call the plaintiff's expert, the Court performed the balancing test of Rule 403 of the Mississippi Rules of Evidence and concluded that the prejudicial value outweighed the probative value of the cumulative testimony and should not be allowed. The Mississippi Supreme Court concluded that the prejudicial value that attaches to using the opposing side's expert was "unfair" and properly excluded. *Id.*

The Rule 403 balancing test mandates in favor of allowing the expert opinion of Dr. Yager's own expert, Dr. Gould. The prejudice that would have attached to Dr. Yager was not "unfair prejudice," but, rather, was entirely fair because Dr. Yager voluntarily:

1. Designated Dr. Gould as his expert (Record, pp. 2276-80);

2. Produced Dr. Gould for his deposition on March 30, 2007, and voluntarily disclosed all of his opinions (Plaintiff's Trial Exhibit 93 marked for identification);

3. Used Dr. Gould's testimony as a sword in support of a motion for partial summary judgment (Record, pp. 2311-12; 3086-87);

4. Used Dr. Gould as a shield in opposing plaintiff's motion for partial summary judgment (Record, pp. 2979-80);

5. Reviewed Dr. Gould's deposition in formulating his own expert opinion about the standard of care owed by a neurologist (Trial Transcript p. 2002, ln. 24-25);

6. Offered expert testimony at trial regarding the standard of care owed by a neurologist. (Trial Transcript, pp. 1505-09).

Dr. Yager should not be allowed to manipulate his own witness by using Dr. Gould when it suits him and preventing or limiting Sharon Dun from equal access when it does not.

B. *Dr. Gould was not and could not have been withdrawn or released by Dr. Yager.*

In his brief, Dr. Yager goes to great lengths to argue that Dr. Gould was released or withdrawn by Dr. Yager to insulate or distance himself from Dr. Gould's opinions. In his brief (Appellee Brief at p. 24), Dr. Yager equates his decision not to call Dr. Gould at trial with withdrawal of Dr. Gould as his expert. He then goes on to wonder why the "semantics of the withdrawal are important." (*Id.*) The answer is simple. Unlike the plaintiff's expert in *Jackson*, Dr. Gould could not be released because he was loaded into Dr. Yager's gun (the designations), pointed at Sharon Dunn (the deposition), and fired at her (Yager Motion for Partial Summary Judgment). The fact that he misfired is of no consequence and the jury should be allowed to see Dr. Yager holding the gun he fired at Sharon Dunn, especially when Dr. Yager took the stand and was qualified, tendered, accepted, and testified as an expert witness. Dr. Yager cannot now "unring" the bell and at trial claim that Dr. Gould is no longer his expert.

C. *Dr. Gould's testimony was not cumulative.*

Like Dr. Yager's futile attempt to claim Dr. Gould was withdrawn, his claim that Dr. Gould's testimony was cumulative must also fail for two reasons. To begin with, Dr. Gould's testimony was offered before Dr. Olson testified and thus, was not and could not have been cumulative. Secondly, as noted in Appellant's Brief at pp. 5-11, Sharon Dunn did everything in her power to avoid calling Dr. Olson for all the reasons previously stated. She sought to substitute Dr. Malkin for Dr. Olson. She sought to introduce Dr. Gould in lieu of Dr. Olson. When Sharon Dunn was denied the use of Dr. Malkin and Dr. Gould, she was left with two

alternatives - no expert neurologist or a bad expert neurologist. She was forced to choose the latter, who was asked to give testimony about the standard of care of a neurologist prescribing pain medication when he had been disciplined and his license restricted because of improperly prescribing pain medication (Defendant's Trial Exhibits 54 and 56; Record, p. 2292). Dr. Olson's tainted testimony could hardly be called cumulative when compared to that of Dr. Gould, who was board certified in both neurology and pain management and a professor of medicine at LSU (Record, p. 2281). Dr. Gould's testimony was far more probative than Dr. Olson's and the fact that it could be tied to Dr. Yager through Dr. Yager's own actions made it even more probative and compelling.

III. THE 2009 PHYSICIANS' DESK REFERENCE (PDR) WAS ERRONEOUSLY EXCLUDED.

Despite the fact that, at trial, Dr. Yager repeatedly introduced and/or made reference to the 1996, 1997, and 2008 Physicians' Desk Reference (PDR),[1] when it suited him, on appeal Dr. Yager now contends that the information contained in the 2009 PDR about generic carbamezapine (Tegretol) "has no relevance on the warnings that should have been given in 1995 (Appellee's Brief, p. 26). However, Sharon Dunn did not offer the 2009 PDR for the purpose of establishing the appropriateness of the warnings. On the contrary, Sharon Dunn offered the 2009 PDR to establish both causation and the material risks associated with taking Tegretol.

With respect to causation, at trial, Dr. Yager spent considerable time identifying each and every drug that Sharon Dunn had taken that had been associated with SJS and contended that any one of these drugs could have been responsible for Ms. Dunn's SJS.

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[1]See Trial transcript, pp. 1086, 1836-38, 1861-62, 2014.

(Trial Transcript, pp. 1830-37) The 2009 PDR has all the other drugs listed, but carbamezapine is the only one with an established incidence rate that would have made it more likely than not the drug which caused Sharon Dunn's SJS.

With respect to the material risks of Tegretol, the true incidence rate of severe dermatological adverse reactions, such as SJS, among new users of carbamezapine (Tegretol), was established by the 2009 PDR as approximately "1 to 6 per 10,000 new users." (Excerpts: Plaintiff's Exhibit 110 marked for identification only). The 2009 PDR would have not only established SJS as a material risk, but would have also served to impeach the testimony of Dr. Yager and his experts, who all claimed that the chance of getting SJS from Tegretol was "1 in a million," as noted below in the excerpts of the trial testimony of Dr. Yager, his immunology expert, Dr. Merlin Wilson, and his pharmacology expert, Dr. John Cleary.

Dr. Yager testified:

Q. Had you studied the medical literature regarding Stevens-Johnson Syndrome since this lawsuit was filed?
A. Yes, sir.
Q. Can you tell us what is the incident rate of Stevens-Johnson Syndrome in the general population?
A. It varies from different populations, but **it's somewhere between one and three in a million**.

(Record, pp. 1826-27.) Dr. Merlin Wilson testified:

Q. What is, based upon not only your own experience, but based upon the literature, what is your knowledge as to the incidence of Stevens-Johnson in the population?
A. Well, there's a couple of numbers that people use, and the one that sticks in my mind is **one in a million**. Now, some people say it's six in a million. But the difference between one in a million and six in a million is not that great; so it's a very rare event of Stevens-Johnson Syndrome as an entity, not Stevens-Johnson Syndrome related to Tegretol. In other words, that's all the cases.

Dr. John Cleary testified:

> A. Depending on which book you pick up, the rate of association between most medications and Stevens-Johnson, specifically in this case, Carbamezapine, is somewhere around **one in a million**. . . .

(Record, p. 2614.)

Contrary to the above opinions, the FDA published the incidence rate of SJS among new users of carbamezapine in the 2009 PDR as follows:

> SERIOUS DERMATOLOGIC REACTIONS . . . AND SOMETIMES FATAL DERMATOLOGICAL REACTIONS, INCLUDING TOXIC EPIDERMAL NECROLYSIS (TEN) AND STEVENS-JOHNSON SYNDROME (SJS), HAVE BEEN REPORTED DURING TREATMENT WITH CARBAMEZAPINE. THESE REACTIONS ARE ESTIMATED TO OCCUR IN 1 TO 6 PER 10,000 NEW USER IN COUNTRIES WITH MAINLY CAUCASIAN POPULATIONS.
> (Plaintiff's Exhibit 110 marked for identification)

In 2008 the FDA, the agency that regulates all prescription drugs, concluded that the incidence rate for severe dermatological reactions like SJS and TENS was 1 to 6 per 10,000 new users. That incidence rate was first published in the Physicians' Desk Reference 2009 edition. The FDA incidence rate findings published in the 2009 PDR would have not only corroborated the testimony of plaintiff's epidemiologist, Dr. Steve Waring, and the 1994 article from the New England Journal of Medicine (Excerpts: Plaintiff exhibit 106, identification), but would also have trumped or impeached all the opinions of Dr. Yager and his experts regarding the incidence rate of SJS and aided the jury's understanding of the real material risk of taking Tegretol, which according to the FDA numbers could have been as high as 1 in 1700 users (6 per 10,000 ≈1 per 1700). This is important since Dr. Yager did not disclose to Sharon Dunn that Tegretol had a risk of severe dermatological reactions, like SJS, and it was for the jury to decide whether it was a material risk that should have been disclosed to her in order for him to obtain her informed consent.

IV. THE JURY WAS IMPROPERLY INSTRUCTED ON THE LAW OF INFORMED CONSENT

A. *Mississippi's informed consent law requires that all the known material risks of treatment be disclosed and causation is established when any of the material risks would have convinced the reasonable patient to forego the suggested treatment*

Dr. Yager contends Mississippi's informed consent law only required him to disclose the particular material risk which ultimately materialized. Dr. Yager further contends that he may not be held liable for failing to disclose any unmaterialized risks of Tegretol even assuming that a reasonable patient would not have taken Tegretol because of one of these other unmaterialized risks. (Appellee's brief, p. 29.) Dr. Yager's analysis is misplaced for the simple reason that had Sharon Dunn had chosen not to take Tegretol due to a material risk other than Stevens Johnson Syndrome, this case would have been unnecessary. Mississippi informed consent law clearly states that an physician has an absolute duty to disclose all the material risks of a particular treatment to a patient in order to provide the patient an informed opportunity to evaluate whether undergoing the treatment is worth the risk. See *Jamison v. Kilgore*, 903 So.2d 45, 50 (Miss., 2005) and *Whittington v. Mason*, 905 So.2d 1261, 1266 (Miss., 2005). This was especially critical because Tegretol, although a dangerous drug anti-seizure medication, was prescribed off label by Dr. Yager and possessed numerous life threatening material risks other than Stevens Johnson Syndrome including at least blood dyscrasias, agranulocytosis and aplastic anemia. (Trial Transcript: p. 1064, ln. 23). Therefore, the dispute between the parties on this particular issue appears to be one of causation under informed consent.

Under Mississippi law, informed consent causation consists of a two prong injury. "First, the plaintiff must show that a reasonable patient would have withheld consent had she

been properly informed of the risks, alternatives, and so forth." *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d 1346, 1364 (Miss. 1990)(citing *Phillips By and Through Phillips v. Hull*, 516 So.2d 488, 493 (Miss. 1987)(overruled on other grounds) and P. APPELBAUM, C. LIDZ & A. MEISEL, INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 121 (1979)). According to *Palmer*, the first causation prong is established if the plaintiff shows that a reasonable patient would have foregone the treatment in light of the disclosed risks. *Id. Palmer* does not state, nor does any other informed consent case located by Sharon Dunn, that the plaintiff must prove that the reasonable patient would have rejected the proposed treatment based solely upon the material risk that eventually materialized. *Id.* The basis for this Court not making the distinction seems abundantly clear; irregardless or what particular risk would have convinced the reasonable patient not to undergo the treatment, the result is the same; the treatment and its resulting injury would have been avoided.

This interpretation is further demonstrated by the second prong of the informed consent causation analysis which requires the plaintiff to "show" that the treatment was the proximate cause of the worsened condition (i.e., injury). That is, the plaintiff must show that she would not have been injured had the appropriate standard of care been exercised." *Id.* According to *Palmer*, Sharon Dunn is only required to prove that her injury, Stevens Johnson Syndrome, was caused by the proposed treatment, Tegretol. There is no requirement that the "injury" be one of the material risks. Implicit in the transaction from the first causation prong to the second prong is the foundation that a reasonable patient would have declined the treatment, and, therefore, Sharon Dunn need only prove a relationship between the injury and the treatment.

Dr. Yager contends that he was absolved of duty to disclose all the material risks because it would have been to time consuming and impractical in the real world. (Appellee's brief, p. 29). As a practical matter, this argument is without merit. Experts who are familiar with the material risk that ultimately materialized would undoubtedly be qualified to opine regarding the material risk which did not materialize. Additionally, Dr. Yager contends that since Plaintiff consumed another drug, Bextra, with an alleged association with Stevens Johnson Syndrome, disclosing the unmaterialized risks of Tegretol would not have altered Sharon Dunn's decision. (Appellee's brief, p. 30 (citing T. at 1172-1173)). This is certainly an argument that Dr. Yager could have made to the jury to convince them that a reasonable patient would not have objected to taking Tegretol to f treat back and leg pain; however, it is not a basis for excluding such a determination from the jury completely. The jury should have been provided the opportunity to consider whether a reasonable patient would have taken Tegretol in light of ALL the material risks. Finally, Dr. Yager contends that plaintiff ignored the unmaterialized risks of Tegretol and instructed the jury in P7B to consider only the risks associated with Stevens Johnson Syndrome when analyzing whether Dr. Yager breached the standard of care for warning. (Appellee's brief, pp. 29-30). The initial instruction submitted by Sharon Dunn regarding warning included warning regarding the unmaterialized risks of Tegretol, blood and liver reactions, which the trial court refused to give. (See P7; Record, p. 3235).

B. Informed consent is an absolute standard not dictated by customary practice

In this case, instructions D10 and D30 (Excerpt: Record, pp. 3195-96 and 3173), substituted a customary practice standard in lieu of the absolute standard to disclose all the

material risks.[2] These instructions directly conflicted with Sharon Dunn's informed consent instruction, and this deficiency could not be cured even considering the instructions as a whole as suggested by Dr. Yager. Both D10 and D30 provided inaccurate law which resulted in confusing the jury regarding the standard for determining informed consent.

C. *The jury instructions prematurely absolved Dr. Yager of liability*

Despite Dr. Yager's contention to the contrary (Appellee's Brief, p. 30), Sharon Dunn provided ample authority for remanding this case based upon the erroneous jury instructions. (See Appellant's brief, p. 42.) This is Dr. Yager's only defense because the deficiencies in D8A, D14, D18, D27 and D33 are so glaring. They all instruct the jury to absolve Dr. Yager of liability without considering plaintiff's other causes of action. (Excerpts: Record, pp. 3268, 3177, 3181, 3191, 3224.) Dr. Yager further argues that it is baseless to assume that the jury would only review one instruction before absolving Dr. Yager of liability. (Appellee's brief, p. 30-31). What is baseless is to assume that the jury would not consider only one jury instruction without considering all the jury instructions when the first jury instruction required a non-guilty verdict. For instance, Dr. Yager's informed consent instructions, D10 and D30, did not instruct the jury to consider failure to warn liability if they absolved Dr. Yager of informed consent. (Excerpts: Record p. 3173.)

