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

GLENDA SHOWS, STEPHEN P. THOMPSON and PATRICIA B. THOMPSON; ESTATE of ALFRED PEPPERMAN, Deceased, DAVID PEPPERMAN, Executor; CRAIG FARON TROUB and MARION TROUB; TED THOMAS and DONNA THOMAS; JEFFREY PICKICH; RONALD E. NUGENT and BARBARA P. NUGENT; CHARLES J. LINKEY and JOYCE A. LINKEY; WALTON JONES and PENNY JONES; WAYNE HARBOUR; PAUL GLOYER and CONSTANCE GLOYER; ALAN LIPSKI; SHERROD WILLETTE and MARY WILLETTE; CHET CARTER;	)	
Plaintiffs,	)	CIVIL ACTION NO. 1:07-cv-709-WHB-LRA
-vs-	)	
STATE FARM FIRE AND CASUALTY COMPANY, et al.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT E.A. RENFROE & COMPANY, INC.'S MOTION REQUESTING THAT THE COURT CONSIDER WHETHER PROVOST & UMPHREY IS AN "ASSOCIATED FIRM" WITHIN THE MEANING OF THE COURT'S APRIL 16, 2008 ORDER

Plaintiffs Glenda Shows, et al.,[1] respectfully file this Memorandum of Law in Response to Defendant E.A. Renfroe & Company, Inc.'s Motion Requesting that the Court Consider Whether Provost & Umphrey is an Associated Firm" Within the Meaning of the Court's April 16, 2008 Order. In response to Renfroe's motion [364] and memorandum [365], the Plaintiffs would show the following:

[1] The "*et al.*" includes *Shows* Plaintiffs currently represented by Provost Umphrey, all of whom are listed above in the style of the case.

I. REQUEST FOR HEARING AND ORAL ARGUMENT

Pursuant to Local Rule 7.2(F), Plaintiffs request that the Court set this motion for a hearing at such time and place as may suit the convenience of the Court, and allow Plaintiffs' counsel the opportunity to appear in person before the Court and present oral argument.

II. INTRODUCTION

The original disqualification Opinion entered in *McIntosh* disqualified the firms of the former Scruggs Katrina Group (SKG), the associated firm of Hesse & Butterworth, P.L.L.C., "and other attorneys associated as counsel for the plaintiffs by these firms" as a result of payments made by Scruggs to certain witnesses. [*McIntosh* 1172]

As subsequent orders make clear, attorneys who participated in State Farm Katrina litigation cases with the disqualified firms are likely to be included as "associated counsel" because their participation in these cases can be taken as a ratification of the misconduct that ultimately led to the disqualification orders. [*See McIntosh* 1183, 1193]

The original disqualification order in *McIntosh* was entered on April 4, 2008. [*McIntosh* 1173] The order in this case disqualifying the firms of the Katrina Litigation Group (KLG) and associated counsel was entered on April 16, 2008. [354] At the time those orders were entered, Provost Umphrey was not associated with any KLG firm on any Katrina litigation claim, nor had Provost Umphrey participated in any way in any State Farm Katrina case; Provost Umphrey's *only* involvement in these cases has been as substitute counsel *after* the Court disqualified the Plaintiffs' former lawyers.

Don Barrett first contacted Provost Umphrey regarding the possibility of Provost Umphrey representing Katrina victims on April 17, 2008. (Exhibit 1, Declaration of Walter Umphrey at ¶ 4; Exhibit 2, Affidavit of John W. (Don) Barrett at ¶ 7.) Although Provost Umphrey has worked with Mr. Barrett and other members of the SKG/KLG on matters completely unrelated to the Katrina

litigation, prior to that April 17, 2008, meeting, Provost Umphrey had not represented any client in any Katrina claim arising out of Mississippi. (Exhibit 1, Declaration of Walter Umphrey at ¶ 4.) Provost Umphrey has never been associated with KLG or any of its member firms in any Katrina litigation claim whatsoever. Prior to the disqualification of KLG in *McIntosh* on April 4, 2008, and in this case on April 16, 2008, Provost Umphrey had never participated in any Katrina litigation meetings or conferences with KLG attorneys, in person, by telephone, or otherwise. Provost Umphrey has never interviewed any witnesses for or with KLG, never attended any depositions for or with KLG, and never had any contact with KLG whatsoever about anything related to Katrina litigation. (Exhibit 1, Declaration of Walter Umphrey at ¶ 5; Exhibit 2, Affidavit of John W. (Don) Barrett at ¶ 9)

Apart from some "suggestions" of professional misconduct thrown in the footnotes and an implication that Mr. Barrett's actions were somehow improper, Renfroe's motion and memorandum basically raise two issues: whether accepting Mr. Barrett's recommendation amounts to an "association" with KLG, and whether Provost Umphrey participated in KLG Katrina litigation cases so as to qualify as "associated counsel" under the disqualification orders.

As to the first issue, for Provost Umphrey to be "associated counsel," there would have to have been some participation in this litigation by Provost Umphrey that could be construed as ratifying the misconduct that led to the disqualification. Provost Umphrey is not "associated counsel" because it had no involvement in this litigation prior to the disqualification order, and Provost Umphrey's involvement after the disqualification orders has only been as substitute counsel. A substitution is simply not an association.

