South Carolina Bar
Continuing Legal Education Division

2019 Masters-In-Equity Bench Bar

19-41

Friday, October 11, 2019

presented by
The South Carolina Bar
Continuing Legal Education Division

http://www.scbar.org/CLE

SC Supreme Court Commission on CLE Course No. 196251

2019 Masters-In-Equity Bench Bar
DATE

This program qualifies for 6.0 MCLE, 1.0 LEPR, 1.0 SA/MH, 2.0 BKY
SC Supreme Commission on CLE Course # 196251

8:30 a.m. **Registration**

8:55 a.m. **Welcome and Opening Remarks**
Hon. Joseph K. Coffey
Coffey & McKenzie, PA

9:00 a.m. **Emotional Intelligence for Lawyers and Judges**
Henry L. Deneen
Murphy & Grantland, PA

10:00 a.m. **The ABA and Cybersecurity Ethics for Lawyers**
Jamie Khan
McCullough Khan, LLC
Richard J. Krenmayer
Stasmayer Inc.

11:00 a.m. **Break**

11:15 a.m. **Equity Principles**
Stephen A. Spitz
Stevens & Lee

12:15 p.m. **Lunch (on your own)**

1:30 p.m. **Resistible Force Meets Immovable Object: How Your Findings of Fact and Conclusions of Law Fare on Appeal**
Hon. George "Buck" James, Jr.
S.C. Supreme Court

2:30 p.m. **Break**

2:45 p.m. **Pinckney Act**
W.T. Geddings, Jr.
Geddings Law Firm

3:45 p.m. **Orders of Reference and Surplus Funds and Bankruptcy, Oh My!**
Reginald P. Corley
Scott & Corley, PA
Hon. John E. Waites
U.S. Bankruptcy Court

4:45 p.m. **Adjourn**

Masters-In-Equity Bench Bar

SPEAKER BIOGRAPHIES
(by order of presentation)

Hon. Joseph K. Coffey
Coffey & McKenzie, PA
Manning, SC
(course planner)

Judge Coffey received his Bachelor of Science in Business Administration from The Citadel in 1992, and his J.D. degree from the University of South Carolina School of Law in 1999; Judge Coffey was admitted to the South Carolina Bar in 2000 and is a partner in the law firm of Coffey & McKenzie, P.A. of Manning. Judge Coffey was appointed Master in Equity for Clarendon County in June 2016. Judge Coffey is an active member of the Manning Rotary Club, Citadel Club of Sumter and Clarendon, Synovus Bank Advisory Board, Manning United Methodist Church, and serves on the Board of Trustees of the Garden City Chapel. Judge Coffey is married to Katherine S. Coffey, and they have two children: Merrix R. Coffey and Walker K. Coffey.

Jamie Khan
McCullough Khan, LLC
Charleston, SC

Jamie is a founding member and attorney with McCullough Khan, LLC in Charleston, South Carolina. He primarily practices in the fields of commercial and business litigation, land use and real property litigation, and privacy/information security/cyber security. He has an active Circuit Court mediation practice. He is a Certified Information Privacy Professional/United States (CIPP/US) by the International Association of Privacy Professionals as well as a S.C. Supreme Court Certified Circuit Court Mediator.

Jamie is a member of the South Carolina Bar Technology Committee and also volunteers as a member of the South Carolina Fee Dispute Board. Jamie recently completed his term as a Member of the Citadel Board of Visitors, the governing body of The Citadel, The Military College of South Carolina. Prior to his service on the Board of Visitors, he was the Chairman and President of The Citadel Alumni Association and a member of the Board of Directors of The Citadel Foundation. Jamie has been AV Preeminent® rated by Martindale-Hubbell® for his legal knowledge, analytical capabilities, judgment, communication ability and legal experience since 2014.

Jamie graduated from The Citadel in 2000 and was a member of the inaugural class of The Charleston School of Law (2007). Prior to attending law school, he was a patrolman and detective with the Charleston Police Department.

Richard J. Krenmayer

Stasmayer Inc.
Charleston, SC

Richard Krenmayer is the Co-Founder and CEO of Stasmayer, Incorporated, a managed IT and IT Security company. He attended the University of Massachusetts Dartmouth with his business partner, David Stasaitis, where they both received a B.S. in Business Information Systems and started Stasmayer, Incorporated. Consulting businesses since age 12, he is an industry veteran that loves to make a great story become reality by helping others build great businesses through the power of technology. He always says and truly believes that, "This is the time to be alive."

Richard is one of the founding members of the University of South Carolina Cybersecurity Legal Task Force which had its Inaugural Institute in April and expects all of you to attend this magnificent 2nd annual event in 2020.

As cybersecurity continues to evolve and come to the forefront of everyone's mind in business, he has given multiple speeches and CLEs to provide a call to action on the subject and is a co-author for the latest edition of the South Carolina BAR's Paralegal Survival Guide having written the section on cybersecurity.

In his other life, Rick is a professional songwriter and performer since age 6, enjoys traveling to new places around the world, being a weather hobbyist, reading lots of books, speaking other languages and always learning more, all while raising his son, who's interest in machines dwarfs his own interest in business and technology.

Henry L. Deneen

Murphy & Grantland, PA
Greer, SC

Henry L. Deneen joined Murphy & Grantland in July 2016. He began his legal career as a litigator in private practice, later being appointed a municipal judge for the city of West Columbia, SC. He served as Chief Legal Counsel for then-South Carolina Governor, David M. Beasley from 1995 through 1997. Beasley and Deneen co-founded The Center for Global Strategies, Ltd. (CGS), a non-profit organization connecting businesspeople to international initiatives. He currently serves as the Executive Director of CGS. Deneen most recently served as President of Greater Europe Mission, during which time he earned a Doctorate in Executive Leadership, with a focus on Emotional Intelligence. He now regularly offers CLE-accredited courses on Emotional Intelligence designed specifically for lawyers. Deneen also founded Blindspot Solutions, LLC in July, 2019, focusing on EI training for professionals and Executive Coaching.

A South Carolina native, he serves clients in matters involving the defense of South Carolina businesses and through mediation primarily in the upstate from his home in the Greenville area.

Deneen is certified as a Mediator in South Carolina Circuit, Family, and Probate Courts. He received his Juris Doctor from the University of South Carolina School of Law. He and his wife, Celia, have been married for over 30 years and have four children: Laura, Lee, Leslie and Layna, two of whom are married.

Stephen A. Spitz

Stevens & Lee
Charleston, SC

I claim, upon information and belief, to be a Member of the S.C. (active) and Nebraska (inactive) bars and have practiced and taught and written about Property, Real Estate Transaction, and Equity for a number of years. All the rest is just details.

I do hold the rather unique honor of having received a license (along with law) to hold a license to tell fortune telling in Beaufort County. See S.C. Code Section 40-41-310. Fortunately, I am very happy (and so is the whole world) to report that I have never told a single fortune – in Beaufort County or elsewhere. By the way, the details about how that license came to be, is at least a "one and perhaps even two scotch story".

Hon. George "Buck" James, Jr

S.C. Supreme Court
Sumter, SC

Justice James was born June 2, 1960 in Savannah, Ga. and grew up in Sumter. He is the son of the late Ren F. James and the late George C. James. He is married to the former Dena Owen. They have a daughter, Alston, and a son, George. Alston is a speech pathologist in Rock Hill, and George is an attorney in Columbia.

Justice James graduated cum laude from The Citadel in 1982 with a Bachelor of Science degree in Business Administration. He earned his law degree from the University of South Carolina School of Law in 1985. Justice James joined the firm of Richardson, James & Player and practiced with his father, George C. James, and with the late Henry B. Richardson, Jr., Thomas E. Player, Jr., and his brother, John E. James, III. In 2000, the firm merged with the firm of Lee, Erter, Wilson, Holler & Smith and became known as Lee, Erter, Wilson, James, Holler & Smith, LLC. Justice James was a partner in that firm until his election to the circuit court bench in 2006.

Justice James was sworn in as a resident circuit judge for the Third Judicial Circuit on July 1, 2006. He served as a Business Court Judge and was the 2009 recipient of the Matthew J. Perry Civility Award from the Richland County Bar Association. Justice James was elected to the Supreme Court on February 1, 2017 and was sworn in on February 7, 2017.

In addition to his membership in the South Carolina Bar and the Sumter County Bar Association, Justice James is a member of the South Carolina Commission on Continuing Legal Education and is a member of the Judicial Division of the American Bar Association. He is a member of the Executive Committee of the ABA Appellate Judges Conference and is also a member of the Appellate Judges Education Institute. He is a former member of the South Carolina Defense Trial Attorneys Association, and the Defense Research Institute.

W.T. Geddings, Jr.

Geddings Law Firm
Manning, SC

William Thomas Geddings, Jr. (Tommy) is from Manning, South Carolina. He obtained his BS Degree in Accounting from the University of South Carolina and his Juris Doctor from the University of South Carolina School of Law. He is admitted to the South Carolina Bar, Georgia Bar

and Federal Courts. He is a Court-Certified Mediator and Arbitrator and frequently serves as a Special Referee for Clarendon County and surrounding counties. He currently serves on the SC Bar's Ethics Advisory Committee. He is a General Practitioner and currently his practice predominately involves Family Law, Real Estate, Civil Litigation and Estate work. He has written several articles for the South Carolina Lawyer magazine and spoken at several bar meetings and conferences.

He is married to the former Jane Ulmer from Walterboro, SC and is the father of two children, Mary, who is studying to become a Physicians Assistant and Will, who is studying to become a Chiropractor. He is a proud member of the Alice Drive Baptist Church in Sumter, South Carolina and just completed a two year term as the international president of the Sigma Chi Fraternity. He is a member of numerous civic and community organizations and enjoys spending time with his family, travelling and movies.

Reginald P. Corley

Scott & Corley, PA
Columbia, SC

REGINALD (REGGIE) P. CORLEY is the Managing Attorney at Scott & Corley, P.A. He graduated with a B.A. degree from Furman University and then completed his Juris Doctorate at the University of South Carolina School of Law. Reggie has centered his practice on the default mortgage and real estate industries, representing mortgage lenders and servicers, title insurance companies, government agencies, and government-sponsored enterprises in mortgage foreclosure, bankruptcy, property clearance, and creditor rights litigation actions throughout South Carolina. He frequently speaks at onsite training sessions and conferences for banks, lenders, and mortgage servicers throughout the country. Mr. Corley is rated AV Preeminent from Martindale-Hubbell and is a repeat selection to Best Lawyers in America in the field of Mortgage Banking Foreclosure Law, and Super Lawyers – Rising Stars. Mr. Corley is also a 2018 recipient of the South Carolina Lawyers Weekly Leadership in Law award and is a Riley Diversity Leadership Fellow within the diversity leadership program at Furman University. He is a current member of the Practice and Procedure Committee and the Unauthorized Practice of Law Committee of the South Carolina Bar Association and is the past President of the Lexington County Bar Association.

Hon. John E. Waites

U.S. Bankruptcy Court
Florence, SC

The Honorable John E. Waites was appointed as a United States Bankruptcy Judge for the District of South Carolina on June 27, 1994 and was reappointed in 2008. He served as the District's Chief Bankruptcy Judge from March 1, 2006 until March 1, 2013. He presently serves as President of the National Conference of Bankruptcy Judges (NCBJ) and a member of the Judicial Conference Committee on the Administration of the Bankruptcy System (having been appointed by Chief Justice Roberts in 2013). Judge Waites is a fellow of the American College of Bankruptcy, a founding member of the J. Bratton Davis Bankruptcy American Inn of Court and the recipient of the South Carolina Bankruptcy Law Association's J. Bratton Davis Professionalism Award, the Credit Abuse Resistance Education (CARE) Lifetime Achievement Award, the Legal Services Corporation's Pro Bono Award, and the United States District Court Judge Matthew J. Perry Civility

Award. He has been a twelve-year member of the South Carolina Access to Justice Commission of the South Carolina Supreme Court and is a member of the South Carolina Bar's Pro Bono Board.

Table of Contents

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The ABA and Cybersecurity Ethics for Lawyers

Jamie Khan
Richard Krenmayer

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The ABA and Cybersecurity Ethics for Lawyers

2019 Masters-In-Equity Bench Bar

TABLE OF CONTENTS

The ABA and Cybersecurity Ethics for Lawyers

2019 Masters-In-Equity Bench Bar

Introduction

Cybersecurity and privacy discussions, regulations, statutes and news articles about breaches are becoming more and more prevalent daily. These discussions and requirements are important to lawyers as lawyers hold a massive amount of confidential data in electronic form. Lawyers and law firms are targets for various cyber and information security related attacks to include spear fishing, wire transfer fraud, ransomware attack, and business email compromise.

The American Bar Association ("ABA") has recognized these threats to lawyers in the digital age of document storage and communication. The ABA has adopted "technology amendments" to the Model Rules and has also authored at least two formal opinions on the subject.

This ethics hour instruction component to the 2019 Masters-In-Equity Bench Bar meeting is designed to educate the lawyers and judges on 1) what the ABA is doing in the form of rule amendments and formal opinions to educate and require of lawyers in the digital age; 2) explore the S.C. Rules of Professional Responsibility on these topics; and 3) bring awareness to these critical issues and how you can best protect yourself and your firm.

A few things are clear 1) technology is swiftly changing; 2) data breaches are now common; 3) information security is necessary; 4) industries and professions (including lawyers) are adopting new rules and regulations to combat these issues; and 5) the regulations will continue to tighten on these issues and require compliance. This short study will show where and how this is likely to impact lawyers and the practice of law in the very near future.

ABA Model Rule Technology Amendments:

A brief summary of the actual text of a portion of the 2012 ABA technology amendments to the model rules and comments is necessary for the context of a comparison to the S.C. Rules of Professional Responsibility and an understanding of the ABA Formal Opinions on this subject. Below are excerpts of the relevant rule and comment amendments on this subject. South Carolina has not yet adopted these amendments. However, as we will see, there may be enough requirements in our rules and comments to essentially arrive at the same obligations.

ABA Model Rule 1.1 (modified comment): Competence

The ABA modified comment [8] to Rule 1.1 to read as follows:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (emphasis added).

ABA Model Rule 1.6(c): Confidentiality

In 2012, as part of the amendments to the model rules, the ABA enacted Rule 1.6(c) which states: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." (emphasis added).

ABA Model Rule 1.6(c) (modified comment): Confidentiality

The ABA modified comment [18] of Rule 1.6(c) to read:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) *if the lawyer has made reasonable efforts to prevent the access or disclosure*. (emphasis added).

ABA Formal Opinion 477 – Securing Communication of Protected Client Information

In this formal opinion enacted on May 11, 2017, the ABA took the opportunity to discuss the history of the technology amendments and the specifics of them in the context of a lawyer's duty to secure communications of protected client information. The ABA noted that there is a serious threat from cybercriminal elements to target electronic systems and data, including lawyers. The ABA recognized the threats, the prevalence of electronic communications by lawyers, rapidly changing technology and the need to take action when it adopted ABA Formal Opinion 477.

The ABA noted that lawyers must exercise "reasonable efforts" when using technology in communicating about client matters. The ABA noted that what constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. These nonexclusive factors include:

- The sensitivity of the information,
- The likelihood of disclosure if additional safeguards are not employed,
- The cost of employing additional safeguards, and
- The extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

The ABA also took the opportunity to set forth considerations for guidance that should be used by lawyers when determining what reasonable steps should be taken to protect communication of client protected information:

- Understand the nature of the threat,
- Understand how client confidential information is transmitted and where it is stored,

- Understand and use reasonable electronic security measures,
- Determine how electronic communications about client matters should be protected,
- Label client confidential information,
- Train lawyers and nonlawyer assistants in technology and information security, and
- Conduct due diligence on vendors providing communication technology,

ABA Formal Opinion 483 – Lawyers' Obligations after an Electronic Data Breach or Cyberattack

In this formal opinion enacted on October 17, 2018, the ABA again discussed the technology amendments, ABA Formal Opinion 477 and set forth a lawyer's obligation to monitor for a breach and action to take when there is an incident.

While being prepared for risks is crucial, how you respond to security events and incidents is just as important. The ABA in Formal Opinion 483 sets the groundwork clearly. Law firms must not just put safeguards (administrative, physical and digital) in place, but must have the proper apparatus in which to handle breaches. Law firms have an obligation to monitor for a data breach and there are ready made solutions and vendors that can be brought to the table as a trusted partner. Without this cornerstone in the digital portion of your security program, you will have little chance of finding, never mind stopping a breach. Having the right people partnered with your firm is key because the firm not knowing what needs to be known, will never allow a firm to determine what occurred and the extent of the damage or exfiltration of client and confidential firm data. In addition, education and training in these areas are equally important to understand the threats and protect against them.

The ABA set forth its standard for monitoring and responding to data breaches in Formal Opinion 477, tied to model Rule 1.1 (Competence). The ABA stated that lawyers have the following obligations (more expanded details are contained in the actual opinion):

- Obligation to monitor for a data breach,
- Stopping the breach and restoring systems, and
- Determining what occurred,

The ABA also discussed a lawyer's obligations to current and former clients related to notifying these clients of the incident, as well as any applicable state or federal breach notification laws.

Conclusion

The ABA, by its actions, has shown its attempts to be on the forefront of cybersecurity for lawyers. The ABA's guidance should not be ignored even if a state is yet to formally adopt the amendments. As we have seen with other industry specific rules and regulations, we believe these requirements will soon be base line requirements for lawyers nationally. While South Carolina has not adopted these recent technology amendments at this moment, there are already comments in our rules which arguably require similar obligations of lawyers. This will be discussed in our presentation.

RULE 1.1 - COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

...

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

RULE 1.6 - CONFIDENTIALITY OF INFORMATION

...

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

...

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

Formal Opinion 477 **May 11, 2017**

Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

I. Introduction

In Formal Opinion 99-413 this Committee addressed a lawyer's confidentiality obligations for e-mail communications with clients. While the basic obligations of confidentiality remain applicable today, the role and risks of technology in the practice of law have evolved since 1999 prompting the need to update Opinion 99-413.

Formal Opinion 99-413 concluded: "Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client's representation."[1]

Unlike 1999 where multiple methods of communication were prevalent, today, many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients.[2]

Since 1999, those providing legal services now regularly use a variety of devices to create, transmit and store confidential communications, including desktop, laptop and notebook computers, tablet devices, smartphones, and cloud resource and storage locations. Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties.[3]

In 2012 the ABA adopted "technology amendments" to the Model Rules, including updating the Comments to Rule 1.1 on lawyer technological competency and adding paragraph (c)

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413, at 11 (1999).

2. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); ABA COMMISSION ON ETHICS 20/20 REPORT TO THE HOUSE OF DELEGATES (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_outsourcing_posting.authcheckdam.pdf.

3. *See* JILL D. RHODES & VINCENT I. POLLEY, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 7 (2013) [hereinafter ABA CYBERSECURITY HANDBOOK].

and a new Comment to Rule 1.6, addressing a lawyer's obligation to take reasonable measures to prevent inadvertent or unauthorized disclosure of information relating to the representation.

At the same time, the term "cybersecurity" has come into existence to encompass the broad range of issues relating to preserving individual privacy from intrusion by nefarious actors throughout the Internet. Cybersecurity recognizes a post-Opinion 99-413 world where law enforcement discusses hacking and data loss in terms of "when," and not "if."[4] Law firms are targets for two general reasons: (1) they obtain, store and use highly sensitive information about their clients while at times utilizing safeguards to shield that information that may be inferior to those deployed by the client, and (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client.[5]

The Model Rules do not impose greater or different duties of confidentiality based upon the method by which a lawyer communicates with a client. But how a lawyer should comply with the core duty of confidentiality in an ever-changing technological world requires some reflection.

Against this backdrop we describe the "technology amendments" made to the Model Rules in 2012, identify some of the technology risks lawyers' face, and discuss factors other than the Model Rules of Professional Conduct that lawyers should consider when using electronic means to communicate regarding client matters.

II. Duty of Competence

Since 1983, Model Rule 1.1 has read: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] The scope of this requirement was clarified in 2012 when the ABA recognized the increasing impact of technology on the practice of law and the duty of lawyers to develop an understanding of that technology. Thus, Comment [8] to Rule 1.1 was modified to read:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, <u>including the benefits and risks associated with relevant technology</u>, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)[7]

4. "Cybersecurity" is defined as "measures taken to protect a computer or computer system (as on the Internet) against unauthorized access or attack." CYBERSECURITY, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/cybersecurity (last visited Sept. 10, 2016). In 2012 the ABA created the Cybersecurity Legal Task Force to help lawyers grapple with the legal challenges created by cyberspace. In 2013 the Task Force published The ABA Cybersecurity Handbook: A Resource For Attorneys, Law Firms, and Business Professionals.

5. Bradford A. Bleier, Unit Chief to the Cyber National Security Section in the FBI's Cyber Division, indicated that "[l]aw firms have tremendous concentrations of really critical private information, and breaking into a firm's computer system is a really optimal way to obtain economic and personal security information." Ed Finkel, Cyberspace Under Siege, A.B.A. J., Nov. 1, 2010.

6. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 37-44 (Art Garwin ed., 2013).

7. *Id.* at 43.

Regarding the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

> Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document. [8]

III. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the rule and the commentary about what efforts are required to preserve the confidentiality of information relating to the representation. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.[9] The 2012 modification added a new duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[10]

Amended Comment [18] explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

8. ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

9. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2016).

10. *Id.* at (c).

At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.[11]

Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

> . . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.[12]

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[13]

11. The 20/20 Commission's report emphasized that lawyers are not the guarantors of data safety. It wrote: "[t]o be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances."

12. ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 48-49.

13. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2013). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 8, at 5.

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In the technological landscape of Opinion 99-413, and due to the reasonable expectations of privacy available to email communications at the time, unencrypted email posed no greater risk of interception or disclosure than other non-electronic forms of communication. This basic premise remains true today for routine communication with clients, presuming the lawyer has implemented basic and reasonably available methods of common electronic security measures.[14] Thus, the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication.

However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors to determine what effort is reasonable.

While it is beyond the scope of an ethics opinion to specify the reasonable steps that lawyers should take under any given set of facts, we offer the following considerations as guidance:

1. Understand the Nature of the Threat.

   Understanding the nature of the threat includes consideration of the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion. Client matters involving proprietary information in highly sensitive industries such as industrial designs, mergers and acquisitions or trade secrets, and industries like healthcare, banking, defense or education, may present a higher risk of data theft.[15] "Reasonable efforts" in higher risk scenarios generally means that greater effort is warranted.

14. See item 3 below.

15. *See, e.g.*, Noah Garner, *The Most Prominent Cyber Threats Faced by High-Target Industries*, TREND-MICRO (Jan. 25, 2016), http://blog.trendmicro.com/the-most-prominent-cyber-threats-faced-by-high-target-industries/.

2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.

A lawyer should understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information. Understanding these processes will assist a lawyer in managing the risk of inadvertent or unauthorized disclosure of client-related information. Every access point is a potential entry point for a data loss or disclosure. The lawyer's task is complicated in a world where multiple devices may be used to communicate with or about a client and then store those communications. Each access point, and each device, should be evaluated for security compliance.

3. Understand and Use Reasonable Electronic Security Measures.

Model Rule 1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. As comment [18] makes clear, what is deemed to be "reasonable" may vary, depending on the facts and circumstances of each case. Electronic disclosure of, or access to, client communications can occur in different forms ranging from a direct intrusion into a law firm's systems to theft or interception of information during the transmission process. Making reasonable efforts to protect against unauthorized disclosure in client communications thus includes analysis of security measures applied to both disclosure and access to a law firm's technology system and transmissions.

A lawyer should understand and use electronic security measures to safeguard client communications and information. A lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software. Each of these measures is routinely accessible and reasonably affordable or free. Lawyers may consider refusing access to firm systems to devices failing to comply with these basic methods. It also may be reasonable to use commonly available methods to remotely disable lost or stolen devices, and to destroy the data contained on those devices, especially if encryption is not also being used.

Other available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems.

In the electronic world, "delete" usually does not mean information is permanently deleted, and "deleted" data may be subject to recovery. Therefore, a lawyer should consider

whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all.

4. Determine How Electronic Communications About Clients Matters Should Be Protected.

Different communications require different levels of protection. At the beginning of the client-lawyer relationship, the lawyer and client should discuss what levels of security will be necessary for each electronic communication about client matters. Communications to third parties containing protected client information requires analysis to determine what degree of protection is appropriate. In situations where the communication (and any attachments) are sensitive or warrant extra security, additional electronic protection may be required. For example, if client information is of sufficient sensitivity, a lawyer should encrypt the transmission and determine how to do so to sufficiently protect it,[16] and consider the use of password protection for any attachments. Alternatively, lawyers can consider the use of a well vetted and secure third-party cloud based file storage system to exchange documents normally attached to emails.

Thus, routine communications sent electronically are those communications that do not contain information warranting additional security measures beyond basic methods. However, in some circumstances, a client's lack of technological sophistication or the limitations of technology available to the client may require alternative non-electronic forms of communication altogether.

A lawyer also should be cautious in communicating with a client if the client uses computers or other devices subject to the access or control of a third party.[17] If so, the attorney-client privilege and confidentiality of communications and attached documents may be waived, and the lawyer must determine whether it is prudent to warn a client of the dangers associated with such a method of communication.[18]

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16. *See* Cal. Formal Op. 2010-179 (2010); ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 121. Indeed, certain laws and regulations require encryption in certain situations. *Id.* at 58-59.

17. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011) (discussing the duty to protect the confidentiality of e-mail communications with one's client); Scott v. Beth Israel Med. Center, Inc., Civ. A. No. 3:04-CV-139-RJC-DCK, 847 N.Y.S.2d 436 (Sup. Ct. 2007); Mason v. ILS Tech., LLC, 2008 WL 731557, 2008 BL 298576 (W.D.N.C. 2008); Holmes v. Petrovich Dev Co., LLC, 191 Cal. App. 4th 1047 (2011) (employee communications with lawyer over company owned computer not privileged); Bingham v. BayCare Health Sys., 2016 WL 3917513, 2016 BL 233476 (M.D. Fla. July 20, 2016) (collecting cases on privilege waiver for privileged emails sent or received through an employer's email server).

18. some state bar ethics opinions have explored the circumstances under which e-mail communications should be afforded special security protections, *See, e.g.*, Tex. Prof'l Ethics Comm. Op. 648 (2015) that identified six situations in which a lawyer should consider whether to encrypt or use some other type of security precaution:

- communicating highly sensitive or confidential information via email or unencrypted email connections;
- sending an email to or from an account that the email sender or recipient shares with others;
- sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer…;
- sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;

5. Label Client Confidential Information.

Lawyers should follow the better practice of marking privileged and confidential client communications as "privileged and confidential" in order to alert anyone to whom the communication was inadvertently disclosed that the communication is intended to be privileged and confidential. This can also consist of something as simple as appending a message or "disclaimer" to client emails, where such a disclaimer is accurate and appropriate for the communication.[19]

Model Rule 4.4(b) obligates a lawyer who "knows or reasonably should know" that he has received an inadvertently sent "document or electronically stored information relating to the representation of the lawyer's client" to promptly notify the sending lawyer. A clear and conspicuous appropriately used disclaimer may affect whether a recipient lawyer's duty under Model Rule 4.4(b) for inadvertently transmitted communications is satisfied.

6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.

Model Rule 5.1 provides that a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 also provides that lawyers having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. In addition, Rule 5.3 requires lawyers who are responsible for managing and supervising nonlawyer assistants to take reasonable steps to reasonably assure that the conduct of such assistants is compatible with the ethical duties of the lawyer. These requirements are as applicable to electronic practices as they are to comparable office procedures.