V. SHARON DUNN'S CONSTITUTIONAL RIGHT TO ASSIST IN THE PROSECUTION OF HER CASE WAS INFRINGED UPON BY THE TRIAL COURT'S REFUSAL TO ALLOW SHARON DUNN TO PARTICIPATE IN HER CLOSING ARGUMENT

Contained within the Bill of Rights, Mississippi Constitution Article 3 Section 25,

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[2] D30 provides that "A minimally competent physician practicing in the same field or practice or specialty as Dr. Yager would have warned the plaintiff of the risk of contracting Stevens-Johnson syndrome. . . ." (Excerpts: Record p. 3196); and D10 provides that "If you find from the evidence that Dr. Yager, prior to prescribing Tegretol, in his discussions with the Plaintiff, reasonably advised the Plaintiff of the risks of taking Tegretol. . . ." (Excerpts: Record p. 3173).

provides, "No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or **both**." (Emphasis added). Sharon Dunn contends this Constitutional provision guaranteed her the right to give a portion of her closing argument. In support thereof, Sharon Dunn has directed this Court to the decisions of *Ballard v. State*, 366 So.2d 668 (Miss. 1979) and *Gray v. State*, 351 So.2d 1342 (Miss.1977) wherein this Court determined it was reversible error to preclude a criminal defendant from participating in closing arguments under Miss. Const. Art. 3, § 26. This constitutional provision provides in relevant part that "in all criminal prosecutions the accused shall have the right to be heard by himself or counsel, or both. . . ."

Dr. Yager does not dispute that if Sharon Dunn had been accused of committing a crime that the Mississippi Constitution would permit her to stand before the jury and delivery her closing arguments irrespective of whether she retained counsel. However, because Sharon Dunn is before a civil tribunal and has retained counsel, Dr. Yager contends Sharon Dunn waived her Constitutional right to deliver closing arguments to the jury. Dr. Yager basis for this distinction is the inclusion of the word "heard" in Miss. Const. Art. 3 § 26 and not in Miss. Const. Art. 3 § 25. Based on this distinction, Dr. Yager contends Art. 3 § 25 only guarantees access past the threshold of the courthouse doors with no subsequent rights once inside. Even if such an argument was viable, access to the courthouse was guarantee by Miss. Const. Art. 3 § 24, which provides:

> **All courts shall be open**; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.

With access to all courts previously provided, Article 3 Section 25 was designed to ensure a party's right to counsel and to proceed *pro se* or jointly just as if Sharon Dunn was a criminal

defendant. Moreover, surely the right to "prosecute" ones case encompasses the right to make argument to the jury during closing argument.

Taking this into considers, had Sharon Dunn chose to prosecuted this case without counsel, Dr. Yager would not dispute that Sharon Dunn could address the jury in her closing argument. In *Bullard v. Morris*, 547 So.2d 789, 790 (Miss.,1989), considering Miss. Const. Art. 3 § 25, this Court stated that "it is without question that the Mississippi Constitution permits a person to represent himself, pro se, in a civil proceeding." *Id.*, at 790. So, the question presented is whether the trial court can preclude Sharon Dunn from addressing the jury during closing argument now that she has retained the assistance of counsel. To eliminate any confusion in this respect, the drafters of the Mississippi Constitution specifically included the provision extending the right to "**both**" Sharon Dunn and her counsel.

In *Ex parte Dennis*, 334 So.2d 369 (Miss., 1976), this Court discussed the rule of construction of the Mississippi Constitution. "The construction of a constitutional section is of course ascertained from the plain meaning of the words and terms used within it." *Id.* at 373 (citing *State Teachers' College v. Morris*, 144 So. 374 (Miss., 1932) and *Green v. Weller*, 32 Miss. 650 (1856)(Emphasis added)). This Court went on to say in *Dennis*, that "[i]f there be no ambiguity, there of course exists no reason for legislative or judicial construction." *Id.* Here the there is no ambiguity in the language of Article 3 Section 25. Moreover, even if ambiguity existed, which is disputed, "both" in certainly means in conjunction with one another. Had Article 3 Section 25 intended to divest Sharon Dun the right to participate in her closing argument once she obtained counsel, the drafters of the Constitution could have excluded the "both" language.

Assuming the Bill of Rights guarantees Sharon Dunn the right to assist in the prosecution of her case, Dr. Yager contends that because Sharon Dunn could have provided rebuttal testimony instead of closing argument, no prejudice resulted. As discussed in Sharon Dunn's initial brief, her closing arguments were directed at highlighting her prior trial testimony. Because it was not new testimony, it was not rebuttal testimony. See Appellee's Brief, at 15 (quoting *Broussard v. Olin Corp.*, 546 So.2d 1301, 1303-04 (La. App. 3rd Cir., 1989)("Rebuttal evidence is confined to new matters adduced by the defense and not repetition of the plaintiff's theory of the case."). Sharon Dunn's closing arguments highlighting the facts of the case simply could not have been offered again as rebuttal testimony. Dr. Yager's rebuttal testimony "Hail Mary" is a poor attempt to distract this Court from the true Constitutional inquiry. If counsel could provide closing argument on behalf of Sharon Dunn, why couldn't Sharon Dunn provided it herself? The drafter of the Mississippi Constitution could not have been clearer. A plaintiff and her counsel have the constitutional right to jointly prosecute her case, including providing closing argument.

VI. SHARON DUNN WAS PREJUDICED BY NUMEROUS REFERENCES TO SETTLEMENT

In this particular case, the question presented is whether a legitimate basis existed for disclosing the fact that Sharon Dunn had previously settled with absent defendants. In this brief, Dr. Yager provided no basis or need for disclosing the settlements simply because Dr. Yager sought to improperly influence the jury that Sharon Dunn had already been adequately compensated. As this Court is well aware, the default rule in Mississippi is that disclosure of compromise is impermissible evidence of invalidity of Sharon Dunn's claim against Dr. Yager. Miss. R. Evid. 408 clearly provides:

> Evidence of . . . accepting . . . a valuable consideration in compromising . . . is not admissible to prove liability for or invalidity of the claim or its amount. . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Miss. R. Evid. 408.

The general rule excluding settlement evidence was recognized by this Court in *Weatherly v. Welker*, 943 So.2d 665 (Miss., 2006), wherein the Court provided that "revealing the fact of settlement is permissible **when** it explains the absence of settling defendants who were previously in court because it serves the purpose of reducing jury confusion." *Id.*, at 668 (citing *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1071 (5th Cir., 1986)). In *Weatherly*, this Court went on to find that the disclosure of settlement negotiations by the trial court did not serve the purpose of reducing jury confusion thereby clearly falling "outside of the permissible purposes set out in Rule 408." *Id.* Instead, the *Weatherly* Court found disclosing settlement negotiation to the jury "was not done 'in such a fashion that no party may complain of bias, hostility, or duress, or a predetermined result.'" *Id.*, (quoting D.L. Spillman, Jr., Annotation, *Propriety and Prejudicial Effect of Suggestion or Comments by a Judge as to Compromise or Settlement of Civil Case*, 6 A.L.R.3d 1457, 1460 (1966)(footnote omitted)). It is Sharon Dunn's contention that disclosure of settlement in this case was likewise inappropriate because no confusion existed regarding why Sharon Dunn was only proceeding against Dr. Yager.

DR. YAGER'S CROSS-APPEAL

(6)
STATEMENT OF THE CASE

I. COURSE OF THE PROCEEDINGS RELATED TO THE ISSUES PRESENTED ON DR. YAGER'S CROSS-APPEAL AND SHARON DUNN'S CROSS CROSS-APPEAL

On April 25, 1996, Sharon Dunn filed suit against Dr. Yager (Record, p. 86). On May 31, 1996, Dr. Yager filed his answer asserting the affirmative defense of lack of personal jurisdiction (Record, p. 98). On June 5, 1996, plaintiff served jurisdictional interrogatories on Dr. Yager requesting that he produce the number of patients from the State of Mississippi he had treated each year. On June 25, 1996, Dr. John Yager responded to the jurisdictional discovery claiming that the number of patients that he treated each year from the State of Mississippi was information which was "not readily available." (Cross-Appellee Excerpt: 1; from 2004 Record, p. 407) On March 2, 1999, after the applicable Alabama statute of limitations had run, (See ALA. CODE ANN. § 6-5-482 (West. 1999)), Dr. Yager filed his Motion to Dismiss for lack of personal jurisdiction which was supported by an affidavit categorically denying any connection to the State of Mississippi. The entire case was subsequently stayed when one of the Mississippi physician defendants, Dr. Lehman, filed bankruptcy. When the stay was lifted in 2002 and Dr. Lehman's liability discharged in bankruptcy, the case proceeded against Novartis, a New Jersey corporation, Dr. Yager, an Alabama physician, and Dr. Pacita Coss, a Mississippi physician, NACCO, and Vancleave Pharmacy. On August 29, 2002, a mediation was conducted with Donald C. Dornan serving as mediator. No compromise was reached during the mediation, but Sharon Dunn settled her claim against the forklift manufacturer, NACCO d/b/a Hyster Co., sometime thereafter. (Record, p. 25).

Following the unsuccessful mediation, and due to serious life threatening health-related problems, David Bradley was forced to seek co-counsel to assist in the representation of Ms. Dunn. Mr. Bradley retained Gregg Spyridon and his associate, Michael Rutledge of the New Orleans, Louisiana law firm of Spyridon, Koch & Palermo, LLC. On November 22, 2002, the trial court entered an order enrolling Gregg Spyridon and Michael Rutledge as counsel of record for Sharon Dunn. (Record, p. 13). On November 15, 2003, approximately fifteen (15) months after the Dunn mediation concluded, Mr. Dornan merged his Biloxi law firm with Spyridon, Koch & Palermo LLC to form Spyridon, Koch, Palermo & Dornan, LLC.[3]

On October 9, 2002, Dr. Yager was requested to supplement his answers to the jurisdictional interrogatories and produce a corporate representative who could testify as to the exact number of patients from Mississippi treated by Dr. Yager. (2004 Record, p. 365) When Dr. Yager objected, Judge Harkey ordered Dr. Yager (2004 Record, p. 743) to produce all records reflecting the number of Mississippi patients that Dr. Yager treated from 1995 to 2002. Dr. Yager objected and asked Judge Harkey to reconsider. After Judge Harkey recused himself, Judge Krebs ordered Dr. Yager to submit an affidavit from the Neurology Center outlining Dr. Yager's access to and control over the Neurology Center's records. Based on the affidavit submitted for an *in camera* inspection, Judge Krebs ordered Dr. Yager to make a representative of the Neurology Center available for a deposition for the purpose of determining the number of Mississippi patients treated by Dr. Yager and the Neurology Center. (2004 Record, p. 1021).

On March 12, 2004, Sharon Dunn filed a Motion to Strike, or in the alternative, for a Negative Inference seeking to strike Dr. Yager's defense of lack of personal jurisdiction. The

[3]Since the departure of Josh Koch, the firm is now Spyridon, Palermo & Dornan, LLC.

basis of the Motion to Strike was that Dr. Yager had destroyed a database of patient demographics as well as the medical records of all Mississippi patients treated between 1994 and 1996 which, alone, would have established the "minimum contacts" required by state and federal law to assert personal jurisdiction over a non-resident defendant. The trial court denied Ms. Dunn's Motion to Strike, and Ms. Dunn then moved for reconsideration. Before the trial court could reconsider the Motion to Strike, on September 2, 2004, it denied Dr. Yager's Motion to Dismiss for Lack of Personal Jurisdiction, rendering moot plaintiff's Motion to Strike. On October 25, 2004, this Court granted an interlocutory appeal on the issue of personal jurisdiction. (Excerpts: Record p. 2195). When an interlocutory appeal from the denial of Yager's Motion to Dismiss was granted, Sharon Dunn filed a Motion for leave to file an interlocutory cross-appeal from the denial of her Motion to Strike, contending that this Court should also consider the effect of Dr. Yager's destruction of jurisdictional documents on his appeal. On December 10, 2004, this Court denied Sharon Dunn's Motion for Leave to file a cross-appeal on the issue of Dr. Yager's spoliation of evidence. Subsequently, on March 27, 2006, the Mississippi Supreme Court notified the parties that the interlocutory appeal of the denial of Dr. Yager's Motion to Dismiss for Lack of Personal Jurisdiction had been improvidently granted, allowing this matter to proceed. (Excerpts: Record p. 3024).

II. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW BY DR. YAGER'S CROSS-APPEAL AND SHARON DUNN'S CROSS CROSS-APPEAL

Because of the extensive briefing in Appellant's initial brief regarding those issues on appeal, the facts presented herein are limited to those necessary to decide the issues raised by Defendant/Appellee's Cross Appeal and Plaintiff/Appellant's Cross Cross-Appeal.

1. *Dr. Yager Contracted with Ingalls to Treat Sharon Dunn*

When Dr. Yager first saw Sharon Dunn in April, 1995, for persistent complaints of low back pain following a fork lift accident at Ingalls Shipyard in Pascagoula, Mississippi, he did what any good businessman would do. He reached out to Mississippi and contracted with Sharon Dunn's employer, Ingalls Shipyard, through its third-party administrator, F.A. Richard, to guarantee payment for his treatment of Sharon Dunn. (Cross-Appellee Excerpt: 2; from Record, pp. 1483, 1484, 1487) On May 10, 1995, when he wanted to conduct additional diagnostic testing, he once again reached out to Mississippi and contacted Ingalls' third-party administrator, F.A. Richard, and obtained specific authorization to perform the testing at the expense of Ingalls, a second contract in Mississippi. (Cross-Appellee Excerpt: 3; from Record pp. 1468 and 1486).

2. *Dr. Yager Purposefully Directed a Defective Product into the Stream of Commerce in Mississippi*

After contracting with Ingalls to be sure he would be paid for his services, he performed a series of diagnostic tests that led him to believe that Sharon Dunn was suffering from neurogenic back pain. To treat the back pain, Dr. Yager prescribed Tegretol, an anti-seizure medication approved by the FDA only to treat epilepsy. Dr. Yager did not obtain Sharon Dunn's informed consent for the experimental non-approved use of Tegretol to treat back pain. More importantly, Dr. Yager chose to delete a patient warning concerning adverse reactions to Tegretol that had been provided by the defendant manufacturer, Novartis (formerly known as Ciba Geigy). The patient warning provided by Novartis states as follows:

Information for Patients:

> Patient should be made aware of the early toxic signs and symptoms of a potential hematologic problem, such as **fever**, **sore throat**, **rash**, **ulcers in the mouth**...and should be advised to report to the physician immediately if any such signs or symptoms appear.

(2004 Record, p. 601). Although Novartis intended for the prescribing physicians to pass on this "patient information" to their respective patients, Dr. Yager chose not to provide the "patient information" to Sharon Dunn when he prescribed the Tegretol. (Record, pp. 109, 118)

When Sharon Dunn returned to Mississippi from Dr. Yager's office, she filled the prescription at the Vancleave Pharmacy in Jackson County, Mississippi.

3. *Sharon Dunn's Injury and Damages Occurred Solely Within the State of Mississippi*

Sharon Dunn began taking Tegretol on May 20, 1995, and returned to light duty work at Ingalls Shipyard without incident. (2004 Record, p. 122) On June 13, 1995, Sharon Dunn began to experience the early toxic signs and symptoms of an adverse reaction to the Tegretol while at work at Ingalls Shipyard in Jackson County, Mississippi. (2004 Record, p. 125, at p. 139) These symptoms were the classic signs and symptoms listed in the "patient information" that Dr. Yager chose not to pass on to Sharon Dunn.

