

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION**

THOMAS C. & PAMELA McINTOSH,

Plaintiffs,

**Civil Action No. 1-06-CV-1080-LTS-  
RHW**

v.

STATE FARM FIRE AND CASUALTY  
COMPANY, et al.,

Defendants.

**DECLARATION OF CHARLES W. WOLFRAM**

Charles W. Wolfram, under oath, declares and says:

**INTRODUCTION**

1. My name is Charles W. Wolfram. I am an adult and fully competent and able to make this declaration. Except as otherwise indicated, the statements contained in this declaration are within my personal knowledge and are true and correct. I have written the entirety of this declaration, using my own office equipment and other resources. I am prepared to testify to my opinions and the grounds for them as well as all aspects of the preparation of this declaration, should that be appropriate.

2. I have been retained by counsel for defendant State Farm Fire and Casualty Company ("State Farm") to consider submitting my opinions as an expert in matters of lawyer's ethics in support of State Farm's motion to disqualify Richard F. Scruggs ("Scruggs"), The Scruggs Law Firm, P.A. ("Scruggs Firm"), an apparent entity known as The Scruggs Katrina

Group (“the SKG”), and each of the lawyer members or participants in SKG and their respective law firms as counsel for plaintiffs Thomas C. and Pamela McIntosh (“McIntoshes”) in this action. State Farm’s disqualification motion asserts that Mr. Scruggs acted in a highly inappropriate manner in having extensive contact with and receiving boxes full of confidential State Farm documents from two sisters, Cori Rigsby (“Cori”) and Kerri Ann Rigsby (“Kerri”) (collectively, “Rigsby Sisters”), who, as Mr. Scruggs was fully aware, had obtained much of their information as protected work product of State Farm or documents covered by the Rigsby Sisters’ common-law and contractual duties of confidentiality to State Farm.

3. In summary, it is my considered expert opinion that Mr. Scruggs blatantly, seriously, and repeatedly departed from the standard of conduct that would be followed by a lawyer of ordinary care and prudence in dealing with clearly confidential and privileged information possessed by the Rigsby Sisters as former confidential agents of State Farm. Mr. Scruggs’ course of conduct warrants his disqualification from further participation in this matter. Moreover, Mr. Scruggs’ extensive sharing of State Farm confidential documents and other information obtained from the Rigsby Sisters with all other members of the SKG requires that those other lawyers and their law firms also be disqualified.

### **QUALIFICATIONS**

4. I am the Charles Frank Reavis Sr. Professor Emeritus at the Cornell Law School, and I am currently living in retirement in Berkeley, California. (I took emeritus status in July 1999 after a year as acting dean at the law school.) Although retired, I continue academic work and consulting with lawyers and law firms about issues of legal and judicial ethics. I was first admitted to the bar in 1962 and am currently admitted (on inactive status) in the District of Columbia and Minnesota. I began my career as a law professor in 1965. For more than thirty

years, I have been extensively involved in research, writing, teaching, speaking, public-service activities, and consulting relating to legal and judicial ethics and the legal profession. Without implying that any organization specifically endorses the views stated in this declaration, I state that for the fourteen years beginning in 1986 I served as Chief Reporter for the American Law Institute's Restatement of the Law Governing Lawyers ("Restatement") which includes an extensive chapter on lawyer conduct in litigation (chapter 6), a specific section dealing with a lawyer's dealings with information of a nonclient known to be legally protected (§ 102), and comments of that section dealing with the prohibition against seeking confidential information in the course of an otherwise permissible communication with a nonclient (Comment c) and the prohibition against contact with a nonclient agent extensively exposed to confidential information of a nonclient. (I was the drafting reporter for chapter 6.) The Restatement was given final approval by the Institute in May 1998, and was published in a two-volume set in the fall of 2000.

5. I am also the author of the West Publishing Company treatise Modern Legal Ethics, and am currently revising the book extensively for a second edition. A chapter of the book will be devoted to lawyer conduct in the course of representing a client in litigation, including restrictions on the ability of a lawyer to gather information outside the established procedures for litigation. In addition to Modern Legal Ethics, I have written about the professional responsibilities of lawyers and judges in other books, scholarly articles, book chapters, and newspapers and magazines. The Restatement, my treatise, and other works that I have authored are known to and have been cited, quoted, and relied upon by scholars and courts, including the Supreme Court of the United States. (My Modern Legal Ethics treatise is listed as one of the "Most Cited Treatises and Texts" published in the prior twenty years in Fred R.

