

# The Mississippi Bar Litigation Section

## E-Newsletter

November 2013

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## Message from the Chair — Edward “Ted” Connell, Jr.

Welcome to the Fall e-newsletter of the Litigation Section of the Mississippi Bar. I am honored to serve as the Section’s Chair for the 2013 -2014 year. In this position, I hope to continue service to the Bar’s civil litigators. Along these lines, the Officers and Executive Committee of the Litigation Section have worked diligently to calendar a wide array of specialized offerings to the Mississippi Bar’s civil litigators.



The Section plans to continue its publication in the Mississippi Rules Annotated in association with the Mississippi Law Institute and Mississippi College School of Law. The Section also plans to provide scholarship money to the University of Mississippi Law School and Mississippi College School of Law and to contribute to both schools’ building funds. In addition, the Section recently made a donation of \$1,500.00 to the Mississippi Volunteer Lawyers Project.

The Section is finalizing its annual Continuing Legal Education Seminar. We expect the Seminar will be held April 4, 2014, in Oxford, Mississippi. While we have not finalized the speakers, we hope that you will put this date on you calendar. This weekend will also be held in conjunction with an Ole Miss baseball series with Auburn University.

The Section is also planning for the Litigation Section annual meeting that will be held on June 27, 2014, during the Bar’s Annual Convention at the Hilton Sandestin. Although the Section has not made a final decision on the speaker, the plan is to have one of the nation’s top legal minds be the speaker for the Section meeting. We hope that you will plan to travel to Sandestin this year to attend as we expect this year’s speaker to be a national head liner.

Be looking for e-mails from Lexology/Newsstand, an innovative, web-based daily newswire service, that will provide litigation focused e-mails with a depth of free, practical know-how that we expect to be very beneficial to your everyday litigation, legal practice. We expect this service to deliver fully tailored, high-quality and practical litigation news and tips to the desktops of lawyers of Litigation Section on a daily basis. Once we begin this service, we encourage all members to provide feedback as to whether this service is helpful and whether the Section should continue this program.

As is customary, the Section will continue its semi-annual e-newsletter in the Fall and Spring. I encourage all members to submit written materials for the newsletter. If you wish to do so, please contact Meade Mitchell at [meade.mitchell@butlersnow.com](mailto:meade.mitchell@butlersnow.com), who has graciously agreed to continue to be the editor of the Section’s e-newsletter.

Finally, the Officers and the Executive Committee are interested in feedback from you regarding how the Section can better serve you. We are trying to “ramp up” the CLEs to be provided and encourage you to take advantage of each. However, we recognize that the Section can include more than an opportunity to receive CLE hours. With that said, we welcome any ideas that you may have.

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## Litigation Section Awards Scholarships to Law Students

### University of Mississippi Law School

The Litigation Section awarded \$1000 scholarships to two outstanding law school students at the University of Mississippi Awards Day in April 2013. Pictured below, from left to right, are the Litigation Section award recipients, David Lee Thorne and Richard Benjamin McMurtray.



### Mississippi College School of Law

On behalf of the Litigation Section, Immediate Past Chair, Doug Minor, along with Dean Jim Rosenblatt presented, Karlee Keller and Lance Martin with a \$1000 scholarship each for their continuing education. The scholarships were presented at the Law Day Awards ceremony in April 2013 at the Mississippi College School of Law.



## Litigation Section Donates to Mississippi Volunteer Lawyers' Project

In 2013, the Litigation Section donated \$1,500 to the MVLP, which provides free legal assistance and advocacy to disadvantaged people throughout Mississippi. Pictured below are Tiffany Graves, Executive Director of the MVLP, and Donna Jacobs, Chair of the MVLP Board of Directors, receiving the donation from Rebecca Wiggs, Chair-Elect of the Litigation Section.