4. *Dr. Yager's Minimum Contacts with the State of Mississippi*

a. *Contracting with Mississippi residents/businesses*

When Dr. Yager began practicing in Mobile, Alabama with the Neurology Center in 1989, one of the first things he did to expand his practice into Mississippi was to join his partners and contract with the State of Mississippi to treat Mississippi Medicaid patients. (Cross-Appellee Excerpt: 4; from Record pp. 1491 -1511) The Mississippi Medicaid records clearly show that this was a contract initiated by Dr. Yager for the purpose of Dr. Yager and

his partners being authorized to treat at least 300 Medicaid patients from 1989, through August of 1995.[4] Like Dr. Yager's contract with Ingalls, this contract also establishes "interstate contractual obligations" to treat Mississippi residents and was in effect in June 1995, when the cause of action arose. While the Ingalls contract was specifically to treat Sharon Dunn, the contract with Mississippi Medicaid was more general but no less significant as it establishes Dr. Yager's systematic and continuous contacts with Mississippi from 1989 to 1995 to treat Mississippi patients.

In addition to the interstate contracts with Mississippi Medicaid and Ingalls, Dr. Yager had also established interstate contractual obligations with the Jackson, Mississippi office of the Muscular Dystrophy Association. (Cross-Appellee Excerpt: 5c; from 2004 Record, pp. 951-54) Under this contractual arrangement, Dr. Yager arranged to treat Mississippi patients from the Jackson, Mississippi area at his office in Mobile, Alabama several times per year. This was not some humanitarian effort by Dr. Yager, but rather, a systematic and continuous effort on the part of Dr. Yager to generate "profit" for himself and his Neurology Center. (Cross-Appellee Excerpt: 5c, p. 952 at p. 127, ln. 18; from 2004 Record, p. 952 at p. 127, ln. 18) Finally, it is believed that but for the destruction of the medical records of every patient treated by Dr. Yager and the Neurology Center between 1994 and 1996, including Dr. Yager's Mississippi patients, Sharon Dunn would be able to produce additional interstate contractual arrangements for payment of Dr. Yager's services, similar to the contractual arrangements he had with Ingalls, Mississippi Medicaid and the Jackson office of the MDA for treating Mississippi residents.

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[4] Ten (10) patients per year per each of the six (6) members of the Neurology Center.

b. Soliciting Business in Mississippi: PPOs.

In 1992, as PPOs were changing the way doctors traditionally marketed their services to prospective patients, Dr. Yager and his partners began joining PPOs. By participating in those PPOs, Dr. Yager marketed himself to over 800,000 Mississippi residents.[5] According to the Affidavit of the vice-president and co-owner, Nan M. Wallis of a preferred provider organization, PPO Plus:

> 15.
>
> ...the most effective means of building a patient base is through membership in a preferred provider organization and other managed care organizations. **Traditional marketing such as television, radio, and Yellow Pages is typically not as effective due to the pricing incentives available for participating members.**
>
> 5.
>
> "PPOs (Preferred Provider Organizations) arrange and facilitate the provision and delivery of health care services by hospitals, physicians, and ancillary providers to eligible employees and defendants.
>
> 7.
>
> Physicians join preferred provider networks to market their practice and to increase their volume of patients.
>
> 8.
>
> Most, if not all preferred provider organizations require the participating physician to discount his/her normal fees and charges for providing health care services to their members, in order to be listed in the preferred provider organizations provider directory.
>
> 9.
>
> The provider directory is then either provided to member patients or access to the provider directory is granted electronically.

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[6] (Cross-Appellee Excerpt: 6; from Record, p. 1707 -09); see also (Cross-Appellee Excerpt: 7a; from Record, p. 1710-1714); (Cross-Appellee Excerpt: 8; from Record, p. 1767-1769); (Cross-Appellee Excerpt: 9; from Record, p. 1770-1770a); (Cross-Appellee Excerpt: 10; from Record, p. 1774-75)

10.

> Members have an incentive to use providers listed in the directory because these providers have discounted their fees and charges. If the member chooses a provider outside the network, the member must pay additional costs.

11.

> [T]he **primary reason** a physician participates in a preferred provider network is to **increase their patient volume** via access to the preferred provider organization's membership.

* * *

14.

> [Based upon Dr. Yager's participation in preferred provider organizations such as Gulf Health Plans, Blue Cross/Blue Shield of Mississippi, American Life Care, Private Health Care Systems and Beech Street Corporation,] Dr. Yager was marketed to over **800,000 Mississippi residents** as a participating provider through the provider directories. (Cross-Appellee Excerpt: 6; from Record, pp. 1707-09)

The first and most significant PPO agreement Dr. Yager and his partners executed was the one with Gulf Health Plans (GHP). (Cross-Appellee Excerpt: 7a; from Record, pp. 1710-14) GHP was a multi-state PPO with a patient network in Alabama, Mississippi and Florida. *Id.* By executing a PPO agreement with GHP, Dr. Yager was provided access to market and treat 1,070 Mississippi residents. *Id.* According to the PPO Agreement that Dr. Yager executed, GHP was authorized and obligated to solicit business on his behalf. In particular, paragraph 2.1 of the PPO Agreement provided as follows:

> "2.1 **Participating Physician [Dr. Yager] authorizes PPO to enter into agreements** (directly or indirectly) with Payors, Health Plans, or networks of Payors or Health Plans **on behalf of Participating Physician [Dr. Yager].**"

* * *

> 4.2 **[Gulf Health Plans] (GHP) agrees to use its best efforts** to arrange for health plans with third-party payors such as employers, employer groups, commercial insurance carriers or other self-funded or self-insured entities of same. [GHP] **agrees to notify [Dr. Yager] of new**

> **arrangements** between [GHP] and payors, health plans or managed care networks. Upon notification that [GHP] has entered into an arrangement with any new payor, health plan or managed care network, **[Dr. Yager] shall have fifteen (15) days to inform [GHP] in writing that [Dr. Yager] will not be a participating physician in that new payor, health plan or network.** (Cross-Appellee Excerpt: 7b; from Record, pp. 1715-26)

Based upon the Affidavit of the President of Gulf Health Plans, Kerry Goff, in 1996 when suit was filed against Dr. Yager, GHP had expanded its network of patients in Mississippi, beyond Greene County, Mississippi to a large number of businesses in Mississippi including commercial insurers such as Blue Cross/Blue Shield of Mississippi and self insured employers such as the Beau Rivage Casino, Freide Goldman Halter, Stuart C. Irby, Fox Everett and Mississippi Administrative Services. (Cross-Appellee Excerpt: 7a; from Record, pp. 1710-1714) The GHP network was also expanded to include other Mississippi PPO networks such as American Life Care, Beech Street and Private Health Care Systems. *Id.*

Each time GHP added a Mississippi business, insurer or provider network, GHP notified Dr. Yager and his Neurology Center to give Dr. Yager the opportunity to accept or reject these Mississippi businesses. *Id.* Dr. Yager never rejected any Mississippi businesses or insurers which provided health plans to Mississippi residents who would have access to Dr. Yager at reduced rates. *Id.*

GHP and all of the participating PPOs, insurers and employees maintained a directory of physicians including Dr. John Yager as a participating provider. (Cross-Appellee Excerpt: 6; from Record, pp. 1707-09) The directory was, and is, distributed, in print or accessible through the Internet to residents of the State of Mississippi that are members of health plans that have been provided access to GHP network. *Id.* Dr. Yager was not the only member of his firm associated with the Gulf Health Plans. All of the physicians and members of the

Neurology Center also participated with the Gulf Health Plan Network with substantially the same provider agreement as the one signed by Dr. Yager. This is significant since Dr. Yager was a one-third owner of the Neurology Center, and exercised sufficient control over the Neurology Center such that the purposeful activities of the Neurology Center that were directed at Mississippi can also be attributed to Dr. Yager. (Cross-Appellee Excerpt: 11; from 2004 Record, p. 1021) According to the affidavit of Nan Wallis who reviewed Dr. Yager's participation in GHP, Blue Cross/Blue Shield, American Life Care, Beech Street, Dr. Yager and his firm's market share of Mississippi patients grew from 1,070 in 1992 to over 800,000 in 1996 when suit was filed. (Cross-Appellee Excerpts: 1; 6, 7a, 8, 9 and 10, from Record, pp. 1707-14; 1767-75)

5. *More than 800 Mississippi patients have been treated by Dr. Yager and his Neurology Center*

As a result of the efforts of Dr. Yager and the Neurology Center to expand their business into Mississippi, Dr. Yager and his Neurology Center began treating Mississippi patients as early as 1989. Although Dr. Yager's and the Neurology Center's patient records prior to 1997 were destroyed, Dr. Yager treated more than 170 Mississippi patients (Cross-Appellee Excerpt: 13; from Record, pp. 1689-94) and his Neurology Center treated more than 800 Mississippi patients between 1997 and 2004 (Cross-Appellee Excerpt: 14; from Record, pp. 1650-67) and generated a steady stream of business and revenue from the State of Mississippi. In his appellant's brief, Dr. Yager argues that Mississippi patients represent only 2.2% of his total patients. (Appellee's Brief, p. 6). However, Dr. Yager may have treated hundreds or thousands more before 1997 but those records are gone and we will never know whether the correct percentage was 2.2% or 10% or higher.

Dr. Yager also argues that treating Mississippi patients is not a business activity within Mississippi. Dr. Yager misses the point again. While treating Mississippi patients may not, without more, be a Mississippi activity, one thing is for certain: there is always more to the treatment of a patient than their residency. Assuming that the records of Dr. Yager's other Mississippi patients were similar to Sharon Dunn's, their medical records would have revealed interstate contracts with Mississippi employers, insurers, PPOs and other Mississippi entities guaranteeing payment of Dr. Yager's services like Ingalls guaranteed for Sharon Dunn. The medical records may also have revealed how the Mississippi patients came to be treated by Dr. Yager such as through direct solicitation by Dr. Yager or Mississippi PPOs or Mississippi Medicaid or associations like the Muscular Dystrophy Association of Jackson, which are all business activities within Mississippi. Finally, these records would have also established a revenue stream from Mississippi. Sharon Dunn never had the opportunity to obtain and review this information before it was destroyed by Dr. Yager's office even though it was requested and ordered to be produced before its destruction.

6. *Destruction of Jurisdictional Evidence*

After Dr. Yager raised the affirmative defense of lack of personal jurisdiction on May 31, 1996, plaintiff served jurisdictional interrogatories on Dr. Yager requesting that he produce the number of Mississippi patients he treats each year. On June 25, 1996, Dr. Yager responded claiming that the information "was not readily available." (2004 Record, p. 407) On October 9, 2002, Dr. Yager was requested to supplement his answers to the jurisdictional interrogatories and produce a corporate representative who could testify as to the exact number of patients from Mississippi treated by Dr. Yager. (2004 Record, p. 365) When Dr. Yager objected, Judge Harkey ordered Dr. Yager (2004 Record, p. 743) to produce all records reflecting the number

of Mississippi patients that Dr. Yager treated from 1995 to 2002. Dr. Yager objected and asked Judge Harkey to reconsider. After Judge Harkey recused himself, Judge Krebs ordered Dr. Yager to submit an affidavit from the Neurology Center outlining Dr. Yager's access to and control over the Neurology Center's records. Based on the affidavit submitted for an *in camera* inspection Judge Krebs ordered Dr. Yager to make a representative of the Neurology Center available for a deposition for the purpose of determining the number of Mississippi patients treated by Dr. Yager and the Neurology Center.

On January 28, 2004, during the corporate deposition of the Neurology Center, Dr. Yager's office disclosed for the first time that: 1) an electronic database which contained patient demographic information for patients treated between 1989 and October, 1996, was destroyed by Neurology Center when another company, CSC, was hired in October, 1996 take over the database; 2) the 1994 patient records were destroyed in 2001; 3) the 1995 patient records were destroyed in 2002; and 4) the 1996 patient records were destroyed as late as November, 2003. (Cross-Appellee Excerpt: 5a at p. 36 and Excerpt 5b at pp. 49-52; from 2004 Record, pp. 929 at p. 36 and 933 at pp. 49-52).

The destruction of the electronic database and the underlying patient records of Dr. Yager and his Neurology Center, P.C. were not only destroyed after suit was filed and jurisdictional interrogatories were propounded to Dr. Yager, but also after Dr. Yager had been ordered by the court to produce these records on several occasions for jurisdictional purposes. Thus, the true number of Mississippi patients treated by Dr. Yager will never be known and, as a result, Dr. Yager should not be allowed to benefit from that destruction to defeat jurisdiction.

7. *The mediation of this matter by Donald Dornan*

On August 29, 2002, Donald C. Dornan served as a mediator in the above-referenced matter. (Cross-Appellee Excerpt: 15; from Record, p. 565) The mediation, which was held at Mr. Dornan's office in Biloxi, Mississippi, was attended by counsel for all parties in this action, including counsel for Dr. Yager. At the time of the mediation, neither Gregg Spyridon, Michael Rutledge nor any member of the firm of Spyridon, Koch & Palermo, L.L.C. were involved in the case in any manner whatsoever.

At the mediation, none of the parties were able to reach a settlement. The majority of the counsel in attendance, including counsel for Dr. Yager, attended the mediation without any settlement authority or intent to settle and left before the mediation concluded. (Cross-Appellee Excerpt: 15; from Record, pp. 565-572). The only meaningful settlement discussions that took place were between Ms. Dunn, represented by David and Owen Bradley, and Hyster aka NACCO Material Handling Group, Inc. ("NACCO"), represented by Mr. Wayne Drinkwater and Marvin Welch, NACCO's risk manager. (Cross-Appellee Excerpt: 15; from Record, p. 566, ¶ 6). Unfortunately, the mediation was unsuccessful in that no party was able to reach a settlement agreement. The mediation was concluded and the mediation file was placed by Donald Dornan in off-site storage where it remains today. (Cross-Appellee Excerpt: 15; from Record, p. 566, ¶7).

Eventually, Sharon Dunn and NACCO reached a settlement agreement several months later, on their own and without the assistance of a mediator. The only parties who would have had an incentive to disclose confidential information during the mediation were NACCO and/or the plaintiff who were the only ones to conduct meaningful settlement discussions during the

mediation and eventually settled on their own. According to the attached affidavits of Marvin Welch (NACCO) and David Bradley "no confidential information was disclosed by anyone"and the subsequent association of Mr. Dornan with Spyridon, Koch & Palermo did not in any way compromise the integrity of the mediation process.

8. *The association of Gregg L. Spyridon and Michael Rutledge*

Following the unsuccessful mediation, and due to serious life threatening health-related problems, David Bradley was forced to seek co-counsel to assist in the representation of Ms. Dunn. Mr. Bradley retained Gregg Spyridon and his associate, Michael Rutledge of the New Orleans, Louisiana law firm of Spyridon, Koch & Palermo, LLC. The representation of Ms. Dunn by Gregg Spyridon and Michael Rutledge has always been handled exclusively out of their New Orleans office.