As to the second, merely taking over as substitute counsel cannot possibly qualify as becoming "associated counsel" such that Scruggs's misconduct could be imputed to Provost Umphrey, and Mr. Barrett's actions in assisting the KLG clients in finding substitute counsel was

merely the fulfillment of his ethical duties as a withdrawing lawyer. Moreover, Provost Umphrey's acceptance of Mr. Barrett's recommendation cannot be construed as a ratification of the conduct that led to his disqualification because his actions in assisting his clients in securing substitute counsel were merely a fulfillment of his ethical obligations.

III. LEGAL STANDARD FOR DISQUALIFICATION

"An attorney may be disqualified only when there is a 'reasonable possibility that some specifically identifiable impropriety' actually occurred and, in light of the interests underlying the standards of ethics, the social need for ethical practice outweighs the party's right to counsel of his choice." *United States v. Kitchin*, 592 F.2d 900, 903 (5th Cir. 1979). The Fifth Circuit has held that:

> Application of the disqualification rule requires a balancing of the likelihood of public suspicion against a party's right to counsel of choice…. However, rather than indiscriminately gutting the right to counsel of one's choice, we have held that disqualification is unjustified without at least a reasonable possibility that some identifiable impropriety actually occurred…. A disqualification inquiry, particularly when instigated by an opponent, presents a palpable risk of unfairly denying a party the counsel of his choosing. Therefore, notwithstanding the fundamental importance of safeguarding popular confidence in the integrity of the legal system, attorney disqualification, particularly the disqualification of an entire firm, is a sanction that must not be imposed cavalierly.

FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1316 (5th Cir. 1995) (citations omitted).

The Fifth Circuit has ruled that "motions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law." *In re American Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992). Federal courts may adopt state or American Bar Association ("ABA") rules as their ethical standards, but whether and how these rules apply are questions of federal law. *Owens v. First Fam. Fin. Servs.*, 379 F. Supp. 2d 840, 845 (S.D. Miss. 2005). Under Local Rule 83.5 of the Rules of the United States District Courts for the Northern and Southern Districts of Mississippi, this Court has adopted the Mississippi Rules of Professional Conduct. *Id.* at 845. But while local rules are the most immediate source of guidance for deciding a motion to disqualify, national ethical rules are also relevant to this Court's determination. *FDIC v.*

United States Fire Ins. Co., 50 F.3d 1304, 1312 (5th Cir. 1995). The Court should also consider the standards of the profession, the public interest, and the litigants' rights. *In re Dresser Indus.*, 972 F.2d 540, 543 (5th Cir. 1992).

The Fifth Circuit has considered the following factors in the disqualification analysis: whether a conflict has (1) the appearance of impropriety in general; or (2) a possibility that a specific impropriety will occur; and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case. *Id.* at 544. However, an appearance alone is not sufficient. "An attorney's conduct need not be governed by standards that can be imputed only to the most cynical members of the public." *Church of Scientology v. McLean*, 615 F.2d 691, 693 (5th Cir. 1980). "There must be a reasonable possibility some specifically identifiable impropriety occurred in order to warrant disqualification." *Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526, 530 (5th Cir. 1981), *see also Church of Scientology v. McLean*, 615 F.2d 691, 693 (5th Cir. 1980). Furthermore, while liability to disqualification for an actual impropriety "extends to partners and employees, and former partners and employees, of that lawyer who participated in the attorney-client relationship," disqualification cannot be imputed where no such participation exists.[2] *See American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1129 (5th Cir. 1971)

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[2] The Mississippi Rules of Professional Conduct have rejected the mere "appearance of impropriety" as the basis for vicarious disqualification of counsel:

> 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.

MISS. R. PROF. CONDUCT Rule 1.10 , cmt. The Restatement of the Law Governing Lawyers similarly indicates that an "appearance of impropriety," standing alone, is not a violation of ethics rules:

> General provisions of lawyer codes. Modern lawyer codes contain one or more provisions (sometimes referred to as "catch-all" provisions) stating general grounds for discipline, such as

(disqualification could not be imputed to firm that that did not have employer-employee or partnership relationship with disqualified lawyers).

In this case, Provost Umphrey is not subject to disqualification because it did not participate in any misconduct either directly or indirectly whether by act or omission, nor does Provost Umphrey have a relationship with any offending firm that that would allow the misconduct could be imputed to Provost Umphrey.

IV. MR. BARRETT'S RECOMMENDATION WAS ENTIRELY PROPER.

When the KLG was disqualified, State Farm decided to take advantage of the fact that the Plaintiffs had been temporarily deprived of effective legal counsel. The Associated Press recently reported that "State Farm Fire and Casualty Co. initiated or reopened settlement talks with policyholders after a federal judge in April disqualified their attorneys from handling up to 200 lawsuits against the Bloomington, Ill.-based company," and that a State Farm spokesman said, "We're willing to speak with them whether they're represented by counsel or not." (Exhibit 4, AP story, *State Farm Reaches Out-of-Court Settlement in Katrina Cases* (May 8, 2008).)

In his affidavit, Mr. Barrett explained his reasons for seeking out substitute counsel and selecting Provost Umphrey:

> engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" (ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.4(c) (1983)) or "in conduct that is prejudicial to the administration of justice" (*id.* Rule 8.4(d)). Such provisions are written broadly both to cover a wide array of offensive lawyer conduct and to prevent attempted technical manipulation of a rule stated more narrowly. On the other hand, the breadth of such provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent (see Comment h) and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it. That is particularly true of the "appearance of impropriety" principle (stated generally as a canon in the 1969 ABA Model Code of Professional Responsibility but purposefully omitted as a standard for discipline from the 1983 ABA Model Rules of Professional Conduct). Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.
>
> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 5, cmt. c.