Shapiro, The Most-Cited Legal Books, 18 *Legal Information Alert* 1, 6 (September, 1999)—the only work on legal ethics listed.) I have frequently lectured to bar associations, continuing education groups, judicial conferences and similar groups of lawyers and judges; I have consulted with lawyers and judges about problems of legal and judicial ethics, including the same set of issues raised by State Farm’s motion (see below ¶ 20); and I have testified and submitted expert opinions in litigation on issues relating to legal and judicial ethics in cases in many jurisdictions in the United States, as well as in courts in Australia, Canada, England, and Japan. As indicated below, some of those expert opinions have also related to issues raised by State Farm’s disqualification motion. Other information on my qualifications is given in my resume, a current copy of which is attached as Exhibit 1.

6. I have no personal information that would permit me to swear to the existence of the facts on which I base my opinions. For purposes of my analysis here, I have assumed the facts set out in my analysis, below, to be established by competent evidence. Those facts are based on documents and Internet sources that I have examined in preparing my opinions, which I have listed in Exhibit 2.

### **ANALYSIS**

7. The Situation of the Rigsby Sisters in Early 2006. For several years, the Rigsby Sisters have worked for the E.A. Renfroe and Company, Inc. (“Renfroe”), which is engaged by State Farm (and occasionally other casualty insurers) to provide experienced adjusters on short notice to respond to large-scale catastrophes, such as a hurricane, flood, or tornado. Renfroe recognized the several reasons why its adjusters would be required to keep information of insurers such as State Farm entirely confidential, because of the privacy interests of insureds as well as the proprietary and work-product nature of State Farm’s own information. Accordingly,

Renfroe took multiple steps to assure that its adjusters were familiar with their duties of confidentiality. Renfroe also on several occasions had the Rigsby Sisters sign contracts containing confidentiality undertakings and confidentiality agreements. Both kinds of documents were worded in broad terms. While there is some indication in the lawyer-to-lawyer discussions in depositions that Mr. Scruggs claims to have been under the impression that the Renfroe confidentiality agreements covered only specific assignments on a disaster-by-disaster basis, there is no indication of such a limitation in the documents themselves. In any event, the Rigsby Sisters in signing the Renfroe documents promised to keep information about State Farm confidential for a minimum of two years following the end of their employment. Moreover, both Rigsby Sisters readily admitted in sworn deposition testimony that they fully understood that all information about State Farm that they learned during the course of their Katrina work was confidential. In fact, they had risen to managerial positions, where one of their duties was to train newer adjusters and in that process to assure that they were fully familiar with the confidentiality expected of all Renfroe personnel who learned of State Farm information.

8. The fact that the immediate employer of the Rigsby Sisters was Renfroe (and not State Farm) hardly means that they owed State Farm no duty of confidentiality. Again, both Rigsby Sisters readily testified that they considered that they and other Renfroe adjusters normally did owe such confidentiality duties to State Farm, although both claimed that the nature of the State Farm information they possessed excused them from their duties of confidentiality.<sup>1</sup>

The first part of that understanding is well grounded in hornbook law of agency. As stated in the

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<sup>1</sup> Agency law does not recognize an exception to confidentiality such as that suggested by the Rigsby Sisters and Mr. Scruggs, under which (they appear to claim) an agent can make a unilateral and non-reviewable determination based on clearly incomplete information that the ultimate principal is violating the legal rights of a third person. See below ¶ 13.

Restatement (Second) of Agency (1958), the relationship between Renfroe and its employees such as the Rigsby Sisters is that of principal and agent (§ 1),<sup>2</sup> the relationship between State Farm and Renfroe is also that of agent and principal (id.), and the relationship between State Farm and the Rigsby Sisters as agents of Renfroe is that of an agent's principal and subagents of the agent (id. § 5). Given the subagent relationship, the Rigsby Sisters stood in a fiduciary relationship with State Farm with respect to matters within the scope of their agency work (id. § 13). As such, the Rigsby Sisters owed State Farm the same duties that Renfroe owed State Farm (id. § 428), which certainly includes an agent's broad duties of confidentiality (id. § 395). Moreover, subagents such as the Rigsby Sisters owe those duties of confidentiality to the ultimate principal on a continuing basis even after termination of the subagency relationship (id. § 396). Moreover, the agent-principal relationship between persons such as the Rigsby Sisters and an ultimate principal such as State Farm has important collateral consequences. Most specifically, a third person such as Mr. Scruggs who intentionally causes or assists a subagent to violate a duty owed to the ultimate principal is subject to liability to the ultimate principal (id. § 312), a liability that definitely extends to violations of the subagent's duties of confidentiality (id. cmt. c).