## 2013 CLE Seminar

### “Turning to Damages: Methods for Proving and Defending the Ultimate Issue in Injury Litigation”

On Friday, June 14, 2013, the Litigation Section hosted a seminar entitled “Turning to Damages: Methods for Proving and Defending the Ultimate Issue in Injury Litigation.” During this 6.5 CLE credit hour seminar, including one (1) hour of ethics, attendees heard the most current thinking and attitudes of plaintiff and defense lawyers, a federal judge, a life care planner/vocational expert and an economist on topics ranging from punitive damages to caps. Speakers included United States Magistrate Judge David A. Sanders as well as attorneys Ken Coghlan, John C. Henegan, Merrill Nordstrom, Art Spratlin, Jim Waide, and Rachel Pierce Waide. John Corlew, author of *Damages Law for Mississippi Trial Practice*, provided insight into current trends in punitive damages. Additionally, Bruce Brawner, a life care planner and vocational rehabilitation specialist, and Jim Koerber, an economist, provided an in depth discussion on how attorneys and experts can maximize their relationships and client results in litigation. The seminar was held at the Oxford Conference Center.

## BEST PRACTICES FOR MINORS' SETTLEMENTS

By: Nick Thompson<sup>1</sup>



### A. Introduction

Often, when a car accident or other incident occurs, one of the parties involved is a child. If the child is injured in the accident or has medical evaluation or treatment afterwards, the minor, through his/her parents, may assert a claim for unliquidated damages against the person they believe is responsible. That person may want to compromise and settle the child's claim.

Mississippi law requires all settlements with "minors" to be approved by the chancery court. Minors' settlements are at least a minor (no pun intended) part of most litigators' practices. And most litigators know the general requirements for obtaining chancery approval of them.

However, as a result of some rather unscrupulous lawyers<sup>2</sup> and/or parents, who have embezzled and/or misspent their client/child's money, chancellors today are now using the white glove approach, being much more thorough with their handling of all minors' settlements. Chancellors are being very diligent and requiring annual accounting of settlement funds placed in restricted guardianship accounts. Some chancellors are even requiring annual accountings of all minors' settlements, even when they are not placed in guardianship accounts.

Many chancellors now require the child's parents to get their employment contract with the child's attorney—whom they have hired to seek recovery from the alleged wrongdoer—approved before seeking approval of any proposed settlement negotiated by that attorney. Some chancellors even require restricted guardianship accounts for all minors' settlements, regardless of the amount. Therefore, successfully obtaining chancery approval of a settlement of a minor's doubtful claim is becoming more and more difficult and detail specific.

All of this is, of course, a good thing. The goal of these proceedings is to ensure that the settlement is in the child's best interest and to protect the child's money from being frittered away before the child reaches the age when he/she can choose for him/herself how to use it. Thus, litigators who handle minors' settlements must be patient with the process and know all of the applicable rules and procedures, both those provided by statutory and case law and those that are imposed through each individual chancellor's equitable discretion.<sup>3</sup>

This article will address the statutory and common-law rules for such minors' settlements and provide some best practices for seeking and successfully obtaining chancery approval of them. Hopefully, this information will help all litigators avoid some of the more recent pitfalls that have become associated with this process.

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<sup>1</sup> Nick Thompson is an associate attorney at Copeland, Cook, Taylor & Bush, P.A., in Hattiesburg. He practices primarily in the areas of general liability and insurance defense litigation.

<sup>2</sup> See, e.g., *Miss. Bar v. Brown*, 2012 Miss. LEXIS 474 (Miss. Oct. 4, 2012).

<sup>3</sup> See *Union Chevrolet Co. v. Arrington*, 162 Miss. 816, 826-27, 138 So. 593, 595 (1932).



## B. Rules and Best Practices

### 1. *Basic Procedure*

At its most basic, the process for obtaining chancery court approval of the settlement of a minor's doubtful claim is rather straightforward. The child's parents must file a Petition in the chancery court asking the court to approve the proposed settlement. They must go for a hearing and testify before the chancellor as to the details of the minor's claim, their desire to settle it, and their belief that the settlement is fair and reasonable and in the child's best interest. And after all is said and done, the chancellor hopefully will enter an Order approving the settlement. However, there are many potential traps and pitfalls involved in preparing the Petition, going before the chancellor at the hearing, and complying with the Order entered by the court. Nonetheless, having a working knowledge of the rules for such settlements, as well as some practices and procedures that can help avoid the snags, is a must.