9. *The merger of Donald Dornan and Spyridon, Koch and Palermo*

On November 15, 2003, approximately fifteen (15) months after the Dunn mediation concluded, Mr. Dornan merged his Biloxi law firm with Spyridon, Koch & Palermo LLC to form Spyridon, Koch, Palermo & Dornan, LLC ("SKPD"). Following the merger, the representation of Ms. Dunn by Gregg L. Spyridon and Michael Rutledge continued to be handled exclusively by Mr. Spyridon, with the assistance of Mr. Rutledge, from the their New Orleans, Louisiana office. Neither Don Dornan nor anyone in the Biloxi, Mississippi office had access to the Dunn litigation file, either electronically or physically. (Cross-Appellee Excerpt: 15; from Record, p. 566, ¶ 8). Similarly, the file pertaining to the mediation conducted by Dornan has been in storage and inaccessible to the members of the SKPD New Orleans, Louisiana office. *Id.* In fact, all mediation files conducted by Mr. Dornan, including the Dunn file that were concluded prior to November 1, 2003, were not made part of any documents that became part of the

newly created firm of SKPD. Those files, including the Dunn File remain the exclusive property of Don Dornan.

10. *The spoliation of jurisdiction evidence by Dr. Yager*

On April 25, 2996, Sharon Dunn filed suit against Dr. Yager. On May 31, 1996, Dr. Yager filed his answer to the complaint raising the affirmative defense of lack of personal jurisdiction. On June 5, 1996, plaintiff served jurisdictional interrogatories on Dr. Yager requesting that he produce the number of patients from the State of Mississippi he had treated each year. After seven (7) years and multiple motions and orders to compel, including a determination by the trial court that Dr. Yager had sufficient ownership and control over his corporate medical practice (the Neurology Center, P.C.), Dr. Yager was ordered to designate a corporate representative to testify and produce all Mississippi patient records of Yager and the Neurology Center. (2004 Record, p. 1021-22). On January 28, 2004, during the corporate deposition of the Neurology Center, Dr. Yager's office disclosed for the first time the following spoliation of evidence:

A. An electronic database designed and maintained by GSD, which contained patient demographic information for patients treated between 1989 and October 1996, was destroyed by Neurology Center when another company, CSC, was hired in October 1996 to replace GSD (Cross-Appellee Excerpt: 5a at p. 36; from 2004 Record, p. 929, at p. 36);

B. The 1994 patient records were destroyed in 2001;

C. The 1995 patient records were destroyed in 2002; and

D. The 1996 patient records were destroyed as late as November 2003 (Cross-Appellee Excerpt: 5b at pp. 49-52; from 2004 Record, p.933, at pp. 49-52).

The destruction of the electronic database and the underlying patient records of Dr. Yager and his Neurology Center, P.C. were not only destroyed after suit was filed and

jurisdictional interrogatories were propounded to Dr. Yager, but also after Dr. Yager had been ordered to produce these records on several occasions for jurisdictional purposes. The relevant timeline of events is set forth below:[6]

A.	April 25, 1996	Complaint filed. (Record, p. 86)
B.	May 31, 1996	Yager's Answer and Defense of Lack of Personal Jurisdiction (2004 Record, p. 901)
C.	October 1996	Neurology Center destroys the GSD database when CSC is hired to replace them. (Cross-Appellee Excerpt: 5a)
D.	2001	All 1994 patient records are destroyed by Neurology Center. (Cross-Appellee Excerpt: 5b at 49-52)
E.	2002	All 1995 patient records are destroyed by Neurology Center. (Cross-Appellee Excerpt: 5b; from 2004 Record, p. 933 at 49-52).
F.	January 6, 2003	Yager's Second Supplemental Response. (2004 Record, p. 993)
F.	November 2003	An unknown quantity of 1996 Patient records are destroyed by the Neurology Center. (Cross-Appellee Excerpt: 5b; from 2004 Record, p. 933 at 49-52)
G.	January 21, 2004	[ORDER] Order by Judge Krebs allowing production of Neurology Center, P.C. records of Mississippi patients treated by Neurology Center and Dr. Yager prior to the action of the CSC database in October 1996. (2004 Record, p. 1021)

On June 9, 2004, the trial court denied Sharon Dunn's Motion to Strike (Cross-Appellee Excerpt: 16; from 2004 Record, pp. 1002-3) but ultimately determined on September 2, 2004, that Ms. Dunn's damages occurred exclusively in the State of Mississippi and that other evidence obtained by Sharon Dunn from third parties, such as Mississippi Medicaid, Blue

[6] A more detailed summary of the time line involved the production of jurisdictional discovery can be found at Cross Appellee Excerpt 17 from June 29, 2005, Supplemental Record.

Cross Blue Shield of Mississippi and Preferred Provider Organizations (PPO), along with her medical records, supported a finding that Dr. Yager had sufficient contacts with the State of Mississippi to confer personal jurisdiction over Dr. Yager.

(7)

SUMMARY OF ARGUMENT RAISED IN DEFENDANT'S CROSS APPEAL

A. *The Mississippi court based personal jurisdiction on Dr. Yager.*

From the single act of Dr. Yager placing a dangerous product into the stream of commerce in Mississippi without the manufacturer's "patient information" that was intended for Sharon Dunn, to the multitude of activities Dr. Yager directed at the forum state including contracting with, soliciting business from and treating of Mississippi residents, there can be little doubt that these "purposeful activities" directed at Mississippi were such that Dr. Yager could reasonably anticipate being haled into Court in Mississippi to respond to claims "arising out of" or "related to" his treatment of Mississippi residents. Although Dr. Yager treated Sharon Dunn in Mobile, Alabama, a tort was nevertheless committed, in part, in Mississippi within the meaning of the Long Arm Statute when all of her injuries and damages took place in Jackson County, Mississippi. Since injury and/or damages are necessary to complete the tort and since the injuries and damages occurred exclusively in Mississippi, a necessary element or part of the tort was committed in Mississippi satisfying the requirements of the Long Arm Statute.

The due process requirements of the U.S. Constitution are also satisfied because Dr. Yager has the "minimum contacts" with the State of Mississippi to justify haling him into court to defend the claims asserted by Sharon Dunn. Dr. Yager has entered into contracts with and solicited business from Mississippi residents for the sole purpose of treating Mississippi

residents that has produced revenue from Mississippi since 1989 sufficient to establish the requisite minimum contacts. Finally, the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice because Mississippi has a clear interest in protecting the rights of its injured citizens.

B. *No rules of professional conduct were violated.*

Citing only a provision of the Court Annexed Mediation Rules applicable to mediators and not lawyers, Dr. Yager seeks to disqualify Gregg L. Spyridon and Michael Rutledge who have never been mediators. To fashion a new rule that would require the forfeiture of an existing property right vested in plaintiff's counsel, would not only be unjust, but would violate the U.S. Constitution and Mississippi Constitution. Even if valid grounds for disqualification existed, which is denied, adequate safeguards have always been in place to protect all the parties in this litigation, which the Mississippi Supreme Court has always favored over *per se* disqualifications.

(8)

SUMMARY OF ARGUMENT RAISED IN PLAINTIFF'S CROSS APPEAL

Further supporting personal jurisdiction, the database and patient records that were destroyed by Dr. Yager were direct evidence of his contacts with the State of Mississippi. Their destruction is inextricably connected to this appeal and the issue of personal jurisdiction and it is impossible to correctly consider one issue without the other. Dr. Yager's destruction of all of his records of treating Mississippi patients should remove all doubt about Dr. Yager's continuous and systematic contacts with the State of Mississippi, which are more than sufficient to confer either specific or general jurisdiction over Dr. Yager.

ARGUMENT OF DEFENDANT'S CROSS APPEAL

VII. THE JACKSON COUNTY CIRCUIT COURT PROPERLY EXERCISED PERSONAL JURISDICTION OVER DR. YAGER

A. Standard for Summary Judgment on issue of Personal Jurisdiction

Dr. Yager correctly points out that this Court reviews denial of summary judgment *de novo*. *Sealy v. Goddard*, 2005 WL 311751, *2 (Miss., 2005)(citing *Tel-Com Management, Inc. v. Waveland Resort Inns, Inc.*, 782 So.2d 149, 151 (Miss., 2001)).

B. Overview of Legal Arguments

In his brief, Dr. Yager essentially makes three arguments which can be summarized as follows:

a. There was no jurisdiction under the Long Arm Statute because Dr. Yager did not contract with the residents of Mississippi, commit a tort in whole or in part in Mississippi, or do business in Mississippi.[7]

b. In the alternative, if the Long Arm Statute was satisfied, Dr. Yager's conduct or contacts do not give rise to an exercise of either general or specific jurisdiction.[8]

c. Finally, Appellant argues that the exercise of jurisdiction over Dr. Yager is "unfair" because he will not be able to take advantage of certain minimal "procedural safeguards" that are available to him in Alabama such as venue, a well plead Complaint and restrictions on expert testimony.[9]

The problem with Dr. Yager's argument is two-fold. First, Appellant treats each legal argument separately and out of context when it is a multi-step cumulative approach requiring

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[7] Appellant Br. at 9-17.

[8] Appellant Br. at 17-21.

[9] Appellant Br. at 22-24.

a determination of one step before addressing the next. Second, appellant discusses general or specific jurisdiction in the abstract without connecting these concepts to any facts which would determine whether Sharon Dunn's jurisdictional claim is based on a tort arising in Mississippi, triggering a specific jurisdiction approach or whether her claim is based on a tort arising outside the forum state requiring a general jurisdiction analysis. Dr. Yager simply leaps to the self-serving and erroneous conclusion that he is not amenable to jurisdiction in Mississippi.

It is the contention of Sharon Dunn that, as demonstrated in detail below:

a. Sharon Dunn sustained an injury exclusively within the State of Mississippi that was caused by the tortious conduct arising from Dr. Yager's treatment of Sharon Dunn in Alabama, triggering the tort prong of the Mississippi Long Arm Statute, MISS. CODE ANN. § 13-3-57;

b. Sharon Dunn's claim arises out or relates to the following activities that Dr. Yager purposefully directed at residents of Mississippi which confer a Mississippi Court with "specific" personal jurisdiction over Dr. Yager:

    1. Contracting with Ingalls to guarantee payment for Dr. Yager's treatment of Sharon Dunn;

    2. Placing a defective product in the stream of commerce in Mississippi;

    3. Soliciting business for medical treatment from over 800,000 Mississippi residents;

    4. Contracting with Mississippi Medicaid and the MDA to treat Mississippi patients;

    5. Treating hundreds of Mississippi patients.

c. The continuous and systematic contracting with, soliciting business from and treatment of Mississippi residents that Dr. Yager "purposefully directed" at the forum state from 1989 to 2003, confer "general jurisdiction" over Dr. Yager;

d. In the unlikely event that this Court should determine that the minimum contacts evidence presented to support the exercise of personal jurisdiction over Dr.

Yager is somehow insufficient, then, Sharon Dunn contends that the destruction of jurisdictional evidence by Dr. Yager alone is sufficient to confer general or specific jurisdiction over Dr. Yager.

e. The exercise of personal jurisdiction over Dr. Yager does not offend traditional notions of fair play and substantial justice.

C. *Mississippi Long Arm Statute*

1. *Since Sharon Dunn's injuries took place exclusively in Mississippi, Dr. Yager committed a tort in this state within the meaning of the Mississippi Long Arm Statute.*

Dr. Yager erroneously claims that since no part of the alleged tort, medical malpractice, occurred in Mississippi, personal jurisdiction over Dr. Yager is not permitted under the tort prong of the Long Arm Statute. (Appellee's Brief, p. 40). Dr. Yager's argument must be rejected for several reasons. First, as noted above, the tort claims against Dr. Yager are based on both the theories of products liability and medical malpractice. Second, while Dr. Yager's tortious conduct may have occurred, in part, in Alabama, the tort was not complete until the actual injury took place. *Horne v. Mobile Area Water and Sewage System*, 897 So.2d. 972 (Miss. 2004); *Sorrells v. R & R Custom Coach Works, Inc.*, 636 So.2d. 668 (Miss. 1994); *Jobe v. ATR Marketing, Inc.*, 87 F.3d. 751 (5th Cir. 1996); *Rittenhouse v. Mayberry*, 832 F.2d. 1380 (5th Cir. 1987); *Estate of Port Noy v. Cessna Aircraft Company*, 730 F.2d. 286 (5th Cir. 1984).

In *Horne*, this court held that for purposes of Mississippi's Long Arm Statute, a tort is committed in Mississippi when the injury results in the state because an injury is necessary to complete a tort. *Horne*, 897 So.2d. at 977. Writing for a unanimous court, Justice Cobb stated:

> Under now well-established law, Mississippi's Long Arm Statute contains no requirement that the part of the tort which causes the injury be committed in Mississippi.

Id. (citing *Sorrells v. R & R Custom Coach Works, Inc.*, 636 So.2d. 668, 672 (Miss. 1994)). Since its decision in 2004, this Court has taken the opportunity on numerous occasions to cite to and reiterate the *Horne* rule. See *Estes v. Bradley*, 954 So.2d 455, 461 (Miss. App. 2006)("[A] tort is committed in Mississippi if . . . the injury itself occurs here.") and *Yatham v. Young*, 912 So.2d 467, 470 (Miss. 2005)("[F]or purposes of our long-arm statute, a tort is committed in Mississippi when the injury results in this State. This is true because an injury is necessary to complete a tort.")

Like the plaintiffs in *Horne*, all of Sharon Dunn's injuries and damages occurred exclusively within the State of Mississippi. Although she received a prescription for Tegretol from Dr. Yager in his office in Mobile, Alabama, the undisputed evidence reveals that Sharon Dunn:

1. Filled the prescription for Tegretol in the Vancleave Pharmacy in Vancleave, Mississippi (2004 Record, p. 123);

2. Ingested the medication at her home and work in Jackson County, Mississippi (2004 Record, p. 123);

3. Suffered the early toxic signs and symptoms of an adverse reaction to the Tegretol while at work at Ingalls Shipyard in Jackson County, Mississippi, and eventually lost the use of her eyes when she failed to respond to the medical treatment she received exclusively in Mississippi. (2004 Record, pp. 124-27).

Despite his contention to the contrary, both cases relied upon by Dr. Yager support Sharon Dunn's position by establishing that since Sharon Dunn ingested Tegretol in Mississippi and her subsequent injury occurred in Mississippi as a result of ingesting Tegretol, at least the injury portion of the "tort" occurred in Mississippi.

Dr. Yager's attempt to equate tortious conduct with injury and their reliance on *Rittenhouse v. Mayberry*, 832 F.2d. 1380 (5th Cir. 1987) is misplaced. In *Rittenhouse*, a

Mississippi resident, was referred to Dr. Wardlaw, a Tennessee physician. Dr. Wardlaw examined her in Tennessee and referred her to Dr. Mabry, also a Tennessee physician. Dr. Wardlaw instructed Mrs. Rittenhouse to take an over-the-counter laxative and increase her fluid intake in preparation for a test Dr. Mabry was to conduct. Ms. Rittenhouse then returned to Tennessee and her colon was damaged during the testing performed in Tennessee.