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being

- sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
- sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

19. *See* Veteran Med. Prods. v. Bionix Dev. Corp., Case No. 1:05-cv-655, 2008 WL 696546 at *8, 2008 BL 51876 at *8 (W.D. Mich. Mar. 13, 2008) (email disclaimer that read "this email and any files transmitted with are confidential and are intended solely for the use of the individual or entity to whom they are addressed" with nondisclosure constitutes a reasonable effort to maintain the secrecy of its business plan).

implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

7. Conduct Due Diligence on Vendors Providing Communication Technology.

Consistent with Model Rule 1.6(c), Model Rule 5.3 imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's "conduct is compatible with the professional obligations of the lawyer."

In ABA Formal Opinion 08-451, this Committee analyzed Model Rule 5.3 and a lawyer's obligation when outsourcing legal and nonlegal services. That opinion identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer's due diligence and duty of supervision. Those factors also apply in the analysis of vendor selection in the context of electronic communications. Such factors may include:

- reference checks and vendor credentials;
- vendor's security policies and protocols;
- vendor's hiring practices;
- the use of confidentiality agreements;
- vendor's conflicts check system to screen for adversity; and
- the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.[20]

Since the issuance of Formal Opinion 08-451, Comment [3] to Model Rule 5.3 was added to address outsourcing, including "using an Internet-based service to store client information." Comment [3] provides that the "reasonable efforts" required by Model Rule 5.3 to ensure that the nonlawyer's services are provided in a manner that is compatible with the lawyer's professional obligations "will depend upon the circumstances." Comment [3] contains suggested factors that might be taken into account:

- the education, experience, and reputation of the nonlawyer;
- the nature of the services involved;
- the terms of any arrangements concerning the protection of client information; and
- the legal and ethical environments of the jurisdictions in which the services will be performed particularly with regard to confidentiality.

20. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. [2] & [8] (2016).

Comment [3] further provides that when retaining or directing a nonlawyer outside of the firm, lawyers should communicate "directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."[21] If the client has not directed the selection of the outside nonlawyer vendor, the lawyer has the responsibility to monitor how those services are being performed.[22]

Even after a lawyer examines these various considerations and is satisfied that the security employed is sufficient to comply with the duty of confidentiality, the lawyer must periodically reassess these factors to confirm that the lawyer's actions continue to comply with the ethical obligations and have not been rendered inadequate by changes in circumstances or technology.

IV. Duty to Communicate

Communications between a lawyer and client generally are addressed in Rule 1.4. When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved.[23] The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted. Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client. Whether a lawyer is using methods and practices to comply with administrative, statutory, or international legal standards is beyond the scope of this opinion.

A client may insist or require that the lawyer undertake certain forms of communication. As explained in Comment [18] to Model Rule 1.6, "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule."

21. The ABA's catalog of state bar ethics opinions applying the rules of professional conduct to cloud storage arrangements involving client information can be found at: http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.

22. By contrast, where a client directs the selection of a particular nonlawyer service provider outside the firm, "the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer." MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [4] (2017). The concept of monitoring recognizes that although it may not be possible to "directly supervise" a client directed nonlawyer outside the firm performing services in connection with a matter, a lawyer must nevertheless remain aware of how the nonlawyer services are being performed. ABA COMMISSION ON ETHICS 20/20 REPORT 105C, at 12 (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.authcheckdam.pdf.

23. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(1) & (4) (2016).

V. Conclusion

Rule 1.1 requires a lawyer to provide competent representation to a client. Comment [8] to Rule 1.1 advises lawyers that to maintain the requisite knowledge and skill for competent representation, a lawyer should keep abreast of the benefits and risks associated with relevant technology. Rule 1.6(c) requires a lawyer to make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of or access to information relating to the representation.

A lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 483 **October 17, 2018**

Lawyers' Obligations After an Electronic Data Breach or Cyberattack

Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

Introduction[1]

Data breaches and cyber threats involving or targeting lawyers and law firms are a major professional responsibility and liability threat facing the legal profession. As custodians of highly sensitive information, law firms are inviting targets for hackers.[2] In one highly publicized incident, hackers infiltrated the computer networks at some of the country's most well-known law firms, likely looking for confidential information to exploit through insider trading schemes.[3] Indeed, the data security threat is so high that law enforcement officials regularly divide business entities into two categories: those that have been hacked and those that will be.[4]

In Formal Opinion 477R, this Committee explained a lawyer's ethical responsibility to use reasonable efforts when communicating client confidential information using the Internet.[5] This

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

[2] *See, e.g.*, Dan Steiner, *Hackers Are Aggressively Targeting Law Firms' Data* (Aug. 3, 2017), https://www.cio.com (explaining that "[f]rom patent disputes to employment contracts, law firms have a lot of exposure to sensitive information. Because of their involvement, confidential information is stored on the enterprise systems that law firms use. . . . This makes them a juicy target for hackers that want to steal consumer information and corporate intelligence."); *See also Criminal-Seeking-Hacker' Requests Network Breach for Insider Trading*, Private Industry Notification 160304-01, FBI, CYBER DIVISION (Mar. 4, 2016).

[3] Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, WALL ST. J. (Mar. 29, 2016), https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504.

[4] Robert S. Mueller, III, *Combatting Threats in the Cyber World Outsmarting Terrorists, Hackers and Spies*, FBI (Mar. 1, 2012), https://archives.fbi.gov/archives/news/speeches/combating-threats-in-the-cyber-world-outsmarting-terrorists-hackers-and-spies.

[5] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) ("Securing Communication of Protected Client Information").

opinion picks up where Opinion 477R left off, and discusses an attorney's ethical obligations when a data breach exposes client confidential information. This opinion focuses on an attorney's ethical obligations after a data breach,[6] and it addresses only data breaches that involve information relating to the representation of a client. It does not address other laws that may impose post-breach obligations, such as privacy laws or other statutory schemes that law firm data breaches might also implicate. Each statutory scheme may have different post-breach obligations, including different notice triggers and different response obligations. Both the triggers and obligations in those statutory schemes may overlap with the ethical obligations discussed in this opinion. And, as a matter of best practices, attorneys who have experienced a data breach should review all potentially applicable legal response obligations. However, compliance with statutes such as state breach notification laws, HIPAA, or the Gramm-Leach-Bliley Act does not necessarily achieve compliance with ethics obligations. Nor does compliance with lawyer regulatory rules *per se* represent compliance with breach response laws. As a matter of best practices, lawyers who have suffered a data breach should analyze compliance separately under every applicable law or rule.

Compliance with the obligations imposed by the Model Rules of Professional Conduct, as set forth in this opinion, depends on the nature of the cyber incident, the ability of the attorney to know about the facts and circumstances surrounding the cyber incident, and the attorney's roles, level of authority, and responsibility in the law firm's operations.[7]

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[6] The Committee recognizes that lawyers provide legal services to clients under a myriad of organizational structures and circumstances. The Model Rules of Professional Conduct refer to the various structures as a "firm." A "firm" is defined in Rule 1.0(c) as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." How a lawyer complies with the obligations discussed in this opinion will vary depending on the size and structure of the firm in which a lawyer is providing client representation and the lawyer's position in the firm. *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 (2018) (Responsibilities of Partners, Managers, and Supervisory Lawyers); MODEL RULES OF PROF'L CONDUCT R. 5.2 (2018) (Responsibility of a Subordinate Lawyers); and MODEL RULES OF PROF'L CONDUCT R. 5.3 (2018) (Responsibility Regarding Nonlawyer Assistance).

[7] In analyzing how to implement the professional responsibility obligations set forth in this opinion, lawyers may wish to consider obtaining technical advice from cyber experts. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) ("Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.") *See also, e.g.*, *Cybersecurity Resources*, ABA Task Force on Cybersecurity, https://www.americanbar.org/groups/cybersecurity/resources.html (last visited Oct. 5, 2018).

I. Analysis

A. Duty of Competence

Model Rule 1.1 requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[8] The scope of this requirement was clarified in 2012, when the ABA recognized the increasing impact of technology on the practice of law and the obligation of lawyers to develop an understanding of that technology. Comment [8] to Rule 1.1 was modified in 2012 to read:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)[9]

In recommending the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

> Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to 'keep abreast of changes in the law and its practice.' The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document. [10]

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[8] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018).

[9] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 43 (Art Garwin ed., 2013).

[10] ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

In the context of a lawyer's post-breach responsibilities, both Comment [8] to Rule 1.1 and the 20/20 Commission's thinking behind it require lawyers to understand technologies that are being used to deliver legal services to their clients. Once those technologies are understood, a competent lawyer must use and maintain those technologies in a manner that will reasonably safeguard property and information that has been entrusted to the lawyer. A lawyer's competency in this regard may be satisfied either through the lawyer's own study and investigation or by employing or retaining qualified lawyer and nonlawyer assistants.[11]

1. Obligation to Monitor for a Data Breach

Not every cyber episode experienced by a lawyer is a data breach that triggers the obligations described in this opinion. A data breach for the purposes of this opinion means a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode.

Many cyber events occur daily in lawyers' offices, but they are not a data breach because they do not result in actual compromise of material client confidential information. Other episodes rise to the level of a data breach, either through exfiltration/theft of client confidential information or through ransomware, where no client information is actually accessed or lost, but where the information is blocked and rendered inaccessible until a ransom is paid. Still other compromises involve an attack on a lawyer's systems, destroying the lawyer's infrastructure on which confidential information resides and incapacitating the attorney's ability to use that infrastructure to perform legal services.

Model Rules 5.1 and 5.3 impose upon lawyers the obligation to ensure that the firm has in effect measures giving reasonable assurance that all lawyers and staff in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2], and Model Rule 5.3 Comment [1] state that lawyers with managerial authority within a firm must make reasonable efforts to establish

[11] MODEL RULES OF PROF'L CONDUCT R. 5.3 (2018); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2018); *See also* JILL D. RHODES & ROBERT S. LITT, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 124 (2d ed. 2018) [hereinafter ABA CYBERSECURITY HANDBOOK].

internal policies and procedures designed to provide reasonable assurance that all lawyers and staff in the firm will conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2] further states that "such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

Applying this reasoning, and based on lawyers' obligations (i) to use technology competently to safeguard confidential information against unauthorized access or loss, and (ii) to supervise lawyers and staff, the Committee concludes that lawyers must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data[12] and the use of data. Without such a requirement, a lawyer's recognition of any data breach could be relegated to happenstance --- and the lawyer might not identify whether a breach has occurred,[13] whether further action is warranted,[14] whether employees are adhering to the law firm's cybersecurity policies and procedures so that the lawyers and the firm are in compliance with their ethical duties,[15] and how and when the lawyer must take further action under other regulatory and legal provisions.[16] Thus, just as lawyers must safeguard and monitor the security of paper files and actual client property, lawyers utilizing technology have the same obligation to safeguard and monitor the security of electronically stored client property and information.[17]

While lawyers must make reasonable efforts to monitor their technology resources to detect a breach, an ethical violation does not necessarily occur if a cyber-intrusion or loss of electronic information is not immediately detected, because cyber criminals might successfully hide their

[12] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008).
[13] Fredric Greene, *Cybersecurity Detective Controls—Monitoring to Identify and Respond to Threats*, ISACA J., Vol. 5, 1025 (2015), *available at* https://www.isaca.org/Journal/archives/2015/Volume-5/Pages/cybersecurity-detective-controls.aspx (noting that "[d]etective controls are a key component of a cybersecurity program in providing visibility into malicious activity, breaches and attacks on an organization's IT environment.").
[14] MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2018); MODEL RULES OF PROF'L CONDUCT R. 1.15 (2018).
[15] *See also* MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3 (2018).
[16] The importance of monitoring to successful cybersecurity efforts is so critical that in 2015, Congress passed the Cybersecurity Information Sharing Act of 2015 (CISA) to authorize companies to monitor and implement defensive measures on their information systems, and to foreclose liability for such monitoring under CISA. AUTOMATED INDICATOR SHARING, https://www.us-cert.gov/ais (last visited Oct. 5, 2018); *See also* National Cyber Security Centre "Ten Steps to Cyber Security" [Step 8: Monitoring] (Aug. 9, 2016), https://www.ncsc.gov.uk/guidance/10-steps-cyber-security.
[17] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).

intrusion despite reasonable or even extraordinary efforts by the lawyer. Thus, as is more fully explained below, the potential for an ethical violation occurs when a lawyer does not undertake reasonable efforts to avoid data loss or to detect cyber-intrusion, and that lack of reasonable effort is the cause of the breach.

2. Stopping the Breach and Restoring Systems

When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach. How a lawyer does so in any particular circumstance is beyond the scope of this opinion. As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach.[18] The decision whether to adopt a plan, the content of any plan, and actions taken to train and prepare for implementation of the plan, should be made before a lawyer is swept up in an actual breach. "One of the benefits of having an incident response capability is that it supports responding to incidents systematically (i.e., following a consistent incident handling methodology) so that the appropriate actions are taken. Incident response plans help personnel to minimize loss or theft of information and disruption of services caused by incidents."[19] While every lawyer's response plan should be tailored to the lawyer's or the law firm's specific practice, as a general matter incident response plans share common features:

> The primary goal of any incident response plan is to have a process in place that will allow the firm to promptly respond in a coordinated manner to any type of security incident or cyber intrusion. The incident response process should promptly: identify and evaluate any potential network anomaly or intrusion; assess its nature and scope; determine if any data or information may have been accessed or compromised; quarantine the threat or malware; prevent the exfiltration of information from the firm; eradicate the malware, and restore the integrity of the firm's network.
>
> Incident response plans should identify the team members and their backups; provide the means to reach team members at any time an intrusion is reported, and

[18] *See* ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 202 (explaining the utility of large law firms adopting "an incident response plan that details who has ownership of key decisions and the process to follow in the event of an incident.").

[19] *NIST Computer Security Incident Handling Guide*, at 6 (2012), https://nvlpubs.nist.gov/nistpubs/specialpublications/nist.sp.800-61r2.pdf.

> define the roles of each team member. The plan should outline the steps to be taken at each stage of the process, designate the team member(s) responsible for each of those steps, as well as the team member charged with overall responsibility for the response.[20]

Whether or not the lawyer impacted by a data breach has an incident response plan in place, after taking prompt action to stop the breach, a competent lawyer must make all reasonable efforts to restore computer operations to be able again to service the needs of the lawyer's clients. The lawyer may do so either on her own, if qualified, or through association with experts. This restoration process provides the lawyer with an opportunity to evaluate what occurred and how to prevent a reoccurrence consistent with the obligation under Model Rule 1.6(c) that lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[21] These reasonable efforts could include (i) restoring the technology systems as practical, (ii) the implementation of new technology or new systems, or (iii) the use of no technology at all if the task does not require it, depending on the circumstances.

3. Determining What Occurred

The Model Rules do not impose greater or different obligations on a lawyer as a result of a breach involving client information, regardless of whether the breach occurs through electronic or physical means. Just as a lawyer would need to assess which paper files were stolen from the lawyer's office, so too lawyers must make reasonable attempts to determine whether electronic files were accessed, and if so, which ones. A competent attorney must make reasonable efforts to determine what occurred during the data breach. A post-breach investigation requires that the lawyer gather sufficient information to ensure the intrusion has been stopped and then, to the extent reasonably possible, evaluate the data lost or accessed. The information gathered in a post-breach investigation is necessary to understand the scope of the intrusion and to allow for accurate disclosure to the client consistent with the lawyer's duty of communication and honesty under

[20] Steven M. Puiszis, *Prevention and Response: A Two-Pronged Approach to Cyber Security and Incident Response Planning*, THE PROF'L LAWYER, Vol. 24, No. 3 (Nov. 2017).

[21] We discuss Model Rule 1.6(c) further below. But in restoring computer operations, lawyers should consider whether the lawyer's computer systems need to be upgraded or otherwise modified to address vulnerabilities, and further, whether some information is too sensitive to continue to be stored electronically.

Model Rules 1.4 and 8.4(c).[22] Again, how a lawyer actually makes this determination is beyond the scope of this opinion. Such protocols may be a part of an incident response plan.

B. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the Rule and the commentary about a lawyer's efforts that are required to preserve the confidentiality of information relating to the representation of a client. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.[23] The 2012 modification added a duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[24]

Amended Comment [18] explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and

[22] The rules against dishonesty and deceit may apply, for example, where the lawyer's failure to make an adequate disclosure --- or any disclosure at all --- amounts to deceit by silence. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. [1] (2018) ("Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.").
[23] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2018).
[24] *Id.* at (c).

- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[25]

As this Committee recognized in ABA Formal Opinion 477R:

> At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors.

As discussed above and in Formal Opinion 477R, an attorney's competence in preserving a client's confidentiality is not a strict liability standard and does not require the lawyer to be invulnerable or impenetrable.[26] Rather, the obligation is one of reasonable efforts. Rule 1.6 is not violated even if data is lost or accessed if the lawyer has made reasonable efforts to prevent the loss or access.[27] As noted above, this obligation includes efforts to monitor for breaches of client confidentiality. The nature and scope of this standard is addressed in the ABA Cybersecurity Handbook:

> Although security is relative, a legal standard for "reasonable" security is emerging. That standard rejects requirements for specific security measures (such as firewalls, passwords, or the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that the measures are effectively implemented, and ensure that they are continually updated in response to new developments.[28]

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[25] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2018). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 9, at 5.

[26] ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 122.

[27] MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [18] (2018) ("The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.")

[28] ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 73.

Finally, Model Rule 1.6 permits a lawyer to reveal information relating to the representation of a client if the disclosure is impliedly authorized in order to carry out the representation. Such disclosures are permitted if the lawyer reasonably believes that disclosure: (1) is impliedly authorized and will advance the interests of the client in the representation, and (2) will not affect a material interest of the client adversely.[29] In exercising this discretion to disclose information to law enforcement about the data breach, the lawyer must consider: (i) whether the client would object to the disclosure; (ii) whether the client would be harmed by the disclosure; and (iii) whether reporting the theft would benefit the client by assisting in ending the breach or recovering stolen information. Even then, without consent, the lawyer may disclose only such information as is reasonably necessary to assist in stopping the breach or recovering the stolen information.

C. Lawyer's Obligations to Provide Notice of Data Breach

When a lawyer knows or reasonably should know a data breach has occurred, the lawyer must evaluate notice obligations. Due to record retention requirements of Model Rule 1.15, information compromised by the data breach may belong or relate to the representation of a current client or former client.[30] We address each below.

1. Current Client

Communications between a lawyer and current client are addressed generally in Model Rule 1.4. Rule 1.4(a)(3) provides that a lawyer must "keep the client reasonably informed about the status of the matter." Rule 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Under these provisions, an obligation exists for a lawyer to communicate with current clients about a data breach.[31]

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[29] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421(2001) (disclosures to insurer in bills when lawyer representing insured).

[30] This opinion addresses only obligations to clients and former clients. Data breach, as used in this opinion, is limited to client confidential information. We do not address ethical duties, if any, to third parties.

[31] Relying on Rule 1.4 generally, the New York State Bar Committee on Professional Ethics concluded that a lawyer must notify affected clients of information lost through an online data storage provider. N.Y. State Bar Ass'n Op. 842 (2010) (Question 10: "If the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients' confidential information,

Our conclusion here is consistent with ABA Formal Ethics Opinion 95-398 where this Committee said that notice must be given to clients if a breach of confidentiality was committed by or through a third-party computer vendor or other service provider. There, the Committee concluded notice to the client of the breach may be required under 1.4(b) for a "serious breach."[32] The Committee advised:

> Where the unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation, for example where it is likely to affect the position of the client or the outcome of the client's legal matter, disclosure of the breach would be required under Rule 1.4(b).[33]

A data breach under this opinion involves the misappropriation, destruction or compromise of client confidential information, or a situation where a lawyer's ability to perform the legal services for which the lawyer was hired is significantly impaired by the event. Each of these scenarios is one where a client's interests have a reasonable possibility of being negatively impacted. When a data breach occurs involving, or having a substantial likelihood of involving, material client confidential information a lawyer has a duty to notify the client of the breach. As noted in ABA Formal Opinion 95-398, a data breach requires notice to the client because such notice is an integral part of keeping a "client reasonably informed about the status of the matter" and the lawyer should provide information as would be "reasonably necessary to permit the client to make informed decisions regarding the representation" within the meaning of Model Rule 1.4.[34]

The strong client protections mandated by Model Rule 1.1, 1.6, 5.1 and 5.3, particularly as they were amended in 2012 to account for risks associated with the use of technology, would be compromised if a lawyer who experiences a data breach that impacts client confidential information is permitted to hide those events from their clients. And in view of the duties imposed by these other Model Rules, Model Rule 1.4's requirement to keep clients "reasonably informed about the status" of a matter would ring hollow if a data breach was somehow excepted from this responsibility to communicate.

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notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated.") (*citations omitted*).

[32] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-398 (1995).

[33] *Id.*

[34] MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2018).

Model Rule 1.15(a) provides that a lawyer shall hold "property" of clients "in connection with a representation separate from the lawyer's own property." Funds must be kept in a separate account, and "[o]ther property shall be identified as such and appropriately safeguarded." Model Rule 1.15(a) also provides that, "Complete records of such account funds and other property shall be kept by the lawyer . . . ." Comment [1] to Model Rule 1.15 states:

> A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property.

An open question exists whether Model Rule 1.15's reference to "property" includes information stored in electronic form. Comment [1] uses as examples "securities" and "property" that should be kept separate from the lawyer's "business and personal property." That language suggests Rule 1.15 is limited to tangible property which can be physically segregated. On the other hand, many courts have moved to electronic filing and law firms routinely use email and electronic document formats to image or transfer information. Reading Rule 1.15's safeguarding obligation to apply to hard copy client files but not electronic client files is not a reasonable reading of the Rule.

Jurisdictions that have addressed the issue are in agreement. For example, Arizona Ethics Opinion 07-02 concluded that client files may be maintained in electronic form, with client consent, but that lawyers must take reasonable precautions to safeguard the data under the duty imposed in Rule 1.15. The District of Columbia Formal Ethics Opinion 357 concluded that, "Lawyers who maintain client records solely in electronic form should take reasonable steps (1) to ensure the continued availability of the electronic records in an accessible form during the period for which they must be retained and (2) to guard against the risk of unauthorized disclosure of client information."

The Committee has engaged in considerable discussion over whether Model Rule 1.15 and, taken together, the technology amendments to Rules 1.1, 1.6, and 5.3 impliedly impose an obligation on a lawyer to notify a current client of a data breach. We do not have to decide that question in the absence of concrete facts. We reiterate, however, the obligation to inform the client does exist under Model Rule 1.4.

2. Former Client

Model Rule 1.9(c) requires that "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client."[35] When electronic "information relating to the representation" of a former client is subject to unauthorized access, disclosure, or destruction, the Model Rules provide no direct guidance on a lawyer's obligation to notify the former client. Rule 1.9(c) provides that a lawyer "shall not . . . reveal" the former client's information. It does not describe what steps, if any, a lawyer should take if such information is revealed. The Committee is unwilling to require notice to a former client as a matter of legal ethics in the absence of a black letter provision requiring such notice.[36]

Nevertheless, we note that clients can make an informed waiver of the protections in Rule 1.9.[37] We also note that Rule 1.16(d) directs that lawyers should return "papers and property" to clients at the conclusion of the representation, which has commonly been understood to include the client's file, in whatever form it is held. Rule 1.16(d) also has been interpreted as permitting lawyers to establish appropriate data destruction policies to avoid retaining client files and property indefinitely.[38] Therefore, as a matter of best practices, lawyers are encouraged to reach agreement with clients before conclusion, or at the termination, of the relationship about how to handle the client's electronic information that is in the lawyer's possession.

Absent an agreement with the former client lawyers are encouraged to adopt and follow a paper and electronic document retention schedule, which meets all applicable laws and rules, to reduce the amount of information relating to the representation of former clients that the lawyers retain. In addition, lawyers should recognize that in the event of a data breach involving former client information, data privacy laws, common law duties of care, or contractual arrangements with

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[35] MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(2) (2018).
[36] *See* Discipline of Feland, 2012 ND 174, ¶ 19, 820 N.W.2d 672 (Rejecting respondent's argument that the court should engraft an additional element of proof in a disciplinary charge because "such a result would go beyond the clear language of the rule and constitute amendatory rulemaking within an ongoing disciplinary proceeding.").
[37] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9, cmt. [9] (2018).
[38] *See* ABA Ethics Search Materials on Client File Retention, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/piles_of_files_2008.pdf (last visited Oct.15, 2018).

the former client relating to records retention, may mandate notice to former clients of a data breach. A prudent lawyer will consider such issues in evaluating the response to the data breach in relation to former clients.[39]

3. Breach Notification Requirements

The nature and extent of the lawyer's communication will depend on the type of breach that occurs and the nature of the data compromised by the breach. Unlike the "safe harbor" provisions of Comment [18] to Model Rule 1.6, if a post-breach obligation to notify is triggered, a lawyer must make the disclosure irrespective of what type of security efforts were implemented prior to the breach. For example, no notification is required if the lawyer's office file server was subject to a ransomware attack but no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or disclosed to unauthorized persons. Conversely, disclosure will be required if material client information was actually or reasonably suspected to have been accessed, disclosed or lost in a breach.

The disclosure must be sufficient to provide enough information for the client to make an informed decision as to what to do next, if anything. In a data breach scenario, the minimum disclosure required to all affected clients under Rule 1.4 is that there has been unauthorized access to or disclosure of their information, or that unauthorized access or disclosure is reasonably suspected of having occurred. Lawyers must advise clients of the known or reasonably ascertainable extent to which client information was accessed or disclosed. If the lawyer has made reasonable efforts to ascertain the extent of information affected by the breach but cannot do so, the client must be advised of that fact.

In addition, and as a matter of best practices, a lawyer also should inform the client of the lawyer's plan to respond to the data breach, from efforts to recover information (if feasible) to steps being taken to increase data security.

The Committee concludes that lawyers have a continuing duty to keep clients reasonably apprised of material developments in post-breach investigations affecting the clients'

[39] *Cf.* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018), at 8-10 (discussing obligations regarding client files lost or destroyed during disasters like hurricanes, floods, tornadoes, and fires).

information.[40] Again, specific advice on the nature and extent of follow up communications cannot be provided in this opinion due to the infinite number of variable scenarios.

If personally identifiable information of clients or others is compromised as a result of a data beach, the lawyer should evaluate the lawyer's obligations under state and federal law. All fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have statutory breach notification laws.[41] Those statutes require that private or governmental entities notify individuals of breaches involving loss or disclosure of personally identifiable information.[42] Most breach notification laws specify who must comply with the law, define "personal information," define what constitutes a breach, and provide requirements for notice.[43] Many federal and state agencies also have confidentiality and breach notification requirements.[44] These regulatory schemes have the potential to cover individuals who meet particular statutory notice triggers, irrespective of the individual's relationship with the lawyer. Thus, beyond a Rule 1.4 obligation, lawyers should evaluate whether they must provide a statutory or regulatory data breach notification to clients or others based upon the nature of the information in the lawyer's possession that was accessed by an unauthorized user.[45]

III. Conclusion

Even lawyers who, (i) under Model Rule 1.6(c), make "reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data

[40] State Bar of Mich. Op. RI-09 (1991).
[41] National Conference of State Legislatures, *Security Breach Notification Laws* (Sept. 29, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.
[42] *Id.*
[43] *Id.*
[44] ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 65.
[45] Given the broad scope of statutory duties to notify, lawyers would be well served to actively manage the amount of confidential and or personally identifiable information they store beyond any ethical, statutory, or other legal obligation to do so. Lawyers should implement, and follow, a document retention policy that comports with Model Rule 1.15 and evaluate ways to limit receipt, possession and/or retention of confidential or personally identifiable information during or after an engagement.

breach under Model Rule 1.4 in sufficient detail to keep clients "reasonably informed" and with an explanation "to the extent necessary to permit the client to make informed decisions regarding the representation."