9. Beyond confidentiality obligations that any subagent would owe the agent's (Renfroe's) principal (and beyond any confidentiality obligations that were specifically assumed by the Rigsby Sisters under their several confidentiality and employment agreements with Renfroe), the nature of their work for State Farm would also have clearly indicated, even to a

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<sup>2</sup> The facts available to me do not clearly indicate whether Renfroe's adjusters such as the Rigsby Sisters were its servants or, differently, independent contractors. The difference is irrelevant for all purposes of this declaration, however, because both servants and independent contractors are agents. See id. § 2, cmt. b.

lawyer far less experienced than Mr. Scruggs, that fundamental concepts of confidentiality embedded in procedural law independently placed them off limits as a source of information. As does the federal system (Federal Rule of Civil Procedure 26(b)(3)), Mississippi procedural law (Miss. Code of Civil Procedure, Rule 26(b)(3)) similarly limits the extent to which a lawyer such as Mr. Scruggs can inquire into work product of an adversary such as State Farm. Both work-product rules also clearly indicate that such inaccessible work product can be generated both by a lawyer and the lawyer's assistants (such as paralegals and secretaries) as well as by a party such as State Farm and agents of such a party such as the Rigsby Sisters. (Id.) Lawyers fully understand that the procedural rules immunizing work product from formal pretrial discovery also place persons and data protected by the work-product rule outside the permissible limits of informal inquiry, such as by self-help investigatory work. (As discussed below (see ¶¶ 19-23), that prohibition has given rise to a so-called "confidential agent" rule precluding a lawyer such as Mr. Scruggs from even contacting a person, such as both the Rigsby Sisters, who have been extensively exposed to an adversary's work product.)

10. To be sure, some authority suggests that certain kinds of routine, pre-litigation work of insurance adjusters is not necessarily work product. E.g., Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter, Inc., 2003 WL 22110281, No. 02 CIV 0504(RCC) (S.D.N.Y., Sept. 10, 2003). That is because some work of insurance adjusters, according to that authority, is routine insurance-claims work and thus is not created "in anticipation of litigation" as is required for work product material. (Id.) Even if such a view were generally accepted in Mississippi, however, it would be clear to a lawyer such as Mr. Scruggs that, in the unique circumstances of the Katrina aftermath, supervisory and management personnel such as the Rigsby Sisters would

likely participate directly in litigation and litigation-related work.<sup>3</sup> And, to be sure, the Rigsby Sisters testified that they participated in several mediation sessions involving individual State Farm policyholders in which they worked directly with State Farm lawyers and other State Farm dispute personnel. Moreover, in the course of preparing for and conferring with other State Farm personnel about their mediation work, they obviously learned extensive information about State Farm's dispute-resolution policies and practices, which, they surmised, would apply in other dispute-resolution settings, including in-court litigation such as this very proceeding. All that would have been apparent to a lawyer of ordinary care and prudence, and particularly to a lawyer such as Mr. Scruggs, given his decades of tort-litigation experience, his experience in dealing with insurance companies and adjusters, and his prior experience in contested Katrina-related insurance claims.

11. The Confidential Nature of the State Farm Documents Taken by the Rigsby Sisters. Both Mr. Scruggs and the Rigsby Sisters have admitted that the Rigsby Sisters took several thousand pages of confidential data from State Farm files over several months, using State Farm computers, passwords, and printers to gain access to the documents. Starting in February 2006, they passed multiple copies of those documents on to Mr. Scruggs during a series of meetings with him that were unknown to any of their Renfroe or State Farm colleagues. Eventually, they provided Mr. Scruggs a large number of documents that were similarly taken several months after they first began their extensive contact with Mr. Scruggs. At a minimum,

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<sup>3</sup> Among other considerations, and as Mr. Scruggs well knew, the attorney general of Mississippi in September 2005 had sued State Farm, purportedly on behalf of all State Farm policyholders affected by Katrina, seeking relief because of State Farm's claims and settlement practices. With that pending litigation drawing claims adjustment practices directly into issue (and, as I understand it, on an ongoing basis), it would be difficult to avoid concluding that all State Farm Katrina-related claims adjusting had taken on a litigation-anticipating status in Mississippi.

this involved upwards of fifteen thousand documents. The Rigsby Sisters testified that in their first contact with Mr. Scruggs in February 2006, they gave him approximately 20 pages of documents relating to this very McIntosh matter, despite the fact that Kerri Rigsby served as the team manager for the claims adjuster who had handled the McIntoshes' claim.

12. After having reviewed only the documents that the Rigsby Sisters surreptitiously provided to Mr. Scruggs at their initial meeting in February, any lawyer of ordinary care and prudence would have recognized at once that the documents included confidential and work-product material. Even if the documents do not explicitly contain a lawyer's advice or thought processes about a specific legal issue, a reasonable lawyer would have recognized that the absence of such an indication eliminated only one basis for concluding that the documents were privileged, but hardly all. At the very least, the early documents and other information provided to Mr. Scruggs in his first meeting with the Rigsby Sisters constituted, at the very least, so-called "fact work product" and perhaps much more rigorously protected "opinion work product" of State Farm. (As is well known among lawyers, courts will order production of opinion work product only very rarely.) Moreover, the fact that the documents and other material was produced by State Farm employees or agents who were non-lawyers did not in any way indicate that the material was not privileged. As mentioned above (¶¶ 9-10), both the federal and Mississippi procedural rules on work product recognize (as does the law of most states) that work-product protection extends to materials of a "party" and the party's non-lawyer "insurer . . . and agents" in addition to materials of a party's "attorney." Moreover, the common-law protection of a principal's information in the hands of an agent has never been limited to lawyer-agents (see ¶ 8, above).