Rittenhouse filed suit naming Drs. Mabry and Wardlaw, along with their respective medical entities. Both physicians were subsequently dismissed by the trial court for lack of personal jurisdiction. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the dismissal of Dr. Wardlaw because he was personally served within the borders of Mississippi. Turning to Dr. Mabry, the Court concentrated its analysis on the "tort in whole or in part" language of the long-arm statute. The Court stated:

> "Mississippi's Long Arm Statute contains no requirement that the part of the tort which causes the injury be committed in Mississippi. Since injury is necessary to complete a tort, **a tort is considered to have been committed in part in Mississippi where the injury results in the state."**

Id. (quoting *Sorrells v. R & R Custom Coach*, 636 So.2d 668, 672 (Miss. 1994)(Emphasis added). The Court then pointed out that Ms. Rittenhouse's claim did not arise out of any injury from the laxative or extra fluids ingested in Mississippi. Rather, it stated the claim was solely related to the procedure performed in Tennessee and therefore there was no Mississippi injury.

Unlike *Rittenhouse* where the act of ingesting fluids and laxatives in the State of Mississippi was not the cause of damage, in the instant case the Tegretol was filled at a Mississippi pharmacy and taken exclusively in Jackson County, Mississippi. When Ms. Dunn first began to experience an adverse reaction to the drug, she was at work at Ingalls Shipyard

in Pascagoula, Mississippi. When the disease process progressed, she consulted two Mississippi physicians, Drs. Pacita Coss in Wiggins, Mississippi and Dr. Thomas Lehman in Hattiesburg, Mississippi. When Drs. Coss and Lehman failed to properly diagnose and treat the adverse reaction to Tegretol, Ms. Dunn's symptoms progressed to the point where she lost her eyesight. All of her injuries occurred in Mississippi. Thus, the tort which began with Dr. Yager's tortious actions in Mobile, Alabama, was not complete until Sharon Dunn's injuries took place in Mississippi, satisfying the tort prong of the Long Arm Statute.

Because there is no decision of this Court which supports Dr. Yager's position with respect to Miss. Code Ann. § 13-3-57, Dr. Yager is forced to rely on other jurisdictions and this Court interpretation of the Mississippi venue statute in *Forrest County General Hospital v. Conway*, 700 So.2d 324 (Miss. 1997). In *Conway*, the plaintiffs sued in Hinds County several health care provides who only resided in either Forrest or Lamar Counties. *Id.* at 325. The plaintiffs took their infant daughter to the emergency room at Forrest County General Hospital and was examined by several health care personnel and eventually diagnosed with a virus, prescribed an antibiotic and discharged less than two hours later. *Id.* at 325. Later the same afternoon, the child's condition worsened and they eventually returned to Forrest General where she was diagnosed with meningitis. *Id.* Sometime thereafter, the child became critical and was transported to University Medical Center Hospital were the child remained in the hospital for sixty-nine days during which the child's arms and legs were amputated to preserve her life. *Id.*

At the of *Conway* suit, Mississippi's venue statute provided that venue has proper in a county in "where the cause of action may occur or accrue." *Id.* at 326 (citing Miss. Code Ann. § 11-11-3). The *Conway* Court went on to state "that a cause of action occurred or accrued

when 'it came into existence as an enforceable claim, that is, when the right to sue becomes vested.'" *Id.* (quoting *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So.2d 344, 346 (1943)). Although the allegations of the plaintiff's complaint are not thoroughly discussed, the *Conway* Court found that the initial damage occurred and accrued in Forrest County when the doctors allegedly failed to properly diagnose the disease presumably in time avoid the critical and irreversible rapid onset of meningitis. *Id.* at 326-27. Dr. Yager relies on this portion of the opinion in an attempt to support his position that the tort in this case occurred exclusively in Alabama because that where Dr. Yager treated Sharon Dunn. However, Dr. Yager omits one critical point of the *Conway* opinion which support Sharon Dunn's position and is consistent with *Home*. The *Conway* Court went on to explain that cause of action had occurred or accrued in Forrest County because the "injury" had already occurred in Forrest County and the only action occurring in Hinds County was the treatment of the already injured child. *Id.* For Dr. Yager's interpretation of *Conway* to be correct and applicable to this case, Sharon Dunn would have the right to sue Dr. Yager the moment he walked out of his office in Mobile. There is no dispute that Sharon Dunn's cause of action did not accrue until she ingested the Tegretol and sustained an adverse reaction.

2. *The "contract" and "doing business" prongs of the Long Arm Statute are also satisfied.*

a. *The "contract" prong.*

Although it is clear that Sharon Dunn sustained an injury exclusively within the State of Mississippi triggering the tort prong of the Long Arm Statute, it is also painfully obvious that Dr. Yager's purposeful activities with the State of Mississippi also satisfied both the "contract"

and "doing business" prong of the Long Arm Statute. As noted above, the Long Arm Statute provides, in pertinent part:

> Any non-resident person...who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state...shall be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

Miss. Code Ann. § 13-3-57 (Emphasis added). As noted above, the first thing that Dr. Yager did in connection with his treatment of Sharon Dunn's employer, Ingalls Shipyard, through their third-party administrator, F.A. Richard, was to guarantee payment for his treatment of Sharon Dunn. (Record, pp. 1483-84, 87). When he wanted to conduct additional diagnostic testing, he once again reached out to Mississippi and contracted with Ingalls' third-party administrator, F.A. Richard, and obtained specific authorization to perform the testing at the expense of Ingalls, a second contract in Mississippi. (Record, pp. 1468 & 1486).

It is clear from the guarantee referenced in Sharon Dunn's medical records that to the extent that Dr. Yager treated Sharon Dunn in Mobile, including diagnostic testing, that Ingalls Shipyard in Pascagoula, Mississippi would be legally and contractually obligated to pay Dr. Yager for his professional services. While the contract was apparently arranged over the phone, it was nevertheless documented in writing in Sharon Dunn's medical records written by Dr. Yager's office sufficient enough to be an admission of the existence of a contract between Dr. Yager and Ingalls Shipyard. At least one Mississippi court has found such an arrangement to give rise to the contract prong of the Long Arm Statute. In *BankPlus v. Toyota of New Orleans*, 851 So.2d. 439 (Miss. App. 2003), the Mississippi Court of Appeals found that a contract sufficient to trigger the "contract" prong of the Long Arm Statute had been created during a phone conversation between BankPlus and Mississippi Banking Corporation and

Toyota of New Orleans, a Louisiana corporation, in which BankPlus agreed to release the lien on a damaged vehicle being exchanged by the bank's customer for a new vehicle in exchange for Toyota issuing title to the new vehicle in the name of BankPlus. In *BankPlus*, the Court of Appeals held:

> While we do not know the exact words that were spoken on the phone between BankPlus and Toyota, it is apparent that some agreement was reached resulting in BankPlus releasing the lien on the Camry and mailing the title and cashier's check to Toyota.

Id. at 443.

Not surprisingly, Dr. Yager completely avoids addressing the contract prong of Miss. Code Ann. § 13-3-57, especially since the case on which he relies on to support his tort prong analysis, *Rittenhouse*, establishes a roadmap for establishing jurisdiction based an implied contract between physician and patient. In *Rittenhouse*, the Fifth Circuit recognized that medical malpractice suit typically sound in tort but that no Mississippi authority precluded the analysis of personal jurisdiction for medical malpractice from a contractual relationship standpoint. *Rittenhouse v. Mabry*, 832 F.2d 1380, 1383-84 (5th Cir. 1987)(citing 61 Am. Jur.2d Physicians, Surgeons, and Other Healers § 158, at 290-91 (1981)("The relationship between a physician and patient may result from an express or implied contract .... [T]he voluntary acceptance of the physician-patient relationship by the affected parties creates a prima facie presumption of a contractual relationship between them."); *United Companies Mortgage of Mississippi, Inc. v. Jones*, 465 So.2d 1083, 1084 (Miss.1985) (stating that an action for legal malpractice may sound in tort or contract); *Hutchinson v. Smith*, 417 So.2d 926, 927 (Miss.1982)). According, Dr. Yager and Sharon Dunn entered into at least an implied contract for her treatment which included Dr. Yager's prescription of Tegretol, which was performed, in part, in Mississippi when Sharon Dunn filled the prescription at Vancleave Pharmacy.

b. The "doing business" prong.

The Mississippi Long Arm Statute also provides that:

> any non-resident person. . . who shall do any business or perform any character of work or service in the state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

Miss. Code Ann. § 13-3-57 (Emphasis added). While Dr. Yager argues that he does not conduct any business in Mississippi, the contracts with Mississippi Medicaid, Ingalls and the Jackson Mississippi Muscular Dystrophy Association, the solicitation of business from over 800,000 Mississippi residents and the treatment of hundreds, if not thousands, of Mississippi residents discussed throughout this brief not only belie Dr. Yager's contention but support the "doing business" prong of the Long Arm Statute. See *BankPlus v. Toyota of New Orleans*, *supra.* at 444.

D. "Minimum Contacts"

Although it is clear that the requirements of Mississippi's Long Arm Statute have been satisfied, the inquiry does not end there. In order for the Mississippi court to exercise personal jurisdiction over Dr. Yager under the state's Long Arm Statute, the application of that statute must comport with the due process requirements of the Fourteenth Amendment to the U.S. Constitution. The U.S. Supreme Court has held that due process requires that in order to subject a non-resident defendant to personal jurisdiction that the defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154 90 L.Ed. 95 (1945). Dr. Yager analyzes the minimum contacts requirement by subdividing them into contacts that give rise to "specific" personal

jurisdiction and those that give rise to "general" personal jurisdiction. It is the contention of Sharon Dunn that Mississippi has both specific and general jurisdiction over Dr. Yager.

1. General v. Specific Jurisdiction

Minimum contacts generally fall into two categories - those that give rise to specific personal jurisdiction and those that give rise to general personal jurisdiction. Specific jurisdiction is appropriate when a cause of action, occurring in state, arises out of or relates to the non-resident defendant's contacts with the forum state. General jurisdiction is appropriate when the defendant's contacts with the forum state are "continuous and systematic" but the cause of action occurs outside the forum state and is not related directly or indirectly to those contacts. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, (1987); *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, (1984); *Worldwide Volkswagon Corp. v. Woodson*, 444 U.S. 286, (1980); see also *Sorrells v. R & R Custom Coach Works, Inc.*, 636 So.2d. 668 (Miss. 1994).

The distinction between general and specific jurisdiction may be useful in determining or weighing the sufficiency of the contacts a non-resident defendant has with the forum state for establishing personal jurisdiction over that defendant. For example, when the cause of action relates to the non-resident defendant's contact with the forum, even a single act can support jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Magee v. International Life Insurance Company*, 355 U.S. 220 (1957); *Sorrels*, 636 So.2d. at 674; *Bearry v. Beech Aircraft Corporation*, 818 F.2d. 370 (5th Cir. 1987); *Bullion v. Gillespie*, 895 F.2d. 213 (5th Cir. 1990). When the cause of action does not arise from the non-resident defendant's activity in the forum state, more contact with the forum state is generally required because the state has no direct interest in the cause of action. *Perkins v. Benguet Consolidated Mining*

Company, 342 U.S. 437, 447-48 (1952); *Bearry v. Beech Aircraft Corporation*, 818 F.2d. at 374. The additional contacts for general jurisdiction have been quantified as "continuous and systematic" contacts. See *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 1872-73, 80 L.Ed. 2d. 404 (1984).

2. *Specific Jurisdiction: "Claims Arising out of or Related To"*

a. *Claims "Arising Out of or Related to"*

In *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, (1984), the United States Supreme Court declined to address the meaning of "arising out of" or "related to", or whether there was any distinction between the two terms, or what sort of nexus between a cause of action and a defendant's contact with a forum is necessary to distinguish between general and specific jurisdiction. *Id.* at 416, n. 10. The Court has nevertheless provided adequate guidance to assist the lower courts in resolving specific jurisdiction questions.

In *Burger King Corporation v. Ruduzewicz*, 471 U.S. 462 (1985), the Court emphasized the importance of giving "fair warning" to the defendant that he may be haled into court in the forum state, in order to satisfy Constitutional due process requirements. *Id.* at 472. It explained:

> By requiring that individuals have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign...the due process clause, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimal assurance as to where that conduct will and will not render them liable to suit.

Id. (citing *Worldwide Volkswagon Corporation v. Woodsen*, 444 U.S. 286, 297, (1980) and *Shaffer v. Heitner*, 433 U.S. 186, 218, (1977) (Emphasis added)). The Court expressly noted that "where a forum seeks to assert specific jurisdiction" the "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum and

the litigation results from the alleged injuries that "arise out of or relate to" those activities. *Id.* at 472; see also *Horne v. City of Mobile*, 897 So.2d at 980 (Emphasis added). Thus, the Court has tacitly defined "arising out of" or "related to" as any nexus between a claim and the minimum contacts with the forum that gives defendants "fair warning" that the purposeful activity may subject them to the jurisdiction of the forum state. The Supreme Court has given many examples which are relevant to the instant case.

Specifically addressing "interstate contractual obligations" such as the ones Dr. Yager entered into with Ingalls and Mississippi Medicaid, the Court found the "fair warning" requirements satisfied when the defendant "reached out" into the forum and entered into contracts with citizens of the forum state, noting:

> [W]e have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other state for the consequences of their activities.

Burger King, 471 U.S. at 473. (citations omitted)(Emphasis added). With respect to the placement of a product into the stream of commerce in the forum state by a defendant, like Dr. Yager who directed a prescription to a Mississippi resident without the manufacturer warning, the United States Supreme Court held that "the forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state and those products subsequently injure forum consumers." *Worldwide Volkswagon Corporation v. Woodsen*, 444 U.S. at 297-298; see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

To the extent the directing of a prescription to a Mississippi resident which causes injury exclusively in Mississippi is not enough purposeful conduct to give a defendant "fair warning"

it may be subject to a foreign court's jurisdiction, the United States Supreme Court has recognized the efforts of a defendant, such as Dr. Yager, to market his services in Mississippi as the sort of additional conduct that would satisfy due process requirements for exercising specific jurisdiction over a defendant. The Court described the additional conduct as follows:

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state, for example, designing the product for the market in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product [or services] through a . . . agent in the forum state. . . . [H]ence, if the sale of a product . . . arises from the efforts . . . to serve, directly or indirectly, the market for its product [or services] in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective [product] there has been the source of injury to its owners or to others.

Asahi, at 110-112 (citing *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-1240, 2 L.Ed. 2d. 1283 (1958) (Emphasis added)). In *Keeton*, the U.S. Supreme Court expanded "arising out of or related to" even further by using a blend of related and unrelated contacts to uphold personal jurisdiction over a publisher whose only contact with the forum state was that its magazines were circulated in the forum state. While noting that the publisher's "activities in the forum state may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities," the Court found that the marketing efforts of the publisher had a sufficient nexus to a cause of action arising out of or related to the content of five issues to support the exercise of specific jurisdiction over the publisher. The Court explained the nexus as follows:

> Respondent, Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine . . . Respondent produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication

> wherever a substantial number of copies are regularly sold and distributed.