Excerpts of S.C. Rules of Professional Responsibility

Rule 1.6 and applicable comment:

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(7) to comply with other law or a court order; or

(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

…

Comments 20 & 21 (emphasis added):

Acting Competently to Preserve Confidentiality

[20] A lawyer must *act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure* by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[21] *When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients*. *This duty, however, does not require that the lawyer use special security measures if the method of communication affords a* ***reasonable expectation of privacy***. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

South Carolina Bar

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Emotional Intelligence for Lawyers and Judges

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2019 Masters-In-Equity Bench Bar
Columbia, South Carolina
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What is Emotional Intelligence (EI)?

A. **Personal Competence**
1. Self-Awareness
2. Self-Management

B. **Social Competence**
1. Social Awareness
2. Relationship Management

EI and the Practice of Law

Rule 407 - SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, being a member of the legal profession, is a representative of clients, an officer of the legal system and a **public citizen having special responsibility** for the quality of justice.

[12] The legal profession's relative autonomy carries with it special responsibilities of **self-government.**

[13] Lawyers play a **vital role** in the preservation of society.

Can My EI Be Improved?

Dedication and Personal Investment are key

- Feedback
- Willpower
- People Skills

Are we coachable and willing to receive/give feedback?

Self-initiative is one of the most important indicators for learning about and enhancing our EI

Hard Skills v. Soft Skills

Hard Skills

- Often relate to education, life experience, job history, etc.
- Can determine fitness for hiring
- Indicators include aggressiveness, follow-through, speed, and persistence

Soft Skills

- May be of equal or greater importance than Hard Skills
- Can determine fitness for hiring and even greater contributions in the workplace
- Indicators include creativity, listening, team-building, finesse, savvy, openness to criticism, and being a team player

EI and the Practice of Law

Rule 407 - SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly **inform the client** of any decision or circumstance with respect to which the client's informed consent.. is required..

Comment [5] The client should have sufficient information to **participate intelligently** in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. **Adequacy of communication** depends in part on the kind of advice or assistance that is involved.

EI and the Practice of Law

Rule 407 - SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other **considerations such as moral, economic, social and political factors**, that may be relevant to the client's situation.

Comment: Scope of Advice [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to **sustain the client's morale and may put advice in as acceptable a form as honesty permits.**

[2] …Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

EI and the Practice of Law

Rule 407 - SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:
Unlawfully obstruct another party's access to evidence
Falsify evidence or testimony
Knowingly disobey an obligation
Make frivolous requests
Allude to irrelevant matters
Request a non-Client refrain from giving information to another party

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against…obstructive tactics in discovery procedure.

Blind Spots Do I have one (or many)?

Defined as behaviors that undermine effectiveness, limit results, and damage relationships

Some say – "I don't have a blind spot!"

Characterized by:

- Mental tricks we play to deceive ourselves
- Self-serving bias
- Claiming too much credit
- Accepting too little blame

Identifying Blind Spots in Our Lives

- How can I uncover them?
- What are the most common Blind Spots that derail leaders?
- Peeling away masks – can we really hide our true selves?
- What is our tendency? To blame others, stick with old habits, and act as if they don't exist

Results of Unaddressed Blind Spots

Breakdowns in Leaders, Organizations, and Societies Corrupt Decision-making

- Reduce our scope of awareness
- Lock in rigid and fixed viewpoints

Impact on Work Environments

- Lawyers and staff become lackluster and pessimistic
- People spend more time talking about what is not working than what is working
- Productivity and performance drop
- Mistakes and breakdowns are quietly covered-up

- No one is accountable
- Everyone freely hands out blame
- The firm focuses on looking good instead of being effective
- Cycles of unproductive behavior

Strategies for Addressing Blind Spots

Critical first step – realizing that it's not someone else who needs to change! *The Anatomy of Peace*

Engage in partnership with and support of others

Extensive self-evaluation

Two steps that are essential – bringing this issue to light and asking for advice, help, and accountability

Blind Spots Case Study

Reading a summary of events:
a new file or incident report

Small group discussion:
litigation strategy session

Formulating possible solutions:
mediation/arbitration

What Have I Learned?

How can I apply one thing I've learned to my life, both professionally and personally?

Measuring Success

Share your goals with another person	Self-analysis	Seek feedback from others

Potential Training Modules

- Giving and Receiving Feedback
- The Johari Window
- *Leadership and Self-Deception (*Getting out of the box)
- Developing and Learning From a Personal X-Ray
- Understanding the Amygdala Hijack
- Strategies for coping with a prospective Amygdala Hijack
- Understanding the MSCEIT test

Resources

Emotional Intelligence 2.0
by Travis Bradberry and Jean Greaves

Harvard Business Review

Immunity to Change: How to Overcome it and Unlock the Potential in Yourself and Your Organization
by Robert Kegan and Lisa Laskow Lahey

Leadership and Self-Deception: Getting Out of the Box
By the Arbinger Institute

The Power of Habit: Why We Do What We Do in Life and Business
By Charles Duhigg

The Advantage: Why Organizational Health Trumps Everything Else in Business
By Patrick Lencioni

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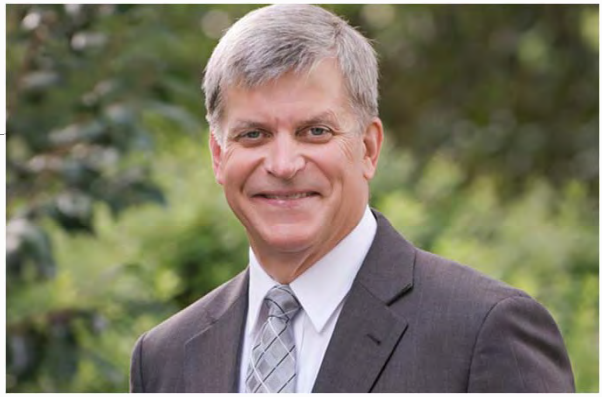

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Continuing Legal Education Division

Equity Principles

Stephen Spitz

Quick Review of Some Fundamental Equity Principles
October 11, 2019 (Part 1)

By **Stephen Spitz**
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11 Equitable Maxims

1. Equity will not suffer a wrong to be without a remedy[1]

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1. Among the most common equitable remedies consider the following:

1 injunction
2. specific performance
3. accounting of profits
4. rescission
5. rectification (to correct a wrong)
6. equitable estoppel / judicial estoppel
7. constructive trusts
8. subrogation
10. Equitable lien
11. Equitable compensation
12. Receiver (Appointment or removal)
13. Interpleader

But consider **Key Corporate Capital v. County of Beaufort**, 602 S.E.2d 104 (S.C. App. 2004) where, on further review, the Court of Appeals reliance upon this maxim was squarely reversed by the Supreme Court. The Supreme Court found that that Court of Appeals

2. Equity normally acts in personam not in rem[2]

3. Equity follows the law[3]

4. Equity is equality[4]

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had to be reversed on the grounds that the maxim was not relevant on the facts of the case. But, further note that some of the majority of the Court of Appeals that decided the Key Corporate case are now on the Supreme Court, raising the interesting question, which case is truly precedent? The seemingly overruled Court of Appeals or the Supreme Court case?

[2] See **Thornton v. Thornton**, 492 S.E.2d 86 (S.C. 1997) (squarely recognizing this maxim)

[3] There are well recognized restraints on equity. Often, where the rights of the parties are expressly created by statute, the South Carolina Supreme Court declines to invoke an equitable remedy. See, for example, **Santee Cooper v. S.C. Public Service Commission, 379 S.E.2d 119 (S.C. 1989)**

The rule is typically expressed that equity has no role to play unless the legal remedy is "inadequate" – or said in different words, a legal remedy is adequate when it exists and when it fits the situation. See **Key Corporate Capital**, 644 S.E.2d 675 (S.C. 2007) (A court's equitable powers must yield in the face of an unambiguously worded statute)

[4] A court of equity often seeks to secure equality among persons who are equally obligated or who are equally entitled to claim a benefit. Instances of the application of this maxim may be found in the law of contribution and other situations.

5. Equity regards as done as What Ought To Be Done

6. Equity regards Substance over Form[5]

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[5] See, **Regions Bank v. Wingard Properties** INC. 745 S.E. 348 (SC. App. 2011) discussing equitable maxims in general and the equitable maxim, in particular, substance over form. We will talk about this case at the CLE and its continued relevance. See also **Johnson v. Johnson**, 372 S.E.2d 107 (SC App. 1988) (If the end result is equitable . . . specific factors found by the lower court, even if wrong, are irrelevant). Time permitting, we will discuss both of these two cases.

7. **Equity disfavors Forfeitures**[6]
8. **One who seeks equity should do equity**[7]
9. **One who seeks equity should have clean hands**
10. **Equity does not favor those who sleep on their rights**[8]
11. **"SUEM" by Circuit Court Judge Roger Young & Professor Steve Spitz, 55 S.C. Law Review 175 (2003 - 2004) In Equity, Good Guys Should Win and Bad Guys Should Lose.**

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6. See **Kirkiakides v, United Artists Communications, Inc**., 312 S.C. 271, 440 S.E.2d 384 (S.C. 1994) where the Supreme Court reversed a landlord tenant case on the ground that it was an **inappropriate forfeiture**. (The amount of rent past due was only $4,732, out of a total yearly rent fee of $59,379; the tenant's breach was inadvertent, and not in bad faith, the tenant attempted to quickly cure as soon as the tenant was aware of the default, tenant had more than 20 years remaining on the lease, and the value of the improvements to the leasehold by the tenant had already been S1,200,000 dollars.)

This is an important case, and time permitting, we will hopefully discuss its impact in the CLE.

7 What does this maxim really mean? We could have a whole CLE on the various answers to that question.

8 The doctrine of laches is a very familiar one.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina on the relation of William Walter Wilkins, III, Solicitor of the Thirteenth Judicial Circuit, Respondent,

v.

Elephant, Inc., Gregory Kenwood Gaines, and Frontage Road Associates, Inc., Defendants,

of which Elephant, Inc. and Gregory Kenwood Gaines are the Appellants.

Appellate Case No. 2016-001695

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Unpublished Opinion No. 2019-UP-290
Submitted February 1, 2019 – Filed August 14, 2019

AFFIRMED

Thomas R. Goldstein, of Belk Cobb Infinger & Goldstein, PA, of Charleston; and H. Louis Sirkin, of Cincinnati, Ohio, for Appellants.

Solicitor William Walter Wilkins, III, and Deputy Solicitor Andrew Scott Culbreath, both of Greenville, for

Respondent.

PER CURIAM: Elephant, Inc. and Gregory Kenwood Gaines (collectively, Appellants) appeal the trial court's order holding Elephant, Inc. in criminal and civil contempt of a consent order and imposing requirements on Gaines. We affirm.

1. We find no merit to Appellants' argument the trial court lacked subject matter jurisdiction over the contempt proceeding. *See Pierce v. State*, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000) ("Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." (citing *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994))). Chief Justice Toal assigned Judge Simmons to serve as a circuit court judge for the Thirteenth Judicial Circuit, granting him authority to hear criminal and civil motions and non-jury trials. In addition, in the Order/Rule to Show Cause filed April 29, 2016, the chief administrative judge referred the case to the master-in-equity. *See* Rule 53(b), SCRCP ("In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case."); *Blackmon v. Patel*, 302 S.C. 361, 362-63, 396 S.E.2d 128, 129 (Ct. App. 1990) (affirming master's order granting summary judgment following ex parte order of reference to the master-in-equity for the appointment of a receiver in which the circuit court judge, without notice to any parties, added a provision to the order as proposed permitting the master to rule upon any summary judgment motions).

2. We find Appellants' challenge to the trial court's independence and impartiality is not preserved for our review as they never requested the trial court recuse itself. *See Davis v. Parkview Apartments*, 409 S.C. 266, 289, 762 S.E.2d 535, 547 (2014) ("Timeliness is essential to any recusal motion. To be timely, a recusal motion must be made at counsel's first opportunity after discovery of the disqualifying facts." (quoting *Duplan Corp. v. Milliken, Inc.*, 400 F. Supp. 497, 510 (D.S.C. 1975))); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

3. We find no merit to Appellants' argument the trial court erred in imposing criminal contempt for what they contend was merely the breach of a civil agreement. While the consent order was the product of an agreement of the parties, it carries the authority of the court. *See Johnson v. Johnson*, 310 S.C. 44, 46, 425 S.E.2d 46, 48 (Ct. App. 1992) ("[A] consent order is an agreement of the parties, *under the sanction of the court*, and is to be interpreted as an agreement." (emphasis added) (citing *Jones & Parker v. Webb*, 8 S.C. 202, 206 (1876))); *Ex parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 824 (Ct. App. 2009) ("All courts have the inherent power to punish for contempt, which 'is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.'" (quoting *Miller v. Miller*, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (Ct. App. 2007))).

4. We hold the trial court did not err in refusing to grant a continuance. *See Bozeman v. State*, 307 S.C. 172, 175, 414 S.E.2d 144, 146 (1992) ("The denial of a motion for a continuance is within the sound discretion of the trial judge and his ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant." (citing *State v. Babb*, 299 S.C. 451, 454, 385 S.E.2d 827, 829 (1989))). The trial court's denial of Appellants' motion for a continuance did not deny them the right to counsel. *See State v. Bennett*, 259 S.C. 50, 53-54, 190 S.E.2d 497, 498 (1972) (holding the trial court's denial of a motion for a continuance did not deny the defendant his right to counsel when defendant was represented by appointed counsel and sought the continuance to obtain other counsel). We disagree with Appellants' contention the court's ruling was erroneous because their attorney lacked preparation time. *See State v. Vaughn*, 268 S.C. 119, 123, 232 S.E.2d 328, 329 (1977) ("[W]hen a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case[,] its denial by the trial court has rarely been disturbed on appeal." (quoting *State v. Motley*, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968))); *id.* (rejecting appellant's argument "that a continuance should have been granted because the solicitor was able to call the case for trial when he desired to do so, and, consequently, inadequate notice of the time for trial was provided").

5. We disagree with Appellants' argument the State was required to provide them with notice of the violation and an opportunity to cure the violation as a condition precedent to a contempt action. *See City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC*, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012) ("As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part

thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety. If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." (quoting *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989))); *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 207, 687 S.E.2d 714, 719 (Ct. App. 2009) (stating a condition precedent "connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises. The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." (quoting *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994))). The consent order provides, "If there are any instances of non-compliance [as reported by the independent monitor,] then the Solicitor shall forward such reports to [Appellants], which will include the date and time when the Monitor visited the Subject Property, the incident of non-compliance observed, and where such non-compliance occurred at the premises." Although the consent order did not require provision of notice to Appellants as a condition precedent to a contempt action, we find the record on appeal contains evidence the State, in fact, provided the notice. Independent Monitor One testified, without objection, the Solicitor forwarded the report to Appellants. *See Hanna v. Palmetto Homes, Inc.*, 300 S.C. 535, 537, 389 S.E.2d 164, 165 (Ct. App. 1990) ("[T]estimony received without objection becomes competent and its sufficiency is for the [fact finder]." (citing *Cantrell v. Carruth*, 250 S.C. 415, 421, 158 S.E.2d 208, 211 (1967))). In addition, the State provided Appellants with notice of the violations in the petition for the Rule to Show Cause, which included affidavits from the independent monitors. We also hold the plain language of the order does not afford Appellants an opportunity to correct the infractions before they can be sanctioned.

6. We disagree with Appellants' argument the trial court erred in considering criminal contempt and civil contempt in the same proceeding. *See DiMarco v. DiMarco*, 393 S.C. 604, 608, 713 S.E.2d 631, 634 (2011) ("A judge certainly may order both a civil and a criminal contempt sanction, and, in that case, the sanctions should be separate and distinct."). Appellants correctly assert criminal and civil contempt have different standards of proof. *See DiMarco*, 393 S.C. at 607, 713 S.C. at 633 (stating "[c]ivil contempt must be shown by clear and convincing evidence" and "[c]riminal contempt must be shown beyond a reasonable doubt" (citing *Poston v. Poston*, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998))). We hold the trial court recognized this difference and correctly applied the burdens of proof.

7. To the extent Appellants are challenging the sanctions imposed, this complaint is not properly before this court because it was not raised to or ruled on by the trial court. Appellants withdrew their motion for reconsideration. *See In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." (citing *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993))). Furthermore, the trial court did not abuse its discretion in imposing sanctions. *See State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994) ("A determination of contempt ordinarily resides in the sound discretion of the trial [court]." (citing W*hetstone v. Whetstone*, 309 S.C. 227, 233, 420 S.E.2d 877, 880 (Ct. App. 1992))); *Miller*, 375 S.C. at 454-55, 652 S.E.2d at 760 ("It is within the trial court's discretion to punish by fine or imprisonment all contempts of authority before the court." (quoting *Brandt v. Gooding*, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006))).

8. We disagree with Appellants' argument they were not on notice that they would have to defend against both criminal and civil contempt. In the petition for the Rule to Show Cause, the State requested that if Appellants were found in contempt "they be sanctioned to the maximum extent allowed by law and in a manner that will ensure the [Appellants] permanently abate all conduct creating a nuisance." Thus, the State was requesting the court sanction Appellants by all available means, including both civil and criminal contempt. *See Miller*, 375 S.C. at 454-55, 652 S.E.2d at 760 ("It is within the trial court's discretion to punish by fine or imprisonment all contempts of authority before the court." (quoting *Brandt v. Gooding*, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006))).

9. We disagree with Appellants' argument the trial court used their right to remain silent against them even though Appellants were facing criminal contempt. *See Miller*, 375 S.C. at 454, 652 S.E.2d at 760 ("Once the moving party has made out a prima facie case [for contempt], the burden then shifts to the respondent to establish his or her defense and inability to comply with the order." (quoting *Widman v. Widman*, 348 S.C. 97, 120, 557 S.E.2d 693, 705 (Ct. App. 2001))).

10. We find no reversible error in the trial court's denial of Appellants' request for a jury trial. First, Appellants waived this issue by failing to immediately appeal once the trial court denied their request for a jury trial. *See Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) ("[T]he failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." (citing

Foggie v. CSX Transp., Inc., 313 S.C. 98, 23, 431 S.E.2d 587, 590 (1993))). Furthermore, we do not believe the trial court erred in denying Appellants' request for a jury trial. As the Solicitor did not seek a jail sentence in excess of six months and the trial court did not impose any jail time, Appellants were not entitled to a jury trial. *See Ex parte Cannon*, 385 S.C. at 666, 685 S.E.2d at 827 ("Regardless of whether a six-month imprisonment sentence is imposed for civil or criminal contempt, a contemnor has no right to a jury trial for an imprisonment sentence of six months or less."); *Rhoad v. State*, 372 S.C. 100, 107, 641 S.E.2d 35, 38 (Ct. App. 2007) ("[A] contemnor may be tried without a jury under certain circumstances, as long as the sentence imposed is no longer than six months.").

11. We disagree with Appellants' argument the trial court erred in holding they knowingly violated the provisions of the consent order. *See Ex parte Cannon*, 385 S.C. at 660, 685 S.E.2d at 824 ("Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." (quoting *Widman*, 348 S.C. at 119, 557 S.E.2d at 705)); *id.* at 661, 685 S.E.2d at 824 ("A willful act is one . . . done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." (alteration by court) (quoting *Miller*, 375 S.C. at 454, 652 S.E.2d at 759-60)). We find the record contains evidence beyond a reasonable doubt numerous violations of the dress requirements to avoid a "state of nudity" and conduct restrictions set forth in the consent order occurred and although Appellants, through their employees, were aware of these violations, they did not prevent them from occurring. In addition, Appellants failed to challenge the trial court's findings concerning the provision of requested video and placement of cameras as additional violations. *See First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (stating an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance" (citing *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997))). Accordingly, we hold the trial court did not err in finding Appellants in both civil and criminal contempt.

12. We find Appellants' argument the trial court erred by imposing additional requirements on Gaines after finding him not guilty of contempt is not properly before this court. Although Appellants raised this argument in their motion for reconsideration, they withdrew the motion before the trial court considered it. *See In re Timmerman*, 331 S.C. at 460, 502 S.E.2d at 922 ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or

amend the judgment in order to preserve the issue for appeal." (citing *Pelican Bldg. Ctrs.*, 311 S.C. at 60, 427 S.E.2d at 675)).

AFFIRMED.[1]

HUFF, THOMAS, and KONDUROS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

South Carolina Bar
Continuing Legal Education Division

Resistible Force Meets Immovable Object: How Your Findings of Fact and Conclusions of Law Fare on Appeal

Hon. George "Buck" James, Jr.

RESISTIBLE FORCE MEETS IMMOVABLE OBJECT: HOW YOUR FINDINGS OF FACT AND CONCLUSIONS OF LAW FARE ON APPEAL

Master-in-Equity Bench Bar

October 11, 2019

George C. James, Jr.

I. Your case has wound its way to the Supreme Court of South Carolina
   A. What happens? How does it really work in the Supreme Court?
   B. Staff attorneys, law clerks, justices, and the standard of review. Who does what and when do they do it?
   C. What is the Court's agenda?
   D. The handling of the case in chambers: bench memoranda, oral argument, submitted cases, DIG
   E. The vote
   F. The preparation and circulation of an opinion

II. Why should all this matter to the trial court and to the lawyer in a nonjury case?
   A. Does the appellate opinion bear any resemblance to the case as tried?
   B. If not, why not?
   C. Who's on First?
   D. Examples from transcripts
   E. What's the lawyer to do?
   F. What's the judge to do?
   G. Proposed orders
   H. Motions to alter or amend/for reconsideration
   I. Final cleanup

South Carolina Bar

Continuing Legal Education Division

Pinckney Act

W.T. Geddings, Jr.

SECTION 15-61-10. Partition is compellable between certain joint tenants and tenants in common; Determination if property is heirs' property.

(A) All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be compellable to make severance and partition of all such lands, tenements and hereditaments.

(B) In an action to partition real property, upon motion of a party or from statements contained in the pleadings, a court shall determine, in a preliminary hearing held after the filing of the action, whether the property is heirs' property. If the court determines that the property is heirs' property, the property must be partitioned under Article 3, Chapter 61, Title 15, unless all of the cotenants otherwise agree in a record.

SECTION 15-61-11. Waiver of partition of land which is site of electric generating plant.

Notwithstanding the provisions of § 15-61-10, the right to compel judicial partition of lands may be waived by tenants-in-common owning land upon which is to be constructed or has been constructed an electric generating plant producing electric energy for sale or distribution within or without this State, provided the effective period of such waiver does not extend beyond the operating life of the generating plant. If notice is given by the recording of a deed or instrument of conveyance creating a tenancy-in-common and containing an expression of agreement to waive the right of judicial partition, then such agreement shall run with the land and shall be binding upon the heirs, successors and assigns of any tenant-in-common so bound. The power and right to enter into agreements to waive the right of judicial partition authorized by this section shall be in addition to any such powers and rights already authorized by the laws of South Carolina.

SECTION 15-61-20. Only parties to proceeding are affected by partition.

No severance or partition shall be prejudicial or hurtful to any person or persons, their heirs or successors, other than such as are parties unto the partition, their executors and assigns.

SECTION 15-61-25. Right of first refusal of joint tenant or tenant in common to purchase property prior to partition; procedure.

(A) For the purposes of this section, "joint tenants and tenants in common" include heirs or devisees. Upon the filing of a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for the nonpetitioning joint tenants or tenants in common who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case. The nonpetitioning joint tenants or tenants in common shall be allowed to purchase the interests in the property as provided in this section whether default has been entered against them or not.

(B) In the circumstances described in subsection (A) of this section, and in the event the parties cannot reach agreement as to the price, the value of the interest or interests to be sold shall be determined by one or more competent real estate appraisers, as the court shall approve, appointed for that purpose by the court. The appraisers appointed pursuant to this section shall make their report in writing to the court within thirty days after their appointment. The costs of the appraisers appointed pursuant to this section shall be taxed as a part of the cost of court to those seeking to purchase the interests of the joint tenants or tenants in common petitioning to sell their interest in the property described in the petition for partition.

(C) In the event that the petitioning joint tenants or tenants in common object to the value of the interests as determined by the appointed appraisers, those joint tenants or tenants in common shall have ten days from the date of filing of the report to file written notice of objection to the report and request a hearing before the court on the value. An evidentiary hearing limited to the proposed valuation of the interests of the petitioning joint tenants or tenants in common shall be conducted, and an order as to the valuation of the interests of the petitioning joint tenants or tenants in common shall be issued.

(D) After the valuation of the interest in property is completed as provided in subsection (B) or (C) of this section, the nonpetitioning joint tenants or tenants in common seeking to purchase the interests of those filing the petition shall have forty-five days to pay into the court the price set as the value of those interests to be purchased. Upon the payment and approval of it by the court, the court shall execute and deliver or cause to be executed and delivered the proper instruments transferring title to the purchasers.

(E) In the event that the nonpetitioning joint tenants or tenants in common fail to pay the purchase price as provided in subsection (D) of this section, the court shall proceed according to its traditional practices in partition sales.

SECTION 15-61-30. State as owner of escheated interest is not necessary party.

If one having a vested interest in real estate as tenant in common dies without a will and without known heirs partition proceedings may be maintained against unknown heirs without making the State a party to the action, and a sale and conveyance under a decree in the cause shall vest such interest as may be subject to escheat under the provisions of this chapter in the purchaser, provided that in such decree provisions be made for the payment of the divisible share of such deceased person in the proceeds of sale, if any, to the State Treasurer, to be paid into the State Treasury, subject to the right of the heir or heirs to recover such share by proper proceedings and on issue tried in the court of common pleas.

SECTION 15-61-40. Validation of certain titles.

All titles to real estate conveyed prior to March 18 1924 under order of the court in partition cases when one or more of the parties in interest had died without heirs or other disposition of the estate are hereby validated in so far as they may be affected by the provisions of this chapter.

SECTION 15-61-50. Jurisdiction to partition in kind or by sale.

The court of common pleas has jurisdiction in all cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares or, in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties.

SECTION 15-61-100. Sale may be ordered without writ upon testimony taken.

Nothing in Rule 71, South Carolina Rules of Civil Procedure, concerning partition actions, shall be construed to affect the power of a court hearing a partition action to dispense with the issuing of a writ of partition when, in the judgment of the court, it would involve unnecessary expense to issue such writ. And the court may in all proceedings in partition, without recourse to such writ, determine by

means of testimony taken before the proper officer and reported to the court whether a partition in kind among the parties be practicable or expedient and, when such partition cannot be fairly and equally made, may order a sale of the property and a division of the proceeds according to the rights of the parties.

SECTION 15-61-110. Attorneys' fees.

The court of common pleas may fix attorneys' fees in all partition proceedings and, as may be equitable, assess such fees against any or all of the parties in interest.

ARTICLE 3. Clementa C. Pinckney Uniform Partition of Heirs' Property Act

SECTION 15-61-310. Short title.

This article may be cited as the "Clementa C. Pinckney Uniform Partition of Heirs' Property Act".

SECTION 15-61-320. Definitions.

As used in this article:

(1) "Ascendant" means an individual who precedes another individual in lineage, in the direct line of ascent from the other individual.

(2) "Collateral" means an individual who is related to another individual under the law of intestate succession of this State, but who is not the other individual's ascendant or descendant.

(3) "Descendant" means an individual who follows another individual in lineage, in the direct line of descent from the other individual.

(4) "Determination of value" means a court order determining the fair market value of heirs' property under Section 15-61-360 or Section 15-61-400 or adopting the valuation of the property agreed to by all cotenants.