### 2. *Minors and Guardians and Guardianships*

The Mississippi Legislature has defined a "minor" (and an "infant") as anyone under the age of twenty-one (21) years.<sup>4</sup> The natural parents of a minor qualify as his/her "natural" guardians and are responsible for the care, maintenance, and education of the "ward."<sup>5</sup> However, the chancery court may appoint a so-called "general" guardian (*i.e.*, "legal" guardian) of the person, the estate, or the person and estate of the minor. The parents, as "natural" guardians of the minor, are the preferred "general" guardians. All court-appointed guardians are "general" guardians.<sup>6</sup> The guardian must take and subscribe an oath, at or prior to the time of his appointment, faithfully to discharge the duties of guardian of the ward according to law.<sup>7</sup>

A minor over the age of fourteen (14) years and under no disability other than minority may, by petition, select the person whom he/she wants to be his/her guardian.<sup>8</sup> Therefore, in cases in which the minor is at least fourteen (14) years old – and the amount of the settlement requires a guardianship or one is requested as alternative relief – it is a good idea to include the minor as a signatory to the petition.

The minor is not legally capable of joining in the request to approve the settlement, but he/she can join in the part of the petition that asks for the parents to be appointed as the general guardians. The requested relief could be stated something similar to the following:

The Petitioners would further show that the minor is over the age of fourteen (14) years and under no legal disability except minority, and he/she fully joins in this Petition and selects the Petitioners to be the general guardians over his/her person and estate, pursuant to Miss. Code Ann. § 93-13-13.

<sup>4</sup> See Miss. Code Ann. § 1-3-27 (1972) (minor); Miss. Code Ann. § 1-3-21 (1972) (infant).

<sup>5</sup> Miss. Code Ann. § 93-13-1 (1972). The term "ward," as used in several of the statutes, means "any and all persons under every form of legal disability, including, but not limited to, the disabilities of minority, intellectual disability, mental illness, unsound mind, alcoholism, addiction to drugs, and convicted felons." Miss. Code Ann. § 1-3-58. (Rev. 2010).

<sup>6</sup> Miss. Code Ann. § 93-13-15 (Rev. 2008).

<sup>7</sup> Miss. Code Ann. § 93-13-17 (Rev. 2001).

<sup>8</sup> Miss. Code Ann. § 93-13-13 (1972).

If this request is included in the Petition, the minor should sign his/her own separate “Acknowledgment” under oath before a notary public. The minor’s “Acknowledgment” should generally trace the language of the request above.

### 3. *Settlements by Guardians*

The “doubtful claim” statute provides that *guardians* may, with chancery court approval, settle the minor’s unliquidated, disputed, or doubtful claims.<sup>9</sup> Section 93-13-59 states that:

Guardians may be empowered by the court, or chancellor in vacation, to sell or compromise claims due their wards, on the same proceedings and under the same circumstances prescribed in reference to the sale or compromise by an executor or administrator of claims belonging to the estate of a deceased person. And the guardian in such case is authorized to receive in satisfaction of claims, when to the interest of the ward, property, real or personal, the title to be taken in the name of the ward.<sup>10</sup>

However, to make the guardian’s compromise and settlement effective against the ward, judicial sanction thereof must be on a real, not perfunctory or merely formal, hearing. So the chancellor cannot conduct a hearing and enter an order approving the settlement where no witness on behalf of the minor has been heard or all witnesses are adverse to the minor.<sup>11</sup>

At the hearing, it is always best to make a record. That way, the minor’s parents/guardians are on record stating, *inter alia*, that they agree with the settlement, they believe the settlement is fair, and that they understand they cannot come back later and ask for more money for the minor. Usually, the only witnesses that should testify at the hearing are the minor’s parents/guardians, and the minor if he/she is over the age of fourteen (14) years. For the sake of time and convenience, it is prudent to ask all the detailed questions of one parent/guardian, and then, simply ask the other parent/guardian if he/she agrees with everything the first parent/guardian just said.