465 U.S. at 781. (Emphasis added).

In the instant case, Dr. Yager does not have a national practice like the publisher in *Keeton*, but he does operate a regional practice reaching into Mississippi, Florida, Georgia, Louisiana, Texas and other states. (Record, pp. 1710-14). While the great majority of his patients come from Alabama, he has continuously and deliberately exploited the Mississippi market as demonstrated by the 800,000 Mississippi residents that Dr. Yager was able to access by marketing his services through PPOs or group health plans. While we will never know the total number of Mississippi patients Dr. Yager or his Neurology Center treated prior to 1997, we do know that this marketing of services or "establishment of channels" for providing regular treatment to Mississippi patients was the type of nexus contemplated in *Burger King*, *Asahi*, and *Keeton*.

Dr. Yager's solicitation of Mississippi patients was also more substantial than the California telephone directory solicitation the Ninth Circuit found to be sufficiently related to a medical malpractice claim against an Arizona doctor. See, e.g., *Cubbage v. Merchent*, 744 F.2d 665 (9th Cir. 1984). Furthermore, and perhaps more importantly, the interstate contracts that Dr. Yager entered into with Mississippi Medicaid, the Jackson, Mississippi Muscular Dystrophy Association and Ingalls were clearly the type of "reaching out" that creates continuing obligations and relationships contemplated by the Court in *Burger King*.

These activities were not fortuitous, incidental activities as claimed by Dr. Yager, but rather were deliberate, purposeful activities directed at the State of Mississippi or at residents of the State of Mississippi. They are, without exception, all related to medical treatment by Dr. Yager and are more than sufficient to give Dr. Yager "fair warning" that he may be haled into

court in Mississippi to respond to claims arising out of or related to his treatment of Mississippi residents, like Sharon Dunn. The placement of a dangerous product into the stream of commerce in Mississippi, without the manufacturer's patient warning, that was part of the treatment that Dr. Yager conducted pursuant to an interstate contract with Ingalls who guaranteed payment for his services, can hardly be said to be unrelated to the claims Sharon Dunn has asserted against Dr. Yager. These purposeful activities are also substantially more than the single act that many courts, including this Court, found to be sufficient to sustain specific personal jurisdiction over a non-resident defendant.

b. A Single Act Purposefully Directed at the Forum Can Support Specific Jurisdiction When it Gives Rise to or Relates to the Claim.

In *Horne v. Mobile Area Water and Sewer System*, 897 So.2d. 972 (Miss. 2004), this Court held that the single act of releasing eighteen (18) billion gallons of water was sufficient to give the Chancery Court in Jackson County, Mississippi jurisdiction over the City of Mobile on the grounds that the single act was "purposefully directed" at residents of Mississippi whose properties were flooded by the release of the water by the City of Mobile and the "action resulted from the alleged injuries that arose out of the activities." *Id.*, at 979-980. In reaching its decision, this Court cited with approval the case of *Medical Assurance Company of Mississippi v. Jackson*, 864 F.Supp. 576 (S.D. Miss. 1994) which noted that "a single act by the defendant directed at the forum state...can be enough to confer personal jurisdiction if that act gives rise to the claim being asserted."

In *Medical Assurance*, a Mississippi insurance company sued an Alabama attorney and his Alabama clients for breach of a settlement agreement. The attorney and the client moved to dismiss the action for lack of personal jurisdiction. In denying the motion to dismiss, the

district court found that two letters and two telephone calls creating a settlement agreement was sufficient to confer specific personal jurisdiction over the non-resident Alabama defendant for a claim based upon breach of that settlement agreement. In *Horne*, the court compared its facts with those in *Medical Assurance* and noted a number of similarities including Mississippi plaintiffs who claimed injury exclusively in Mississippi from the tortious conduct of Alabama defendants who never stepped foot in Mississippi. The similarities that the court found between *Horne* and *Medical Assurance* can also be found in the instant case. Sharon Dunn is a Mississippi plaintiff claiming injury exclusively in Mississippi from the tortious conduct of an Alabama defendant who treated Sharon Dunn in Alabama without physically stepping into Mississippi. However, the similarities end there as the minimum contacts in *Horne* and *Medical Assurance* pale in comparison to the plethora of purposeful contacts that Dr. Yager had with Mississippi.

In *BankPlus v. Toyota of New Orleans*, 851 So.2d 439, 444 (Miss. App. 2003), the Mississippi Court of Appeals upheld specific jurisdiction over a Louisiana Toyota dealership that caused damage exclusively in Mississippi with less contacts than Dr. Yager had with the forum of Dr. Yager. The Court notes that:

> [the dealership] advertise[s] in a manner that reaches Pearl River County and does not hesitate to sell to Mississippi residents that come to New Orleans to purchase cars.... [The Toyota dealership] also agreed to accept BankPlus's check for financing the Avalon for a Mississippi resident. Toyota entered into a transaction with BankPlus in Mississippi and the action arises from the transaction.

Id. at 444. As noted in *Keeton*, the cause of action does not have to arise directly from the jurisdictional contacts, but must bear only a nexus to the activity upon which the suit is founded. See also, *Allen v. Jefferson Lines*, Inc., 610 F.Supp. 236 (S.D. Miss. 1985).

However, in the instant case, Sharon Dunn's claim arises directly out of Dr. Yager's contract with Ingalls to treat her as well as the directing of the prescription of Tegretol to a Mississippi resident without the manufacturer's patient information. Since Sharon Dunn is a Mississippi resident and her claim arises out of Dr. Yager's treatment, her lawsuit relates directly or indirectly to Dr. Yager's solicitation of business from Mississippi residents through Mississippi Medicaid, the Jackson Muscular Dystrophy Association, and the numerous PPOs that gave Dr. Yager access to more than 800,000 Mississippi residents. In either case, these contacts would be more than sufficient to confer specific jurisdiction over Dr. Yager.

c. *Sister Courts have found specific jurisdiction over non-resident physicians.*

Dr. Yager has not cited a single case in which a court declined to exercise specific personal jurisdiction over a physician, or any other defendant for that matter, where the tortious conduct of the physician/defendant in one state caused injury and damages exclusively in the forum state. However, there are numerous cases from sister states which support specific personal jurisdiction.

In *Wright v. Yackley*, 459 F.2d 287 (9th Cir. 1972), the Ninth Circuit held that an Idaho court did not have specific jurisdiction over a South Dakota doctor who treated a South Dakota resident for four months with prescription medication until she moved to Idaho and requested a copy of the original prescription in order that she could refill it in Idaho. In *Wright*, the doctor did not initiate the call to Idaho, there was no systematic or continuing efforts on the part of the South Dakota doctor to provide services to anyone in Idaho and the injury began during the four months she was taking the medication in South Dakota but was not completed or manifested until after the plaintiff had moved to Idaho. Twelve (12) years later the Ninth Circuit considered its holding in *Wright* and decided to limit it to its facts. In *Cubbage*, 744 F.2d 665

(9th Cir. 1984), a California resident filed a medical malpractice suit in California against two Arizona doctors who treated a California resident for an ulcer in Arizona and then subsequently transferred her to a California hospital for further treatment in which they did not participate. In declining to apply *Wright*, the United States court of Appeals for the Ninth Circuit found that the Arizona doctors had "purposefully availed" themselves of the privilege of conducting activities in California by the following relevant contacts with California that were strikingly similar to the contacts that Dr. Yager had with Mississippi:

> Appellee's relevant contacts with California were the obtaining of a Medi-Cal number and the placing of a telephone listing . . . in a local phone directory distributed in the adjacent California area. Through directory solicitation and participation in a state healthcare program, appellees were able to attract a substantial number of patients from California. As noted earlier, the 9th Circuit also found that the claim arose out of or resulted from the doctor's forum related activities simply on the basis of the nexus between the residency of the plaintiff (California) and "a telephone directory solicitation".

744 F.2d at 670 (citing *Keeton,* 465 U.S. at 779-780, 104 S. Ct. at 1481.

The holding in *Cubbage* is in accord with other jurisdictions. *Lemke v. St. Margaret Hosp.*, 552 F. Supp. 833 (N.D. Ill. 1982) (Indiana doctor who regularly treated Illinois patients was found "purposefully holding himself out to Illinois residents as a provider of medical care" and subject to Illinois jurisdiction); *Presbyterian Univ. Hosp. v. Wilson*, 637 A.2d 486 (Md. Ct. Spec. App. 1994)(finding a Pennsylvania hospital registered as a Maryland Medical Assistance Provider and a Maryland Transplant Referral Center subject to jurisdiction in Maryland, regardless of the fact that it did not advertise or traditionally solicit patients in Maryland); *Kennedy v. Freeman*, 919 F.2d 126 (10th Cir. 1990)(finding jurisdiction where a Texas doctor neither solicited nor advertised, but rather simply accepted a test sample from an Oklahoma doctor).

3. General Jurisdiction

In the unlikely event this Court were to conclude that specific jurisdiction over Dr. Yager is lacking, then Sharon Dunn contends that Mississippi court may exercise general jurisdiction over Dr. Yager. General jurisdiction is present where a defendant's contacts with the forum state are "continuous and systematic." *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So.2d 545, 549 (Miss. 2000); *Martin & Martin v. Jones*, 616 F.Supp. 339, 341 (S.D. Miss. 1985). General jurisdiction exists without regard to the relationship of the cause of action. *Id.* at 549. In the instant case, there is no question that Dr. Yager has engaged in a pattern of continuous and systematic activities within the State of Mississippi since 1989. Dr. Yager attempts to distort his contacts with the state by examining each contact separately when the analysis calls for a "cumulative" approach. The facts in this case are clear. In 1989, Dr. Yager entered into a contract with Mississippi Medicaid to treat Mississippi Medicaid patients "continuously and systematically" for seven (7) years until August of 1995, after Sharon Dunn's cause of action arose in June, 1995. Dr. Yager began marketing his services to Mississippi residents in 1992 through contracts he entered into with PPOs. (Record, pp. 1767-1775). Through marketing efforts of the PPOs he expressly authorized, his market share of Mississippi residents grew from 1,070 in 1992 to over 800,000 in 1996 when Sharon Dunn filed her lawsuit against Dr. Yager.

There is also no question that Dr. Yager continuously and systematically treated Mississippi patients from 1989 to the present. The only question we may never know the answer to is "how many" because of the records that were destroyed by Dr. Yager's office between 2002 and 2004 after they had been requested in discovery. Although Dr. Yager argues in his brief that only 2.2% of his patients come from Mississippi, he is only relying on

records of patients treated by Dr. Yager after 1997. (Record, p. 1914-1939, corporate deposition of Neurology Center, P.C.) The records of patients that he treated before 1997, when the cause of action arose in 1995 or when suit was filed in 1996, were the records that were relevant to this inquiry. They would not only have established an accurate number of Mississippi patients "continuously and systematically" treated between 1994 and 1996, they would also have, more likely than not, established the "continuous and systematic" reaching out to Mississippi to create interstate contractual obligations to guarantee payment for his services similar to the contract Dr. Yager had with Ingalls that was reflected in Sharon Dunn's own medical records, the only pre-1997 medical records that were not destroyed. These contacts are not only "continuous and systematic" but substantial and sufficient to confer general jurisdiction over Dr. Yager, notwithstanding the fact they are also "related" to Sharon Dunn's claim against Dr. Yager.

As illustrated by *Admin. of the Tulane Educational Fund v. Cooley*, 462 So.2d 696 (Miss. 1984), these activities show that Dr. Yager should have had an awareness that he could be haled into a Mississippi court of law. In *Cooley*, this Court allowed exercise of jurisdiction in Mississippi over a Louisiana university. The court based its finding, in part, on a connection the university maintained with the medical community in Mississippi, writing:

> More specifically, the medical school and the Tulane Hospital maintain a variety of ongoing connections with hospitals in the State of Mississippi, with medical practitioners in within Mississippi, and with the treatment of patients from Mississippi. Even in the instance of activities conducted at New Orleans facilities, there are reasonably foreseeable effects in Mississippi, ranging from the response of Mississippi patients to treatments following their return home to the billing of Mississippi residents at their addresses in Mississippi for services rendered.

Id. at 704 (Emphasis added). Dr. Yager's argument that his Mississippi Medicaid "contract" is insufficient to establish jurisdiction because he did not anticipate that more than 10% of the his business would be Mississippi Medicaid patients. (Appellee's Brief, p. 6). Dr. Yager misses the point for several reasons. First, we will never know the actual number of Mississippi Medicaid patients treated by Dr. Yager at the Neurology Center because of the destruction of documents. Second, the contract created an interstate contractual obligation covering seven (7) years including the time period when the cause of action arose. Third, Dr. Yager never addresses his contractual arrangements with Ingalls, the Muscular Dystrophy Association of Jackson, Mississippi or the contracts that were used to secure payment for the countless other Mississippi residents he treated but whose records were destroyed by his office. These contracts establish that Dr. Yager purposefully availed himself of the benefits and protection of the State of Mississippi such that he could have anticipated being hailed into court in Mississippi. See *Burger King*, 471 U.S. 462 (1985).

With respect to the PPOs, Dr. Yager doesn't refute the magnitude of the solicitation. Dr. Yager's own contract with GHP conclusively establishes that Dr. Yager expressly authorized GHP "to act on his behalf" and "to use its best efforts" to exploit all markets, including Mississippi. (Record, pp. 1715-1726). Clearly, Dr. Yager's listing in the provider directory for over 800,000 Mississippi residents was not the result of any fortuitous, random or attenuated contacts or the unilateral activity of another party or person and is sufficient for a Mississippi court to exercise either general or specific jurisdiction over Dr. Yager.

E. *Fair Play and Substantial Justice*

Under either general or specific jurisdiction inquiry, the court must also consider whether the exercise comports with fair play and substantial justice. This requires considering:

> [T]he burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most effective resolution of the controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies.

Asahi, 480 U.S. at 113, 107 S. Ct. At 1033 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

In the instant case, the factors clearly weigh in favor of the plaintiff. First, this Court has affirmatively held that Mississippi has an interest in adjudicating disputes involving its injured residents. *Horne*, 897 So.2d at 980; see also *Keeton*, 465 U.S. at 776. The interstate judicial system interest is not diminished nor is a significant burden imposed on any party due to their proximity of Dr. Yager's place of business and the forum county. *Id.*, see also *Thompson v. Chrysler Motors Corp.*, 755 So.2d 1162, 1172 (5th Cir. 1985). Likewise, Defendant's argument that the exercise of jurisdiction over a physician like Dr. Yager will have a "chilling effect" on the ability of Mississippi residents to obtain medical treatment in cities such as Mobile, Alabama, New Orleans, Louisiana, and Memphis, Tennessee is unfounded and expressly rejected by this Court in *Admin. of the Tulane Educational Fund v. Cooley*, 462 So.2d 696, 705 (Miss. 1984). Any interest in Mississippians receiving medical care wherever they travel is exceeded by "the interest it has in protecting its citizens from tortious injury by health care providers." Finally, Dr. Yager's argument that he will be deprived of certain procedural and substantive safeguards provided by his home state was also rejected by the U.S. Supreme Court. In *Keeton*, the Court held that:

> Any potential unfairness in applying New Hampshire statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the Court to adjudicate the claims. The issue is personal jurisdiction, not choice of law.

Keeton, 465 U.S. at 778 (citing *Hanson v. Denckla*, 357 U.S. 235, 254 78 S.Ct. 1228, 1240, 2 L.Ed. 2d 1283 (1958)).