> After we transmitted the disqualification order to our clients for whom we had worked long and hard, the KLG offices received many calls seeking guidance and recommendations as to what they should do. At least one had gone to a Coast lawyer, who declined to take the case. Some (probably all) were being solicited by State Farm, seeking to settle their cases while they were effectively unrepresented.
>
> I believed that we were morally and ethically bound to assist these clients who were facing a 45-day deadline to hire new counsel, in obtaining substitute counsel with the ability, resources, and commitment to successfully contend with State Farm and its powerful defense group. I ultimately decided that the firm that best met these criteria was Provost-Umphrey.

(Exhibit 2, Affidavit of John W. (Don) Barrett at ¶¶ 5-6.)

The Court's Order in *McIntosh* disqualified the KLG and associated counsel from "representing these plaintiffs or any other individuals who have claims against State Farm… in this case and in any other cases in the United States District Court for the Southern District of Mississippi," and ordered the disqualified counsel to send a copy of the disqualification order and opinion to each client affected by the ruling. [*McIntosh* 1173] There is nothing in the order or opinion requiring the disqualified counsel to do or refrain from doing anything else. [*See McIntosh* 1172, 1173] This Court's order in this case was substantially the same. [354] While case law on what a lawyer can and cannot due upon disqualification in a case like this appears to range from scant to non-existent, the applicable ethics rules provide considerable guidance.

MRPC 1.16 requires that upon termination of representation, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interest." MISS. R. PROF. CONDUCT, Rule 1.16(d); *see also* ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.16 (same); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 33(1) (same). Although there do not appear to be any Mississippi cases or ethics opinions addressing whether those steps including assisting the client in finding substitute counsel, the ABA/BNA Lawyers' Manual on Professional Conduct's discussion of Model Rule 1.16 states that "the withdrawing attorney has a continuing duty to minimize any harm to the client's interests by… assisting the clients search for a new lawyer… and devoting

reasonable efforts to transferring responsibility for the matter." ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 31:1203 (citations omitted). "Once the client obtains replacement counsel, the withdrawing lawyer must cooperate with the new counselor face disciplinary action. Cooperation is generally interpreted as responding diligently to replacement counsel's inquiries and handing over relevant documents and papers to the succeeding counsel without delay." ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 31:1205-06 (citations omitted). The Restatement (Third) of the Law Governing Lawyers similarly states: "The lawyer must ordinarily advise the client of the implications of termination, assist in finding a new lawyer, and devote reasonable efforts to transferring responsibility for the matter…. Failure to take such steps can give rise to disciplinary sanctions and malpractice liability." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33(1) cmt. b (2000).

The disqualification orders and opinions in this case put Mr. Barrett, the Plaintiffs, and Provost Umphrey on notice that the disqualified firms and associated counsel could no longer represent the Plaintiffs in this Court, and the Order gave the Plaintiffs 45 days to retain new counsel of inform the Court of their intention to proceed pro-se, or face the prospect of dismissal of their cases. [*McIntosh* 1173] [354] The applicable ethics rules required the disqualified counsel to take steps to protect their clients' interests, and the authorities state that those steps include assisting the client in finding a new lawyer. Nothing in the orders or opinions purports to relieve the disqualified lawyers of their contractual obligations to their clients (or former clients, as the case may be) or to relieve the disqualified lawyers of their ethical duties.

Finally, if Mr. Barrett's conduct in recommending Provost Umphrey went against the Court's intent, that is not something that can be held against Provost Umphrey or (Provost Umphrey's clients) because no such intent was expressed in this Court's Order or the *McIntosh* Orders and Opinion.

V. PROVOST UMPHREY IS NOT "ASSOCIATED COUNSEL" UNDER THE COURT'S DISQUALIFICATION ORDER OR SUBJECT TO DISQUALIFICATION THEREUNDER.

A. Disqualification order

The original disqualification Opinion entered in *McIntosh* disqualified the firms of the former Scruggs Katrina Group (SKG), the associated form of Hesse & Butterworth, P.L.L.C., "and other attorneys associated as counsel for the plaintiffs by these firms" because of improper payments made by Scruggs to witnesses. [*McIntosh* 1172] While Scruggs was the one who made the payments, the other members of the SKG joint venture were disqualified because they "knew or should have known that the payments were being made, and… their failure to take timely and reasonable remedial steps or object to this arrangement amounts to a ratification of Scruggs's actions." [*McIntosh* 1172] The Court further explained that:

> [O]ther members of the joint venture should have been aware that the payments were being made and did nothing to prevent their continued payment. In these circumstances, all of the other members of the original SKG are responsible for this breach of ethics. Those whom these firms have subsequently associated musty also be disqualified to prevent the appearance of impropriety in the remainder of this litigation. *See* MRPC 5.1(c) ("A Lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved… or… knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."); *See American Can Co.*, 436 F.2d 1125, 1128-29 (5th Cir. 1971).