(5) "Heirs' property" means real property held in tenancy in common that satisfies all of the following requirements as of the filing of a partition action:

(a) there is no agreement in a record binding all of the cotenants that governs the partition of the property;

(b) one or more of the cotenants acquired title from a relative, whether living or deceased; and

(c) any of the following applies:

(i) twenty percent or more of the interests are held by cotenants who are relatives;

(ii) twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or

(iii) twenty percent or more of the cotenants are relatives.

(6) "Manifest prejudice" or "Manifest injury" means a result that is obviously unfair or shocking to the

conscience and is direct, obvious, and observable when considering the factors under Section 15-61-390(A).

(7) "Partition by allotment" means a court-ordered partition of the heirs' property where ownership to all or a portion of the heirs' property is granted to one or more cotenants proportionate in value to their interests in the entire heirs' property parcel, with adjustments being made for payment to compensate other cotenants for the value of their respective interests in the heirs' property.

(8) "Partition by sale" means a court-ordered sale of the entire heirs' property, whether by auction, sealed bids, or open-market sale, conducted under Section 15-61-400.

(9) "Partition in kind" means the division of heirs' property into physically distinct and separately titled parcels.

(10) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(11) "Relative" means an ascendant, descendant, or collateral, or an individual otherwise related to another individual by blood, marriage, adoption, or law of this State other than this article, and for purposes of this article, who owned or owns an interest in the heirs' property.

(12) "Time computed" means computation of time as prescribed by this section, which shall be governed by Rule 6, South Carolina Rules of Civil Procedure, so that when the period of time prescribed or allowed is seven days or less, intermediate Saturdays, Sundays, and holidays are excluded in the computation.

SECTION 15-61-330. Preliminary determination whether property is heirs' property; construction with Article 1.

(A) In an action to partition real property under Article 1, upon motion of a party or from statements contained in the pleadings, the court shall determine, in a preliminary hearing held after the filing of the action, whether the property is heirs' property. If the court determines that the property is heirs' property, the partition of the heirs' property is governed by the provisions of this article, unless all cotenants otherwise agree in a record.

(B) This article supplements the provisions of Article 1 and if the provisions of this article differ from the provisions of Article 1, the provisions of this article control for partitions of heirs' property.

SECTION 15-61-340. Service of pleading; notice by publication.

(A) This article does not limit or affect the method by which service of pleading in a partition action may be made.

(B) If the plaintiff in a partition action seeks notice by publication and the court determines that notice by publication is required and, pursuant to Section 15-61-330, that the property may be heirs' property, the plaintiff, not later than ten days after the determination of the court, shall post and maintain while the action is pending a conspicuous sign on the property that is the subject of the action in addition to compliance with the requirements for notice by publication. The sign must state that the action has commenced and identify the name and address of the court and the common designation by which the property is known. The court may require, through its order, the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

SECTION 15-61-350. Sale may be ordered without writ upon testimony taken.

Pursuant to Rule 71, South Carolina Rules of Civil Procedure, this article does not affect a court's power, in partition proceedings, to dispense with the issuing of a writ of partition when, in the judgment of the court, it would involve unnecessary expense to issue such a writ. A court may, in all partition proceedings, without recourse to such writ, determine by means of testimony taken before the proper officer and reported to the court whether a partition in kind or partition by allotment among the parties is practicable or expedient and, when such cannot be fairly and equally made, may order the sale of the property and a division of the proceeds according to the rights of the parties. If a court issues a writ of partition and appoints commissioners pursuant to Rule 71, South Carolina Rules of Civil Procedure, each commissioner, in addition to the requirements and disqualifications applicable to commissioners in Rule 71, must be disinterested and impartial and not a party to or a participant in the action.

SECTION 15-61-360. Determination of value of property.

(A) Except as otherwise provided in subsections (B) and (C), if a court determines that property that is the subject of a partition action is heirs' property, the court shall determine the fair market value of the property by ordering an appraisal pursuant to subsection (D).

(B) If all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of valuation.

(C) If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall establish by order the fair market value of the property. The court shall send notice of the order to the party that filed the partition action. Within one week from the date notice was sent, the party that filed the partition action shall send a copy of the order establishing the fair market value of the property to all other cotenants with a known address.

(D) If a court orders an appraisal, the court shall appoint a disinterested real estate appraiser licensed in this State to determine the fair market value of the property assuming sole ownership of the fee simple estate. On appointment of the appraiser, the court shall order the appraiser to file with the court a sworn or verified appraisal upon its completion and the court shall send to the party that filed the partition action a notice of the appraisal filing stating:

(1) the appraised fair market value of the property;

(2) that the appraisal is available at the clerk's office; and

(3) that a party may file with the court an objection to the appraisal no later than thirty days after the notice is sent, stating the grounds for the objection.

(E) If an appraisal is filed pursuant to subsection (D), within one week from the date the notice was sent, the party that filed the partition action shall send notice to all other cotenants with a known address, stating:

(1) the appraised fair market value of the property;

(2) that the appraisal is available at the clerk's office; and

(3) that a party may file with the court an objection to the appraisal no later than thirty days after the notice is sent stating the grounds for the objection.

(F) If an appraisal is filed with the court pursuant to subsection (D), the court shall conduct a hearing to determine the fair market value of the property not sooner than sixty days after a copy of the notice of the appraisal is sent to each party under subsections (D) and (E), whether or not an objection to the appraisal is filed. In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party.

(G) After a hearing under subsection (F), but before considering the merits of the partition action, the court, by order, shall determine the fair market value of the property. The court shall send notice of the order to the party that filed the partition action and, within one week from the date notice was sent, the party filing the partition action shall send copies of the fair market value order to all other cotenants with a known address.

(H) The court, in its discretion, shall determine allocation of payment from the parties to cover the costs of the appraisal.

SECTION 15-61-370. Cotenant requesting partition by sale.

(A) If any cotenant requests partition by sale, after the determination of value pursuant to Section 15-61-360, the party filing the partition action, after receipt of the value information from the clerk's office, shall send notice to the parties that any cotenant, except a cotenant that requested partition by sale, may buy all of the interests of the cotenants that requested partition by sale.

(B) A cotenant, except a cotenant that requested partition by sale, who is interested in purchasing the interests of the cotenants that requested partition by sale, shall notify the court of that interest no later than ten days prior to the date set for the partition trial. A cotenant that did not request partition by sale must be allowed to purchase the interests of any cotenant who requested a partition by sale, as provided in this article, whether default has been entered against the cotenant or not.

(C) The purchase price for each of the interests of a cotenant that requested partition by sale is the value of the entire parcel determined pursuant to Section 15-61-360 multiplied by the cotenant's fractional ownership of the entire parcel.

(D) After the expiration of the period in subsection (B), the following requirements apply:

(1) If only one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall notify the party filing the partition action of that fact. After receiving notice from the court, the party filing the partition action shall notify all the parties of that same fact.

(2) If more than one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court, by order, shall allocate the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy. The court shall send notice of the order to the party that filed the partition action and, within one week from the date notice was sent, the party filing the partition action shall send a copy of the order showing the price to be paid by each electing cotenant to all other cotenants with a known address.

(3) If no cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall notify the party filing the partition action to send notice to all the parties of that fact and the court shall resolve the partition action, by order, pursuant to Section 15-61-380.

(E) If notices are sent to the parties under subsection (D)(1) or (2), the court shall set a date, not

sooner than sixty days after the date the notice was sent, by which electing cotenants must pay their apportioned price into the court. After this date, the following requirements apply:

(1) If all electing cotenants timely pay their apportioned price into court, the court shall issue an order reallocating all the interests of the cotenants and disburse the amounts held by the court to the persons entitled to them.

(2) If no electing cotenant timely pays its apportioned price, the court shall resolve the partition action pursuant to Section 15-61-380(A) and (B), as if the interests of the cotenants that requested partition by sale were not purchased.

(3) If one or more but not all of the electing cotenants fail to pay their apportioned price on time, the court, on motion, shall order the party so moving to give notice to the electing cotenants that paid their apportioned price of the interest remaining and the price for all the interests.

(F) Not later than twenty days after notice is sent pursuant to subsection (E)(3), any cotenant who paid may elect to purchase all of the remaining interest by paying the entire price into the court. After an additional twenty-day period, the following requirements apply:

(1) If only one cotenant pays the entire price for the remaining interests, the court shall issue an order reallocating the remaining interests to that cotenant and disburse the amounts held by it to the persons entitled to them.

(2) If no cotenant pays the entire price for the remaining interests, the court shall resolve the partition action pursuant to Section 15-61-380, as if the interests of the cotenants that requested partition by sale were not purchased.

(3) If more than one cotenant pays the entire price for the remaining interests, the court shall reapportion the remaining interests among those paying cotenants, based on each paying cotenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interests. The court shall issue promptly an order reallocating all of the cotenants' interests, disburse the amounts held by it to the persons entitled to them, and promptly refund any excess payment held by the court.

(G) Not later than forty days after the party filing the partition action sends notice to the parties pursuant to subsection (A), any cotenant entitled to buy an interest under this section may request the court to authorize a sale as part of the pending action of the interests of cotenants named as defendants and served with the complaint, but that did not appear in the action.

(H) If the court receives a timely request under subsection (G), the court, after a hearing, may deny the request or authorize the requested additional sale on such terms as the court determines are fair and reasonable, subject to the following limitations:

(1) A sale authorized under this subsection may occur only after the purchase prices for all interests subject to sale under subsections (A) through (F) have been paid into court and those interests have been reallocated among the cotenants as provided in those subsections.

(2) The purchase price for the interest of a nonappearing cotenant is based on the court's determination of value pursuant to Section 15-61-360.

SECTION 15-61-380. Partition in kind or by allotment.

(A) If all the interests of the cotenants that requested partition by sale are not purchased by other cotenants pursuant to Section 15-61-370 or if, after conclusion of the buyout pursuant to Section 15-61-370, a cotenant remains that has requested a partition in kind or a partition by allotment, the court shall order a partition in kind or a partition by allotment, unless the court, after consideration of the factors listed in Section 15-61-390, finds that partition in kind or partition by allotment may result in manifest prejudice or manifest injury to the cotenants as a group. In considering whether to order partition in kind or partition by allotment, the court shall approve a request by two or more parties to have their individual interests aggregated.

(B) If the court does not order partition in kind or partition by allotment under subsection (A), the court shall order partition by sale pursuant to Section 15-61-400 or, if no cotenant requested partition by sale, the court shall dismiss the action.

(C) If the court orders partition in kind or partition by allotment pursuant to subsection (A), the court may require that one or more cotenants pay one or more of the other cotenants amounts so that the payments, taken together with the value of the in-kind distributions to the cotenants, will make the partition in kind or the partition by allotment just and proportionate in value to the fractional interests held.

SECTION 15-61-390. Determination of manifest prejudice or injury to cotenants as a group.

(A) In determining pursuant to Section 15-61-380(A) whether partition in kind or partition by allotment would result in manifest prejudice or manifest injury to the cotenants as a group, the court shall consider the following:

(1) whether the heirs' property practicably can be divided among the cotenants;

(2) whether partition in kind or partition by allotment would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur;

(3) evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other;

(4) a cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;

(5) the lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;

(6) the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and

(7) any other relevant factor.

(B) The court may not consider any one factor in subsection (A) to be dispositive without weighing the totality of all relevant factors and circumstances.

SECTION 15-61-400. Sale of heirs' property; open-market sale; sale by sealed bids.

(A) If the court orders a sale of heirs' property, the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group.

(B) If the court orders an open-market sale and the parties, not later than thirty days after the entry of the order, agree on a real estate broker licensed in this State to offer the property for sale, the court, upon consultation with the parties, shall appoint the broker and establish a reasonable commission. If the parties do not agree on a broker, the court shall appoint a disinterested real estate broker licensed in this State to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

(C) If a broker appointed under subsection (B) obtains within a reasonable time an offer to purchase the property for at least the determination of value:

(1) the broker shall comply with the reporting requirements in Section 15-61-410;

(2) the sale may be completed in accordance with state law other than this article; and

(3) the commission of the real estate broker must be paid from the proceeds of the sale.

(D) If the broker appointed under subsection (B) does not obtain within a reasonable time an offer to purchase the property for at least the determination of value, the court, after a hearing, may:

(1) approve the highest outstanding offer, if any;

(2) redetermine the value of the property and order that the property continue to be offered for an additional time; or

(3) order that the property be sold by sealed bids or at an auction.

(E) If the court orders a sale by sealed bids or an auction, the court shall set terms and conditions of the sale. If the court orders an auction, the auction must be conducted pursuant to procedures governing judicial sales and auctions.

(F) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds.

SECTION 15-61-410. Report of broker appointed to offer heirs' property for open-market sale.

(A) Unless required otherwise to do so within a shorter time, a broker appointed under Section 15-61-400, to offer heirs' property for open-market sale shall file a report with the court not later than ten days after receiving an offer to purchase the property for at least the value determined pursuant to Section 15-61-360 or 15-61-400.

(B) The report required by subsection (A) must contain the following information:

(1) a description of the property to be sold to each buyer;

(2) the name of each buyer;

(3) the proposed purchase price;

(4) the terms and conditions of the proposed sale, including the terms of any owner financing;

(5) the amounts to be paid to lienholders;

(6) a statement of contractual or other arrangements or conditions of the broker's commission; and

(7) other material facts relevant to the sale.

SECTION 15-61-420. Construction of article.

This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b), except to the extent that South Carolina law, rules, and regulations so authorize.

Section 15-16-370 – CoTenant requesting partition by sale

P = anyone who requested partition by sale
X = anyone who did NOT request partition by sale
FMV = Fair Market Value

A. If there are any P, then after FMV is determined, the Plaintiff must send notice to all parties that any X may buy all of the interests of the P.

B. Any X (but NOT any P) who wishes to purchase interests of P must notify the Court at least 10 days before the partition trial of that interest. Any X, regardless of whether in default or not, has the right to purchase the interests of P.

C. The purchase price of any P interest is the FMV multiplied by P's ownership interest

D1 If there is 1 X who elects to buy all Ps, the Court notifies the Plaintiff of that fact then the Plaintiff must notify all other parties of that fact.

D2 If there is more than 1 X who wish to buy all Ps, the Court will apportion the interests of Ps among the purchasing Xs in the same proportion the purchasing Xs have in the whole. Same notice requirement as D1.

D3 If no X wishes to buy all P, the court shall notify the Plaintiff who shall send notice to all parties of that fact and the hearing will proceed.

E If the notice is sent for D1 or D2, the Court must set a hearing date no more than 60 days following that notice by which time all buying Xs must have paid their apportioned price into the Court. After that hearing date, E1, E2 and E3 apply.

E1 If all buying Xs pay their price, the court issues an order reallocating all of the interests of the cotenants and disburses the amounts held by the court to the persons entitled thereto.

E2 If no buying X timely pays its apportioned price, the Court resolves the issue by §15-61-380(A) and (B) as if the interests of P were not purchased.

E3 If one or more but not all of the buying X fail to pay their apportioned price on time, the Court, on motion, shall order the party so moving to give notice to the buying X who paid of the interest remaining and the price for all of the interests.

F No later than 20 days after notice through E3, any buying X may elect to purchase all of the remaining interest by paying the entire price into the Court. After an additional 20 days, F1, F2 and F3 apply.

F1 If only one buying X pays the entire price for the remaining interests, the Court issues an order allocating the remaining interests to that X and disburses the amounts held by the Court accordingly.

F2 If no buying X pay the entire price for the remaining interests, the Court shall resolve the partition action pursuant to §15-61-380 as if P were not purchased.

F3 If more than one buying X pay the entire price for the remaining interests, the court shall reapportion the remaining interests among those paying Xs based on each paying Xs original fractional ownership of the entire parcel divided by the total original fractional ownership of all buying Xs that paid the entire price for the remaining interests. The Court will promptly issue an order reallocating all of the cotenants ownership interests, disburse the amounts held by it to the persons entitled thereto and refund any excess payment held by the court.

G Not later than 45 days after the Plaintiff sends notice to the parties of the right of X to purchase the interests of P, any X may request the court to authorize a sale as part of the pending action of cotenants named as defendants and served with the complaint but that did not appear. In other words, within 45 days of the notice required by A, any X may request that the interests of someone who has not appeared in the action be available for sale and that person/entity treated like a P.

H If an X makes a request that a defendant who has not appeared be treated as a P, the court, after a hearing, may grant or deny that request or authorize the additional sale on such terms as the court determines are fair and reasonable, subject to the conditions of H1 and H2.

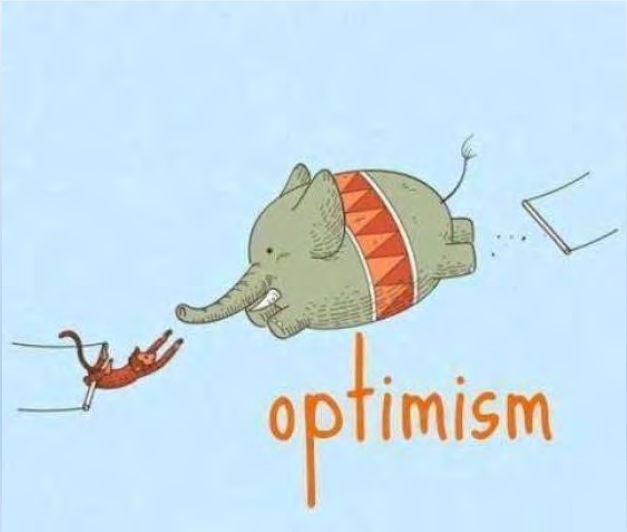
H1 The sale of the Defendant in default or who has not appeared may only be authorized under this subsection AFTER the purchase price for all interests subject to sale under (A) through (F) have been paid into the court and those interests have been reallocated among the cotenants as provided in those subsections.

H2 The purchase price of the interests of the nonappearing cotenant is based on the Court's determination of FMV.

CLEMENTA C. PINCKNEY ACT

Quiet Title Actions and Partition of Real Estate under §15-61-10 *et seq* of the Code of Laws of South Carolina, 1976 as amended

Splitting property is easy, anyone can do it!



Highlights of the Pinckney Act

- Named for Senator Clementa C. Pinckney who was a victim of the Emanual A.M.E. Church mass shooting in Charleston on June 17, 2015.
- The law went into effect on January 1, 2017.
- Heirs Property is traditionally the term for property which has been passed down from generation to generation without use of proper deeds or estates.
- The Act was intended to address inequity in the coastal regions where tracts of land were held as traditional "heirs property" and developers were taking advantage of the owners to take and develop family property.
- Part of the Uniform Act series – Uniform Partition of Heirs Property

Heirs Property under Pinckney Act

- The Act defines Heirs Property as "real property held in tenancy in common that satisfies all of the following requirements of the filing of a partition action:
  a) There is no agreement in a record binding all of the co-tenants that governs the partition of the property;
  b) One or more of the cotenants acquired title from a relative, whether living or deceased; and
  c) Any of the following applies:
     i. Twenty percent or more of the interests are held by cotenants who are relatives;
     ii. Twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or
     iii. Twenty percent of more of the cotenants are relatives"

What are the requirements of filing a Partition Action

- **SECTION 15-61-10**. Partition is compellable between certain joint tenants and tenants in common; Determination if property is heirs' property.

  (A) All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be compellable to make severance and partition of all such lands, tenements and hereditaments.

  (B) In an action to partition real property, upon motion of a party or from statements contained in the pleadings, a court shall determine, in a preliminary hearing held after the filing of the action, whether the property is heirs' property. If the court determines that the property is heirs' property, the property must be partitioned under Article 3, Chapter 61, Title 15, unless all of the cotenants otherwise agree in a record.

Partitions

- Partition in Kind – Split the actual property
- Partition by Allotment – allow one or more CoTenant to buy out other CoTenant's interests
- Partition by Sale – Sale can be private sale, public sale, auction or anything commercially reasonable
- Circuit Court, NOT Probate Court, has jurisdiction for partition actions. §15-61-50 sets jurisdiction and authorizes the Court to use one of the aforementioned methods with Partition by Sale only if the other 2 are not viable.

What is NOT subject to partition?

- Tenants in Common with right of survivorship – *Smith v. Cutler*, 623 S.E.2d 644, 366 S.C. 546 (S.C. 2005)
- Joint Tenants with right of survivorship can be terminated by the unilateral act of one party
- In *Davis v. Davis*, 223 S.C. 182, 75 S.E.2d 46 (1953) the Court held that the future interests created by a tenancy in common with right of survivorship is indestructible – i.e. not subject to defeat by the unilateral act of one cotenant
- Tenants in Common with right of survivorship requires ALL parties to act in order to terminate it.

How is Pinckney different?

- Regular Partition it is easier for a CoTenant to buy out the other CoTenants
- If Pinckney applies, the process to buy out a CoTenant may be harder and/or more complicated. The goal of Pinckney is to protect heirs from unwanted development by providing the Court with tools to evaluate more than just the base facts.
- Pinckney Act provides guidance on otherwise vague factors the Court must consider and specific timelines.

Clementa C. Pinckney Uniform Partition of Heirs' Property Act (SC Code of Laws, Sections 15-61-310 et seq.)
Effective for Partition Actions Filed On and After January 1, 2017. (Minimum Estimated Duration = 12 Months)

	TASK	START	DURATION	END	Codes
1	Notice / Motion for HP Determination (+10 lead time)	**1/1/2017**	10 days	1/10/2017	15 61 330
2	Post & Maintain HP Sign on Property (10 days after deter.)	1/10/2017	1 year	12/31/2017	15 61 340
3	Sale may be ordered without writ upon testimony taken.	1/10/2017	1 year	12/31/2017	15 61 340
4	Hearing on HP Determination (7 days lead for order)	1/10/2017	7 days - order	1/17/2017	NONE
	SECTION 15 61 360. Determination of value of property.				
5	Court Appoints Licensed Appraiser (+10 lead time)	1/17/2017	2 months	3/17/2017	15 61 360(D)
6	Appraisal Filed with Court (+2 months lead)	3/17/2017	60 days	5/16/2017	15 61 360(F)
7	Notice for hearing on filed appraisal (+60)	5/16/2017	10 days	5/26/2017	15 61 360(G)
8	Hearing on Filed Appraisal (+60 + 10 lead = +70)	5/26/2017	7 days - order	6/2/2017	15 61 360(G)
9	Court Gives FMV to Plaintiff	6/2/2017	1 week	6/9/2017	15 61 360(G)
10	Plaintiff gives FMV to Parties	6/9/2017	n/a	6/9/2017	15 61 360(G)
11	Right of First Refusal Notice	6/19/2017	n/a	6/19/2017	15 61 370(A)
12	Notice for trial date set by court - (trial 2 months out)	6/19/2017	n/a	(est. 8/19/2017)	NONE
	SECTION 15 61 370. Cotenant requesting partition by sale.				
13	10 days BEFORE trial date:	8/10/2017	n/a	8/10/2017	15 61 370
14	Trial Date	(est. 8/19/2017)	n/a	(est. 8/19/2017)	NONE
15	Notice of Who Wants to Buy What	8/10/2017	n/a	n/a	15 61 370(D)
16	Deposits for Purchases Due in 60 Days	10/9/2017	n/a	10/9/2017	15 61 370(E)
17	Notice of Resolution Under 15-61-380 - in kind / allotment	10/29/2017	n/a	10/29/2017	15 61 370(F)
18	Notice for Purchase of Defaulting Parties [out of order]	7/29/2017	n/a	7/29/2017	15 61 370(G)
19	D2 Notice After Reallocations Under D(2) of Section 15-61-370	11/8/2017	n/a	11/8/2017	15 61 370(H)
	SECTION 15 61 380. Partition in kind or by allotment.				- -
20	*Paragraph "E(3)" of Section 370. (No cotenant elects to buy all the interests in partition by sale)*				15 61 390
	SECTION 15 61 400. Sale of heirs' property; open market sale; sale by sealed bids.				- -
21	30 days after order for open market sale	12/8/2017	n/a	12/8/2017	15 61 400
22	10 days to file after an offer at fmv	12/18/2017	n/a	**12/18/2017**	15-61-410

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Getting Started (POV as the JUDGE)

- Are all the parties named?
  - Start with the last official deed on record. Talk with attorney privately.
    - Tax records do not matter
    - The neighbor's cousin's girlfriend's séance of an old TV show has more credence than the attorney
    - NO ONE is "in charge" of Heirs Property
    - A Power of Attorney stops at death
    - Oldest child is not the boss

CONSIDERATIONS

- Are all the parties named?
- Where all the parties served?
  - Use Acceptance of Service as much as possible
  - Be aware that some people panic when named as Defendants
  - Difficulty in finding an address is not a reason not to serve
  - Petition for Publication and Orders of Publication can be expensive
  - Request a spreadsheet from Plaintiff's attorney showing Defendant, date served, method and whether there was an Answer

CONSIDERATIONS

- Are all the parties named?
- Where all the parties served?
- Has a Guardian ad Litem been appointed and notice run in the paper as well as being posted on the property?
  - Sample Notice is included in the packet
  - X lives in Baltimore and dies with no estate – where does the notice in the paper need to run?
  - Lying about someone's whereabouts being unknown
- Has anyone filed an Answer?
  - Pro Se Defendants
  - Non-Real Estate attorneys appearing for trial
  - What is a real defense? (manifestly unfair)

CONSIDERATIONS

- More Considerations Pre-Trial
  - Can the property be divided in kind?
  - Do you have an appraisal?
    - Not needed if everyone agrees to the value
    - Court can determine the cost of the appraisal outweighs the evidentiary value. Court can determine Fair Market Value and notice of that must be sent to all cotenants with a known address within one week by the person who filed for the Partition
    - Court appoints a disinterested real estate appraiser licensed in SC to determine fair market value assuming sole ownership. Requirements of the report are set out in §15-61-360(D) and are many. Further time limits and requirements for action in determining Fair Market Value.
  - Was notice of the hearing given?
  - The Right of a CoTenant to purchase

Right of a CoTenant to Purchase

- §15-61-370 sets out the process. Detailed summary is in your material and set out in great detail in the statute
- Plaintiff, and any CoTenant who requests partition by sale, is NOT eligible to purchase the other interests during this process!
- If a Defendant joins in the Plaintiff's prayer for relief, does that Defendant have a right to purchase?
- Numerous time limits, notice requirements and actions that must be taken so if someone elects to try to purchase the interests of other CoTenants, read the statute closely.

Section 15-61-380

- **SECTION 15-61-380**. Partition in kind or by allotment.

  (A) If all the interests of the cotenants that requested partition by sale are not purchased by other cotenants pursuant to Section 15-61-370 or if, after conclusion of the buyout pursuant to Section 15-61-370, a cotenant remains that has requested a partition in kind or a partition by allotment, the court shall order a partition in kind or a partition by allotment, unless the court, after consideration of the factors listed in Section 15-61-390, finds that partition in kind or partition by allotment may result in manifest prejudice or manifest injury to the cotenants as a group. In considering whether to order partition in kind or partition by allotment, the court shall approve a request by two or more parties to have their individual interests aggregated.

  (B) If the court does not order partition in kind or partition by allotment under subsection (A), the court shall order partition by sale pursuant to Section 15-61-400 or, if no cotenant requested partition by sale, the court shall dismiss the action.

  (C) If the court orders partition in kind or partition by allotment pursuant to subsection (A), the court may require that one or more cotenants pay one or more of the other cotenants amounts so that the payments, taken together with the value of the in-kind distributions to the cotenants, will make the partition in kind or the partition by allotment just and proportionate in value to the fractional interests held.