### 13. Mr. Scruggs' Claim of Right to Possess and Use the State Farm Documents.

Mr. Scruggs' position that he was entitled to possess and use the State Farm documents that he knew were taken without its permission and in violation of the duties the Rigsby Sisters owed to both Renfroe and State Farm apparently rests entirely on a kind of "supervening public good" argument, to the effect that he was privileged to possess and use them (including sharing them with unidentified persons in the Mississippi Attorney General's office, as well as with several identified and unidentified lawyers, both within and outside the SKG) because they contained evidence of State Farm's fraud and other wrongdoing. I am not an expert on Mississippi and federal law on fraud, but even if one accepts for the sake of analysis that the documents contained evidence of such fraud, I have never previously seen authority that a lawyer can permissibly receive and freely use documents wrongfully taken from another on a kind of "crime-fraud" basis. The crime-fraud doctrine, of course, is a limited and judicially-controlled exception to the attorney-client and work-product privileges, under which a court is empowered, on a proper evidentiary showing in an adversary proceeding, to override a claim of privilege and permit an adversary in litigation to gain access to otherwise privileged documents. See generally Restatement of the Law Governing Lawyers § 82 (2000) (crime-fraud exception to attorney-client privilege); *id.* § 93 (crime-fraud exception to work-product privilege). Here, however, Mr. Scruggs purports to have the power to shortcut such judicial consideration and make his own determination—sitting in final and non-reviewable judgment on his own self-interested actions, and without any notice to or participation by State Farm—that the undisclosed and unanalyzed evidence of purported fraud on the part of State Farm warranted his taking and using its confidential documents. As will be seen, many decisions have denied any such extra-judicial, ex parte power when sought to be exercised by a private practitioner such as Mr. Scruggs.

14. The issue then becomes whether it was seriously inappropriate for Mr. Scruggs, in effect, to take matters entirely into his own hands, make his own subjective determination that State Farm was not entitled to the protection of confidentiality, and accordingly seek and review State Farm's documents and share them with whomever he might choose, as he admittedly did. In my opinion, Mr. Scruggs' course of action was not only inappropriate, but quite seriously so.

15. Mr. Scruggs' Duties When Dealing with a "Confidential Agent" Such as the Rigsby Sisters. As indicated above (¶¶ 7-12), Mr. Scruggs clearly was on notice that the Rigsby Sisters were currently in positions with their Renfroe employer where they were routinely exposed to an extensive amount of material that was legally protected against disclosure to persons such as him. Nonetheless, Mr. Scruggs knowingly and deliberately conducted repeated conversations with the Rigsby Sisters, repeatedly received what became upwards of 15,000 pages of confidential State Farm documents, entered into a purported attorney-client representation of the Rigsby Sisters with respect to those very documents, and ultimately retained both Rigsby Sisters at handsome compensation to serve as, in effect, paralegals and advisers on all SKG matters. All that occurred while Mr. Scruggs knew that the Rigsby Sisters continued to work on State Farm Katrina matters. Mr. Scruggs' actions reflect a fundamental misunderstanding of the responsibilities of lawyers in dealing with the confidential information of nonclients. In addressing that topic, I wish first to clear away some needless underbrush. I will then indicate what in my opinion would be the responsible course for Mr. Scruggs to have taken, but which, unfortunately, he did not take.

16. Giving him the benefit of some doubt, Mr. Scruggs might have misled himself by misreading the Mississippi Rules of Professional Conduct. (I take it that it is common ground

that Mr. Scruggs was fully subject to those rules, as a lawyer admitted to practice in Mississippi, and as a lawyer admitted to practice in this very litigation before this federal court sitting in Mississippi. See Uniform Local Rules of the United States District Courts for the Northern District and Southern District of Mississippi, R. 83.5 (a lawyer who makes any appearance in this Court “is bound by the provisions of the Mississippi Rules of Professional Conduct and is subject to discipline for violation thereof”).<sup>4</sup> While there is no rule in the Mississippi Rules of Professional Conduct that, in precisely those words, instructs a lawyer not to violate the confidentiality rights of a litigation adversary, that would hardly end the inquiry on the part of a lawyer such as Mr. Scruggs who was even minimally attentive to the need to respect the legal rights of third persons. At least two of the Rules would immediately arrest the attention of a lawyer who in good faith sought guidance from them in a situation similar to the one that Mr. Scruggs confronted when, as he testified, he was first contacted by the Rigsby Sisters—Rule 4.2 and Rule 4.4.