[*McIntosh* 1172 at 3]

In a subsequent Order in *McIntosh*, the Court expanded on the meaning of "associated counsel" where, among other things, the proposed substitute counsel had appeared as local counsel for the Plaintiffs in Alabama on a discovery matter in this case. The Court stated: "Whether appearing or not, actual participation in or connections to this or other litigation are major concerns of the Court." [*McIntosh* 1183 at 1] In explaining what was meant by "other litigation," the "there is sufficient involvement in State Farm Katrina litigation cases to qualify Taylor-Martino as 'other attorneys associated as counsel for the plaintiffs by these [disqualified] firms.'" [*McIntosh* 1183 at 2]

The next day, this Court entered an Order disqualifying the firms of the former SKG and associated counsel for the reasons set out in the *McIntosh* Memorandum Opinion. [354]

The "associated counsel" issue came up again in *McIntosh* when Lumpkin & Reeves, PLLC (Lumpkin), sought clarification of the disqualification order. Lumpkin attended a deposition of one of the disqualified firms' *Shows* clients and identified himself as appearing "also on behalf of the *Plaintiffs*." Lumpkin also participated in telephone conferences and attended a meeting with KLG attorneys. The Court noted that this activity occurred after the disqualification motions were filed, and that Lumpkin knew or should have known "of the serious allegations made against the Scruggs Katrina Group." [*McIntosh* 1193 at 2] While the Court did not explain exactly why this participation was disqualifying, given the prior orders and opinions in *McIntosh*, it is apparent that the Court regarded Lumpkin's "pre-disqualification" participation as a ratification of Scruggs's misconduct.

B. Provost Umphrey has never been "associated counsel"

Provost Umphrey is clearly not "associated counsel" under the disqualification orders. As set out in the various disqualification orders and the Memorandum Opinion in *McIntosh*, to be "associated counsel," there would have to have been some participation in this litigation by Provost Umphrey that could be construed as ratifying the misconduct that led to the disqualification. That is the only way the offending lawyers' misconduct could be imputed to Provost Umphrey under MRPC 5.1(c) or *American Can*.

Provost Umphrey is not "associated counsel" because it had no involvement in this litigation prior to the disqualification order, and Provost Umphrey's involvement after the disqualification orders has only been as substitute counsel. (Exhibit 1, Declaration of Walter Umphrey at ¶ 4; Exhibit 2, Affidavit of John W. (Don) Barrett at ¶ 7.) Prior to taking over as substitute counsel on some of the former KLG cases, Provost Umphrey had not represented *any* client with a Mississippi Katrina claim or participated in any meetings or conferences with KLG attorneys, in person, by

telephone, or otherwise. (Exhibit 1, Declaration of Walter Umphrey at ¶¶ 4, 5; Exhibit 2, Affidavit of John W. (Don) Barrett at ¶ 9.) Provost Umphrey has never interviewed any witnesses for or with KLG, never attended any depositions for or with KLG, and never had any contact with KLG whatsoever about anything related to Katrina litigation. (Exhibit 1, Declaration of Walter Umphrey at ¶¶ 4, 5; Exhibit 2, Affidavit of John W. (Don) Barrett at ¶ 9.)

Provost Umphrey clearly had nothing to do with Scruggs's misconduct. Provost Umphrey did not "order[] or, with knowledge of the specific conduct, ratif[y] the conduct involved," nor did Provost Umphrey "know[] of the conduct at the time when its consequences can be avoided or mitigated but fail[] to take reasonable remedial action." *See* MRPC 5.1(c). And by no stretch of the imagination could Provost Umphrey be said to have the sort of relationship with any of the disqualified firms that would allow their conduct to be imputed to Provost Umphrey under the standard set out in *American Can* and referenced in the *McIntosh* disqualification opinion. *See American Can*, 436 F.2d at 1129 (disqualification could not be imputed to firm that that did not have employer-employee or partnership relationship with disqualified lawyers). Such a relationship might exist where a substitute counsel agrees to some sort of referral fee or other fee sharing arrangement, but Provost Umphrey has made no financial arrangements, express or implied, with the KLG or Mr. Barrett in connection with the Katrina litigation. (*See* Exhibit 1, Declaration of Walter Umphrey at ¶ 6; Exhibit 2, Affidavit of John W. (Don) Barrett at ¶ 10.) Furthermore, Provost Umphrey's acceptance of Mr. Barrett's recommendation cannot be construed as a ratification of the conduct that led to his disqualification because, as far as Provost Umphrey can tell, his actions in assisting his clients in securing substitute counsel were merely a fulfillment of his ethical duties. That action, as well as other actions complained of by Renfroe, are completely independent of the conduct that led to the disqualification.

C. Provost Umphrey's Nashville office address does not make Provost Umphrey "associated counsel."

Renfroe points to the fact that Provost Umphrey's Nashville, Tennessee, office has the same address as the Nashville office of Barrett Law Office, P.A., as possible evidence that Provost Umphrey may be associated counsel in the Mississippi Katrina litigation. While the fact that Provost Umphrey leases office space is evidence of a landlord-tenant relationship, it is not evidence that Provost Umphrey has ever been associated as counsel on any Katrina case.

Provost Umphrey has leased office space in Nashville from Barrett Law Office since June 15, 2007. (Exhibit 3, Declaration of Michael Hamilton at ¶ 3.) Provost Umphrey's Nashville office maintains its own separate telephone, fax, copier and computer services. (Exhibit 3, Declaration of Michael Hamilton at ¶ 4.) There is one non-lawyer employee who is separately employed on a part time basis by Provost Umphrey and the Barrett Law Office. She is paid by Provost Umphrey's payroll department for the ten hours per week she works for Provost Umphrey. (Exhibit 3, Declaration of Michael Hamilton at ¶ 5.) Michael Hamilton, the one and only lawyer in Provost Umphrey's Nashville office, has worked as co-counsel with Patrick Barrett, the managing attorney of the Nashville office of Barrett law Office, P.A., on approximately five cases since 2003, none of which involved or were related to Hurricane Katrina litigation or bad faith insurance litigation. (Exhibit 3, Declaration of Michael Hamilton at ¶¶ 1, 6, 7.) Mr. Hamilton was not aware of Provost Umphrey's possible involvement in the Katrina litigation until April 21, 2008, after Don Barrett had recommended Provost Umphrey to the KLG clients. (Exhibit 3, Declaration of Michael Hamilton at ¶ 8.)