F. Conclusion

Dr. Yager is clearly amenable to the jurisdiction of the courts of Mississippi under both the Mississippi Long Arm Statute, and the due process requirements of the U.S. Constitution. Although Dr. Yager treated Sharon Dunn in Mobile, Alabama, a tort was nevertheless committed, in part, in Mississippi within the meaning of the Long Arm Statute because all of her injuries and damages took place in Mississippi. Constitutional due process requirements are also satisfied because Dr. Yager has the "minimum contacts" with the State of Mississippi to justify haling him into court to defend the claims asserted by Sharon Dunn. Dr. Yager has entered into contracts with and solicited business from Mississippi residents for the sole purpose of treating Mississippi residents that has produced revenue from Mississippi since 1989 sufficient to establish the requisite minimum contacts. Dr. Yager established interstate contractual obligations with various Mississippi entities such as Ingalls Shipyard, Mississippi Medicaid and the Jackson Muscular Dystrophy Association. Dr. Yager also reached out to Mississippi residents through PPO solicitations that reached over 800,000 Mississippi residents. The volume of Mississippi patients treated by Dr. Yager and his Neurology Center between 1997 and 2004 reached close to 800 Mississippi patients. But for Dr. Yager's destruction of his medical records prior to 1997, that number may have doubled or even tripled along with the number of interstate contractual arrangements that were likely in place with Mississippi entities to guarantee or pay for Dr. Yager's services. When Dr. Yager gave Sharon Dunn a prescription for Tegretol without the manufacturer's warning, he placed a defective product in the stream of commerce and directed it at a Mississippi resident in the same

manner that the City of Mobile directed the flow of water at residents of Mississippi in *Horne* without physically stepping into Mississippi. The cumulative effect of all these contracts were more than sufficient to give Dr. Yager "fair warning" that treating Mississippi patients may subject him to the personal jurisdiction of a Mississippi court. Finally, the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. Mississippi has a clear interest in protecting the rights of its injured citizens.

VIII. AS A MATTER OF LAW, THE DISQUALIFICATION OF A MEDIATOR IS NOT IMPUTED ONTO OTHER INDIVIDUALS UNDER THE PROVISIONS OF THE COURT ANNEXED MEDIATION RULES FOR CIVIL LITIGATION OR THE RULES OF PROFESSIONAL CONDUCT

A. Standard of Review

Dr. Yager cities *Owen v. First Family Financial Services, Inc.,* 379 F.Supp.2d 840, 846 (S.D. Miss. 2005) for the proposition that interpretation of disciplinary rules is a question of law that requires *de novo* review. (Appellee's Brief, , p. 51). Sharon Dunn contends this is the federal standard for reviewing a state court's disciplinary rules and to Mississippi standard of review. In Mississippi, "[a] trial court's findings of fact when considering a motion to disqualify an attorney are reviewed for manifest error." *Ousley v. State*, 984 So.2d 996, 999 (Miss.App. 2007)(citing *Hartford Cas. Ins. Co. v. Haliburton Co.*, 826 So.2d 1206, 1220 (Miss. 2001) and *Colon v. Johnson*, 764 So.2d 438, 439 (Miss. 2000)(citing *Quick Change Oil & Lubrication Co. v. County Line Place, Inc.*, 571 So.2d 968, 970 (Miss.1990)). The manifest error standard applies to the review of findings of fact, and the trial court has broad discretion. *Id.,* (citing *Haliburton*, 826 So.2d at 1220).

B. Court Annexed Mediation Rules

Mr. Spyridon and Mr. Rutledge cannot be disqualified from the case as a matter of law. Dr. John Yager's argument for disqualification relies on the provisions of the Court Annexed Mediation Rules for Civil Litigation, XV.C., which provides:

> A **mediator** must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a **mediator** shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter **under circumstances which would raise legitimate questions about the integrity of the mediation process**.

(Emphasis added). There is no Mississippi case law interpreting this provision of the Court Annexed Mediation Rules for Civil Litigation. The plain language of Rule XV.C, however, operates only to disqualify the mediator from the case if he "established a professional relationship" with one of the parties to the mediation "under circumstances which would raise legitimate questions about the integrity of the mediation process." Mr. Dornan, has not undertaken to represent or assist in the representation of Ms. Dunn in any capacity and will not be involved in the representation of Ms. Dunn in any manner.[10] Thus, Rule XV.C is not applicable because Mr. Dornan has not established a professional relationship with Ms. Dunn or any other "party."

In order to disqualify Mr. Spyridon or Mr. Rutledge, Mr. Dornan would first have to be disqualified under the rule, then and only then, Mr. Dornan's disqualification would have to be imputed to Mr. Spyridon and Mr. Rutledge under a rule for imputed disqualification if one

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[11] Mr. Dornan's opportunity to decline to serve as mediator in the case is limited under the Court Annexed Mediation Rules for Civil Litigation. Under the Comment to Rule XV.C, when the mediator is court appointed, "the mediator shall conduct the mediation, unless he or she has a conflict of interest, or is relieved by the court."

exists. In the instant case, there are no express or implied rules for imputing a disqualification of a mediator to a firm or lawyer with which he subsequently becomes associated.

The Court Annexed Mediation Rules for Civil Litigation are promulgated pursuant to the exclusive grant of authority to promulgate the general rules for practice in the circuit, chancery, and county courts of this state and bestowed upon the Mississippi Supreme Court by Article 6, § 144 of the Mississippi Constitution. Miss. Code Ann. § 9-3-61. The Supreme Court, which amended the Court Annexed Mediation Rules for Civil Litigation to contain the provision at issue effective June 27, 2002, did not elect to apply imputed disqualification rules for mediators. The reason is simple. The duties and obligations of a mediator are substantially different from those of lawyers, judges and public servants all of which have rules of imputed disqualification which the Mississippi Supreme Court determined were necessary by promulgating them under Rule 1.10, 1.11 and 1.12 of the Mississippi Rules of Professional Conduct, none of which apply to mediators.

C. Mississippi Rules of Professional Conduct

There are three provisions contained in the Mississippi Rules of Professional Conduct dealing with imputed disqualifications. These provisions are found at Rule 1.10, 1.11 and 1.12 and deal with lawyers representing clients (Rule 1.10), judges, arbitrators and adjudicative officers (Rule 1.12) and public servants who go to work in the private sector (Rule 1.11). None of these provisions even remotely deal with mediators. Each provision is discussed separately below.

a. Rule 1.10 (Lawyers who represent clients)

The Mississippi Rule of Professional Conduct 1.10 effective at the time the issue was raised Dr. Yager and decided by the trial court set forth a general rule of imputed disqualification. Rule 1.10(a) states:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 [lawyers representing clients with adverse interests], Rule 1.8 [prohibited business transactions involving clients], Rule 1.9 [lawyers representing former and current clients with adverse interests] or Rule 2.2 [lawyers acting as intermediary for two or more clients].

Since none of these rules involve lawyers as mediators, Rule 1.10(a) would not be applicable. The comments to Rule 1.10 state that paragraph (a) operates only among lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c). However, Rule 1.10(b) and 1.10(c) address only the attorney/client relationship and not a mediator/lawyer who joins a firm 15 months after an unsuccessful mediation in which the firm did not participate. Dr. Yager seeks it interject Rule 2.4 into this Court's analysis by citing the current form of Rule 1.10, instead the version cited above. According to its comments, Rule 1.10 was amended to add reference to Rule 2.4 effective November 3, 2005. Dr. Yager's Motion to Disqualify the Plaintiff's Attorneys was filed on December 13, 2003 (Record, p. 544), and denied by the trial court on February 10, 2004 (Record, p. 577). Moreover, the comment to Rule 2.4 indicates that it did not become effective until November 3, 2005. Since Mr. Dornan never represented any of the parties to this litigation, Rule 1.10 has no application to the instant case.

b. Rule 1.11 (Public Servants)

While Rule 1.11 is designed to prevent a lawyer from exploiting public office for the advantage of a private client, the comments to the rule view it as the counterpart to Rule

1.10(b), which applies to lawyers moving from one firm to another. While neither Rule 1.11 nor 1.10(b) apply to mediators, it is important to note that in Rule 1.11, the lawyers in a firm with which the disqualified lawyer associates are not disqualified as long as the disqualified lawyer is appropriately screened from the case. As noted above, adequate measures have always been in place to screen Mr. Dornan from the Dunn case and the firm from the mediation file as discussed below.

c. Rule 1.12 (Judges and Arbitrators)

As recognized by Dr. Yager (Appellee's Brief, , p. 52, fn. 4), Rule 1.12, did not include the terms "mediator, or other third party neutral" in 2003-2004 when this issue was decided by the trial court. Rule 1.12 did not include mediators and other third party neutrals until November 3, 2005. The version effective at the time of trial court order on February 10, 2004 (Record, p. 577) provided :

> (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person.
>
> (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person.
>
> (c) <u>If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:</u>
>
> 1. <u>the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and</u>

II. written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(Emphasis added). This provision is inapplicable to the instant dispute because it only applies to "judge[s] or other adjudicative officer[s], arbitrator[s] or law clerks]" and not mediators.[11]

Even if the Court were to find that the screening provisions were somehow applicable, adequate screening measures have certainly been taken. As set forth in the accompanying affidavit, Mr. Dornan has been screened from participation in the matter. (Record, p. 565). All work related to the instant case was done in the New Orleans, Louisiana, office. Mr. Dornan worked in the Biloxi, Mississippi, and had no physical or electronic access to the file. Further, the entire mediation file has been placed in permanent storage and no lawyer in the New Orleans, Louisiana, office is even aware of its location.

D. There is no Per Se Rule of Disqualification in Mississippi

The Mississippi Supreme Court has consistently declined to adopt a *per se* disqualification rule, favoring a "case-by-case analysis." *Thurman v. State of Mississippi*, 726 So.2d 1226, 1228 (Miss. App. 1998), see also, *Aldridge v. State of Mississippi*, 583 So.2d 203 (Miss. 1991). "[A]pplication of the disqualification rule requires a balancing of the likelihood of public suspicion against a party's right to counsel of choice." *FDIC v. United Sates Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995) (citations omitted). Court "must consider the motion governed by the ethical rules announced by the national profession in the light of the public

[12] Mediators and arbitrators are separate and distinct categories. Denlow, Morton, Mediation of Commercial Disputes, 9 CBA Rec. 30, 31 (1995). While a mediator attempts to achieve an agreed resolution, parties are bound to the decision of the arbitrator. BLACK'S LAW DICTIONARY 100, 996 (7th ed. 1999). Thus, an arbitrator sits in judgment, while the mediator is merely a facilitator.

interest and the litigant's rights" and consider the [state] Rules because they govern attorneys practicing in [the state] generally. *Id.*

In *Pearson v. Dinging River Medical Center, Inc.*, 757 F. Supp. 768 (S.D. Miss. 1991), the court addressed the issue of successive representation under Rule 1.10. In its analysis, the court noted the necessity of determining the "precise nature of the relationship between the present and former representation." *Id.*, (citing *Duncan v. Merrill, Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020 (5th Cir. Unit B 1981). The court further established a two-prong test to determine if disqualification is applicable: (1) the moving party must establish the existence of an actual attorney-client relationship, and (2) a substantial relationship must exist between the subject matter of both representations." *Id.* at 771. (citing *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341, 1345 (5th Cir. Unit A 1981)).

In *Wagner v. State of Mississippi*, 624 So.2d 60, (Miss. 1993), the Mississippi Supreme Court declined to invoke an imputed disqualification to the Office of the District Attorney, where a staff member briefly represented a defendant. The Court found no evidence that the former defense attorney participated in the prosecution of the defendant; there was no evidence that any confidential information was disclosed; and the former defense attorney was screened from the matter. *Id.*, at 65. The Court held that these steps were sufficient to prevent the imputed disqualification of the Office of the District Attorney. *Id.*, at 66.

In the instant case, the following screening efforts mandate against disqualification:

(1) Neither Gregg L. Spyridon or Michael W. Rutledge or any member of the firm participated in the mediation or was involved in the case at the time of the mediation;
(2) Mr. Dornan became associated with the firm 15 months after the mediation was unsuccessfully concluded;
(3) Don Dornan has not and will not participate in the representation of Sharon Dunn;

(4) a "Chinese wall" has been erected such that Mr. Dornan has been screened from the Dunn case;
(5) Gregg Spyridon and Michael Rutledge as well as other members of SKPD have been screened from the Dunn mediation file;
(6) The Dunn mediation file remains in off-site storage under the exclusive contents of Mr. Dornan and was not a part of the merger in question; and
(7) there is no evidence that any confidential information was ever disclosed during or subsequent to the mediation.

As noted in the affidavit of Don Dornan, while private caucuses during the mediation are confidential he advises the parties during the open session that everything discussed in the private sessions is considered fair game for him to discuss or argue to the other side unless a specific piece of information is designated as confidential. Although he has no recollection of anyone designating confidential information during the Dunn mediation, all designations of confidentiality would be reflected in his mediation file which the New Orleans office does not have access to. As in *Wagner* and *Pearson*, the steps outlined above are sufficient to prevent the imputed disqualification of Mr. Spyridon and Mr. Rutledge

E. Constitutional Considerations

As noted above there are no express or implied provisions of law that require the imputed disqualification of Gregg L. Spyridon or Michael Rutledge. To impose such a restriction now on an existing relationship between Mr. Spyridon and Ms. Dunn is constitutionally prohibited. The United States Constitution provides, "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." U.S. CONST. ART. I, § 9. The Mississippi Constitution creates a substantially similar limitation providing "Ex post facto laws, or laws impairing contracts, shall not be passed." Miss. Const. Art. 3, § 16. Mr. Spyridon, through Mr. Bradley, has a valid property interest in his contract with Ms. Dunn. See, e.g., *Jones v. Mississippi Farms. Co.*, 76 So. 880, 881 (Miss. 1918). If

this Court holds that Mr. Spyridon is unable to represent Ms. Dunn, its would qualify as an improper impairment of his contract with Ms. Dunn. While the Mississippi Supreme Court may impose such a restriction upon future relationships, it cannot impose the restriction upon a valid, existing relationship.

IX. THE TRIAL COURT DID NOT ERR IN REFUSING TO DISCLOSE SHARON DUNN'S CONFIDENTIAL SETTLEMENT

On January 7, 2008, Dr. Yager filed a Motion to Compel Production of Settlement Documents between Sharon Dunn and the pharmaceutical manufacturer, Novartis.. (Record, p. 61). On January 24, 2008, the trial court denied Dr. Yager's motion. (Transcript, p. 230). "'The trial court's grant or denial of a motion to compel is subject to an abuse of discretion standard of review on appeal.'" *Edmonds v. Williamson*, 13 So.3d 1283, 1292 (Miss.,2009)(quoting *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid*, 853 So.2d 1192, 1209 (Miss.2003)(citing *Taylor Mach. Works, Inc. v. Great Am. Surplus Lines Ins. Co.*, 635 So.2d 1357, 1363 (Miss.1994)).

Mississippi Rule of Civil Procedure 26 limits discovery to those matter which are relevant to the issue raised by the claims or defenses or any party. Here, Dr. Yager did not establish in the trial court that Sharon Dunn's settlement documents were relevant to the any issue raised by Dr. Yager in this defenses. Therefore, the trial court's denial was well within the trial court's discretion and should not be reversed because abuse of discretion exists. overturned.