17. Rule 4.2 is the well-known “anti-contact” rule—prohibiting a lawyer such as Mr. Scruggs in his representation of his Katrina clients from “communicat[ing] about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” At the time Mr. Scruggs first contacted the Rigsby Sisters, as he of course knew well, he was representing several clients with active claims, some in litigation, against State Farm. He also knew, of course, that State Farm was represented by counsel with respect to his clients. As the

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<sup>4</sup> See also id. Rule 83.1(A)(1)(b) (a lawyer admitted in Mississippi must certify familiarity with Mississippi Rules of Professional Conduct); id. Rule 83.1(C)(1) (any lawyer practicing before court may be disciplined for, among other things, violation of a Mississippi Rule of Professional Conduct).

second paragraph of the Comment to Rule 4.2 makes plain, “[i]n the case of an organization, this rule prohibits communications by a lawyer for one party [Mr. Scruggs] concerning the matter in representation with persons [the Rigsby Sisters] having a managerial responsibility on behalf of the organization . . . .” Accordingly, and quite apart from the clearly confidential nature of the information that Mr. Scruggs sought and obtained from the Rigsby Sisters, Rule 4.2 placed them off limits to any communication with him.

18. Second, even if one ignores the clear command of Rule 4.2, a reasonable lawyer in Mr. Scruggs’ position would also carefully consider Mississippi Rule 4.4, dealing with “respect for the rights of third persons.” Rule 4.4(a) comes very close to dealing explicitly with any question Mr. Scruggs might have had by prohibiting, among other things, “us[ing] methods of obtaining evidence that violate the legal rights” of a third person. At the very least, Rule 4.4(a) strongly intimates that Mr. Scruggs should have first determined what “legal rights” State Farm possessed with respect to the information and documents possessed by the Rigsby Sisters. A comment to new Rule 4.4(b) gives further guidance. The Mississippi Supreme Court added Rule 4.4(b) through an amendment effective November 3, 2005, and it now requires that a lawyer who receives a document that was inadvertently sent must notify the sender. In an accompanying Comment (second paragraph) to Rule 4.4(b), the rule drafters warn that “this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. . . .” The warning is clear: while neither Rule 4.4 nor the Comment explicitly addresses the point, both Rule 4.4(a) (with its reference to not violating the “legal rights” of a third person in seeking evidence) and the Comment to Rule 4.4(b) (with its caution about “the legal duties of a lawyer” who receives “wrongly obtained” documents) provided ample and clear warning to Mr. Scruggs

against plunging ahead with his extensive dealings with the Rigsby Sisters. The point is well understood by lawyers of ordinary care and prudence: while it is clear that a lawyer is constrained in litigation by the direct commands of a lawyer code such as the Mississippi Rules, it would be a fundamental error to assume that the explicit commands of the Mississippi Rules exhaust the subject. The terms of Rule 4.4 clearly indicate that they do not. A significant body of other legal constraints on lawyers exists apart from the important commands of the Rules.

19. The question then becomes whether any other rule constrains Mr. Scruggs. The answer is readily available. We stated the rule against interfering with the confidentiality rights of nonclients in the Restatement of the Law Governing Lawyers (2000). Section 102 of the Restatement addresses the obligations of a litigating lawyer such as Mr. Scruggs in dealing with “information of a nonclient known to be legally protected.” Section 102 states that “[a] lawyer communicating with a nonclient . . . may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality imposed by law.” We were careful in the Restatement to limit this duty in the manner indicated by the concluding words of the Section—to those duties of confidentiality “imposed by law.” Comment d to Section 102 notes that most of the decisions enforcing such a rule against a lawyer such as Mr. Scruggs involve duties of confidentiality imposed by law and not solely by confidentiality agreements or other contractual arrangements. Here, the duty of confidentiality, as the Rigsby Sisters themselves intuited, was imposed by the law of agency because the Rigsby Sisters were entrusted with confidential business secrets, quite apart from any duties that might flow from their employment and confidentiality agreements (see above ¶¶ 7-10).