VI. RENFROE'S SUGGESTIONS OF PROFESSIONAL MISCONDUCT AND CONFLICT AND OVERREACHING ARE MISGUIDED AT BEST.

According to one U.S. Court of Appeals judge, it is now widely recognized that "disqualification motions have become common tools of the litigation process, being used . . . for

purely strategic purposes." Van Graefeiland, *Lawyers Conflict of Interest: A Judge's View (Part II)*, N.Y.L.J., July 20, 1977, at 1; see also, e.g., *United States Football League v. National Football League*, 605 F. Supp. 1448, 1452 (S.D.N.Y.1985) (citing authorities on proposition that disqualification motions are "often interposed for tactical reasons" and produce unnecessary delay); *Gregori v. Bank of America*, 254 Cal. Rptr. 853, 859 (Cal. Ct. App. 1989) ("Motions to disqualify often pose the very threat to the integrity of the judicial process that they purport to prevent. Such motions can be misused to harass opposing counsel, or to intimidate an adversary into accepting settlement…."); *Borman v. Borman*, 393 N.E.2d 847, 855 and n.18 (Mass. 1979) (concern that disqualification motion can be employed as tactical weapons); *Adam v. Macdonald Page & Co.*, 644 A.2d 461, 464 (Me. 1994) (similar); ABA MODEL RULES OF PROFESSIONAL CONDUCT, Scope ¶ [20] (2002) ("[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule."); ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7, cmt. ¶ [15] (1987) ("Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.").

The Fifth Circuit has further cautioned:

> When, for purely strategic purposes, opposing counsel raises the question of disqualification, and subsequently prevails, public confidence in the integrity of the legal system is proportionately diminished. "Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary."

FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1316 (5th Cir. 1995) (quoting *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976)).

Although Renfroe's misguided "suggestions" of misconduct are nowhere near as egregious as State Farm's false accusations, they are still of a sort that should be viewed with extreme skepticism when raised by an opposing party in a motion to disqualify. *See In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83, 88-89 (5th Cir. 1976) (stating that, in general, courts do not disqualify an attorney based complaints about conflicts of interest coming from opposing parties who are strangers to the conflict.); *see also Clemens v. McNamee*, Civil Action No. 4:08-CV-00471, 2008 U.S. Dist. LEXIS 36916 at *7-8 (S.D. Tex. May 6, 2008) (holding that *In re Yarn Processing* remains controlling authority in Fifth Circuit on this issue).

A. There was no violation of MRPC 7.1.

Renfroe states that Provost Umphrey and the KLG may have violated MRPC 7.1, which, Renfroe says, "precludes a lawyer from representing that he or she or his or her law firm is 'the best,' 'one of the best,' or 'one of the most experienced' in a particular field of law."[3] (Renfroe's Brief at 4 n.2.) This is an apparent reference to Mr. Barrett's statement in the letter that he wrote to his clients stating his opinion that Provost Umphrey is "the best law firm to represent you going forward in your litigation against State Farm." (*See* Renfroe's Exhibit A)

As a preliminary matter, Plaintiffs would point out that Mr. Barrett's letter did not say that Provost Umphrey was the "best" in a particular field of law, it was an expression of his considered

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[3] MRPC 7.1(d) provides: "A lawyer shall not make or permit to be made a false, misleading, deceptive or unfair communication about the lawyer or lawyer's services. A communication violates this rule if it… [c]ompares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated." The comment to subsection (d) states: "The prohibition in paragraph (d) discussing comparisons that cannot be factually substantiated would preclude a lawyer from representing that he or she (or his or her law firm) is 'the best,' 'one of the best' or 'one of the most experienced' in a particular field of law."

Subsection (c) of ABA Model Rule 7.1, which corresponds to MRPC 7.1(d), "was deleted when the rule was amended in 2002 because of criticism that it was overly broad. Whether such comparisons are misleading can be determined on a case by case basis." ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 81:305. "This issue is now addressed in the comment, which states that an unsubstantiated comparison of a lawyer's fees or services with those of other lawyers 'may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated." ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 81:305-06 (quoting Model Rule 7.1 cmt [3]).

opinion, based on his knowledge of his clients' cases, that Provost Umphrey was their best choice.[4] In any event, Mr. Barrett's letter is not a solicitation from Provost Umphrey or sent a Provost Umphrey's request. Mr. Barrett wrote that letter of his own accord without any prompting from Provost Umphrey. (Exhibit 2, Affidavit of John W. (Don) Barrett at ¶ 4.) Mr. Barrett wrote the letter out of his continuing duty of loyalty to his clients. (Exhibit 2, Affidavit of John W. (Don) Barrett at ¶ 4.) It is not an improper solicitation under MRPC 7.1; it was sent in accordance with an attorney's duties upon termination of representation under MRPC 1.6(d).

B. There was no violation of MRPC 7.3(b).

Renfroe suggests that Provost Umphrey's letters to the KLG clients—sent at the request of their former lawyers—might somehow violate MRPC 7.3(b), which prohibits solicitations that involve "coercion, duress, or harassment." Renfroe does not identify anything coercive, duress-inducing, or harassing about the letters. The reason for Renfroe's omission is that there is no factual basis for the "suggestion" of misconduct.