Nonetheless, the more facts – regarding the incident, the minor’s injury, the potential value of the minor’s claim, and the reason(s) for the settlement – that are adduced in the Petition and at the hearing, the better for all parties involved. This is because insufficient facts in the record may result in the settlement being set aside later.<sup>12</sup>

Generally, before the guardian can have the authority to act, he/she must put up a bond as the court may require. The conditional nature of the bond obligation must appear in the record as follows: “The condition of the above obligation is that if the above bound \_\_\_\_\_, as guardian of \_\_\_\_\_, of \_\_\_\_\_ County, shall faithfully discharge all the duties required of him by law, then the above obligation shall cease.” The guardian may be sued for any breach of the bond conditions.<sup>13</sup>

<sup>9</sup> Miss. Code Ann. § 93-13-59 (1972).

<sup>10</sup> *Id.*

<sup>11</sup> *Union Chevrolet Co. v. Arrington*, 162 Miss. 816, 138 So. 593 (Miss. 1932).

<sup>12</sup> *See Carpenter v. Berry*, 58 So.3d 1158 (Miss. 2011) (affirming set aside of minor’s settlement of wrongful death claim based on insufficient evidence in record to support reasonableness and fairness of settlement).

<sup>13</sup> Miss. Code Ann. § 93-13-17 (Rev. 2001).

However, a guardian need not enter into a bond if the money or assets due the minor are deposited, pursuant to an order of the court in its discretion, in a restricted guardianship account in a bank in this state, there to remain until further order of the court. This rule only applies if such deposits are fully insured, and a certified copy of the order for deposit is furnished to the bank and it has acknowledge its receipt of the order and the funds.<sup>14</sup>

Restricted guardianship accounts are another prickly aspect of minors' settlements. First, most chancellors want the specific bank and branch to be specifically stated, if not in the Petition, then certainly in the Order approving the settlement. Therefore, before the Petition is filed, the parents/guardians will have to choose a specific bank and branch in which the money will be deposited in the event the settlement is approved.

But these days, fewer and fewer banks are willing to take on the risk and potential liability of restricted guardianship accounts. Therefore, it is a good idea to check with the chosen bank before the Petition is filed to ensure that it is willing to do a restricted guardianship account and to comply with all the statutory requirements for it. Otherwise, the Order approving the settlement may have to be amended if the parents find out later that their chosen bank, which is stated in the Order, does not offer restricted guardianship accounts.

When a restricted guardianship account is ordered, the bank must "acknowledge receipt" of the funds and a certified copy of the Order requiring their deposit in the restricted account.<sup>15</sup> Thus, when the funds are deposited, the bank must execute a "Bank Receipt and Agreement to Accept Funds." By that document, an officer of the bank certifies that the bank has received a certified copy of the chancery court Order approving the settlement, that it has opened a restricted guardianship account and accepted the funds, as stated in the Order, and that the bank will not release any funds without being presented a certified copy of another Order of the court allowing the release. Once the "Bank Receipt" is signed and notarized by the bank officer, it should be filed with the chancery clerk.

#### 4. *Settlements without Guardianships*

Certain settlements of minors' "small claims" do not require guardianships. If the amount of the compromised claim does not exceed the statutory amount, the chancery court may approve the settlement without requiring a guardianship or a restricted guardianship account.<sup>16</sup> Pursuant to Section 93-13-211, since July 1, 2010, the statutory amount requiring a guardianship has been anything *greater than* \$25,000.<sup>17</sup> The statutory amount "refers to the *gross* amount of the settlement of a minor's claim, not the *net* amount."<sup>18</sup> For ease of reference, Section 93-13-211 provides, in its entirety, that:

(1) When a ward is entitled under a judgment, order or decree of any court, or from any other source, to a sum of money not greater than Twenty-five Thousand Dollars (\$25,000.00), or to personal property not exceeding in value that sum, the chancery court of the county of the residence of the ward or the chancery court of

<sup>14</sup> Miss. Code Ann. § 93-13-17 (Rev. 2001).