Issues at the Hearing

- Start by explaining the process. What everyone's role is and how the hearing will go. Assure everyone that they will have a chance to talk when it is their turn.
- Have enough room (decide if everyone can be there since many family and friends often show up)
- Be prepared for long irrelevant stories and misconceptions about the law (paid taxes, grandpa said his father wanted George to own it, we farmed this land for 100 years, etc.)
- Keep in mind that many parties will be elderly and hard of hearing.
- Keep in mind that many parties will not have realistic values of the Fair Market Value of the property. Location, location, location.

Pinckney adds "Manifest Prejudice or injury to CoTenants as a Group"

- Any partition is an action at equity so the Court always has discretion to view issues such as fairness or other factors.
- §15-61-390 gives specific factors for the Court to consider when it is Heirs Property.
- Can the Heirs Property be divided among the CoTenants?
- Would dividing the property in kind or by allotment result in an aggregate FMV materially less than the value as a whole?
- How long has each CoTenant owned the property or have their relatives exercised ownership of the property?

§15-61-390 continued

- Does a CoTenant have any sentimental attachment to the property or is there any ancestral value in the property?
- Is the CoTenant making lawful use of the property (such as a house or farm) and the degree to which that CoTenant would be harmed if CoTenant could not continue the same use of the property.
- Has the CoTenant contributed a pro rata share of the property taxes, insurance or other costs of the property and helped with maintenance or upkeep of the property
- Is there any other relevant factor?
- No ONE factor is dispositive and the Court must consider ALL of the factors and circumstances.
- In other words, any Order needs to address each of the factors specifically.

§15-61-390 Determination of Manifest Prejudice or injury

- **SECTION 15-61-390**. Determination of manifest prejudice or injury to cotenants as a group.

  (A) In determining pursuant to Section 15-61-380(A) whether partition in kind or partition by allotment would result in manifest prejudice or manifest injury to the cotenants as a group, the court shall consider the following:

  (1) whether the heirs' property practicably can be divided among the cotenants;

  (2) whether partition in kind or partition by allotment would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur;

  (3) evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other;

  (4) a cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;

  (5) the lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;

  (6) the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and

  (7) any other relevant factor.

  (B) The court may not consider any one factor in subsection (A) to be dispositive without weighing the totality of all relevant factors and circumstances.

AFTER THE HEARING

- If a sale, §15-61-400 provides information about how to public sales, auctions and closed bid auctions.
- §15-61-410 sets out what the Realtor contemplated in §15-61-400 needs to file in his/her report.
- Whether a partition in kind, partition by allotment or partition by sale, a Clerk's Deed is included in your materials and you can share it with the whoever will be preparing the deed.

§ 15-16-370 – CoTenant requesting partition by sale

- P = anyone who requested partition by sale
- X = anyone who did NOT request partition by sale
- FMV = Fair Market Value
-
- If there are any P, then after FMV is determined, the Plaintiff must send notice to all parties that any X may buy all of the interests of the P.
- Any X (but NOT any P) who wishes to purchase interests of P must notify the Court at least 10 days before the partition trial of that interest. Any X, regardless of whether in default or not, has the right to purchase the interests of P.
- The purchase price of any P interest is the FMV multiplied by P's ownership interest
- D1 If there is 1 X who elects to buy all Ps, the Court notifies the Plaintiff of that fact then the Plaintiff must notify all other parties of that fact.
- D2 If there is more than 1 X who wish to buy all Ps, the Court will apportion the interests of Ps among the purchasing Xs in the same proportion the purchasing Xs have in the whole. Same notice requirement as D1.
- D3 If no X wishes to buy all P, the court shall notify the Plaintiff who shall send notice to all parties of that fact and the hearing will proceed.
- E If the notice is sent for D1 or D2, the Court must set a hearing date no more than 60 days following that notice by which time all buying Xs must have paid their apportioned price into the Court. After that hearing date, E1, E2 and E3 apply.

Purchase by CoTenant continued

- E1 If all buying Xs pay their price, the court issues an order reallocating all of the interests of the cotenants and disburses the amounts held by the court to the persons entitled thereto.
- E2 If no buying X timely pays its apportioned price, the Court resolves the issue by §15-61-380(A) and (B) as if the interests of P were not purchased.
- E3 If one or more but not all of the buying X fail to pay their apportioned price on time, the Court, on motion, shall order the party so moving to give notice to the buying X who paid of the interest remaining and the price for all of the interests.
- F No later than 20 days after notice through E3, any buying X may elect to purchase all of the remaining interest by paying the entire price into the Court. After an additional 20 days, F1, F2 and F3 apply.

Purchase by CoTenant continued

- F1 If only one buying X pays the entire price for the remaining interests, the Court issues an order allocating the remaining interests to that X and disburses the amounts held by the Court accordingly.
- F2 If no buying X pay the entire price for the remaining interests, the Court shall resolve the partition action pursuant to §15-61-380 as if P were not purchased.
- F3 If more than one buying X pay the entire price for the remaining interests, the court shall reapportion the remaining interests among those paying Xs based on each paying Xs original fractional ownership of the entire parcel divided by the total original fractional ownership of all buying Xs that paid the entire price for the remaining interests. The Court will promptly issue an order reallocating all of the cotenants ownership interests, disburse the amounts held by it to the persons entitled thereto and refund any excess payment held by the court.
- G Not later than 45 days after the Plaintiff sends notice to the parties of the right of X to purchase the interests of P, any X may request the court to authorize a sale as part of the pending action of cotenants named as defendants and served with the complaint but that did not appear. In other words, within 45 days of the notice required by A, any X may request that the interests of someone who has not appeared in the action be available for sale and that person/entity treated like a P.

Purchase by CoTenant continued

- H If an X makes a request that a defendant who has not appeared be treated as a P, the court, after a hearing, may grant or deny that request or authorize the additional sale on such terms as the court determines are fair and reasonable, subject to the conditions of H1 and H2.
- H1 The sale of the Defendant in default or who has not appeared may only be authorized under this subsection AFTER the purchase price for all interests subject to sale under (A) through (F) have been paid into the court and those interests have been reallocated among the cotenants as provided in those subsections.
- H2 The purchase price of the interests of the nonappearing cotenant is based on the Court's determination of FMV.

Clementa C. Pinckney Uniform Partition of Heirs' Property Act (SC Code of Laws, Sections 15-61-310 et seq.)

Effective for Partition Actions Filed On and After January 1, 2017. (Minimum Estimated Duration = 12 Months)

	TASK	START	DURATION	END	Codes
1	Notice / Motion for HP Determination (+10 lead time)	**1/1/2017**	10 days	1/10/2017	15 61 330
2	Post & Maintain HP Sign on Property (10 days after deter.)	1/10/2017	1 year	12/31/2017	15 61 340
3	Sale may be ordered without writ upon testimony taken.	1/10/2017	1 year	12/31/2017	15 61 340
4	Hearing on HP Determination (7 days lead for order)	1/10/2017	7 days - order	1/17/2017	NONE
	SECTION 15 61 360. Determination of value of property.				
5	Court Appoints Licensed Appraiser (+10 lead time)	1/17/2017	2 months	3/17/2017	15 61 360(D)
6	Appraisal Filed with Court (+2 months lead)	3/17/2017	60 days	5/16/2017	15 61 360(F)
7	Notice for hearing on filed appraisal (+60)	5/16/2017	10 days	5/26/2017	15 61 360(G)
8	Hearing on Filed Appraisal (+60 + 10 lead = +70)	5/26/2017	7 days - order	6/2/2017	15 61 360(G)
9	Court Gives FMV to Plaintiff	6/2/2017	1 week	6/9/2017	15 61 360(G)
10	Plaintiff gives FMV to Parties	6/9/2017	n/a	6/9/2017	15 61 360(G)
11	Right of First Refusal Notice	6/19/2017	n/a	6/19/2017	15 61 370(A)
12	Notice for trial date set by court - (trial 2 months out)	6/19/2017	n/a	(est. 8/19/2017)	NONE
	SECTION 15 61 370. Cotenant requesting partition by sale.				
13	10 days BEFORE trial date:	8/10/2017	n/a	8/10/2017	15 61 370
14	Trial Date	(est. 8/19/2017)	n/a	(est. 8/19/2017)	NONE
15	Notice of Who Wants to Buy What	8/10/2017	n/a	n/a	15 61 370(D)
16	Deposits for Purchases Due in 60 Days	10/9/2017	n/a	10/9/2017	15 61 370(E)
17	Notice of Resolution Under 15-61-380 - in kind / allotment	10/29/2017	n/a	10/29/2017	15 61 370(F)
18	Notice for Purchase of Defaulting Parties [out of order]	7/29/2017	n/a	7/29/2017	15 61 370(G)
19	D2 Notice After Reallocations Under D(2) of Section 15-61-370	11/8/2017	n/a	11/8/2017	15 61 370(H)
	SECTION 15 61 380. Partition in kind or by allotment.				- -
20	*Paragraph "E(3)" of Section 370. (No cotenant elects to buy all the interests in partition by sale)*				15 61 390
	SECTION 15 61 400. Sale of heirs' property; open market sale; sale by sealed bids.				- -
21	30 days after order for open market sale	12/8/2017	n/a	12/8/2017	15 61 400
22	10 days to file after an offer at fmv	12/18/2017	n/a	**12/18/2017**	15-61-410

Prepared by John J. Pinckney, Pinckney Law Firm. Reprinted with permission.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No: 2018-CP-14-_____
COUNTY OF CLARENDON	)	
Jessie G123,	)	
	)	**ANSWER OF THE GUARDIAN AD LITEM**
Plaintiff,	)	
	)	
vs	)	
	)	

Linda J123 K123, Leron J123, Tammy J123 and Stanley K123 and Richard Roe, a fictitious person representing as a class any unknown person or persons suffering under legal disability having a claim and/or lien upon the property described herein and Mary Roe, a fictitious person representing as a class any unknown heirs of Virginia J123, Joseph Co123, Rosenia Ba123, and Eunice Ga123, deceased, claiming an interest in the property described herein,

Defendants.

ANSWER OF GUARDIAN AD LITEM

The undersigned Guardian Ad Litem, representing a class designated as Richard Roe, a fictitious person and any Defendants or parties hereto suffering from legal disability, and Mary Roe, a fictitious person representing as a class any and all unknown persons claiming any right, title, estate or interest or lien described in the Lis Pendens, hereby answers the Complaint of the Plaintiff and would respectfully show unto this Honorable Court, as follows:

1. That these Defendants are without information and belief as to the allegations of the Complaint and they demand strict proof thereof.
2. That these Defendants suffer under legal disability and their rights are hereby submitted to the protection of the Court.
3. That these Defendants are informed and believe that the Court should inquire into the matters alleged in the Complaint and issue such Orders and Decrees as would protect

the rights and interests of those unknown heirs and devisees and persons suffering under legal disability.

WHEREFOR, having answered the Complaint herein, I pray that the Court inquire into these matters and issue involved in the action herein and issue such Orders and Decrees as would protect the interest of the Defendants, unknown heirs and devisees and persons suffering under legal disability.

_____
_____, Esquire
Guardian Ad Litem

_____, South Carolina
_____, 20_____

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF CLARENDON)
)

DEED OF CLERK OF COURT OF COMMON PLEAS
Case No: 2018-CP-14-00514

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, BEULAH ROBERTS, CLERK OF COURT OF COMMON PLEAS IN AND FOR THE COUNTY OF CLARENDON, SEND GREETINGS:

WHEREAS, Jessie G123, on or about the 7th day of _____, 20____ exhibited her Complaint in the Court of Common Pleas for the County, demanding judgment in relation to the Quieting of Title and Partition of a Tract of land containing XXXX acres designated as Clarendon Tax Map Parcel No. 0XX-00-XX-XXX-00, a XXX-acre tract of land designated as Clarendon Tax Map Parcel No. 0XX-00-XX-XXX-00, and a XXX acre tract of land designated as Clarendon Tax Map Parcel No. 0XX-00-XX-XXX-00.

The cause at issue was resolved by a Decree in Partition issued by W. T. Geddings, Jr. as Special Referee on _____, 20_____, whereby the Court directed that a portion of Clarendon Tax Map Parcel No. 0XX-00-XX-XXX-00 and Parcel No. 0XX-00-XX-XXX-00 be set off to the Defendants in the case namely: Linda J123 K123, Stanley K123, Leron J123 and Tammy J123 as a portion of the partition property.

NOW THEREFORE,

KNOW ALL MEN BY THESE PRESENTS, that I, Beulah Roberts, Clerk of Court, in and for the County aforesaid, State of South Carolina pursuant to the above referred to Decree, have granted, bargained, sold and released and by these presents do grant, bargain, sell and release unto **Linda J123 K123, _____,** the following described

tract of land:

All that piece, parcel or lot of land lying, being and situate in the County of Clarendon, State of South Carolina, being designated as Lot A containing .50 acres, on the plat hereinafter referred to and bounding now or formerly as follows: On the North by lands now formerly of Leroy & Virginia J123; On the East by lands now formerly of Edrena H. Co123; On the South by Lot B on said plat; On the West by lands of Johnny and Shirley Co123 and lands of Jessie G123.

SUBJECT HOWEVER, to a 50" easement of right of way extending from the northern boundary of said lot in a southerly direction approximately 293.35 feet to Lot B on said plat.

For a more particular description of said lot, reference may be had to a plat made by Mathis & Muldrow, Land Surveying, dated _____ 8, 2019, recorded in the Office of the Register of Deeds for Clarendon County in Plat Book _____ at Page _____.

Said lot being designated as a portion of Clarendon County Tax Map Parcel #0XX-00-XX-XXX-00

FOR DERVIATION SEE BELOW

ALSO:

UNTO STANLEY K123, _____, the following described tract of land:

All that piece, parcel or lot of land lying, being and situate in the County of Clarendon, State of South Carolina, being designated as Lot B containing 1 acre, on the plat hereinafter referred to and bounding now or formerly as follows: On the North by Lot A on said plat and lands of Edrena H. Co123; On the East by lands of Andrew Jr. & Barbara Ann Co123; On the South by lands of Jessie G123; On the West by lands of Jessie G123.

For a more particular description of said lot, reference may be had to a plat made by Mathis & Muldrow, Land Surveying, dated _____ 8, 2019, recorded in the Office of the Register of Deeds for Clarendon County in Plat Book _____ at Page _____.

Said lot being designated as a portion of Clarendon County Tax Map Parcel #0XX-00-XX-XXX-00

FOR DERIVATION SEE BELOW

ALSO:

UNTO TAMMY J123, _____, the following described tract of land:

All that piece, parcel or lot of land lying, being and situate in the County of Clarendon, State of South Carolina, being designated as Lot C containing .97 acres, on the plat

hereinafter referred to and bounding now or formerly as follows: On the North by lands of Andrew and Lenora Ann Co123; On the East by a 50' access easement; On the South by Lot C on said plat; On the West by lands of Jessie G123.

TOGETHER with a 50' non-exclusive easement of access extending from the right of way of Connor Road in a southerly direction as shown on the aforesaid plat.

For a more particular description of said lot, reference may be had to a plat made by Mathis & Muldrow, Land Surveying, dated _____ 8, 2019, recorded in the Office of the Register of Deeds for Clarendon County in Plat Book _____ at Page _____.

Said lot being designated as a portion of Clarendon County Tax Map Parcel #0XX-00-XX-XXX-00
SEE DERIVATION BELOW

ALSO:
UNTO LERON J123, _____, the following described tract of land:

All that piece, parcel or lot of land lying, being and situate in the County of Clarendon, State of South Carolina, being designated as Lot C containing .69 acres, on the plat hereinafter referred to and bounding now or formerly as follows: On the North by Lot D on said plat; On the East by a 50' access easement and lands of Jessie G123; On the South and West by lands of Jessie G123.

TOGETHER with a 50' non-exclusive easement of access extending from the right of way of Connor Road in a southerly direction as shown on the aforesaid plat.

For a more particular description of said lot, reference may be had to a plat made by Mathis & Muldrow, Land Surveying, dated _____ 8, 2019, recorded in the Office of the Register of Deeds for Clarendon County in Plat Book _____ at Page _____.

Said lot being designated as a portion of Clarendon County Tax Map Parcel #0XX-00-XX-XXX-00

Said tracts having been conveyed to Virginia J123, Geneva B123, Joseph Co123, Jessie G123, Elizabeth Co123, Johnnie Lee Co123, Andrew Co123, Eunice C. Ga123, Rosenia Ba123 and Rosa Ca123 by deed of Albert Co123 dated October 30, 1987, recorded in the Office of the Register of Deeds for Clarendon County in Deed Book A-XXX at Page XX.

Subsequently, Elizabeth Co123 having conveyed her interest in the premises to her brother Johnnie Lee Co123 and sister in law Shirley Co123 by deed dated December 29, 1998 and recorded _____ 31, _____in the Office of the Register of Deeds for Clarendon County in Deed Book A-XXX at Page XXX.

Subsequently, Eunice C. Ga123 having died testate on _____, 20___ devising her interest in the premises to Paulette Ke123 by her Last Will and Testament on file in

the Office of the Probate Court for Clarendon County in Case Number 20XX-ES-XX-XXX.

Subsequently, Joseph Co123 died intestate on _____ 12, 2015 survived by his widow, Edrena H. Co123 and his children: Sonya L123 and Kenya Co123 as his heirs at law.

Subsequently, Rosenia Ba123 having died intestate in the year 2017 survived by her children: Terry Ba123 and Rosenia Ba123 as her heirs at law.

The interest of Rosa Ca123, Shirley Co123, Johnnie Co123, Andrew Co123, Geneva Be123, Paulette Keith, Edrena Hilton Co123, Sonya Le123 Co123, Kenya Co123, Terry N. Ba123 and Rosenia Ba123 having been conveyed to Jessie G123 by Quit Claim deed dated and recorded _____, 20____ in the Office of the Register of Deeds for Clarendon County in Deed Book XXXX at Page XXXX.

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances to said premises belonging, or in anywise incident or appertaining; and all the estate, right, title, claim, and interest whatsoever of the parties to the cause aforesaid, and each of them, in and to the same, and of all other persons claiming, from, under, or by these or any of them.

TO HAVE AND TO HOLD, all and singular, the premises before mentioned, unto the said Linda J123 K123, Stanley K123, Tammy J123 and Leron J123, their heirs and assigns forever.

IN WITNESS WHEREOF, I, the said Clerk of Court in and for the County aforesaid, under and by virtue of the aforesaid Decree, have made and set my Hand and Seal this _____ day of _____, 20_____.

_____ 1st Witness

_____ 2nd Witness

_____
Beulah Roberts, Clerk of Court
Clarendon County

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

PERSONALLY, APPEARED BEFORE ME, the undersigned witness and made oath that s/he saw the within named Beulah Roberts, sign, seal and as her act and deed, deliver the within

written Deed of Clerk of Court for the uses and purposes therein mentioned and that s/he with the other witness subscribed above witnessed the execution thereof.

SWORN to before me this _____
day of _____, 2019.

_____
1st Witness Sign Again

_____
Notary Public for South Carolina
My Commission Expires: _____
Notary Public Printed Name or Seal Below:

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF CLARENDON)

PERSONALLY, appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.

2. The property being transferred bears a portion of Clarendon County TMP#091-00-03-041-00 and TMP#091-00-03-002-00 was transferred from Beulah Roberts, Clerk of Court for Clarendon County to Linda J123 K123, Stanley K123, Tammy J123 and Leron J123 on _____ _____, 20____.

3. Check one of the following: The deed is
(a) _____ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
(b) _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
(c) ___X___ exempt from the deed recording fee because (See Information section of affidavit);

(If exempt, please skip items 4 - 7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes ____ or No ___

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit):
(a) _____ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of $0.00.
(b)_____ The fee is computed on the fair market value of the realty which is _____.
(c) _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____.

5. Check Yes ___ or No ___ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If Yes, the amount of the outstanding balance of this lien or encumbrance is: _____.

6. The deed recording fee is computed as follows:

(a) Place the amount listed in item 4 above here: $0.00
(b) Place the amount listed in item 5 above here: $0.00
(If no amount is listed, place zero here.)
(c) Subtract line 6(b) from Line 6(a) and place result here: $00.00

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: $0.00

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Attorney.

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Responsible Person Connected with the Transaction

SWORN to before me this _____
Day of _____ year of 20_____

_____
W123

_____
Notary Public for South Carolina
My Commission Expires: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No: 2018-CP-14-_____
COUNTY OF CLARENDON	)	
Jessie G123,	)	
	)	COMPLAINT
Plaintiff,	)	
	)	
vs	)	
	)	

Linda J123 K123, Leron J123, Tammy J123 and Stanley K123 and Richard Roe, a fictitious person representing as a class any unknown person or persons suffering under legal disability having a claim and/or lien upon the property described herein and Mary Roe, a fictitious person representing as a class any unknown heirs of Virginia J123, Joseph Co123, Rosenia Ba123, and Eunice Ga123, deceased, claiming an interest in the property described herein,

Defendants.

The Plaintiffs above named respectively shows the Court as follows:

FIRST CAUSE OF ACTION – QUIET TITLE

1. The Plaintiff brings this action to Quiet Title to the real property described herein to determine the owners thereof pursuant to the provisions of Section 15-67-10 et seq. of the Code of Laws of the State of South Carolina.
2. The Plaintiff requests the appointment of a Guardian ad Litem to represent such parties who may be unknown or suffering under a legal disability in the name of fictitious persons Mary Roe and Richard Roe.
3. That the properties which are the subject of this suit are identified as Clarendon County Tax Map Numbers 0XX-00-XX-XXX-00 containing XXX acres, 0XX-00-XX-XXX-00 containing XXX acres and 0XX-00-XX-XXX-00 containing XXX acres.

4. That John Co123 conveyed the above property to John Co123 and Elizabeth Co123 (JWROS), dated and recorded _____, 19___ in the Office of the Register of Deeds in Deed Book _____ at Page ____. Subsequently, Elizabeth Co123 died in 19___.

5. That John Co123 conveyed the property to his son, Albert Co123 reserving a life estate by deed dated and recorded _____, 19____ in the Office of the Register of Deeds for Clarendon County in Deed Book A-_____ at Page ____. John Co123 died _____, 19____.

6. That Albert Co123 conveyed the property to his ten siblings namely: Virginia J123, Geneva Be123, Joseph Co123, Jessie G123, Elizabeth Co123, Johnnie Lee Co123, Andrew Co123, Eunice Ga123, Rosenia Ba123 and Rosa Cantey by deed dated _____, 19___ in the Office of the Register of Deeds for Clarendon County in Deed Book _____ at Page ____.

7. That Elizabeth Co123, conveyed her right, title and interest in the property to her brother Johnny Co123 and sister-in-law Shirley Co123 by deed dated _____, 19____ and recorded _____, 19____ in the Office of the Register of Deeds for Clarendon County in Deed Book _____ at Page _____.

8. That Virginia J123, died in _____ intestate survived by her children, Leron J123, Linda J123 K123 and Tammy J123 her heirs at law.

9. That Eunice Ga123 died _____, 20____ testate and devised her interest in the property by her Last Will & Testament probated in Clarendon County Probate Court 20__-ES-14-XXX to Paulette Ke123.

10. Joseph Co123 died _____, 20_____ intestate survived by his wife Edrena Hi123 Co123 and his children, Sonya Le123 and Kenya Co123 his heirs at law.

11. Rosenia C. Ba123 died in 20____ intestate survived by her children, Terry Ba123 and Rosenia Ba123 her heirs at law.

12. The tracts owned by the Plaintiff and the Defendants as tenants in common are described as follows:

All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less and bounding now or formerly as follows: On the North by lands of E. A. Le123, et al, Isaac and Susie Ann Sh123 and Lotoria Wa123; On the East by lands of Shannon and Rosenia D. Ba123; On the South by Paxville Highway; On the West by lands of Geneva C. Be123.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00

ALSO:
All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less and bounding now or formerly as follows: On the North by Connor Road. Johnny and Shirley Co123 and Leroy and Virginia J123; On the Northeast by lands of Sonja Le123; On the East by lands of Andrew & Barbara Ann Co123 and Albert Co123; On the South by Paxville Highway.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00

ALSO:
All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less, straddling the right of way of Connor Road and bounding now or formerly as follows: On the North by lands of E.A & J.H. Le123, lands of Miller Co123 and lands of Michael Co123; On the East by lands of Michael and Kevin Da123, lands of Joseph Co123, lands of Ch123 AME Church, lands of Kenneth and Catherine Th123, lands of Starlin G123 and Iva L. Ja123, lands of Frances Br123 and lands of Spe123 Ti123; On the West by lands of Joe & Phyllis Ad123, lands of Shaneka Ad123, lands of Albert Co123, lands of Andrew & Barbara Ann Co123; lands of Jessie & Starlin G123, lands of E.A. & J.H. Le123, lands of Ray & Jonnell At123 and lands of Jim & Cynthia Ro123.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00**.**

13. The Plaintiffs' alleges that ownership of the above described premises as tenants in common is as follows:

NAME OF OWNERS:	PERCENTAGE OF OWNERSHIP:
Jessie G123	10%
Johnnie Lee Co123	15%
Andrew Co123	10%
Paulette Ke123 (Heir of Eunice Ga123)	10%
Geneva Be123	10%
Rosa Ca123	10%
Terry Ba123 (Heir of Rosenia Ba123)	5%
Rosenia Ba123 (Heir of Rosenia Ba123)	5%
Leron J123 K123 (Heir of Virginia J123)	3.33%
Linda J123 (Heir of Virginia J123)	3.33%
Tammy J123 (Heir of Virginia J123)	3.34%
Shirley Co123	5%
Edrena H. Co123 (Heir of Joseph Co123)	5%
Sonya Le123 (Heir of Joseph Co123)	2.5%
Kenya Co123 (Heir of Joseph Co123)	2.5%

SECOND CAUSE OF ACTION – PARTITION

1. The Plaintiffs' brings this Partition action under the Provisions of Section 15-61-10, *et seq,* of the Code of Laws of South Carolina, and Rule 71 of the Rules of Civil Procedure of South Carolina.
2. The Plaintiffs' seeks the partition of the premises above described by having the same appraised and offered for sale and the proceeds applied first to the costs and disbursements of this action, including a reasonable attorney's fee for Plaintiffs' attorney, publication and other costs in accordance with the directions of this Court, and the balance distributed to the Plaintiffs' and the Defendants in accordance with their percentage of ownership.
3. The Plaintiffs hereby offers a First Right of Refusal in accordance with the Provisions of Section 15-61-25 of the Code of Laws of South Carolina to the named Defendants in this

action who may be interested in purchasing the interest of the Plaintiff in the real estate and requires that if such an interest exists, they give notice of it to the Court in this action no later than ten (10) days prior to the date of trial for the case.

4. The Provisions of Section 15-61-310 (Clementa C. Pinckney Uniform Partition of Heirs' Property Act) shall be complied with.

WHEREFORE, Plaintiffs' pray that this Court:

1. Determine the interest in the Plaintiffs and the Defendants in the above described lot as herein alleged in this Court;
2. That certain premises herein above described as Clarendon Tax Map 0XX-00-XX-XXX-00, 0XX-00-XX-XXX-00 and 0XX-00-XX-XXX-00 be appraised and offered for sale by public or private sale and the proceeds first applied to the cost of this action including a reasonable attorneys fee for Plaintiffs attorney, publication and court costs and the balance divided among the Plaintiffs and the Defendants in accordance with their respective interest.
3. For such other and further relief as to the Court may deem just and proper.

_____

Attorneys for the Plaintiffs

Dated: _____, 20_____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No: 2018-CP-14-_____
COUNTY OF CLARENDON	)	
Jessie G123,	)	
	)	QUIET TITLE AND PARTITION DECREE
	)	
Plaintiff,	)	
	)	
vs	)	
	)	

Linda J123 K123, Leron J123, Tammy J123 and Stanley K123 and Richard Roe, a fictitious person representing as a class any unknown person or persons suffering under legal disability having a claim and/or lien upon the property described herein and Mary Roe, a fictitious person representing as a class any unknown heirs of Virginia J123, Joseph Co123, Rosenia Ba123, and Eunice Ga123, deceased, claiming an interest in the property described herein,

Defendants.