C. Provost Umphrey was not "capataliz[ing] on the Plaintiffs' vulnerability."

In a positively Orwellian inversion, Renfroe suggests that Mr. Barrett's recommendation of Provost Umphrey was "designed to capitalize on the Plaintiffs' vulnerability resulting from KLG's disqualification, and to prevent Plaintiffs from exercising fully informed and independent decisions regarding whether and/or how they wished to proceed with their individual claims." (Renfroe's Brief at ¶ 14) Mr. Barrett was prompted to seek out replacement counsel for the KLG clients because numerous KLG clients had been calling KLG offices looking for guidance, at least one tried to hire a Coast lawyer but was turned down, and State Farm was intentionally taking advantage of the KLG disqualification by contacting the clients directly and trying to settle their claims while they were involuntarily temporarily effectively unrepresented. (Exhibit 2, Affidavit of John W. (Don)

[4] "Model Rule 7.1 does not prohibit testimonials or endorsements." ABA/BNA LAWYERS' MANUAL ON

Barrett at ¶¶ 5, 12; Exhibit 4, AP story, *State Farm Reaches Out-of-Court Settlement in Katrina Cases* (May 8, 2008).)

VII. CONCLUSION AND PRAYER

The only legitimate questions raised in Renfroe's motion and memorandum are whether Provost Umphrey has ever been an "associated firm" in any SKG/KLG Katrina cases or had any arrangement that could lead to the sharing of fees with the KLG or any other disqualified counsel. The answers to both questions is an unequivocal "no." The Plaintiffs have a right to be represented by the counsel of their choice, and they have made their choice. The foregoing response and attached exhibits amply demonstrate that Provost Umphrey does not fall within the meaning of an "associated firm" in the Court's disqualification Order and that Provost Umphrey has not been involved directly or indirectly by act or omission in any misconduct that would require or permit Provost Umphrey's disqualification as counsel for the Plaintiffs in this matter. Plaintiffs therefore request that the Court set Renfroe's Motion for a hearing and oral argument, that the Motion be denied, and that Plaintiffs be afforded all other relief to which they may justly be entitled.

THIS, the 6th day of June 2008.

Respectfully submitted,
PROVOST ★ UMPHREY LAW FIRM, L.L.P.

GUY G. FISHER
490 Park Street
Beaumont, Texas 77701
(409) 835-6000 (409) 813-8625 fax
Mississippi Bar No. 101291

PROFESSIONAL CONDUCT 81:306.

CERTIFICATE OF SERVICE

I hereby certify that I have on this date electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

DATED: June 6, 2008

Guy G. Fisher

PROVOST ★ UMPHREY LAW FIRM, L.L.P.
490 Park Street
Beaumont, Texas 77701
(409) 838-8825
(409) 813-8625 fax

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

GLENDA SHOWS, ET AL

vs.

Civil Action No. :
1:07-cv-709-WHB-LRA

STATE FARM MUTUAL AUTOMOBILE,
INSURANCE COMPANY, ET AL

DECLARATION OF WALTER UMPHREY

I, Walter Umphrey, pursuant to 28 U.S.C. §1746 declare:

1. I am an attorney and the managing partner of Provost★Umphrey, L.L.P.

2. Provost★Umphrey's main office is located at 490 Park Street, Beaumont, Texas 77701

3. I have read State Farm and E.A. Renfroe & Company, Inc.'s Motions and Memorandums seeking to disqualify Provost★Umphrey from this litigation pursuant to the Court's April 16, 2008 Order.

4. My first contact with the KLG - Katrina Litigation was on April 17, 2008, when I met with Don Barrett. Don Barrett and I have had a personal and professional relationship for many years. Prior to that time, Provost★Umphrey had not represented a Katrina Litigation victim with a Mississippi claim.

5. Provost★Umphrey has never been associated with KLG in any Katrina Litigation, or in any litigation whatsoever which related in any way to non-payment of claims by any insurance company arising out of hurricane losses. Prior to the disqualification of the KLG on April 4, 2008, Provost★Umphrey never participated in any meetings or conferences with KLG or its attorneys, in person, by telephone, or otherwise. Provost★Umphrey never interviewed any witnesses for or with KLG, never attended any depositions or hearings for or with KLG, and never had any contact with KLG whatsoever about anything related to Katrina litigation.

6. KLG did not "refer" its clients to Provost★Umphrey; they recommended Provost★Umphrey, and some of the clients agreed to sign new contracts with my firm, which replaced the KLG Contracts. KLG has no agreement, express or implied, with respect to referral fees, litigation expenses or any other matter involving Katrina Litigation with Provost★Umphrey.

I declare the above to be true to my knowledge and belief under penalty of perjury.

Walter Umphrey

PLAINTIFF'S EXHIBIT

Dated June 5, 2008

STATE OF MISSISSIPPI

COUNTY OF HOLMES

AFFIDAVIT OF JOHN W. (DON) BARRETT

PERSONALLY APPEARED before me, the undersigned authority in and for the aforesaid county and state, JOHN W. BARRETT, who, after being duly sworn, states on his oath as follows:

1. My name is John W. Barrett. I am commonly known by my life-long nickname of "Don" Barrett. I am an adult under no legal disabilities, am competent to make this affidavit, which is made on my personal knowledge.