<sup>15</sup> *Id.*

<sup>16</sup> Miss. Code Ann. § 93-13-211 (Rev. 2010); *Miss. State Bar Ass'n v. Moyo*, 525 So.2d 1289, 1294 (Miss. 1988).

<sup>17</sup> Miss. Code Ann. § 93-13-211 (Rev. 2010).

<sup>18</sup> *Moyo*, 525 So. 2d at 1296-97 (*emphasis* in original).

the county wherein the person is entitled to the money or property, may order the money or property to be delivered to the ward or to some other person for him if he has no guardian, and compliance with the order shall acquit and release the person so delivering the same.

(2) However, if the sum of money or personal property is not due the ward under a judgment, order or decree of a court, the chancery court before ordering the money or personal property paid over or delivered as provided in this section shall fully investigate the matter and shall satisfy itself by evidence, or otherwise, that the proposed sum of money to be paid, either as liquidated or unliquidated damages because of any claim of the ward whatsoever whether arising *ex delicto* or *ex contractu*, is a fair settlement of the claim of the ward, and that it is to the best interest of the ward that the settlement be made, or that the personal property be delivered to the ward. Thereupon the chancery court may authorize and decree that said sum of money or personal property be accepted by the ward and paid or delivered by the party owing or having the same as authorized by the decree of the court, and compliance with the order in the latter event shall acquit and release the person so paying or delivering the same. He, who under the order shall receive the money or property of a person under such disability, shall thereby become amenable to the court for the disposition of it for the use and benefit of the person under disability but shall not be required to furnish security therefor unless the chancery court shall so order.<sup>19</sup>

Therefore, if the settlement is *equal to or less than* the statutory amount, the Court may simply order the settlement funds to be delivered directly to the minor, or to some other person in the minor's best interest, assuming the minor does not already have a legal guardian.<sup>20</sup> Compliance with the order to deliver the funds automatically acquits and releases the person delivering the funds.<sup>21</sup>

As can be seen, Section 93-13-211 is also very important regarding the chancellor's duty to make a record and to thoroughly investigate the reasonableness and fairness of the proposed settlement, especially when no guardianship is involved.

##### 5. *Parties*

As already stated, the process for obtaining chancery approval of a minor's settlement usually begins by filing a Petition in the chancery court seeking approval. The actual parties named in the caption of the Petition are important. If the amount of the settlement is more than the statutory amount, a guardianship is required. Thus, the petition for authority to settle the minor's claim obviously should be styled "In the Matter of the Guardianship of \_\_\_\_\_, a Minor," and brought in the name of the minor by his/her legal/general "guardians." But if the settlement amount is equal to or less than the statutory amount, thus not requiring a guardianship,

<sup>19</sup> Miss. Code Ann. § 93-13-211 (Rev. 2010).

<sup>20</sup> Technically, therefore, a settlement of exactly \$25,000.00 does not require a guardianship or a restricted guardianship account. It must be more than \$25,000.00. However, one would be hard pressed to find any chancellor who does not require a guardianship for a settlement of exactly \$25,000.00.

<sup>21</sup> Miss. Code Ann. § 93-13-211 (Rev. 2010).



the petition should be brought in the name of the minor's natural parents, natural guardians, and "adult next friends."<sup>22</sup>

Usually, both natural parents of the minor must join in the Petition. The exceptions to this rule are where one parent is dead, his/her sole custody has been given to the other, the parents were never married, the child was born out of wedlock, the absent parent has never been adjudicated a natural parent, and he/she does not live with or support the child financially.<sup>23</sup> However, the reasons the other parent is not joined should be stated in the petition.<sup>24</sup>

Then again, sometimes, the exceptions above do not apply, and there are not enough other reasons for one parent to be excluded. But even then, the other parent still may not want to be included in the Petition or be involved in the minor's settlement. For instance, the parents may be divorced, both have joint legal custody, and the non-custodial parent trusts the custodial parent to settle the child's claim and does not wish to be included in the Petition. In those cases, it is prudent to have the non-custodial parent execute a "Waiver of Service of Process and Joinder." That document merely states that the non-custodial parent is entering an appearance in the matter and swears that he has read the Petition, joins in it, and agrees to the proposed settlement, but that he waives service of process in the proceeding and the option to be present at the hearing.