20. The confidential-agent rule of Section 102 was hardly new when first set out in the Restatement. Its rule was already well established in such decisions as MMR/Wallace Power

& Indus. v. Thames Associates, 764 F. Supp. 712 (D. Conn. 1991),<sup>3</sup> where the court disqualified a law firm that entered into a consulting agreement that was similar to the SKG consulting arrangement with the Rigsby Sisters and that involved a person who, like they, had been extensively exposed to confidential work-product and other confidential information. Among the decisions cited in the reporter's note to Section 102 is Esser v. A.H. Robins Co., 537 F. Supp. 197 (D. Minn. 1982), where the court disqualified a lawyer for claimants who had hired as a paralegal consultant (a position similar to that of the Rigsby Sisters in Mr. Scruggs' office) an insurance adjuster who had dealt with claims similar to those the lawyer was handling for other claimants. Decisions have not insisted on exposure at all as extensive as that between Mr. Scruggs and the Rigsby Sisters. It has sufficed that the lawyer knowingly engaged in a single conversation with an adversary's paralegal or similar person. E.g., Gregori v. Bank of America, 207 C.A.3d 291, 254 Cal. Rptr. 853 (Cal. Ct. App. 1989). Many such decisions, long predating the activities of Mr. Scruggs, have followed the same approach of prohibiting a lawyer from interviewing or employing confidential agents such as the Rigsby Sisters. E.g., Camden v. State of Maryland, 910 F. Supp. 1115, 1116 (D. Md. 1996) (disqualifying lawyer and suppressing evidence where lawyer had extensive ex parte contacts with an opposing party's former investigator who had investigated the very claim the lawyer was handling). At the outset of its opinion, the Camden court announced the following rule (910 F. Supp. at 1116), which Mr. Scruggs plainly violated: "[t]he Court holds that a lawyer representing a client in a matter may not, subject to few exceptions, have ex parte contact with a former employee of another party

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<sup>5</sup> I am familiar with the MMR Wallace decision, having submitted an expert declaration as the legal ethics expert for the prevailing party there. MMR/Wallace, Esser, Gregori, Camden, and Rentclub, all discussed in this paragraph, are cited and briefly described in the Restatement § 102, cmt. d, rep. note, at 109-11 (2000).

interested in the matter when the lawyer knows or should know that the former employee has been extensively exposed to confidential client information of the other interested party.” Among the relevant authorities is a well-known decision from within the Eleventh Circuit, in which the court disqualified the lawyer in the position of Mr. Scruggs who had hired as a “trial consultant” a former managerial employee of an opposing party who, on facts quite similar to those here, possessed extensive confidential business information and documents. See Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992), aff’d, 43 F.3d 1439 (11th Cir. 1995) (affirming on trial court’s alternative ground that lawyer acted wrongfully in paying money to a person who was a fact witness, as are the Rigsby Sisters here).

21. As we note in Comment d to Section 102 of the Restatement (id. at 107-08), a lawyer’s obligations to avoid placing himself in a position of obtaining protected confidential information of a third person ex parte arise, in general, in two settings. First, some agents will be known to the lawyer to be so extensively exposed to confidential information protected by non-contractual obligations, such as the law of agency, that a lawyer such as Mr. Scruggs is prohibited from interviewing or otherwise personally communicating with the person (here, the Rigsby Sisters) at all. At the point of Mr. Scruggs’ earliest contact with the Rigsby Sisters, once he had learned the obvious—that they were claims adjusters who had learned extensive State Farm information in the course of their Katrina disaster work—he had to know that much of what they could tell him (and undoubtedly did tell him) was highly confidential and proprietary information of State Farm that the Rigsby Sisters were prohibited by agency law from disclosing. They were also, of course, independently prohibited from making such disclosures by force of the law of contracts due to the several confidentiality agreements that they had signed with both Renfroe and State Farm. Mr. Scruggs should have recognized that interviewing them on

numerous occasions about their work for State Farm and seeking or receiving from them extensive documents concerning State Farm's claims handling in the Katrina disaster was certain to invade confidential information of State Farm and thus was impermissible.

22. Second, assume (entirely contrary to my considered professional opinion) that it could be maintained that Mr. Scruggs was not in a position reasonably to know at the outset that the Rigsby Sisters possessed extensive confidential State Farm information and documents protected against disclosure by agency and other law. Even on that extreme assumption, Mr. Scruggs still would be under an obligation not to seek or receive confidential State Farm information in the course of what is (merely hypothetically) an otherwise permissible discussion with the Rigsby Sisters. See Restatement § 102, cmt. c, at 106. In fact, Mr. Scruggs engaged in both forms of prohibited activity—both contacting the Rigsby Sisters to talk about State Farm's Katrina claims handling in the first place, and, in the course of a number of his several discussions with them, receiving documents from State Farm's files that he should have known had been wrongfully taken from State Farm.