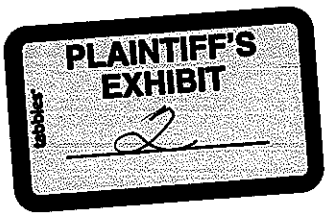
2. I am the partner of Barrett Law Office, P.A., responsible for handling Hurricane Katrina claims on the Mississippi Gulf Coast, which we have participated in through the Scruggs Katrina Group, which was re-named the Katrina Litigation Group ("KLG") after the Scruggs Law Firm withdrew at our insistence.

3. I have read E. A. Renfroe & Company, Inc.'s Memorandum in Support of Its Motion Requesting That The Court Consider Whether Provost & Umphrey Is an "Associated Firm" Within the Meaning of the Court's April 16, 2008 Order."

4. Renfroe's Memorandum disingenuously suggests that Provost-Umphrey and KLG may have violated Rule 7.1 of the MRPC, which precludes a lawyer from representing that he...or his ...law firm is "the best" in a particular field of law. I sent the letter quoted in Renfroe's memorandum. I was not requested by Provost-Umphrey to send the letter. I sent it on my own accord because of my continuing duty of loyalty to our clients.[1]

---

[1] The disqualification orders in *Shows, et al v. State Farm, et al* and in *McIntosh, et al v. State Farm, et al* disqualified KLG attorneys from representing State Farm policyholders in Katrina litigation against State Farm and Renfroe in the U.S. District Court for the Southern District of Mississippi, but neither order voided the KLG's professional employment relationship with these clients, nor dissolved the fiduciary relationship and duty that obligated the KLG



5. After we transmitted the disqualification order to our clients for whom we had worked long and hard, the KLG offices received many calls seeking guidance and recommendations as to what they should do. At least one had gone to a Coast lawyer, who declined to take his case. Some (probably all) were being solicited by State Farm, seeking to settle their cases while they were effectively unrepresented. See paragraph 12 *infra*.

6. I believed and believe that we were morally and ethically bound to assist these clients, who were facing a 45-day deadline to hire new counsel, in obtaining substitute counsel with the ability, resources, and commitment to successfully contend with State Farm and its powerful defense group. I ultimately decided that the firm which best met these criteria was Provost-Umphrey.

7. My first contact with Provost-Umphrey about Katrina litigation was on April 17, 2008, when I met personally with two of Provost-Umphrey's attorneys, Walter Umphrey and Zona Jones, at which time I told them that we represented several hundred Coast families who had been denied insurance benefits from their insurance carrier, State Farm; that I believed that these were worthy cases; that we had been disqualified from representing them in federal court; and that we were looking for a law firm with the substantial manpower and financial resources necessary to compete with State Farm, and with the willingness to engage State Farm fully on behalf of all of our clients who wanted to retain them.

8. I already was aware of Provost-Umphrey's manpower and financial resources. Once they represented to me their willingness to take on this challenge, I, as lead attorney for KLG, made the decision to recommend this firm to our clients with Katrina claims against State Farm.

---

attorneys to protect the interests of these clients as much as possible and to seek out, then recommend successor counsel best able, in our view, to handle their litigation.

9. KLG has never been associated with Provost-Umphrey in any Katrina litigation, or in any litigation whatsoever which related in any way to non-payment of claims by any insurance company arising out of hurricane losses. Provost-Umphrey never participated in any meetings or conferences with KLG or its attorneys, in person, by telephone, or otherwise. Provost-Umphrey never interviewed any witnesses for or with KLG, never attended any depositions or hearings for or with KLG, and never had any contact with KLG whatsoever about anything related to Katrina litigation. I was not aware that Mike Hamilton of Provost-Umphrey was subletting space from my nephew Patrick Barrett in Nashville until after we had recommended Provost-Umphrey. Obviously that office space arrangement, whatever it is, had nothing to do with our recommendation of the Provost-Umphrey firm.

10. KLG did not "refer" our clients to Provost-Umphrey; we recommended Provost-Umphrey, and some of our clients agreed to sign new contracts with that firm, which replaced the KLG contracts. KLG has no referral or fee/expenses agreement with Provost-Umphrey, written or oral.

11. Defendants Renfroe and State Farm, in my opinion, have been aggressive in a calculated attempt to deflect attention from their illegal, bad-faith and probably criminal adjusting of hundreds of claims of families on the Coast following Hurricane Katrina. State Farm's sophisticated public relation machine falsely portrays State Farm as a "victim" in this Katrina litigation. In true Orwellian fashion, black is portrayed as white, evil as good, and good as evil.

12. A striking example of this tactic is footnote 2 of the Memorandum, which suggests that my letter of recommendation involved coercion, duress, or harassment. To the contrary, my letter was entirely proper, and it was State Farm who acted wrongfully in making direct solicitations of our clients, while they were involuntarily without effective representation for a short period of time. See Exhibit 1 attached. The ethical and moral high road would have been for State Farm to have

allowed these vulnerable people in this vulnerable time to have obtained new counsel, to have at least waited for the 45 days granted by the Court to expire, before contacting them. But State Farm doesn't know where the high road is, and is not interested in seeking it.

Further affiant sayeth not.

This the 21st day of May, 2008.

John W. (Don) Barrett

Sworn to and subscribed before me on this the 21st day of May, 2007.