There also may be cases in which the minor's parents are married and both must sign-on to the Petition, but one parent is often away from the area for work. In these circumstances, it may be acceptable for both parents to sign the Petition but for only one of them to appear at the hearing and explain the other's absence. On the other hand, it also would be prudent to have the parent who will be away for work sign a "Joinder" similar to the one described above, which would show his agreement to the Petition and proposed settlement and his waiver of the option to be present at the hearing.

## 6. *Pleadings*

As stated, the Petition for Approval of the Settlement is the primary pleading that must be filed to obtain chancery approval of the settlement of a minor's doubtful claim. But there are several other pleadings that will need to be prepared. First, as discussed above, if you are an attorney representing the minor, you may need to file a Petition for Approval of Employment Contract, prior to filing the Petition for Approval of the Settlement. Second, when you file the Petition for Approval of the Settlement, you may need a "Waiver of Service of Process and Joinder" of the non-custodial parent.

Third, you certainly will need an Order approving the settlement. Depending on the amount of the settlement and/or the chancellor's discretionary preference, the Order may require a guardianship and a restricted guardianship account, or it may not. If the settlement amount is insufficient to require a guardianship, but you anticipate that the chancellor still may require one, it is prudent to have one Order prepared that does not require a guardianship and one Order that does require one.

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<sup>22</sup> *Moyo*, 525 So.2d at 1296.

<sup>23</sup> *Moyo*, 525 So.2d at 1296; *Hemphill-Weathers v. Farrish*, 779 So.2d 167, 175 (Miss. Ct. App. 2001).

<sup>24</sup> *Farrish*, 779 So.2d at 175.

Then, in the event the chancellor requires a guardianship, you will need to have an “Oath of Guardian” ready to be signed and filed. You will also need “Letters of Guardianship” ready for the clerk to issue. And as discussed above, if a guardianship is required, thereby necessitating a restricted guardianship account, you will need a “Bank Receipt and Agreement to Accept Funds” to be completed and signed by the bank.

Finally, you will need to prepare the Release or other settlement agreement, which the minor’s parents/guardians will sign to complete the settlement and receive the settlement funds. An unsigned copy of the Release should be attached as an exhibit to the Petition, so the chancellor will be fully apprised of all the terms of the settlement beyond just the settlement amount.

## 7. *Venue*

Venue may also be an issue in a minor’s settlement. When a guardianship is required, the guardian must be appointed by the chancery court of the county of the ward’s residence.<sup>25</sup> Thus, in all cases wherein the chancellor may require a guardianship as a condition for approval of the settlement, the petition for approval of the settlement should be filed in the chancery court of the county of the minor’s residence.

However, a minor’s settlement without a guardianship, under Section 93-13-211, may also be approved by “the chancery court of the county wherein the person is entitled to the money or property.”<sup>26</sup> There are no cases or other authorities interpreting this language. But it could refer to several different venues. It could refer to the county where the “property” to which the minor is entitled is located. For instance, if a person settles a claim with a minor by agreeing to transfer title to real property to the minor, the Petition to approve the settlement could be filed in the county where the real property is located. Or it may refer to the county in which the minor could file suit to recover the money or property to which he is entitled. In other words, it is the county in which venue is proper for such a civil suit. The primary venue for civil actions is the county in which the defendant resides.<sup>27</sup>

Nonetheless, in all minors’ settlements, the safest course of action is to file the Petition in the county in which the minor resides. As with all chancery matters, the minor must have resided in that county for at least six (6) months prior to the filing of the Petition in order for him/her to be considered a resident of that county.