23. From the moment that the Rigsby Sisters first contacted Mr. Scruggs (according to their mutual account), Mr. Scruggs should have at least doubted his apparent impression that discovering two "moles" who were extensively familiar with the inner workings of State Farm in adjusting Katrina wind and water claims of the very kind he was litigating was an uncommonly lucky stroke. The obvious proposition that ex parte contact with confidential agents such as the Rigsby Sisters was entirely off-limits to a adversary lawyer such as Mr. Scruggs should have struck Mr. Scruggs very soon after what might have been his initial impulse of elation. Only a moment's reflection would, at the very least, have cautioned Mr. Scruggs to proceed only after conducting careful legal research on the legality of having contact with the

Rigsby Sisters. Such an undertaking, conducted competently and in good faith, would have left no doubt in Mr. Scruggs' mind that any contact by him with the Rigsby Sisters except with the approval and guidance of this Court (and that likely only through formal discovery) would subject him to the predictable motion to disqualify that he now confronts. Unfortunately for Mr. Scruggs and his Katrina clients, Mr. Scruggs apparently ignored his responsibilities, plunged ahead and engaged in very extensive ex parte contacts with the Rigsby Sisters, including receiving thousands of pages of confidential State Farm documents, and ending in retaining them as SKG "consultants" for handsome compensation in an ongoing consulting relationship with him, his law firm, and the SKG. The only possible cure for such misconduct, as in all such cases, is disqualification of Mr. Scruggs and a prohibition against his further use or sharing of any confidential State Farm information.

24. Given that Mr. Scruggs must be disqualified because of his personal and extensive contacts with, and receipt of highly confidential documents and other information from, the Rigsby Sisters, it necessarily follows that his law firm, the Scruggs Firm, must also be disqualified. The same confidential information that Mr. Scruggs personally acquired during his months-long contact with the Rigsby Sisters—a relationship that the evidence suggests is continuing to this day—has already presumably been shared with the other lawyers in his office, most of whom the evidence indicates are also personally working on Katrina insurance matters. Moreover, the thousands of pages of confidential State Farm documents that Mr. Scruggs received over several months from the Rigsby Sisters were, according to the evidence, kept in the Scruggs Firm's offices in a place accessible to all of the firm's lawyers.

25. Extent of the Disqualifying Effects of Mr. Scruggs' Contacts with the Rigsby Sisters on Other Members of the Scruggs Katrina Group. Just as the relationship between Mr.

Scruggs and the Rigsby Sisters clearly requires the disqualification of all lawyers in the Scruggs Firm, it also requires the disqualification of all lawyers and law firms associated together in the SKG. That is necessary for two reasons. First, the SKG apparently operates and holds itself out as a law firm with respect to this Katrina insurance claims litigation. There is thus reason to assume that the lawyers and firms that are part of the SKG operate as would branch offices of a law firm, sharing confidential information of common interest in their joint litigation efforts. Such an arrangement presumptively should give rise to their imputed disqualification. Second, Mr. Scruggs' own testimony indicates that precisely that kind of extensive sharing of State Farm confidential information has been occurring over an extended period of time.<sup>5</sup> Mr. Scruggs admitted in his sworn testimony in the Alabama Renfro litigation that he had discussed the State Farm documents with his SKG colleagues, appended some of those documents to litigation papers filed by SKG lawyers, and sent unspecified numbers of the State Farm/Rigsby Sisters documents to other SKG lawyers, some of which he had not yet obtained back at the time of his testimony (despite the injunctive order of the Renfro Court that he do so). Moreover, Mr. Scruggs testified that the same boxes of State Farm documents that were available for examination in the Scruggs Firm's Oxford office were equally available for examination by any SKG lawyer who dropped into the office to inspect them.

26. Given Mr. Scruggs' sworn description of the extensive access by all SKG lawyers to the confidential State Farm documents illegally obtained by the Rigsby Sisters, as well as other confidential State Farm information that Mr. Scruggs obtained in extended

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<sup>6</sup> Corroborating testimony was provided in the deposition testimony of the Rigsby Sisters, who observed firsthand, during the course of their "consultant" work in the Scruggs Firm's Oxford office, that SKG members outside the firm had access to the boxes of State Farm documents.

conversations with the Rigsby Sisters, there is no remedy short of disqualification of all SKG lawyers and law firms to assure that the unlawful use of those confidential documents does not continue despite disqualification of Mr. Scruggs and the Scruggs Firm.

27. The Compelling Need to Impose the Remedy of Disqualification Here to Vindicate Important Interests of Judicial Administration. Courts, rightly, are reluctant to disqualify lawyers unless a compelling need exists. Among other considerations, disqualification denies to the affected client the services of the lawyer initially retained. While forfeiture of the disqualified lawyer's fee because of the lawyer's wrongful conduct<sup>6</sup> will often alleviate the client's need to incur additional legal fees, disqualification will often entail some delay for the client. Nonetheless, in the face of the actual, demonstrated threat of harm to important interests of a party such as State Farm, disqualification is on occasion compellingly necessary, as here. Mr. Scruggs has indeed engaged in "conduct that is prejudicial to the administration of justice" in the sense condemned by Mississippi Rule 8.4(d). His utter disregard of the commands of Mississippi Rules 4.2 and 4.4 as well as his disregard of the established procedures for obtaining (if allowable) discovery of the documents and other information of State Farm as an opposing litigant threatens important values of judicial administration. Mr. Scruggs has disdained the Court's rules and established procedures as well as the Mississippi Rules. Instead, he has attempted to stride across the litigation landscape guided by different and personal rules and procedures. Permitting Mr. Scruggs to evade the command of the Court's own rules and the Rules of Professional Conduct laid down by the Mississippi Supreme Court will inevitably cause cynicism, including lawyer cynicism, about the administration of justice in this Court.