This Quiet Title and Partition Action came to be heard before me pursuant to the provisions of Rule 53 SCRCP on Thursday, _____, 20____. _____ of the Clarendon County Bar represented the Plaintiff and _____ of the Florence County Bar represented the Defendants. _____, Esquire, the appointed Guardian Ad Litem, filed an Answer on behalf of unknown heirs as a class and those suffering under a legal disability.

The Plaintiff, Jessie G123, Starlin G123, Attorney _____ and Attorney _____, representing the Defendants: Linda J123 K123, Leron J123, Tammy J123 and Stanley K123 appeared at the hearing.

This Court has jurisdiction of the property located in Clarendon County and that all of the parties were properly served with notice of the hearing.

EVIDENCE AND DISCUSSION
QUIET TITLE ACTION

1. The properties which are the subject of this action are as follows:

All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less and bounding

now or formerly as follows: On the North by lands of E. A. Le123, et al, Isaac and Susie Ann Sh123 and Lotoria Wa123; On the East by lands of Shannon and Rosenia D. Ba123; On the South by Paxville Highway; On the West by lands of Geneva C. Be123.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00

ALSO:
All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less and bounding now or formerly as follows: On the North by Connor Road. Johnny and Shirley Co123 and Leroy and Virginia J123; On the Northeast by lands of Sonja Le123; On the East by lands of Andrew & Barbara Ann Co123 and Albert Co123; On the South by Paxville Highway.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00

ALSO:
All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less, straddling the right of way of Connor Road and bounding now or formerly as follows: On the North by lands of E.A & J.H. Le123, lands of Miller Co123 and lands of Michael Co123; On the East by lands of Michael and Kevin Da123, lands of Joseph Co123, lands of Ch123 AME Church, lands of Kenneth and Catherine Th123, lands of Starlin G123 and Iva L. Ja123, lands of Frances Br123 and lands of Spe123 Ti123; On the West by lands of Joe & Phyllis Ad123, lands of Shaneka Ad123, lands of Albert Co123, lands of Andrew & Barbara Ann Co123; lands of Jessie & Starlin G123, lands of E.A. & J.H. Le123, lands of Ray & Jonnell At123 and lands of Jim & Cynthia Ro123.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00.

FOR DERIVATION SEE BELOW:

Said tracts having been conveyed to Virginia J123, Geneva B123, Joseph Co123, Jessie G123, Elizabeth Co123, Johnnie Lee Co123, Andrew Co123, Eunice C. Ga123, Rosenia Ba123 and Rosa Ca123 by deed of Albert Co123 dated October 30, 1987, recorded in the Office of the Register of Deeds for Clarendon County in Deed Book A-XXX at Page XX.

Subsequently, Elizabeth Co123 having conveyed her interest in the premises to her brother Johnnie Lee Co123 and sister in law Shirley Co123 by deed dated December 29, 1998 and recorded _____ 31, _____in the Office of the Register of Deeds for Clarendon County in Deed Book A-XXX at Page XXX.

Subsequently, Eunice C. Ga123 having died testate on _____, 20___ devising her interest in the premises to Paulette Ke123 by her Last Will and Testament on file in the Office of the Probate Court for Clarendon County in Case Number 20XX-ES-XX-XXX.

Subsequently, Joseph Co123 died intestate on _____ 12, 2015 survived by his widow, Edrena H. Co123 and his children: Sonya L123 and Kenya Co123 as his heirs at law.

Subsequently, Rosenia Ba123 having died intestate in the year 2017 survived by her children: Terry Ba123 and Rosenia Ba123 as her heirs at law.

The interest of Rosa Ca123, Shirley Co123, Johnnie Co123, Andrew Co123, Geneva Be123, Paulette Ke123, Edrena Hilton Co123, Sonya Le123 Co123, Kenya Co123, Terry N. Ba123 and Rosenia Ba123 having been conveyed to Jessie G123 by Quit Claim deed dated and recorded _____, 20____ in the Office of the Register of Deeds for Clarendon County in Deed Book XXXX at Page XXXX.

2. It appears from the testimony and evidence presented that the properties which are the subject of this action were conveyed to John Co123 and Elizabeth Co123 as joint tenants with the right of survivorship by deed dated _____, 19___ and recorded in the Office of the Register of Deeds for Clarendon County in Deed Book _____ at Page ____. Elizabeth Co123 died in the year 19___ survived by her husband John Co123.
3. John Co123 conveyed the subject property to his son, Albert Co123 reserving a life estate by deed dated and recorded _____, 19___ in the Office of the Register of Deeds for Clarendon County in Deed Book _____ at Page ____. The said John Co123 died on _____, 19___.
4. Albert Co123 conveyed the property to his ten siblings namely: Virginia J123, Geneva Bell, Joseph Co123, Jessie G123, Elizabeth Co123, Johnnie Lee Co123, Andrew Co123, Eunice Gay, Rosenia Ba123 and Rosa Cantey by deed dated _____, 19___ in the Office of the Register of Deeds for Clarendon County in Deed Book _____ at Page _____.
5. Elizabeth Co123 conveyed her interest in the property to her brother Johnny Co123 and sister-in-law Shirley Co123 by deed dated _____, 19___ and recorded

_____, 19___ in the Office of the Register of Deeds for Clarendon County in Deed Book _____ at Page ____.

6. Virginia J123 died in 19___, intestate survived by her children, Leron J123, Linda J123 K123, Tammy J123 and Stanley K123 as her heirs at law.
7. Eunice Gay died testate on _____, 20____ and devised her interest in the property by her Last Will & Testament filed in the Probate Court of Clarendon County Case Number 20___-ES-14-_____ to Paulette Ke123.
8. Joseph Co123 died _____, 20____ intestate survived by his widow, Edrena Hi123 Co123 and his children, Sonya Le123 and Kenya Co123 his heirs at law.
9. Rosenia C. Ba123 died intestate in 20___ survived by her children, Terry Ba123 and Rosenia Ba123 her heirs at law.
10. The interest of Johnnie Lee Co123 (15%), Andrew Co123 (10%), Paulette Ke123 (10%), Rosa Cantey (10%), Terry Ba123 (5%), Rosenia Ba123 (5%), Shirley Co123 (5%), Edrena H. Co123 (5%), Sonya Lemon (2.5%) and Kenya Co123 (2.5%) interest in the below described tract having been conveyed to the Plaintiff, Jessie G123 by deed dated _____, 2018, recorded in the Office of the Register of Deeds for Clarendon County in Deed Book _____ at Page _____on _____, 20___.
11. It is the findings of this Court from the evidence presented that the owners of the above described tracts are as follows:

NAME OF OWNERS:	PERCENTAGE OF OWNERSHIP:
Jessie G123	90%
Leron J123 K123 (Heir of Virginia J123)	2.5%
Linda J123 (Heir of Virginia J123)	2.5%
Tammy J123 (Heir of Virginia J123)	2.5%
Stanley K123 (Heir of Virginia J123)	2.5%

PARTITION ACTION

1. This action is brought pursuant to the Provisions of Section 15-61-10, *et seq,* of the Code of Laws of South Carolina, and Rule 71 of the Rules of Civil Procedure of South Carolina and seeks the partition of the premises above described in kind.
2. It is the findings of this Court that the property is such that it can be partitioned in kind 90% to the Plaintiff and 10% to the Defendants, Linda J123 K123, Leron J123, Tammy J123 and Stanley K123.
3. The parties have announced to the Court that they have agreed upon a partition of the property allocating 4 acres of land above described to the Defendants and the remaining lands to the Plaintiff. The parties have also agreed that the cost of this action including Plaintiff's attorney's fees, publication and court costs including Clerk of Court Deed to the Plaintiff is to be paid by the Plaintiff and the cost of surveying the 4 acres to be set off the Defendants and the Clerk of Court deed to the Defendants shall be paid by the Defendants.

IT IS THEREFORE,

ORDER, ADJUDGED AND DECREED that the above described premises is owned by the parties as follows: a 90% undivided interest by the Plaintiff, Jessie G123 and a 10% interest owned by the Defendants, Leron J123 K123, Linda J123, Tammy J123 and Stanley K123 as tenants in common.

I direct that the property be partitioned in kind in accordance with the agreement of the parties setting off approximately 4 acres of land to the Defendants and the remainder of the land to the Plaintiff.

IT IS FURTHER ORDERED that the cost of this action including Plaintiff's attorney's fees, publication and court costs including Clerk of Court Deed to the Plaintiff shall be paid by the Plaintiff and the cost of the survey of the 4 acres to be set off to the Defendants, the Clerk of Court Deed to the Defendants and Defendants attorney's fees shall be paid by the Defendants.

IT IS FURTHER ORDERED that the survey of the 4 acres hereinabove referred to be set off to the Defendants within thirty (30) days of the date of this Order.

AND IT IS SO ORDERED.

_____
W. T. Geddings, Jr.
Special Referee for Clarendon County

Manning, South Carolina
_____, 20___

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No: 2018-CP-14-_____
COUNTY OF CLARENDON	)	
Jessie G123,	)	
	)	
Plaintiff,	)	
	)	
vs	)	
	)	

Linda J123 K123, Leron J123, Tammy J123 and Stanley K123 and Richard Roe, a fictitious person representing as a class any unknown person or persons suffering under legal disability having a claim and/or lien upon the property described herein and Mary Roe, a fictitious person representing as a class any unknown heirs of Virginia J123, Joseph Co123, Rosenia Ba123, and Eunice Ga123, deceased, claiming an interest in the property described herein,

Defendants.

ORDER APPOINTING GUARDIAN AD LITEM

Upon the verified Petition of the Plaintiffs herein, it is:

ORDERED that _____, Esquire, of the Clarendon County Bar be, and is hereby appointed Guardian Ad Litem for the Defendants in this Action who are designated as Richard Roe and Mary Roe, any party Defendant to this action who maybe a member of the Military and/or have no general or testament guardian within this state.

_____
Beulah Roberts, Clerk of Court
Clarendon County

Manning, South Carolina

_____, 20_____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No: 2018-CP-14-_____
COUNTY OF CLARENDON	)	
Jessie G123,	)	
	)	PETITION FOR APPOINTMENT OF
Plaintiff,	)	GUARDIAN AD LITEM
	)	
vs	)	
	)	

Linda J123 K123, Leron J123, Tammy J123 and Stanley K123 and Richard Roe, a fictitious person representing as a class any unknown person or persons suffering under legal disability having a claim and/or lien upon the property described herein and Mary Roe, a fictitious person representing as a class any unknown heirs of Virginia J123, Joseph Co123, Rosenia Ba123, and Eunice Ga123, deceased, claiming an interest in the property described herein,

Defendants.

Personally appeared before me, _____, who being duly sworn states that he is the Attorney for the Plaintiff in the above entitled action to Quiet the Title and Partition Real Estate and makes this Petition for the appointment of a Guardian Ad Litem as will more fully appear by reference to the Complaint and Petition for Order of Publication on file, there are certain unknown and unnamed parties who are or may be minors and other persons under a legal disability whose address or whereabouts are unknown to the Plaintiff. That said minor persons under legal disability and other unknown persons are made party Defendants under the fictitious names of Mary Roe and Richard Roe who are necessary parties to this Action and have no general or testamentary guardian within this State so that it is necessary that a Guardian Ad Litem be appointed by the Court to represent them in this cause.

That _____, Esquire, a member of the Clarendon County Bar, is fully competent to understand and protect the rights of the minors and other persons under legal disability and is a suitable person to be appointed as Guardian Ad Litem for them in this cause and has consented to act as such Guardian.

WHEREFORE, the Plaintiff makes application for an Order appointing _____, Esquire as Guardian Ad Litem of said minor Defendants, and other persons under legal disability who are made parties as a class and designated as Mary Roe, Richard Roe and who are absent from the State of South Carolina for the purposes of this Action.

_____
Attorney for the Plaintiff

SWORN to before me this _____
day of _____, 20____.

_____
Notary Public for South Carolina
My Commission Expires: _____

I CONSENT TO SERVE:

_____
XXXXXXX, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No: 2018-CP-14-XXXX
COUNTY OF CLARENDON	)	
Jessie G123,	)	
	)	LIS PENDENS
Plaintiff,	)	
	)	
vs	)	
	)	

Linda J123 K123, Leron J123, Tammy J123 and Stanley K123 and Richard Roe, a fictitious person representing as a class any unknown person or persons suffering under legal disability having a claim and/or lien upon the property described herein and Mary Roe, a fictitious person representing as a class any unknown heirs of Virginia J123, Joseph C123, Rosenia B123, and Eunice G3, deceased, claiming an interest in the property described herein,

Defendants.

NOTICE is hereby given that an Action has been commenced in the Court of Common Pleas of Clarendon County and that the nature of this Action is to Quiet Title and Partition Real Estate owned by the Plaintiff and the Defendants, more particularly described as follows:

All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less and bounding now or formerly as follows: On the North by lands of E. A. Le123, et al, Isaac and Susie Ann Sh123 and Lotoria Wa123; On the East by lands of Shannon and Rosenia D. Ba123; On the South by Paxville Highway; On the West by lands of Geneva C. Be123.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00

ALSO:
All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less and bounding now or formerly as follows: On the North by Connor Road. Johnny and Shirley Co123 and Leroy and Virginia J123; On the Northeast by lands of Sonja Le123; On the East by lands of Andrew & Barbara Ann Co123 and Albert Co123; On the South by Paxville Highway.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00

ALSO:

All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less, straddling the right of way of Connor Road and bounding now or formerly as follows: On the North by lands of E.A & J.H. Le123, lands of Miller Co123 and lands of Michael Co123; On the East by lands of Michael and Kevin Da123, lands of Joseph Co123, lands of Ch123 AME Church, lands of Kenneth and Catherine Th123, lands of Starlin G123 and Iva L. Ja123, lands of Frances Br123 and lands of Spe123 Ti123; On the West by lands of Joe & Phyllis Ad123, lands of Shaneka Ad123, lands of Albert Co123, lands of Andrew & Barbara Ann Co123; lands of Jessie & Starlin G123, lands of E.A. & J.H. Le123, lands of Ray & Jonnell At123 and lands of Jim & Cynthia Ro123.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00**.**

_____
Attorneys for the Plaintiffs

Dated: _____, 20_____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No: 2018-CP-14-XXXX
COUNTY OF CLARENDON	)	
Jessie G123,	)	
	)	NOTICE OF ACTION
Plaintiff,	)	
	)	
vs	)	
	)	

Linda J123 K123, Leron J123, Tammy J123 and Stanley K123 and Richard Roe, a fictitious person representing as a class any unknown person or persons suffering under legal disability having a claim and/or lien upon the property described herein and Mary Roe, a fictitious person representing as a class any unknown heirs of Virginia J123, Joseph C123, Rosenia B123, and Eunice G3, deceased, claiming an interest in the property described herein,

Defendants.

NOTICE is hereby given pursuant to §15-61-340 of *The Code of Laws of South Carolina,* 1976, as amended, that an Action has been commenced in the Court of Common Pleas of Clarendon County and that the nature of this Action is to Quiet Title and Partition Real Estate owned by the Plaintiff and the Defendants, more particularly described as follows:

All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less and bounding now or formerly as follows: On the North by lands of E. A. Le123, et al, Isaac and Susie Ann Sh123 and Lotoria Wa123; On the East by lands of Shannon and Rosenia D. Ba123; On the South by Paxville Highway; On the West by lands of Geneva C. Be123.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00

ALSO:
All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less and bounding now or formerly as follows: On the North by Connor Road. Johnny and Shirley Co123 and Leroy and Virginia J123; On the Northeast by lands of Sonja Le123; On the East by lands of Andrew & Barbara Ann Co123 and Albert Co123; On the South by Paxville Highway.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00

ALSO:
All that piece, parcel or tract of land, lying and being situate in the County of Clarendon, State of South Carolina, containing XXX acres more or less, straddling the right of way of Connor Road and bounding now or formerly as follows: On the North by lands of E.A & J.H. Le123, lands of Miller Co123 and lands of Michael Co123; On the East by lands of Michael and Kevin Da123, lands of Joseph Co123, lands of Ch123 AME Church, lands of Kenneth and Catherine Th123, lands of Starlin G123 and Iva L. Ja123, lands of Frances Br123 and lands of Spe123 Ti123; On the West by lands of Joe & Phyllis Ad123, lands of Shaneka Ad123, lands of Albert Co123, lands of Andrew & Barbara Ann Co123; lands of Jessie & Starlin G123, lands of E.A. & J.H. Le123, lands of Ray & Jonnell At123 and lands of Jim & Cynthia Ro123.

Said tract being designated as Clarendon County Tax Map Number: 0XX-00-XX-XXX-00**.**

Common Name (if any) for the property: _____

_____
Attorneys for the Plaintiffs

Dated: _____, 20_____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No: 2018-CP-14-XXXX
COUNTY OF CLARENDON	)	
Jessie G123,	)	
	)	ORDER FROM PRELIMINARY
Plaintiff,	)	HEARING
	)	
vs	)	
	)	

Linda J123 K123, Leron J123, Tammy J123 and Stanley K123 and Richard Roe, a fictitious person representing as a class any unknown person or persons suffering under legal disability having a claim and/or lien upon the property described herein and Mary Roe, a fictitious person representing as a class any unknown heirs of Virginia J123, Joseph C123, Rosenia B123, and Eunice G3, deceased, claiming an interest in the property described herein,

Defendants.

This matter comes before me on _____ for the preliminary hearing required by §15-61-330 of *The Code of Laws of South Carolina,* 1976, as amended, on the issue of whether or not the subject property is "heirs' property". Based upon the definitions and criteria established in the "Clementa C. Pinckney Uniform Partition of Heirs' Property Act" and applicable case law, I find that the subject property IS subject to the provisions of that Act. Further, I find that it is necessary to determine the fair market value of the property since the parties have not agreed upon a stipulated value.

It is therefore:

1. Ordered that the provisions of the aforementioned Act shall apply in this matter; and
2. Ordered that _____ is hereby appointed as a disinterested real estate appraiser to file with the court a sworn or verified appraisal upon completion of a review of the property.

3. Ordered that the Plaintiff , upon receipt of the appraisal of the property as ordered above shall distribute said appraisal as required in §15-61-360 of *The Code of Laws of South Carolina*, 1976, as amended.

AND IT IS SO ORDERED.

_____
XXXXXXXX, Presiding Judge

_____, South Carolina

_____ day of _____, 20___

South Carolina Bar
Continuing Legal Education Division

Orders of Reference and Surplus Funds and Bankruptcy, Oh My!

Reginald Corley
Hon. John Waites

RULE 53, SCRCP – Continuing Jurisdiction of Masters-in-Equity and Special Referees

I. WHERE DOES THE MASTER-IN-EQUITY/SPECIAL REFEREE RECEIVE HER JURISDICTIONAL POWERS?

Rule 53 (Rule 53, SCRCP) – MASTERS AND SPECIAL REFEREES

(b) References.

In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. When a reference is made, the master or special referee shall enter final judgment as to the causes of action referred.

(c) Powers.

Once referred, the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter.

SUBJECT MATTER JURISDICTION: The language in Rule 53(b) establishes which types of cases can be referred to the Master. It states that the matter can be sent to the Master-in-Equity or Special Referee, by the Circuit Judge or Clerk of Court, upon:

1. *Consent* of the parties; or
2. In a *default* case; or
3. In an action for *foreclosure*
4. *All* other actions, "upon application of any party or upon its own motion, direct a reference of some or all of the causes of action."

- Rule 53(b), SCRCP "permits the circuit court, with the consent of the parties, upon application of a party, or upon its own motion, to refer any or all issues in an action." *Chabek v. Nationwide Mutual Fire Ins. Co.*, 303 S.C. 26, 28, 397, S.E.2d 786, 787 (Ct. App. 1990).

- South Carolina Supreme Court Administrative Order 2010-07-15-01 (RE: Orders of Reference in Foreclosure Cases) states, "it will promote judicial efficiency for the Clerk of Court in each county to sign Orders of Reference, referring these matters to either the Master-in-Equity or a Special Referee in their county." This Administrative Order orders that the Clerks of Court sign Orders of Reference pursuant to Rule 53(b), SCRCP in foreclosure actions, default cases, or an action where parties consent.
- "A master's authority to determine issues referred to him by the circuit court is a question of subject matter jurisdiction, which 'may be raised at any time, including on appeal.'" *Deep Keel, LLC v. Atl. Private Equity Grp.*, LLC, 413 S.C. 58, 74-75, 773 S.E.2d 607, 616 (Ct. App. 2015).
- "The appointment and powers of special referees are further governed by Rule 53, SCRP." *Roche v. Young Brothers Inc*., 332 S.C. 75, 504 S.E.2d, 311, 314 (Ct. App. 1998).

POWERS: After the action is properly sent to the Master-in-Equity or Special Referee, Rule 53 grants the Master-in-Equity or Special Referee broad authority to hear and dispose of the case. It states plainly that after the order of reference is made, the Master-in-Equity or Special Referee shall enter a final judgment upon the causes referred. Further, Rule 53(c) grants the master the power to exercise **ALL** power and authority which a circuit judge sitting without a jury would have in a similar matter

- Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference. *SC Dept. of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008).
- "When a case is referred to a master, Rule 53(c) gives the master the power to **conduct hearings in the same manner as the circuit court, unless the order of reference specifies or limits his powers."** *Deep Keel, LLC v. Atl. Private Equity Grp*., LLC, 413 S.C. 58, 75, 773 S.E.2d 607, 616 (Ct. App. 2015).
- "Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is granted by the order of reference. After the Master has exercised that authority, the order of reference terminates, and the power to dispose of the case

returns to the circuit court. A master who acts after the reference terminates does so without subject matter jurisdiction, and the resulting orders are void." *Wachovia Bank of S.C. v. Player*, 334 S.C. 200, 512 S.E.2d 129 (Ct. App. 1999) *reversed on other grounds* 341 S.C. 424 (2000).

S.C. CODE ANN. § 14-11-80.

- *General duties*. The master shall make all such sales as the circumstances may require or as the court may order him to make in granting equitable relief and shall execute all proper conveyances thereof. Such sales shall be conducted at the county courthouse or at such other public places in the county designated in the notice of sale. **He shall execute and perform all orders of the court upon references to him conformably to the practice of the court.**

- This section also specifies the duties, powers, and processes for which the Master in Equity operates. It confirms that the Master-in-Equity has the ability to execute and perform ALL orders of the court conferred to her.

II. CASE LAW REGARDING ORDERS OF REFERENCE

Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 535 S.E.2d 128 (2000).

- The proper construction of the order of reference is that it gives the master jurisdiction over the case and **all matters arising from it until the master has performed all the duties assigned to him.**
- **The language in the order of reference authorizing the master to enter a final judgment is not a limitation on his jurisdiction, but rather is descriptive of the nature of his order.**

Deep Keel, LLC v. Atl. Priv. Grp., LLC, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015).

- In the *Deep Keel* case, the Court of Appeals found that the Master exceeded his authority when the Master ruled on the liability of guaranties made by the defendant. In *Deep Keel* the order of reference specifically provided that, "upon a resolution or

disposition of the foreclosure action, [the] case [was] to be returned to the Circuit Court for final hearing and disposition as to any issues triable by jury" against the defendants. Thus, the order did not authorize the Master to decide any issues regarding the defendant's liability on guaranties; it specifically restricted the master from doing so. *Deep Keel* shows that while the Master has authority to do *ALL* of the functions of a circuit court judge, the Master does not have the authority to make decisions that are expressly limited by the order of reference.

- Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference.
    - *Bunkum v. Manor Props*., 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996). *Stating* "Pursuant to Rule 53, SCRCP, a [special referee] has no power or authority except that which is given to him by an order of reference."
    - *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 492, 730 S.E.2d 328, 331 (Ct. App. 2012). *Stating* "When a case is referred to a [special referee] under Rule 53, the [special referee] is given the power to conduct hearings in the same manner as the circuit court unless the order of reference specifies or limits the [special referee's] powers."
    - *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993).When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner as the circuit court, unless the order of reference specifies or limits his powers.
- Case law sets a strong and broad foundation for which the Master-in-Equity or Special Referee has authority to act under. It shows that the intention behind the creation of the Equity Court's position was to grant authority to hear all matters as a circuit court judge for the issues arising under the Order of Reference and under the scope of Rule 53.
- It states in *Wachovia* that the Order of Reference is not a limitation of the jurisdiction that is granted upon the master with regards to matters arising from the case before the Master, but rather, a description of the nature of the order. This, in conjunction with the broad language of Rule 53 granting authority over pre-and-post-trial matters, demonstrates the range and ability of the Master to resolve issues stemming from the same matter.

III. LANGUAGE COMMONLY SEEN IN A STANDARD ORDER OF REFERENCE

IT IS THEREFORE ORDERED that this action be, and the same hereby is, referred to the Master in Equity for the within county to take the testimony arising under the pleadings and to make his/her findings of fact and conclusions of law, **with authority to rule on all matters related to this action**, including but not limited to, the authority to enter a final judgment in the cause and said Master in Equity **shall and must specifically retain jurisdiction to hear and shall and must hear on the merits any issues after sale or judgment**, **including but not limited** to issues involving **appraisal proceedings under Section 29-3-680, et. seq.**, and **evictions as well as Rule 60 or Rule 61 Motions** and/or similar matters **including but not limited** to the **sufficiency of the successful bid** as well as the **marketability of title** and/or **matters relating to omitted lienholders or claimants**; and with the further authority to sell the subject property at public auction on some convenient sales day hereafter as ordered with any appeal therefrom being directed and mandated to the South Carolina Court of Appeals.

IV. EXAMPLE LANGUAGE: CONSENT ORDER TO ENLARGE AND AFFIRM ORDER OF REFERENCE:

WHEREAS, on [redacted], an Order of Reference was issued that referred the above- captioned matter to the Honorable Charles B. Simmons, Jr, Master in Equity for Greenville County; and

WHEREAS, as authorized by that Order of Reference, a Master in Equity's Order and Judgment of Foreclosure and Sale was filed on [redacted], and the property that is the subject of this foreclosure action was sold to the above-named Plaintiff/Petitioner at the [redacted], judicial foreclosure sale. A Master's Title foreclosure deed was issued to Plaintiff/Petitioner on [redacted], and recorded [redacted], in Deed Book [redacted] at Page [redacted] in the Greenville County Register of Deeds Office. Additionally, an Order of Sale of Real Estate was filed on [redacted]; and

WHEREAS, among other directives, the Order of Reference stated that the "Master in Equity shall and must specifically retain jurisdiction to hear and shall and must hear on

the merits any issues after sale or judgment, including but not limited to ... matters including but not limited to the sufficiency of the successful bid as well as the marketability of title and/or matters relating to omitted lienholders or claimants ..."

WHEREAS, Plaintiff/Petitioner's Summons and a Petition and Rule to Show Cause, entered by the Master in Equity, were filed on [redacted]. The Summons and Petition and Rule to Show Cause ordered the above-named Defendants and Responders to appear and show cause, if any can be shown, why Plaintiff/Petitioner, its successors and assigns, does not have right to (1) access the asphalt driveway easement created and conveyed to the current and future real property owners, and (2) have the current gate or any other barrier to the ingress and egress over, under, and through the subject property removed. After proper service on all Defendants and Respondents, a Return was filed by the Respondent [redacted] on [redacted].