Be very careful, however. Never rely solely on the minor’s mailing address to determine his/her county of residence. The county of the actual physical location of the minor’s home may be different than the county covering the city of his/her mailing address. There may be instances in which the minor and his/her parents physically live in one county, but their mailing address is a city in a different county. Always confirm with the minor’s parents – preferably before the Petition is filed and certainly prior to appearing at the hearing – that the physical location of their home is in the county in which the Petition is to be filed.

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<sup>25</sup> Miss. Code Ann. § 93-13-13 (1972).

<sup>26</sup> Miss. Code Ann. §93-13-211(1) (Rev. 2010).

<sup>27</sup> Miss. Code Ann. § 11-11-3 (Rev. 2004).

Doing so will help you avoid the frustration that arises when you ask the parent at the hearing if he/she is a resident of that county, and he/she replies “No.” If that happens, the hearing is recessed, the cause of action is dismissed, and you must restart the chancery approval process all over again by refiling in the proper county. Generally speaking, the county in which the parents are registered to vote is the county in which they are actually physically located.

#### 8. *Representation and Conflicts*

Due to the practicalities of the process by which most minor’s settlement Petitions are filed, there may be an issue regarding representation. Most often, the settlement of the minor’s claim is negotiated by an insurance carrier on behalf of the party settling with the minor (“the settling party”). But the minor and his/her parents may be represented by their own attorney, or they may not. Thus, the settlement will be negotiated on behalf of the minor either by his/her parents, if unrepresented, or an attorney, if represented.

Very often, minor’s settlements are negotiated and reached in which the minor and his/her parents have chosen not to hire their own attorney. In such circumstances, the responsibility for preparing the pleadings and setting the hearing to obtain chancery approval of the settlement falls upon the attorney hired by the settling party or the settling party’s insurance carrier.

In all cases in which the minor and his/her parents are unrepresented, the attorney for the settling party must make very clear from the start, to both the parents and to the court, that he/she represents the settling party and not the minor or the parents. This should be communicated clearly, both verbally and in writing, to the minor’s parents. The attorney for the settling party also should advise the parents that they have the right to retain their own attorney for the minor to negotiate the minor’s claim. And if the parents have any concerns about the amount or terms of the settlement, they should be encouraged to seek their own counsel to address those concerns.

Usually, when a settlement is reached through these negotiations, the settling party’s insurance carrier hires and pays its own attorney to draft the Petition and other pleadings necessary to obtain chancery approval of the settlement. Obviously, however, the attorney drafting the Petition and other pleadings must cooperate with the minor’s parents (or attorney, if represented) to agree on the facts stated and language used in the pleadings.

Nonetheless, there still may be some drawbacks, particularly if the minor and his/her parents are not represented. First, the filing of the Petition usually will commence a new cause of action, and thus, it will require a civil cover sheet. But since the minor has no attorney to file the Petition or sign the civil cover sheet, the attorney for the settling party must do so. Later, when the Court looks at the record, this may cause the Court to be under the false impression that the attorney who filed the Petition represents the minor, the minor’s parents and/or the guardianship, which is not the case and would be a conflict of interest.

There are several ways to avoid this misperception of representation. First, as discussed above, if the minor and his/her parents are unrepresented, the attorney for the settling party should advise the parents/guardians up front, both verbally and in writing, that he/she is not their attorney. He/she should advise them that he/she represents the settling party. And he/she should advise them that they have the right to hire an attorney for the minor, if they choose.

Second, if the minor is represented, the Petition should be drafted so that it is submitted by the minor's attorney, even though it is drafted primarily by the attorney for the settling party. The Petition can simply state at the end that it is "submitted by" the minor's attorney and "prepared by" the settling party's attorney, and include each attorney's name, bar number, firm, address, phone number, fax number, and email address.

Then, when the settling party's attorney sends the Petition to the minor's attorney for the minor's parents to sign and notarize, he/she should also include a blank civil cover sheet, for the minor's attorney to sign, and a check for the filing fee, made out to the chancery clerk. That way, once the minor's attorney has had the minor's parents properly sign and notarize the Petition, the minor's attorney can file it with the court clerk without incurring any additional cost – which would be borne by the minor – to do so.