ARGUMENT RAISED ON PLAINTIFF'S CROSS CROSS APPEAL

X. DR. YAGER DESTROYED PERSONAL JURISDICTIONAL EVIDENCE UPON WHICH THE TRIAL COURT SHOULD HAVE STRUCK DR. YAGER'S PERSONAL JURISDICTION DEFENSE OR GRANTED SHARON DUNN A NEGATIVE INFERENCE

On April 25, 2996, Sharon Dunn filed suit against Dr. Yager. On May 31, 1996, Dr. Yager filed his answer to the complaint raising the affirmative defense of lack of personal jurisdiction. On June 5, 1996, plaintiff served jurisdictional interrogatories on Dr. Yager requesting that he produce the number of patients from the State of Mississippi he had treated each year. On June 25, 1996, Dr. John Yager responded to the jurisdictional discovery claiming that the number of patients that he treated each year from the State of Mississippi was information which was "not readily available." Dr. Yager subsequently filed his Motion to Dismiss which was supported by an affidavit categorically denying any connection to the State of Mississippi. After seven (7) years and multiple motions and orders to compel, including a determination by the trial court that Dr. Yager had sufficient ownership and control over his corporate medical practice (the Neurology Center, P.C.), Dr. Yager was ordered to designate a corporate representative to testify and produce all Mississippi patient records of Yager and the Neurology Center. On January 28, 2004, during the corporate deposition of the Neurology Center, Dr. Yager's office disclosed for the first time the following spoliation of evidence:

> A. An electronic database designed and maintained by GSD, which contained patient demographic information for patients treated between 1989 and October 1996, was destroyed by Neurology Center when another company, CSC, was hired in October 1996 to replace GSD;
>
> B. The 1994 patient records were destroyed in 2001;
>
> C. The 1995 patient records were destroyed in 2002; and

D. The 1996 patient records were destroyed as late as November 2003.

The destruction of the electronic database and the underlying patient records of Dr. Yager and his Neurology Center, P.C. were not only destroyed after suit was filed and jurisdictional interrogatories were propounded to Dr. Yager, but also after Dr. Yager had been ordered to produce these records on several occasions for jurisdictional purposes. On June 9, 2004, the trial court denied Sharon Dunn's Motion to Strike but ultimately determined on September 2, 2004, that Ms. Dunn's damages occurred exclusively in the State of Mississippi and that other evidence obtained by Sharon Dunn from third parties, such as Mississippi Medicaid, Blue Cross Blue Shield of Mississippi and Preferred Provider Organizations (PPO), along with her medical records, supported a finding that Dr. Yager had sufficient contacts with the State of Mississippi to confer personal jurisdiction over Dr. Yager.

The trial court denied Sharon Dunn's spoliation motion based on the 1985 criminal case of *Washington v. State*, 478 So. 2d 1028 (Miss. 1985), that no negative inference arises because the destruction of the electronic database was done as "matter of routine and without fraudulent intent"and that the negative presumption arises "where the spoliation or destruction was intentional."[12] *Id.*, at 1032. The more recent 2001 civil case of *Thomas v. Isle of Capri Casino*, 781 So.2d 125 (Miss. 2001), suggests a different standard. In *Thomas*, a defendant casino removed three slot machines that were the subject of litigation as the result of a decision made in the routine course of business. The central processing units of the slot machines were subsequently lost. The casino attempted to argue that a negative inference could only be drawn "when the destruction is unexplained or deliberate." *Id.*, at 133. The

[13] As an alternative assignment of error, the June 9, 2004 Order makes no reference the paper patient records which were also destroyed.

Mississippi Supreme Court squarely dismissed this argument stating that the negative inference is appropriate when records were destroyed by a party with an *awareness of a pending dispute*." *Id.* (Emphasis added). See also *DeLaughter v. Lawrence County*, 601 So.2d 818 (Miss. 1992).

Dr. Yager's "awareness of a pending dispute" arose in the instant case no later than when, by affirmative defense and affidavit, he raised the issue of personal jurisdiction. Sharon Dunn subsequently propounded discovery requests seeking information related to the patient information in June 1996. Five months later Dr. Yager's office destroyed the GSD database that contained the very information sought by Sharon Dunn's jurisdictional interrogatories. The corporate representative of the Neurology Center, P.C., Annie Lilley, testified that the paper patient records for 1994, 1995 and 1996 were also destroyed respectively in 2001, 2002 and 2003. (*Id.,* at 49-52.) By this point, Dr. Yager was clearly aware that his contacts with Mississippi, including his Mississippi patient records and the information contained therein, were at issue in this lawsuit. Since the trial court found that Dr. Yager had sufficient ownership and control over these documents, he was under a duty to preserve these records which he violated. As a result, plaintiff's only recourse was to find alternate sources for the same information which the trial court found substantiated personal jurisdiction. Nevertheless, as this Court reviews personal jurisdiction *de novo*, Dr. Yager's patient records were the best evidence of the nature and extent of his contacts with the State of Mississippi and its residents which were destroyed.

CONCLUSION

The evidentiary errors in this case severally limited Sharon Dunn's ability to prove her case and infringed upon her Constitutional rights. Without evidence of unfair prejudice to Dr. Yager, the trial court should have allowed Sharon Dunn to proceed with either Dr. Malkin or Dr. Gould at trial. Moreover, the playing field was further tilted in favor or Dr. Yager by the exclusion of the 2009 PDR which confirmed the higher incident rates of Stevens-Johnson Syndrome which also established SJS was a material risk of Tegretol. Not only was Sharon Dunn precluded from impeaching Dr. Yager and his experts regarding the material risks of Tegretol, the trial court incorrectly charged the jury (1) that informed consent was determined by the customary practice of neurology, (2) that only SJS could be a material risk imposing fault based upon informed consent, and (3) absolving Dr. Yager of fault before considering all of Sharon Dunn's causes of action against Dr. Yager.

With respect to personal jurisdiction, Dr. Yager Yager is clearly amenable to the jurisdiction of the courts of Mississippi under the Mississippi Long Arm Statute because Sharon Dunn was injured in Mississippi and Dr. Yager was doing business and contracted for services to be performed, at least in part, in Mississippi. The Constitutional due process requirements are also satisfied because Dr. Yager entered into contracts with and solicited business from Mississippi residents for the sole purpose of treating Mississippi residents that has produced revenue from Mississippi since 1989 sufficient to establish the requisite minimum contacts. The cumulative effect of all these contracts were more than sufficient to give Dr. Yager "fair warning" that treating Mississippi patients may subject him to the personal jurisdiction of a Mississippi court. Lastly, counsel for Sharon Dunn complied with the

applicable rules regarding association with Mississippi counsel and adequate safeguards were provided to ensure the protection of any confidential information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

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Honorable Robert Krebs
Judge, Circuit Court
Jackson County
3104 Magnolia Street
Pascagoula, MS 39567

THIS, the 18th day of June, 2010.

GREGG L. SPYRIDON, (
PHILIP G. SMITH (

H:\B0642002\Pleadings\Trial Appeal\REPLY BRIEF\06.13.10 Appellant's Reply Brief-GLS.wpd

Ala.Code 1975 § 6-5-482

Code of Alabama Currentness
Title 6. Civil Practice.
Chapter 5. Actions. (Refs & Annos)
Article 27. . Medical Liability Actions. (Refs & Annos)
§ 6-5-482. Limitation on time for commencement of action.

(a) All actions against physicians, surgeons, dentists, medical institutions, or other health care providers for liability, error, mistake, or failure to cure, whether based on contract or tort, must be commenced within two years next after the act, or omission, or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided further, that in no event may the action be commenced more than four years after such act; except, that an error, mistake, act, omission, or failure to cure giving rise to a claim which occurred before September 23, 1975, shall not in any event be barred until the expiration of one year from such date.

(b) Subsection (a) of this section shall be subject to all existing provisions of law relating to the computation of statutory periods of limitation for the commencement of actions, namely, Sections 6-2-1, 6-2-2, 6-2-3, 6-2-5, 6-2-6, 6-2-8, 6-2-9, 6-2-10, 6-2-13, 6-2-15, 6-2-16, 6-2-17, 6-2-30, and 6-2-39; provided, that notwithstanding any provisions of such sections, no action shall be commenced more than four years after the act, omission, or failure complained of; except, that in the case of a minor under four years of age, such minor shall have until his eighth birthday to commence such action.

CREDIT(S)

(Acts 1975, No. 513, p. 1148, § 4.)

HISTORY

Code Commissioner's Notes

Section 6-2-39, referred to in subsection (b), was repealed by Acts 1984, 2nd Ex. Sess., No. 85-39. For present provisions similar to former § 6-2-39, see § 6-2-38.

Editor's Notes:

Since § 6-5-482 is similar to former Code 1940, Tit. 7, § 25(1), notes previously appearing under § 25(1) have been included in the annotations to this section.

LIBRARY REFERENCES

American Digest System:

Health ⚷811.
Limitation of Actions ⚷95(12), 95(13).

Corpus Juris Secundum:

C.J.S. Limitations of Actions §§ 171, 173.

M.R.E. Rule 403

West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Evidence
Article IV. Relevancy and Its Limits
Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

COMMENT

Relevant evidence may be inadmissible when its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury. If the introduction of the evidence would waste more time than its probative value was worth, then a trial judge may rightly exclude such otherwise relevant evidence. By providing for the exclusion of evidence whose probativeness is outweighed by prejudice, Mississippi is following existing federal and state practice. U.S. v. Renfro, 620 F.2d 497 (5th Cir. 1980), cert. denied 449 U.S. 921, 101 S.Ct. 321, 66 L.Ed.2d 149 (1980). Such a rule also keeps collateral issues from being injected into the case. Hannah v. State, 336 So.2d 1317 (Miss. 1976), cert. denied, 429 U.S. 1101, 97 S.Ct. 1125, 51 L.Ed.2d 551 (1977); Coleman v. State, 198 Miss. 519, 23 So.2d 404 (1945). This rule also gives the trial judge the discretion to exclude evidence which is merely cumulative. Carr v. State, 208 So.2d 886 (Miss. 1968).

Rules of Evid., Rule 403, MS R REV Rule 403

Current with amendments received through June 1, 2009

END OF DOCUMENT

M.R.E. Rule 408

West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Evidence
Article IV. Relevancy and Its Limits
Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

COMMENT

Evidence of an offer to compromise a claim is not receivable in evidence as an admission of either the validity or invalidity of the claim. The rule is based on two reasons. First, the evidence is irrelevant, since the offer may be motivated by a desire for peace rather than by a recognition of liability. Secondly, public policy favors the out-of-court compromises and settlement of disputes. The same policy underlines M.R.C.P. 48 which provides that evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

Pre-rule practice in Mississippi was similar to the rule with one significant difference. Under Rule 408 statements of admission facts made in negotiations are excluded from evidence. In Mississippi, an admission made in a settlement negotiation has been admissible against the declarant. See McNeer & Dood v. Norfleet, 113 Miss. 611, 74 So. 577 (1917).

Rule 408 only excludes offers when the purpose is proving the validity or invalidity of the claim or amount. Therefore, an offer for another purpose may well be admissible at trial.

Also, it is important to note that offers which are made in settlement negotiations are not necessarily excluded if they are otherwise discoverable.

Rules of Evid., Rule 408, MS R REV Rule 408

Current with amendments received through June 1, 2009

END OF DOCUMENT

Miss. Code Ann. § 13-3-57

West's Annotated Mississippi Code Currentness
Title 13. Evidence, Process and Juries
Chapter 3. Process, Notice, and Publication
§ 13-3-57. Service on nonresidents; generally

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.

Any such cause of action against any such nonresident, in the event of death or inability to act for itself or himself, shall survive against the executor, administrator, receiver, trustee, or any other selected or appointed representative of such nonresident. Service of process or summons may be had or made upon such nonresident executor, administrator, receiver, trustee or any other selected or appointed representative of such nonresident as is provided by the Mississippi Rules of Civil Procedure, and when such process or summons is served, made or had against the nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident it shall be deemed sufficient service of such summons or process to give any court in this state in which such action may be filed, in accordance with the provisions of the statutes of the State of Mississippi or the Mississippi Rules of Civil Procedure, jurisdiction over the cause of action and over such nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident insofar as such cause of action is involved.

The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him even though said person was a resident at the time any action or proceeding accrued against him.

CREDIT(S)

Laws 1940, Ch. 246, § 1; Laws 1958, Ch. 245, § 1; Laws 1964, Ch. 320, § 1; Laws 1968, Ch. 330, § 1; Laws 1971, Ch. 431, § 1; Laws 1978, Ch. 378, § 1; Laws 1980, Ch. 437, § 1; Laws 1991, Ch. 573, § 98, eff. July 1, 1991.

HISTORICAL AND STATUTORY NOTES

Derivation:

Code 1942, §§ 1437, 1438.

CROSS REFERENCES

Carnivals and fairs, service of process, see § 75-75-1 et seq.

The application of traditional personal jurisdiction jurisprudence to cyberspace disputes. Walter and

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

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

Disqualification from subsequent representation is for the protection of clients and can be waived only by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of a new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10.

Code Comparison

There is no counterpart to Rule 1.9(a) or (b) in the Disciplinary Rules of the Code. The problem addressed in Rule 1.9(a) sometimes has been dealt with under the rubric of Canon 9 of the Code, which provides that "A lawyer should avoid even the appearance of impropriety." EC 4–6 states that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

The exception in the last sentence of Rule 1.9(b) permits a lawyer to use information relating to a former client that is in the "public domain," a use that is also not prohibited by the Code. Since the scope of Rule 1.6(a) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information after the client-lawyer relationship has terminated.

The provision for waiver by the former client is in effect similar to DR 5–105(C).

See MSB Ethics Opinion No. 106.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

Comment

Definition of "Firm". For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a

firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether a law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualifications. The rule of imputed disqualification stated in paragraph (a) gives effect to the principles of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owned by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

Lawyers Moving Between Firms. When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality. Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a

lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions. The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.10(b) and (c) concerning confidentiality have been met.

Code Comparison

DR 5-105(D) provides that "If a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or affiliate with him or his firm, may accept or continue such employment."

See MSB Ethics Opinion Nos. 54, 58 and 87.

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comment

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the

lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and(b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Code Comparison

Rule 1.11(a) is similar to DR 9–101(B), except that the latter uses the terms "in which he had substantial responsibility while he was a public employee."

Rules 1.11(b), (c), (d) and (e) have no counterparts in the Code.

See MSB Ethics Opinion No. 45.

RULE 1.12 FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Comment

This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2) and B(1) of the Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in a proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

Code Comparison

Paragraph (a) is substantially similar to DR 9–101(A), which provides that "A lawyer shall not accept employment in a matter upon the merits of which he has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There is no counterpart in the Code to paragraphs (b), (c) or (d).

With regard to arbitrators, EC 5–20 states that "a lawyer who has undertaken to act as an impartial arbitrator or mediator, ... should not thereafter represent in the dispute any of the parties involved." DR 9–101(A) does not provide a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5–105(C) is similar in effect and could be construed to permit waiver.

RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.