NOW, THEREFORE, on motion of the undersigned counsel for Plaintiff/Petition, with consent of all answering parties, and after review of the above-described pleadings in the Greenville County Clerk of Court's Office, the undersigned finds that, pursuant to Rules 53 and 71, SCRCP, the above- described Summons and Petition and Rule to Show Cause arise from the underlying foreclosure action and from the Order of Reference filed of record on [redacted]. This order affirms that the Honorable Charles B. Simmons, Jr. retains jurisdiction to take testimony, to make his findings of fact and conclusions of law, and to enter a final judgment in the above-described matter. Any appeal therefrom shall be directed to the South Carolina Court of Appeals.

- The above Consent Order to Enlarge and Affirm Order of Reference was filed after a post-foreclosure sale access issue arose regarding the real property that was the subject of the foreclosure action. It affirms that the jurisdiction granted in the original Order of Reference was not limited to only pre-sale matters and that the Master-in-Equity shall hear on the merits any issues after sale or judgment, specifically in this case: marketability of title.
- The language in the Order of Reference, as seen above, clearly states that the Master-in-Equity retains jurisdiction to hear ANY issues after sale or judgement. Note that the language in the *Wachovia* Order of Reference stated that the Master-in-Equity was "to take the

testimony arising under the pleadings to make his findings of fact and conclusions of law with authority to enter a final judgment in the case … provided further that pursuant to S.C. Code [sic] Section 15-39-680 (1986), that the Master-in-Equity is hereby authorized to conduct the public sale any specified time …"

- *Policy Consideration*: Judicial integrity is always a concern of the court, so judicial foreclosure sales and the surplus funds arising therefrom must be handled with care and diligence. "It is the long-established policy in South Carolina that, '[t]he courts should be particularly jealous of the integrity of judicial sales.' *In re Wilson*, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927). [A]ny conduct on the part of those actively engaged in the selling or bidding [at a judicial sale] that tends to prevent a fair, free, open sale, or stifle or suppress free competition among bidders, is contrary to public policy[.]" *Ex parte Keller*, 185 S.C. 283, 291, 194 S.E. 15, 19 (1937).

NOTES:

RULE 71(c), SCRCP – Process for Surplus Funds

- *General Overview*: Once a judicial foreclosure sale is performed, the Master-in-Equity or Special Referee executes a foreclosure deed to the successful bidder. In cases where a deficiency judgment is demanded, the Equity Judge determines the deficiency and issues an appropriate order granting deficiency judgment as part of the final report on sale. The Master-in-Equity or Special Referee is also authorized to determine the disposition of **any surplus funds** arising from the sale.
- *The process for disbursement of surplus funds is governed by Rule 71(c), SCRCP.*

- "The proper construction of the order of reference is that it gives the master jurisdiction over the case and all matters arising from it until the master has performed all the duties assigned to him. . . those duties include[] conducting the sale and disposing of the surplus fund." *See* Rule 71(c), SCRCP. See also*, Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000).

RULE 71, SCRCP.

(c) Disposition of Surplus. In the event of a surplus fund resulting from the sale, the master or other officer conducting the sale shall at the time he makes his report to the court on the sale and disbursements, **cause to be furnished to all parties appearing in the action a notice advising of the surplus fund.** Unless otherwise provided therein, the original order of reference in a foreclosure action shall be considered to extend to the disposition of the surplus fund.

Any party to the action, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the master or other officer conducting the sale a claim of entitlement to the surplus fund, may have a hearing to determine such entitlement. All such claims must be **verified or supported by affidavit** and must be filed with the master or other officer conducting the sale within **forty-five (45) days from the date of the filing of the statement of receipts and disbursements** provided in Rule 71(b). If a claim is not filed within the said forty-five (45) day period, the claim shall be considered abandoned and waived as to such surplus. **The claim must contain the name of the claimant, the nature of the claim, the date the claim arose, and a calculation of the amount claimed**. At the expiration of the claim filing period, the master or other officer conducting the sale shall set a hearing to accept proof of the claims filed. **Only those who have filed a timely claim are entitled to notice of the hearing**. In the event no claims are filed against the surplus funds, the fund shall be paid over to the mortgagor or lienor entitled to the fund. If such mortgagor or lienor cannot be readily determined or located, the fund shall be disposed of as an abandoned fund in the manner provided by law. When the proceedings have been completed, a report of the same shall be made to the court and filed in the action.

<u>BREAK DOWN</u>: RULE 71(c)

- Rule 71(c) involves the application of the surplus funds that are available post-foreclosure sale. It specifies that the Master-in-Equity or other selling officer has authority that extends past the judicial sale and that the original order of reference in a foreclosure action shall be considered to *extend* to the disposition of the surplus fund.
- Rule 71(c) states, in part, that in the event of a surplus fund resulting from a foreclosure sale, any party to the action or any person who had a lien on the mortgaged premises at the time of the sale may have a hearing to determine entitlement to the surplus fund. Rule 71(c), SCRCP. *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 623 731 S.E.2d 547, 549 (2012).
    - In *BAC Home Loan Servicing, L.P. v. Kinder,* the complexity of who can claim surplus funds is shown when a lienholder whose interest was unrecorded at the time of judicial sale came forward to claim surplus funds. The Supreme Court of South Carolina found that although the lien was extinguished at the foreclosure sale, the assignee, standing in the shoes of the assignor, still held a claim to the surplus funds, despite the assignee not having recorded its interest until after judicial sale.
        - What *BAC Home Loan Servicing* shows us is that claimants surrounding surplus funds can be difficult to determine. It is worth noting, however, that the original lienholder, the assignor, was a party to the underlying foreclosure action.
        - What happens when additional parties become "known" by the court but have not been named parties to the foreclosure action? (intestate heirs of a mortgagor)
        - <u>NOTE</u>: The rule, as read on its face, requires payment to the mortgagor if no claims are made. The rule strictly construed says nothing about a deceased mortgagor; however, when a deceased mortgagor is the issue, the construction necessarily requires notice to known heirs at law of the deceased. Notice to these persons is even more difficult when no estate of the mortgagor has been probated in the county where the subject property is located.

RULE 71(c) STATES:

To be a claimant one MUST:

1. Be a party to the action OR
2. Be a person who had a lien on the mortgaged premises at the time of the sale,

AT WHICH TIME:

- Upon filing with the master or other officer conducting the sale a claim of entitlement to the surplus fund, such claimants can have a hearing to determine entitlement.

- As seen in the above *BAC Home Loan Servicing* case, the assignor fell under the second element. Therefore, the assignor was within her rights to assign any interest in the lien, and with it her interest in the surplus funds, to the assignor. The foreclosure did in fact release the lien from the subject property, but the assignor retained her right to the surplus funds after the judicial sale, despite not being a party to the action under element one or having not recorded her lien interest prior to the foreclosure sale.
    - *BAC Home Loan Servicing* shows that the interest in the surplus is a legal right.
        - The surplus acts as a "substitute" for the owner's equity in the real property. The surplus takes the place of the mortgagor's legal interest in the real property.

- What if the lien was not referenced in the foreclosure action or underlying Judgment of Foreclosure and Sale? Can this omitted lienholder make a claim for surplus funds?
- Is there a personal jurisdiction issue – Rule 19 (Joinder of Persons Needed for Just Adjudication) or Rule 24 (Intervention)? How do the omitted lienholder cases apply? – *Peeples v. Snyder*, 141 S.C. 152, 139 S.E. 405 (1927); *Union Nat'l Bank v. Cook*, 110 S.C. 99, 96 S.E. 484 (1918).

HOW DOES ONE GET NOTIFIED IF A SURPLUS EXISTS?

- In the event of a surplus fund resulting from the foreclosure sale, the master or other officer conducting the sale, shall at the time he furnishes his report on the sale and

disbursements, cause to be furnished to all parties *appearing in the action* a notice advising of the surplus fund.

- Parties that have an entitlement to the claim of surplus funds MUST be a claimant who are one of the two classes described above (a party to the action OR a person who had a lien on the mortgaged premises at the time of the sale).

WHAT IF:

- An answer is filed, but not a surplus fund claim?
  - A claim *must* be filed to receive a surplus fund. The rule clearly states that, "if a claim is not filed within the said forty-five (45) day period, the same shall be considered abandoned and waived as to such surplus." *See* Rule 71(c), SCRCP.
- One has filed a surplus funds claim, but then fails to attend the hearing?
  - The master, or other officer, conducting the sale shall set a hearing to accept proof of the claims filed. ONLY those who have filed a timely claim are entitled to such notice of the hearing.
  - "If such mortgagor or lienor cannot be readily determined or located, the fund shall be disposed of as an abandoned fund in the manner provided by law. When the proceedings have been completed, a report of the same shall be made to the court and filed in the action."
- What form is the Affidavit? - does it have to comply with *Deep Keel* case?

  The Affidavit for the claim must include:

  1. The claim must contain the *name* of the claimant,
  2. the *nature* of the claim,
  3. the *date* the claim arose,
  4. and a *calculation* of the amount claimed.

     - In addition, the claim must be filed with the Court within forty-five (45) days of the foreclosure sale.

- What is a Claim?
    - The rule is clear that "claims must be verified or supported by affidavit," but it does not state exactly what a claim is. Can a claim be an equitable lien? Restitution?
    - No, valid claims arise out of some lien, whether by judgment or agreement (e.g. a mortgage). A surplus hearing cannot be used as an opportunity to create a right to the surplus based on the allegation of a contractual right, whether express or implied. Specifically, a contractual claim must be proven and reduced to judgment, or created by agreement, and filed prior to the filing of the underlying foreclosure action. A surplus hearing is limited to persons or parties who have an interest in the real property when the foreclosure action is filed. These persons or parties have an interest in the real property by virtue of their lien or judgment.
- Must there by witnesses and a court reporter at the surplus funds hearing or can the Master in Equity simply rely on the affidavits submitted by the parties?
    - Pursuant to Rule 53(c), "the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter." Furthermore, Rule 71(c) states, "[a]t the expiration of the claim filing period, the master or other officer conducting the sale shall set a hearing to accept proof of the claims filed."
    - It is clear from these two rules that although there may not be direct statutory guidance as to what needs to be done in the hearing itself over the surplus funds, the Master in Equity has the power to accept proof and conduct the necessary and proper means of determining the disposition of the surplus funds. This requires discretion of the part of the Master to determine what is required at each hearing.

NOTES:

Filing Bankruptcy Post-Foreclosure Sale and the Effects on: Foreclosure Sales and Deed Compliance

The Automatic Stay:

- Generally, filing a petition under Chapter 13 of the Bankruptcy Code triggers an automatic stay of creditor proceedings against a debtor's property. 11 U.S.C.S. § 362(a). While the stay is in effect, a creditor cannot proceed with foreclosure. Section 362(c) provides that the stay of such proceedings continues until such property is no longer property of the estate. 11 U.S.C.S. § 362(c)(1). Thus, when a petition giving rise to the stay is dismissed, the stay terminates immediately, and creditors may proceed with foreclosure.
- There is no basis in law for the proposition that the automatic stay continues after dismissal of a case. *Singleton v. Countrywide Home Loans, Inc*. (In re Singleton), 358 B.R. 253 (D.S.C. 2006).

Effect of automatic stay when it occurs post foreclosure sale? The Gavel Rule.

- Our Court has adopted the majority, Gavel Rule Approach, as cited in *Watts*. It states that, "[T]he courts [] find that the language of § 1322(c)(1) is not ambiguous. The statute says that a default may be cured 'until such residence is sold at a foreclosure sale that is conducted in accordance with applicable non-bankruptcy law[.]' This provision is most logically read in two parts, so that the debtor's right to cure ends '[1] when the residence is sold at a foreclosure sale [2] that is conducted in accordance with applicable non-bankruptcy law.' The Court believes that a straightforward reading of the first clause is that *the cut-off point is when the gavel comes down on the last bid at the foreclosure sale*" (emphasis added). *In re Watts*, 273 B.R. 471 (Bankr. D.S.C. 2000).

Two-part test under *Watts:*

1. Has a foreclosure sale taken place?
2. Did the sale comply with the procedural regularity afforded under applicable law?

- "The phrase 'sold at a foreclosure sale' refers to a sale that occurs at a foreclosure auction. The additional phrase 'conducted in accordance with applicable non-bankruptcy law' requires that state law be consulted to assure the sale was noticed, convened, and held (i.e., 'conducted') in compliance with state law." *See* Cain v. Wells Fargo Bank, N.A. (In re Cain), 423 F.3d 617, 620 (6th Cir. 2005).

CASE LAW FOLLOWING *WATTS* - SOUTH CAROLINA BANKRUPTCY CASE LAW:

- **In re Watts (Bankr. D.S.C) - 2000**
- In re Singleton (D.S.C.) **2007** – *Cited Watts*
    - Holding that under *Watts* the property was not considered a part of the bankruptcy estate.
- In re Madison – (Bankr. D.S.C.) **2010** – *Cited Watts*
    - Holding there is a long line of cases stating that after the hammer falls at a judicial sale, the debtor has only bare legal title. This is so even if the deed is not filed before a bankruptcy petition is filed by a debtor.
        - *See In re Riverfront Properties, LLC*, 405 B.R. 570 (Bankr. D.S.C. 2009) *holding* that because the sale remained open when the debtor filed bankruptcy, the debtor held more than bare legal title.
        - *In re Holmes,* No. 99-08796-B (Bankr. D.S.C. 1999) "A pre-petition foreclosure sale generally terminates all interest that a debtor may have in the property, 'regardless of when the deed to the property is delivered' . . . . all [the debtor] has is bare legal title in the property."
- Belle Hall Plantation Homeowner's v. Murray (S.C. Ct. App.) **2017** – *Cited and Distinguished*
    - Regarding Bona Fide Purchasers: the court rejected the defendant's position that under *Watts* the bona fide purchaser status is determined by the date of the foreclosure sale. The court in *Watts* interpreted federal statutes regarding a debtor's right to cure defaults after a foreclosure sale. The *Watts* court found the statute's language to be "clear and unambiguous" in establishing the date of the actual foreclosure sale as the cut-off date for curing mortgage defaults. However, the Court in *Belle* found *Watts* inapplicable to the determination of the

defendant's status as bona fide purchasers. Stating that South Carolina case law is clear that a purchaser must complete all three requirements prior to notice of a defect to be a bona fide purchaser.

BANKRUPTCY CASE LAW FROM OTHER JUDICIAL FORECLOSURE JURISDICTIONS:

- In re Cooper, Inc. (Kansas) **2017** – *Followed Watts*
  - Cited *Watts* stating Debtor's lack of equitable and legal interest in the subject property, and the fact that a foreclosure sale has already taken place, in this case constitutes sufficient cause to grant creditor's motion for relief from stay.
- Foskey v. Plus Props., LLC (D.C.) **2010** – *Cited Watts*
  - Stating "property sold at a pre-petition foreclosure sale could not be deemed to constitute property of the estate."
- In re McKinney (Maine) **2006** – *Cited Watts*
  - The phrase "sold at a foreclosure sale" refers to a sale that occurs at a foreclosure auction. The additional phrase "conducted in accordance with applicable non-bankruptcy law" requires that state law be consulted to assure the sale was noticed, convened, and held (i.e., "conducted") in compliance with state law.
- In re Townsville – (Pennsylvania) **2001** – *Criticized Watts*
  - Stated that the court deemed the language of § 1322(c)(1) ambiguous. "[I]t is impossible to determine, solely from the language of the statute, whether Congress intended a debtor's cure rights to terminate on the date of the auction sale or upon completion of the foreclosure sale process." This is in direct contradiction to *Watts*.

NOTE ABOUT DEED RECORDATION: A prepetition foreclosure sale terminates all legal and equitable interest in the property, *when a deficiency judgment is waived*, regardless of when the deed is recorded. *In re Watts*, 273 B.R. 471 (Bankr. D.S.C. 2000).

- After acceleration of the debt and before sale, the debtor has an equity of redemption. Equity of redemption allows the debtor to pay the indebtedness and require the secured party to reconvey the property to him free of the deed of trust lien. Once the property is

sold, the debtor's equitable interest is extinguished, unless he can show that there was some deficiency in the sale process. *In re Bardell,* 374 B.R. 588 (N.D.W. Va. 2007).

What rights does the debtor retain after the foreclosure sale has taken place?

- *Watts* holds that, "Precedent in this Court and this District has found that upon the falling of the gavel, the debtor is left with bare legal title; thus, the fact that the sale procedure has yet to be completed does not alter the fact that the only right that debtor is left with is the right to raise questions regarding the sale procedure." *In re Watts*, 273 B.R. 471 (Bankr. D.S.C. 2000).

What constitutes the bankruptcy estate?

- Section 541 of the Bankruptcy Code defines property of the bankruptcy estate. The section is broad and provides "all legal or equitable interests of the debtor in property as of commencement of the case" is property of the estate. 11 U.S.C. §541(a)(1). Recovery of property of the estate under the bankruptcy code is governed by 11 U.S.C. §542. The pertinent part §542(a) states that property of the estate should be delivered to the *trustee* for account. This factors into the foreclosure sale with regards to the disbursement of surplus funds.

What right, if any, does the debtor have with regards to surplus funds from the sale?

- In *Watts*, the court determined that because the property in question did not constitute property of the bankruptcy estate. The debtor therefore had neither a legal nor equitable interest in the property sold after the sale, By the petition date, the property was no longer property of the estate under 11 USCS § 541 (Property of the Estate). *In re Watts*, 273 B.R. 471 (Bankr. D.S.C. 2000).
- Furthermore, stating that the Master retained jurisdiction to the disbursement, negotiation, and application of sale proceeds; pursuant to the power granted to her under S.C.R.C.P. Rule 71. (Rendering Section 362(a) inapplicable). *Id*.

EXAMPLE EXERPT FROM ORDER CONFIRMING THAT THE AUTOMATIC STAY OF 11 U.S.C. § 362 IS INAPPLICABLE AND GRANTING RELIEF FROM STAY

In this case, it is undisputed that the Master's Deed conveying the Property to [redacted] was recorded prior to the filing of the Debtor's Chapter 13 Petition. The Property is unquestionably not property of the bankruptcy estate. Accordingly, the Section 362(a) stay is inapplicable to the Property.

Additionally, because the Foreclosure Judgment was entered and the Foreclosure Sale was conducted (with the Master's Deed vesting title to the Property in [redacted]) prior to Debtor's Bankruptcy filing, the Section 362(a) stay is inapplicable to the disbursement, negotiation, and application of the Sales Proceeds to [redacted] to which it is entitled, but which funds are currently being held by the Master. Furthermore, it appears that the Master may be holding surplus sale funds which should be addressed under S.C.R.C.P. Rule 71.

EXAMPLE EXCERPT FROM ORDER GRANTING RELIEF FROM AUTOMATIC STAY:

This matter is before the Court on motion [redacted] ("Movant") seeking relief from the automatic stay. The Movant has waived claims arising under 11 U.S.C. §§ 503(b), 507(b) and agreed that **any funds realized from the disposition of its collateral in excess of all liens, costs, and expenses will be paid to the trustee or bankruptcy estate**. Based upon the certification of Movant the motion is granted and it is

ORDERED that the automatic stay is lifted as to: [redacted], Bluffton, SC 29910 (the "collateral"). Movant may send any required notice to Debtor(s) and proceed with its remedies against the collateral.

- As discussed above, Rule 71(c) grants the Master-in-Equity or Special Referee authority to determine the disposition of **any surplus funds** arising from the sale.
- The excerpt above, in conjunction with Rule 71(c), shows how the disbursement of funds from the judicial sale shall be paid by the Master directly to the trustee or bankruptcy

estate, after adjudicating whether any surplus funds claims were timely and appropriately filed by the lien creditors of record. Pursuant to the above § 362 Order Granting Relief from the Automatic Stay, any surplus funds that would have been paid to the property owner(s), shall be paid directly to the Bankruptcy Trustee.

- How does the Equity Court determine, post-foreclosure sale, if the surplus funds' distribution is subject to a filed Bankruptcy Court § 362 Order Granting Relief from the Automatic Stay?

NOTES:

Orders of Reference, and Surplus Funds, and Bankruptcies… Oh My!

Reginald P. Corley – *Scott & Corley, PA*

Hon. John E. Waites – *U.S. Bankruptcy Court*

Beyond Oz…

Dark Side of the Rainbow – also known as Dark Side of Oz or The Wizard of Floyd – refers to the pairing of the 1973 Pink Floyd album The Dark Side of the Moon with the visual portion of the 1939 film The Wizard of Oz. This produces moments where the film and the album appear to correspond with each other. Band members and others involved in the making of the album state that any relationship between the two works of art is merely a coincidence.

Burns, Poisons & Toxic Snow, OH MY! – Amongst the other alleged foul play while filming The Wizard of Oz. The Wicked Witch of the West was burned (and her stunt double subsequently) during a pyrotechnic scene; The Tin Man was inadvertently poisoned by the aluminum powder in his makeup; and the whole cast was subject to Toxic Fake Snow. How toxic you may ask… It was made of pure asbestos!

It flopped at the box office - Between coming out at the tail end of The Great Depression and competing with *Gone with the Wind*, another 1939 release, the film barely recouped it's $2.8 million budget. Still, the film managed to win two Oscars — for best original score and best original song.

RULE 53 – Continuing Jurisdiction of Master-in-Equity and Special Referee

SUBJECT MATTER JURISDICTION?

What does the Rule say?

RULE 53

- In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. When a reference is made, the master or special referee shall enter final judgment as to the causes of action referred.
- Once referred, the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter.

- "It will promote judicial efficiency for the Clerk of Court in each county to sign Orders of Reference, referring these matters to either the Master-in-Equity or a Special Referee in their county." *South Carolina Supreme Court Administrative Order 2010-07-15-01 (RE: Orders of Reference in Foreclosure Cases)*

- "A master's authority to determine issues referred to him by the circuit court is a question of subject matter jurisdiction, which 'may be raised at any time, including on appeal.'" *Deep Keel, LLC v. Atl. Private Equity Grp.*, LLC, 413 S.C. 58, 74-75, 773 S.E.2d 607, 616 (Ct. App. 2015)

- "The appointment and powers of special referees are further governed by Rule 53, SCRCP." *Roche v. Young Brothers Inc.*, 332 S.C. 75, 504 S.E.2d, 311, 314 (Ct. App. 1998).

POWERS

Rule 53 states that after the order of reference is made, the Master-in-Equity or Special Referee shall enter a final judgment upon the causes referred. Further, Rule 53(c) grants the master the power to exercise ALL power and authority which a circuit judge sitting without a jury would have in a similar matter.

Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference. *SC Dept. of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008).

"When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner as the circuit court, unless the order of reference specifies or limits his powers. After the Master has exercised that authority, the order of reference terminates, and the power to dispose of the case returns to the circuit court."

CASE LAW REGARDING ORDERS OF REFERENCE

Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 535 S.E.2d 128 (2000).

The proper construction of the order of reference is that it gives the master jurisdiction over the case and all matters arising from it until the master has performed all the duties assigned to him.

The language in the order of reference authorizing the master to enter a final judgment is not a limitation on his jurisdiction, but rather is descriptive of the nature of his order.

Deep Keel, LLC v. Atl. Priv. Grp., LLC, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015).

In Deep Keel, the order of reference specifically provided that, "upon a resolution or disposition of the foreclosure action, [the] case [was] to be returned to the Circuit Court for final hearing and disposition as to any issues triable by jury" against the defendants. Thus, the order did not authorize the Master to decide any issues regarding the defendant's liability on guaranties; it specifically restricted the master from doing so. Deep Keel shows that while the Master has authority to do ALL of the functions of a circuit court judge, the Master does not have the authority to make decisions that are expressly limited by the order of reference.

It states in *Wachovia* that the Order of Reference is not a limitation of the jurisdiction that is granted upon the master with regards to matters arising from the case before the Master, but rather, a description of the nature of the order. This, in conjunction with the broad language of Rule 53 granting authority over pre-and-post-trial matters, demonstrates the range and ability of the Master to resolve issues stemming from the same matter.

LANGUAGE COMMONLY SEEN IN A STANDARD ORDER OF REFERENCE

IT IS THEREFORE ORDERED that this action be, and the same hereby is, referred to the Master in Equity for the within county to take the testimony arising under the pleadings and to make his/her findings of fact and conclusions of law, with authority to rule on all matters related to this action, including but not limited to, the authority to enter a final judgment in the cause and said Master in Equity shall and must specifically retain jurisdiction to hear and shall and must hear on the merits any issues after sale or judgment, including but not limited to issues involving appraisal proceedings under Section 29-3-680, et. seq., and evictions as well as Rule 60 or Rule 61 Motions and/or similar matters including but not limited to the sufficiency of the successful bid as well as the marketability of title and/or matters relating to omitted lienholders or claimants; and with the further authority to sell the subject property at public auction on some convenient sales day hereafter as ordered with any appeal therefrom being directed and mandated to the South Carolina Court of Appeals.

EXAMPLE LANGUAGE: CONSENT ORDER TO ENLARGE AND AFFIRM ORDER OF REFERENCE:

WHEREAS, on March 30, 2015, an Order of Reference was issued that referred the above- captioned matter to the Honorable Charles B. Simmons, Jr, Master in Equity for Greenville County; and

WHEREAS, as authorized by that Order of Reference, a Master in Equity's Order and Judgment of Foreclosure and Sale was filed on May 1, 2015, and the property that is the subject of this foreclosure action was sold to the above-named Plaintiff/Petitioner at the June 1, 2015, judicial foreclosure sale. A Master's Title foreclosure deed was issued to Plaintiff/Petitioner on July 1, 2015, and recorded July 22, 2015, in Deed Book XXXX at Page XXXX in the Greenville County Register of Deeds Office. Additionally, an Order of Sale of Real Estate was filed on July 20, 2015; and

WHEREAS, among other directives, the Order of Reference stated that the "Master in Equity shall and must specifically retain jurisdiction to hear and shall and must hear on the merits any issues after sale or judgment, including but not limited to ... matters including but not limited to the sufficiency of the successful bid as well as the marketability of title and/or matters relating to omitted lienholders or claimants ..."

WHEREAS, Plaintiff/Petitioner's Summons and a Petition and Rule to Show Cause, entered by the Master in Equity, were filed on August 3, 2018. The Summons and Petition and Rule to Show Cause ordered the above-named Defendants and Responders to appear and show cause, if any can be shown, why Plaintiff/Petitioner, its successors and assigns, does not have right to (1) access the asphalt driveway easement created and conveyed to the current and future real property owners, and (2) have the current gate or any other barrier to the ingress and egress over, under, and through the subject property removed. After proper service on all Defendants and Respondents, a Return was filed by the Respondent XXXXXXXXXX on September 18, 2018.

NOW, THEREFORE, on motion of the undersigned counsel for Plaintiff/Petition, with consent of all answering parties, and after review of the above-described pleadings in the Greenville County Clerk of Court's Office, the undersigned finds that, pursuant to Rules 53 and 71, SCRCP, the above-described Summons and Petition and Rule to Show Cause arise from the underlying foreclosure action and from the Order of Reference filed of record on March 30, 2015. This order affirms that the Honorable Charles B. Simmons, Jr. retains jurisdiction to take testimony, to make his findings of fact and conclusions of law, and to enter a final judgment in the above-described matter. Any appeal therefrom shall be directed to the South Carolina Court of Appeals

Rule 71(c) – Process for Surplus Funds

General Overview

Once a judicial foreclosure sale is performed, the Master-in-Equity or Special Referee executes a foreclosure deed to the successful bidder. In cases where a deficiency judgment is demanded, the Equity Judge determines the deficiency and issues an appropriate order granting deficiency judgment as part of the final report on sale. The Master-in-Equity or Special Referee is also authorized to determine the disposition of any surplus funds arising from the sale.