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<sup>7</sup> On fee forfeiture in a case such as this, see generally Restatement § 37 (providing for fee forfeiture in the case of a "lawyer engaging in clear and serious violation of duty to a client").

28. Mr. Scruggs' violations of the Mississippi Rules has hardly been a one-shot matter, a temporary lapse from otherwise appropriate lawyering. Instead, Mr. Scruggs' approach to this entire litigation has demonstrated a pattern of imperious disdain for the Rules. It seems clear, for example, that Mr. Scruggs' decision to sign up the Rigsby Sisters as clients was motivated in significant part by his desire to cast all of his discussions with them under his broad notion of the protections of the attorney-client privilege and lawyer work product. That has already produced numerous disputes over those protections when State Farm, as was inevitable, sought to obtain their deposition testimony.

29. Worse, Mr. Scruggs' representation of the Rigsby Sisters has led directly to serious conflicts of interest between them as clients and the interests of policyholders, such as the McIntoshes and other Katrina/State Farm policyholders that Mr. Scruggs also represents, either as individual counsel or as class counsel. Perhaps the most glaring example of that is correspondence that Mr. Scruggs addressed to counsel for State Farm, in which he threatened to scuttle the then-pending class-action settlement agreement between them unless State Farm agreed to pressure Renfroe to drop its Alabama action, in which Renfroe was seeking contempt sanctions against both the Rigsby Sisters and Mr. Scruggs personally for failure to protect the confidentiality of State Farm's documents. I have rarely encountered such a dramatic clash of interests between a class action lawyer's perceived duties to individual clients and his duties to advance the interests of the class in violation of the concurrent-conflict rules (Mississippi Rule 1.7).


30. Mr. Scruggs' representations of the Rigsby Sisters threatens the interests of the McIntoshes even more directly. During the course of their testimony in the Renfroe matter, both Mr. Scruggs and Kerri Rigsby testified that the Rigsby Sisters had taken the "first"

engineer's report about the McIntoshes' property from the State Farm files and given it to Mr. Scruggs in February 2006 or shortly thereafter. Yet, the McIntoshes' complaint pleads that State Farm failed to give the report to the McIntoshes. (Obviously, testimony by the Rigsby Sisters and Mr. Scruggs that they had taken the first report diminishes greatly, if it does not destroy entirely, a claim that State Farm wrongfully failed to disclose a document that it no longer had in its own files.) It is possible that both Mr. Scruggs and the Rigsby Sisters will recant their sworn testimony in Renfro that they took the original of the first report. But such a recantation would cast doubts about the rest of their testimony.

31. On the same point, of course, Mr. Scruggs seems likely to also be ignoring the command of Mississippi Rule 3.7(a), under which Mr. Scruggs should also be disqualified from acting as the McIntoshes' advocate because he "is likely to be a necessary witness" as to the first engineer's report, which is clearly a key to the McIntoshes' success in this litigation. Moreover, Mr. Scruggs' advocate-witness problems under Rule 3.7 will likely cause serious detriment to the McIntoshes' cause. Again, either Mr. Scruggs and the Rigsby Sisters kept from State Farm the original engineer's report, which hurts the McIntoshes, or they testified falsely about it in Renfro, which substantially impairs the litigation position of the McIntoshes in a different way. The ill effects visited on the McIntoshes will be exacerbated because of the client-lawyer relationship between the Rigsby Sisters and Mr. Scruggs. Accordingly, Mr. Scruggs' advocate-witness problems are included among those stated in Rule 3.7(b). He is precluded from serving the McIntoshes as both advocate and witness by force of Rule 1.7, both because of his conflicting obligations to protect the Rigsby Sisters against the risk of being found to have committed perjury (either here or in Renfro) and his own personal-interest conflict in similarly avoiding criminal or professional charges of perjury. As such, and by force of the explicit words

of Rule 3.7(b),<sup>7</sup> Mr. Scruggs' advocate-witness problems preclude not only him from serving as advocate here, but also preclude service by all other lawyers in his own firm and in the SKG.

32. I declare under the penalty of perjury that the foregoing is true and correct and that I executed this declaration on this 14th day of June, 2007.



Charles W. Wolfram

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<sup>8</sup> "(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."