(SEAL) LENA P. DAVIS, HOLMES COUNTY, MS NOTARY PUBLIC My Commission Expires June 5, 2009

Notary Public

My Commission Expires: 6-5-09

State Farm Insurance Companies

April 18, 2008

[redacted]
[redacted]
GULFPORT MS 395039000

Re: Claim Number: [redacted]
Date of Loss: 8/29/2005

Dear Policyholder:

Your prior attorneys have been disqualified by an Order of the United States District Court. If you have retained a new attorney, please have your attorney contact Scot Spragins.

Hickman, Goza & Spragins
P O Box 668
1305 Madison Avenue
Oxford, MS 38655
(662) 234-4000
sspragins@HICKMANLAW.com

We would like to see if we can resolve any remaining issues without the need for further litigation. Please call 228-385-3239 if you are interested.

Sincerely,

State Farm Fire & Casualty Company

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

GLENDA SHOWS, ET AL.

vs. **Civil Action No.:**
1:07-cv-709-WHB-LRA

STATE FARM MUTUAL AUTOMOBILE, INSURANCE COMPANY, ET AL.

DECLARATION OF MICHAEL HAMILTON

I, Michael Hamilton, pursuant to 28 U.S.C. §1746 declare:

1. I am an attorney with the Nashville, Tennessee office of Provost Umphrey Law Firm, LLP. I am the only attorney in Provost Umphrey's Nashville office.
2. Provost Umphrey's Nashville Office is located at One Burton Hills Boulevard, Suite 380, Nashville, Tennessee 37215.
3. The space occupied by Provost Umphrey's Nashville office is subleased from Barrett Law Office, P.A. The sublease for Provost Umphrey's space commenced on June 15, 2007.
4. Provost Umphrey's Nashville Office maintains its own separate telephone, fax, copier and computer systems.
5. Provost Umphrey and Barrett Law Office both employ K. S. Coomer on a part time basis. Provost Umphrey pays Ms. Coomer through its separate payroll department for ten hours' work per week.

6. I have worked as co-counsel with Patrick Barrett, the managing attorney of the Nashville office of Barrett Law Office, P.A. since the Fall of 2003 on approximately 5 cases.
7. None of the cases in which Patrick Barrett and I are now or have been jointly involved are related to Hurricane Katrina Litigation or to bad faith insurance litigation.
8. I was not aware of Provost Umphrey's possible involvement in the Katrina Litigation until April 21, 2008, after Don Barrett had recommended Provost Umphrey to the Katrina Litigation clients.

I declare the above to be true to my knowledge and belief under penalty of perjury.

Michael Hamilton

Dated June 4, 2008

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State Farm reaches out-of-court settlement in Katrina cases

May 8, 2008 6:54 PM ET

AP Associated Press
All Associated Press news

NEW ORLEANS (AP) - The nation's largest insurance company has settled out of court with more than a dozen Mississippi policyholders whose lawyers were barred from representing them in lawsuits against the insurer over Hurricane Katrina damage, according to court filings Thursday.

State Farm Fire and Casualty Co. initiated or reopened settlement talks with policyholders after a federal judge in April disqualified their attorneys from handling up to 200 lawsuits against the Bloomington, Ill.-based company.

At least 13 homeowners were representing themselves, without an attorney, when they agreed to settle their suits for undisclosed terms, Thursday's court filings show.

"We've always been willing to re-engage, one on one, with our customers about their claims," State Farm spokesman Phil Supple said. "We're willing to speak with them whether they're represented by counsel or not."

State Farm made settlement overtures in letters it sent to policyholders whose lawyers were disqualified last month by U.S. District Judge L.T. Senter Jr. in Gulfport, Miss.

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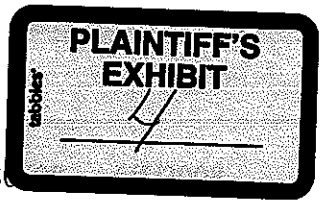
Senter's ruling cited ethical breaches by well-known tort lawyer Richard "Dickie" Scruggs, who led a team of attorneys in filing hundreds of cases against State Farm after the August 2005 hurricane.

Senter said Scruggs made improper payments to Cori and Kerri Rigsby, sisters who were helping State Farm adjust Katrina claims on the coast. The Rigsby sisters secretly copied internal State Farm records and gave them to Scruggs, who later hired them as consultants.

Scruggs withdrew from representing dozens of State Farm policyholders after he was indicted last year on charges that he tried to bribe a state judge. He has pleaded guilty to a conspiracy charge and is awaiting sentencing.

Senter also barred Scruggs' former associates from working on the State Farm cases because the judge said they knew about the improper payments to the Rigsby sisters and didn't try to stop them.

Fabin and Doris Ladnier, who sued State Farm for denying a claim on their Biloxi rental property, negotiated a settlement without an attorney. Doris Ladnier said she and her husband wanted to avoid the hassle of hiring a new lawyer.



"It's very satisfying," she said of the settlement. "I think it turned out for the best."

Judy Guice, a lawyer who has been hired by several former clients of the Scruggs Katrina Group, said she would advise policyholders to consult an attorney before they reach a settlement. But she doesn't fault anyone for forging ahead without one.

"People have got to be able to put this behind them and move on with their lives," she said.

Meanwhile, state insurance regulators are wrapping up a long-awaited report on State Farm's handling of policyholder claims after Katrina. The 18-month study should be completed by the end of May, Deputy Insurance Commissioner Lee Harrell said Thursday.

Hundreds of coastal property owners have sued State Farm for denying their claims after the August 2005 hurricane. Many of the lawsuits challenged the company's refusal to pay for damage from Katrina's storm surge.

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