The process for disbursement of surplus funds is governed by Rule 71(c), SCRCP.

RULE 71(c)

Disposition of Surplus. In the event of a surplus fund resulting from the sale, the master or other officer conducting the sale shall at the time he makes his report to the court on the sale and disbursements, cause to be furnished to all parties appearing in the action a notice advising of the surplus fund. Unless otherwise provided therein, the original order of reference in a foreclosure action shall be considered to extend to the disposition of the surplus fund.

Any party to the action, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the master or other officer conducting the sale a claim of entitlement to the surplus fund, may have a hearing to determine such entitlement. All such claims must be verified or supported by affidavit and must be filed with the master or other officer conducting the sale within forty-five (45) days from the date of the filing of the statement of receipts and disbursements provided in Rule 71(b). If a claim is not filed within the said forty-five (45) day period, the claim shall be considered abandoned and waived as to such surplus. The claim must contain the name of the claimant, the nature of the claim, the date the claim arose, and a calculation of the amount claimed. At the expiration of the claim filing period, the master or other officer conducting the sale shall set a hearing to accept proof of the claims filed. Only those who have filed a timely claim are entitled to notice of the hearing. In the event no claims are filed against the surplus funds, the fund shall be paid over to the mortgagor or lienor entitled to the fund. If such mortgagor or lienor cannot be readily determined or located, the fund shall be disposed of as an abandoned fund in the manner provided by law. When the proceedings have been completed, a report of the same shall be made to the court and filed in the action.

BREAKDOWN: RULE 71(c)

- Rule 71(c) involves the application of the surplus funds that are available post-foreclosure sale. It specifies that the Master-in-Equity or other selling officer has authority that extends past the judicial sale and that the original order of reference in a foreclosure action shall be considered to extend to the disposition of the surplus fund.

- Rule 71(c) states, in part, that in the event of a surplus fund resulting from a foreclosure sale, any party to the action or any person who had a lien on the mortgaged premises at the time of the sale may have a hearing to determine entitlement to the surplus fund.

HOW DOES ONE GET NOTIFIED IF A SURPLUS EXISTS?

In the event of a surplus fund resulting from the foreclosure sale, the master or other officer conducting the sale, shall at the time he furnishes his report on the sale and disbursements, cause to be furnished to all parties appearing in the action a notice advising of the surplus fund.

Parties that have an entitlement to the claim of surplus funds MUST be a claimant.

Rule 71(c) Claimants:

To be a claimant one MUST:

1. Be a party to the action OR
2. Be a person who had a lien on the mortgaged premises at the time of the sale. See, *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 623 731 S.E.2d 547, 549 (2012)

AT WHICH TIME:

Upon filing with the master or other officer conducting the sale a claim of entitlement to the surplus fund, such claimants can have a hearing to determine entitlement.

WHAT IF:

An Answer is filed, but not a surplus fund claim?

- A claim must be filed to receive a surplus fund. The rule clearly states that, "if a claim is not filed within the said forty-five (45) day period, the same shall be considered abandoned and waived as to such surplus." See, Rule 71(c), SCRCP.

One has filed a surplus funds claim, but then fails to attend the hearing?

- ONLY those who have filed a timely claim are entitled to such notice of the hearing.

What must the Affidavit include?

1. The claim must contain the *name* of the claimant,
2. the *nature* of the claim,
3. the *date* the claim arose,
4. and a *calculation* of the amount claimed.

What happens if no surplus funds claims are filed?

- "… the fund shall be paid over the mortgagor or lienor entitled to fund."
- What if the "mortgagor" is deceased?
- What if an heir timely files a claim, but was not a party-defendant to the case?
  1. We're the "unknown heirs" named and served?
  2. Was an estate filed in probate court (presumably post-Lis Pendens)?
- If the mortgagor or lei or cannot be located, the surplus funds are disposed of as abandoned funds.

What is a Claim?

Valid claims arise out of some lien, whether by judgment or agreement (e.g. a mortgage). Specifically, a contractual claim must be proven and reduced to judgment, or created by agreement, and filed prior to the filing of the underlying foreclosure action. A surplus hearing is limited to persons or parties who have an interest in the real property when the foreclosure action is filed. These persons or parties have an interest in the real property by virtue of their lien or judgment.

Filing Bankruptcy Post-Sale and the effects on:

Foreclosure Sale

Deed Compliance

The Automatic Stay

Generally, filing a petition under Chapter 13 of the Bankruptcy Code triggers an automatic stay of creditor proceedings against a debtor's property. While the stay is in effect, a creditor cannot proceed with foreclosure. Section 362(c) provides that the stay of such proceedings continues until such property is no longer property of the estate. Thus, when a petition giving rise to the stay is dismissed, the stay terminates immediately, and creditors may proceed with foreclosure.

Effect of automatic stay when it occurs post foreclosure sale? **The Gavel Rule.**

Our Bankruptcy Court has adopted the majority, Gavel Rule Approach. It states that, "[T]he courts [] find that the language of § 1322(c)(1) is not ambiguous. The statute says that a default may be cured 'until such residence is sold at a foreclosure sale that is conducted in accordance with applicable non-bankruptcy law[.]' This provision is most logically read in two parts, so that the debtor's right to cure ends '[1] when the residence is sold at a foreclosure sale [2] that is conducted in accordance with applicable non-bankruptcy law.' The Court believes that a straightforward reading of the first clause is that the cut-off point is when the gavel comes down on the last bid at the foreclosure sale" (emphasis added). *In re Watts*, 273 B.R. 471 (Bankr. D.S.C. 2000).

Two-part test under Watts:

1. Has a foreclosure sale taken place?
2. Did the sale comply with the procedural regularity afforded under applicable law?

Case Law Following Watts

SOUTH CAROLINA BANKRUPTCY CASE LAW:

- In re Watts (Bankr. D.S.C) - 2000
- In re Singleton (D.S.C.) 2007 – *Cited Watts*
- In re Madison – (Bankr. D.S.C.) 2010 – *Cited Watts*
- Belle Hall Plantation Homeowner's v. Murray (S.C. Ct. App.) 2017 – *Distinguished*

BANKRUPTCY CASE LAW FROM OTHER JUDICIAL FORECLOSURE JURISDICTIONS:

- In re Cooper, Inc. (Kansas) 2017 – *Followed Watts*
- Foskey v. Plus Props., LLC (D.C.) 2010 – *Cited Watts*
- In re McKinney (Maine) 2006 – *Cited Watts*
- In re Townsville – (Pennsylvania) 2001 – *Criticized Watts*

What rights does the debtor retain after the foreclosure sale has taken place?

"Precedent in this Court and this District has found that upon the falling of the gavel, the debtor is left with bare legal title; thus, the fact that the sale procedure has yet to be completed does not alter the fact that the only right that debtor is left with is the right to raise questions regarding the sale procedure."

What constitutes the bankruptcy estate?

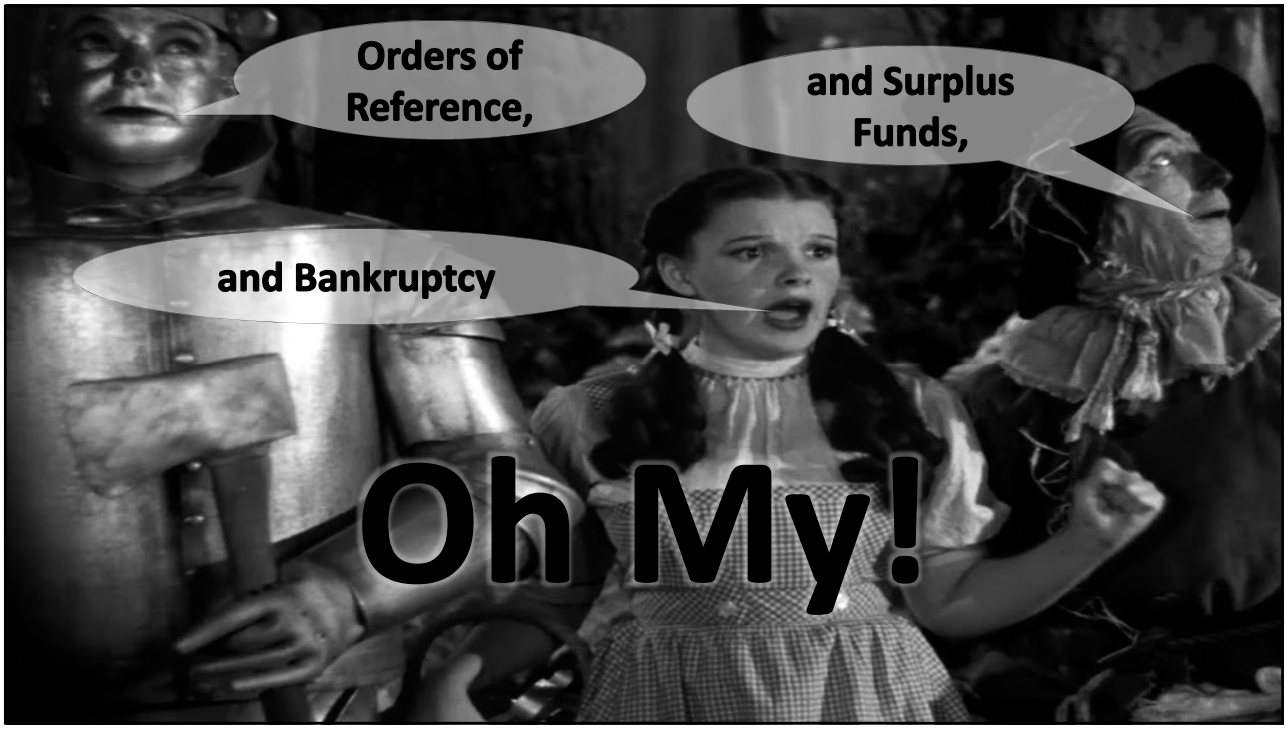
"all legal or equitable interests of the debtor in property as of commencement of the case" is property of the estate." Recovery of property of the estate under the bankruptcy code is governed by 11 U.S.C. §542. The pertinent part §542(a) states that property of the estate should be delivered to the trustee for account. This factors into the foreclosure sale with regards to the disbursement of surplus funds.

What right, if any, does the debtor have with regards to surplus funds from the sale?

EXAMPLE EXCERPT FROM ORDER GRANTING RELIEF FROM AUTOMATIC STAY:

This matter is before the Court on motion XXXXXXXXXX ("Movant") seeking relief from the automatic stay. The Movant has waived claims arising under 11 U.S.C. §§ 503(b), 507(b) and agreed that any funds realized from the disposition of its collateral in excess of all liens, costs, and expenses will be paid to the trustee or bankruptcy estate. Based upon the certification of Movant the motion is granted and it is

ORDERED that the automatic stay is lifted as to: XXXXXXXXXXXXXXXX, Bluffton, SC 29910 (the "collateral"). Movant may send any required notice to Debtor(s) and proceed with its remedies against the collateral.



Any Questions??

Master–In-Equity Bench/Bar Topical Index

Access to Justice
2017 Access to Justice
Robin Wheeler

Alternative Dispute Resolution
2000 Arbitration
Mitchell Willoughby
2008 Dispute Options
Frank J. Smith

Attorney Fees
2005 Attorney Fees: How To Get Them & Keep Them on Appeal
Hon. Ralph King Anderson, Jr.
2010 Attorney Fees: How To Get Them & Keep Them on Appeal
Hon. Ralph King Anderson, Jr.

Bankruptcy Issues
2006 Bankruptcy in a Foreclosure
C. Jennalyn Dalrymple
2009 Bankruptcy Issues
Betsy Johnson Burn

Boundary Line, Easements & Road Closings
1998 Court-Ordered License for Repairs & Maintenance
Dennis J. Rhoad
2002 Easement and Road Closings
K. Scott Katrosh
2005 Easements: Express, Implied & Prescriptive: An Overview & Discussion
Richard M. Unger
Walter G. Robillard
2007 Boundary Lines and Easements
Kenneth Krawcheck

Business Torts, Accountings & Damages
2000 Employment & Non-Compete Contracts
Harry A. Swaggert, III
2000 Insurance Bad Faith Litigation
T. English McCutchen, III
2000 Unfair Trade Practices
Paul A. Dominick
2000 Oppression of Minority Shareholder
Richard S. Rosen
2000 Trade Dress & Trademark Infringement
William C. Cleveland
2000 Damages
Manton M. Grier
2000 Financial Statements
Gary Trugman
2000 Valuing Business Damages
Gary Trugman

2016 Contract Performance – Good Faith and Fair Dealing
Honorable James E. Chellis

Case Law

1998 Important Real Estate Developments and Case Law Update
Professor Stephen A. Spitz
2003 Recent Developments in Equity Cases of Interest
Professor Stephen A. Spitz
2004 Update on Equity Law & Cases
Professor Stephen A. Spitz
2006 Case Law Update
Professor Stephen A. Spitz
2008 Case Law and Blog Update
Professor Stephen A. Spitz
2009 Legislative Update and Case Law Update
John S. Nichols
2010 Federal Landlord Tenant Act
Andrew M. Wilson
2010 Case Law and Legislative Update
Professor Stephen A. Spitz
2011 Spitz on Equity
Professor Stephen A. Spitz
2012 Case Law Update
Professor Stephen A. Spitz
2014 Equity Case Law Update
Professor Stephen A. Spitz
2016 Two of My Favorite All Time Equity Cases
Stephen A. Spitz
2016 What are the Equities in Deciding Fair Value on Dissolution of an LLC; Distinction between Term and at Will Members
Tracey Colton Green
2016 Family Dispute: Equity in the Dissolution of a Statutory Close Corporation, a discussion of Mason v. Mason, 412 S.C. 28, 770 S.E.2d 405 (Ct. App., 2015)
Ralph P. Stroman
2016 Is a Remedy at Law an Adequate Remedy at Law, a discussion of Chase Home Finance, LLC v. Cassandra S. Risher, 405 S.C. 202, 746 S.E.2d 471 (2013)
Louis H. Lang
2016 Limits to the Delegation of the Duty of a Lawyer, a discussion of Johnson v. Alexander 413 S.C. 196, 775 S.E.2d 697 (S.C., 2015)
Mary Leigh Arnold

Civil Procedure

1998 SCRCP 53, Orders of Reference, Exceptions & Appeals
John S. Nichols
2002 Civil Procedure in Non-Jury Setting
Ben N. Miller, III
2006 Common Problems: Service of Process
John S. Nichols
2008 Pleading Special Property Matters
Andrew S. Radeker
2011 SCRCP in Equity Court
Hon. Daniel F. Pieper
2015 Equity Case Law Update
Stephen A. Sptiz

Condo's & Timeshares

2001 Condominiums / Times Shares
Edward G. Menzie

Consumer Law

2004 SC Consumer Protection Code In Equity Cases
Kathleen G. Smith
2004 Consumer Credit, Credit Reporting & Mortgage Servicing
David A. Maxfield
2004 Predatory Lending & Consumer Home Loans
John T. Moore
2004 Current Issues and Hot Topics in Consumer Affairs
Danny R. Collins

E-filing

2017 E-filing
Kevin Brown

Environmental Law

2007 What a Master-In-Equity Ought to Know About Environmental Law
(The True Basics)
Randolph Lowell

Equity

1999 Can That Really Be Done? - Equitable Maxims
Professor Stephen A. Spitz
2002 Suem
The Honorable Roger M. Young
Professor Stephen A. Spitz
2004 The South Carolina Consumer Protection Code in Equity Cases
Kathleen G. Smith
2004 Update on Equity Law & Cases
Professor Stephen A. Spitz
2007 Introduction of a New Blog: "Equity is Swell"
Professor Stephen A. Spitz
2012 Judiciary Squares – The Ultimate Game of Tic Tac Tequity! A Substantive Review of Equitable Maxims in a Game Show Format
Tanya A. Gee
2013 Equity Case Update
Professor Stephen A. Spitz
2016 Equitable Indemnity and Secondary Liability; Secondary Liability in Equitable Subrogation
Marvin D. Infinger
2017 Equity Law Update
Stephen A. Spitz
2018 Equity Law Update
Stephen A. Spitz
2018 Land on Layaway: Installment Sale Contracts and the Equity of Redemption
Andrew Radeker

Ethics

1999 Ethical Issues in Non-Jury Practice
Professor Robert M. Wilcox

2001 Judicial Ethics
James G. Bogle, Jr.
2002 Ethics in the Non-Jury Setting
Michael S. Pauley
2003 Everyday Ethics-Judicial & Attorney
Professor John P. Freeman
2005 New Rules of Professional Responsibility: Appearing Before the Master-In-Equity
Professor John P. Freeman
2006 Ethical Issues for Attorney Fees and Costs
Hon. Curtis L. Coltrane
2008 Pro Se Ethical Issues for Bench & Bar
Professor John P. Freeman
2009 Judicial Ethics for Lawyers Panel Discussion
Barbara M. Seymour
Hon. Ellis B. Drew, Jr.
Deborah S. McKeown
Joseph P. Turner
2010 Self Represented Litigants-Ethical Problems and Practical Solutions
Desa A. Ballard
2011 Attorney as Witness
John S. Nichols
2012 The Unforgiving Minute: A Cautionary (True) Tale for Lawyers and Judges
Jim Blackburn
2013 Foreclosure Ethics
Hon. James O. Spence
2014 Ethics for the Equity Bar
Barbara M. Seymour
2016 Lawyer Diligence as an Ethical Requirement
Daniel A. Speights
2016 Legal Ethics and the Changing Litigation Landscape
Professor John P. Freeman

Evidence

1999 What Evidence Law Do I Need to Know?
Justin S. Kahn
2001 Evidence for Masters
E. Warren Moise
2008 Property Evidence
Louis H. Lang
2017 Evidence and Proof
Honorable George C. James, Jr.
2018 Thinking Through the Structure of Evidence
Hon. John C.Few

Executions & Supplemental Proceedings

1998 Judgment Executions & Supplemental Proceedings
Charles D. Legrand
2001 Supplemental Proceedings
Robert A. Berstein
2002 Enforcement of Judgment Liens by Judicial Sale and Tax Sale
Weyman C. Carter
2003 Executions on Judgments & Supplemental Proceedings
Charles D. LeGrand

2008 Supplemental Proceedings
Joey R. Floyd
2013 Collecting Judgments; Supplemental Hearings
Daniel J. MacDonald
Susan P. MacDonald
2018 Supplemental Proceedings
Joey Floyd

Foreclosures

1998 Mortgage Foreclosures
Hon. D. Mark Stokes
2001 Foreclosures
Peter D. Korn
2001 Mobile Homes
H. Guyton Murrell
2002 Mortgage Foreclosures & Priority Issues
Dean A. Hayes
2003 Foreclosures
Thomas A. Shook
2003 New Legislation Affecting Mobile Homes
John S. Kay
2005 Panel Discussion: Topical Issues in Foreclosure Cases
Beverly J. Finkel
Pearce W. Fleming
Hon. Mikell R. Scarborough
Hon. S. Jackson Kimball, III
2006 Bankruptcy in a Foreclosure
C. Jennalyn Dalrymple
2006 Foreclosure Hearings
J. Pamela Price
2006 Judicial Sales
The Honorable Gordon G. Cooper
2006 Defenses
Susan B. Berkowitz
David A. Maxfield
2006 Manufactured Homes
Jennifer W. Rubin
2006 The Economics of Foreclosure
Kathleen G. Smith
2006 Foreclosure Process (Panel with Questions & Answers)
The Honorable S. Jackson Kimball, III
The Honorable Gordon Cooper
Peter D. Korn
Jennifer W. Rubin
2009 Defenses to Forclosure
Susan B. Berkowitz
2009 Post Forclosure Issues
Peter D. Korn
2011 Foreclosure Intervention FAQs
Rosalyn W. Frierson
2011 Estate Creditor Claims in Foreclosure
Andrew M. Wilson
2014 Defenses to Foreclosure and Current Programs
Susan B. Berkowitz

2014 Foreclosure Appeal
Kevin T. Brown
2015 Best Practices in Equity Court: Foreclosures
J. Kershaw Spong
B. Lindsay Crawford, III
2016 Mortgage Foreclosure – Does interest Ever Stop Accruing?
Honorable Richard L. Booth
2016 Remedy of Foreclosure of a Charging Lien vs the Ability to Pay, a discussion of Kriti Ripley, LLC v. Emerald Investments, LLC, 404 S.C. 367, 746 S.E.2d 26, 2013 WL 3200596 (2013)
James (Chip) Atkinson Bruorton, IV

General Law

1998 Panel Discussion: Interaction Between the Master's Office and the Lawyer's Office
Panel of Judges and Lawyers
2002 The Master-In-Equity: A Historical Perspective
The Honorable Jasper M. Cureton
2003 Panel Discussion: Nuts and Bolts of Equity Practice and Vital Information on Recent Trends
Hon. Roger L. Couch
Hon. Ellis B. Drew, Jr.
Harold P. Threlkeld
Professor Stephen A. Spitz
2003 Recent Developments in Equity Cases of Interest
Professor Stephen A. Spitz
2005 Current Cases & Issues Before the Masters-In-Equity
Professor Stephen A. Spitz
2007 Traps for the Unwary
Claire Manning
2009 Report from the SC Bar H.E.L.P Task Force
C. Stuart Mauney
2010 Home Affordable Modification Program (HMP) Issues
D. Randolph Whitt
2012 Proper Use of Rule 60
Robert W. Maring
2013 What's to be Expected and What's Allowed in the Period After the 5% Bidder's Deposit is Paid and Before a Master-in- Equity's Deed is Issued
Ian D. McVey
2016 Civility Among Professionals: It's Not Just an Aspiration
Mitchell Willoughby
2016 The Fine Line between Zealous Advocacy and Abusive Litigation Techniques
Marvin D. Infinger
2016 Special Confidential Relationships
Professor John P. Freeman
2017 Litigation Required in Road Closure Cases
Joseph Kershaw Spong

Guardian *ad litem*

2015 Best Practices in Equity Court: Guardian *ad litem*
Hon. James B. Jackson, Jr.

2018 Duties and Processes of Guardian *ad Litem*
Kelley Woody

Injunctions & Temporary Restraining Orders
2001 Temporary Restraining Orders, Temporary & Permanent Injunctions
George W. Jefferson

Judge's View
2002 Panel Discussion, Practice Tips
The Honorable Charles B. Simmons, Jr.
The Honorable Clyde N. Davis, Jr.
The Honorable O. Davie Burgdorf
2003 Tips on Getting Your Case Heard
The Honorable Roger L. Couch
2007 How to Impress the Judge
The Honorable Mikell R.Scarborough
2007 Trial Judges and Trial Judging
The Honorable John W. Kittredge
2007 Hoodwinked
The Honorable James O. Spence

Legislative Update
2008 Where Are We Now: Legislative & Other Changes in Light of the Subprime Mortage Crisis
Samuel C. Waters, Esquire
2009 Legislative Update and Case Law Update
John S. Nichols, Esquire
2010 Case Law and Legislative Update
Professor Stephen A. Spitz

2016 Legislative Update
Sneak Peak: Clementia C. Pinckney Uniform Partition of Heirs' Property Act
S.C. Code § 15-61-310
Honorable Mikell Scarborough Loss Mitigation
2015 A Bridge Over Troubled Waters: Making Loss Mitigation More Effective
Hon. John E. Waites

Military Law
2012 Soldiers & Sailors Relief Act
Col. Barry Bernstein

Mobile Homes
2001 Mobile Homes
H. Guyton Murrell
2003 New Legislation Affecting Mobile Homes
John S. Kay

Non-Jury Practice
1999 Ethical Issues in Non-Jury Practice
Professor Robert M. Wilcox
1999 Non-Jury Trials – The Plaintiff's View
Richard J. Breibart
1999 Non-Jury Trials – The Defendant's View

Yolanda C. Courie
1999 Appellate Issues in Non-Jury Practice
Chief Justice Jean Hoefer Toal
1999 Non-Jury Motion Practice: What Are We Doing Here?
The Honorable John W. Kittredge
2002 Civil Procedure in Non-Jury Setting
Ben N. Miller,III
2002 Ethics in the Non-Jury Setting
Michael S. Pauley

Partition
2002 Partitions & Heirs Property
R. Thayer Rivers, Jr.
2013 Partition
Daniel W. Stacy Jr.
2014 Partition Actions
Josh F. Walden
2017 Partition Actions under the Clementa C. Pinckney Uniform Partition of Heirs' Property Act
Richard B. Ness
James Martin Harvey, Jr.
Susan Stewart
2018 S.C.'s Uniform Partition of Heirs Property Act: Divide and Conquer No More?
Teri Callen

Practice & Procedure
2007 Order Drafting
- Appellate View

The Honorable Costa M. Pleicones
- Attorney View

Patrick J. Frawley
- Trial Judge View

The Honorable Roger L. Couch
2009 Quiet Title Actions
J. Thomas Mikell
2010 SC Equity: A Practitioner's Guide
Randolph R. Lowell
Robert L. Reibold
2011 Writs of Assistance
Eric C. Hale
2011 Bifurcation Issues
Henry G. Murrell
2011 Deficiency Judgments
Suzanne G. Grigg
2012 The Etiquette of Waiving: the Rules of Deficiency Waivers for the Modern Lawyer
Shawn M. French
2013 Order Writing; Deed Preparation
Kathryn M. Cook
2015 Best Practices in Equity Court: Partitions
William T. Geddings, Jr.
2016 Doctrine 'Against Public Policy' and Inherent Judicial Powers
Stephen A. Spitz
2016 Order Drafting Tips
Honorable Aphrodite K. Konduros

Patricia A. Howard
Andrew L. Johnson

2017 Service by Publication
John S. Nichols

2018 Master of the House (no materials)
Hon. James E. Lockemy

Pro Se Litigants

2011 Pro Se Litigants
Hon. Costa m. Pleicones

2013 Dealing with Self-Represented Litigants
Chad W. Burgess
Lt. Michael Prodan

Research & Web

2007 Introduction of a New Blog: “Equity is Swell”
Professor Stephen A. Spitz

2012 Casemaker: The South Carolina Bar’s FREE Online Research Resource
Courtney G. Kennaday

Receivership

2010 Receivership Issues for Masters and Practitioners
Stanley H. McGuffin
John E. Hass

2015 Best Practices in Equity Court: Receivership
D. Ryan McCabe, Jr.

Safety in Court

2011 Safety in Court
Patrick J. Frawley
Jeffery M. Anderson

Supreme Court

2003 Supreme Court Issues
Chief Justice Jean Hoefer Toal

Subdivision Law

2012 Subdivision Law
John K. Dubose, III

2014 Homeowners Association Overview
Joseph L. Johnson

Tax Sales

1998 Law on Tax Sales
The Honorable Roger M. Young

2001 Tax Sales Update
The Honorable Roger M. Young

2009 Tax Sales of Real Property and Mobile Homes in South Carolina
John S. Kay

2017 Tax Sales
John S. Kay

2018 Quiet Title Post Tax Sale
A. Parker Barnes, III

John H. Harris

Trespass
2005 Trespass: How Many Ways Can You Spell Relief?
Benjamin Goldberg

Trial & Tactics
1999 Non-Jury Trials – The Plaintiff's View
Richard J. Breibart
1999 Non-Jury Trials – The Defendant's View
Yolanda C. Courie
2003 Handling Unusual Cases
Harold P. Threlkeld

Trusts
2004 Express & Implied Trusts-The Basics
Professor S. Alan Medlin

Unfair Trade Practices
2000 Unfair Trade Practices
Paul A. Dominick
2001 Unfair Trade Practices
Thomas E. Lydon

Water Rights
2009 Water Rights
Professor Steven A. Spitz
2014 Surface Water Issues
Clrke W. McCants, III

Zoning
1998 Zoning Appeals
William B. Regan