Third, when the minor and the parents/guardians are unrepresented, the attorney for the settling party should clearly state on the face of the pleadings that he/she does not represent the parents/guardians, the minor, or the guardianship. The Petition and the proposed Order approving the settlement should include a paragraph that states that the parents/guardians have been advised that they have the right to and should consult with an attorney, that they have chosen not to do so, and that they have relied on their own best judgment in agreeing to the settlement of the minor's claim.

However, in all cases – whether the minor is represented or not – there is another step that can be taken to avoid any mistaken appearance of representation. After the Petition is filed, but before the hearing, the attorney for the settling party should file an "Entry of Appearance" on behalf of the settling party and the insurance carrier. Also, at the hearing, the carrier's attorney should introduce himself on the record as the attorney for the settling party and ask the minor's parents/guardians to confirm on the record either that the minor has no attorney or that the minor is represented by the attorney they hired, as the case may be. That way, the record will be clear that that settling party's attorney is representing the settling party and the carrier, and not the minor or the minor's parents/guardians or the guardianship.

Finally, if the minor is unrepresented, there is a possibility of a guardian *ad litem* being involved. If the parents have chosen not to retain their own counsel, the chancellor has the discretion to appoint a guardian *ad litem* to review the settlement and protect the minor's interests.<sup>28</sup> If the chancellor appoints a guardian *ad litem*, the hearing will be recessed until the guardian *ad litem* can meet with the parents and the child, review the medical records and bills, etc., and consider the settlement amount. Then, at a later hearing, the guardian *ad litem* will present a report to the chancellor stating that he/she believes the settlement is fair and in the best interests of the minor, or not. If not, the settling party most likely will have to increase the amount offered in settlement in order for the guardian *ad litem* to agree to it and for the Court to approve it.

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<sup>28</sup> Miss. Code Ann. § 9-5-89 (1972); Miss. R. Civ. P. 17(c)-(d).

The statute provides for the guardian *ad litem*'s fee to be paid out of the minor's estate.<sup>29</sup> But the applicable civil rule assesses the guardian *ad litem*'s fee as part of the costs of the action.<sup>30</sup> Often, the chancellor will order that the settling party or his/her insurance carrier will be responsible to pay the agreed-upon fee for the guardian *ad litem*'s services.

#### 9. *Settlements with Minors 18-20 Years Old*

All of the rules, procedures, and practices discussed above are for obtaining chancery court approval of settlements with "minors." As stated, "minors" are defined as persons under the age of twenty-one (21) years. However, by statute, minors eighteen (18) years of age or older are competent to enter into contractual relationships affecting personal property.<sup>31</sup>

According to the Mississippi Supreme Court, this statute "effectively removes the disability of minority of all persons 18 years of age or older [to give them] the right to settle a claim for personal injuries, to execute a contract settling the claim, and to accept money in settlement of the claim."<sup>32</sup> Therefore, chancery court approval is not required to settle a claim for personal injuries with a minor who is at least eighteen (18) years of age.

In some cases, when the minor is approaching eighteen (18) years of age, it may be a good idea to wait to settle the minor's claim until after his/her eighteenth birthday. That will be the most cost effective strategy for everyone. No chancery approval would be required, and hence, no attorney's fees to draft pleadings and attend hearings will have to be expended by either side.

#### C. Conclusion

Most of us have been involved in minors' settlements. There are very specific statutory and common-law rules for these proceedings. Each chancellor has his/her own individual tendencies and employs his/her own considerations, procedures, requirements, and discretion in each case. But the primary focus of all this remains protecting the best interest of the minor child and ensuring that the settlement is fair and equitable. Therefore, it is necessary for all litigators to know the statutes, cases, and rules that govern these proceedings and the procedures and practices required by individual chancellors, as well as to develop some "best practices" from their own personal experience. Hopefully, the rules and best practices discussed herein have been helpful in that regard.

<sup>29</sup> Miss. Code Ann. § 9-5-89 (1972).

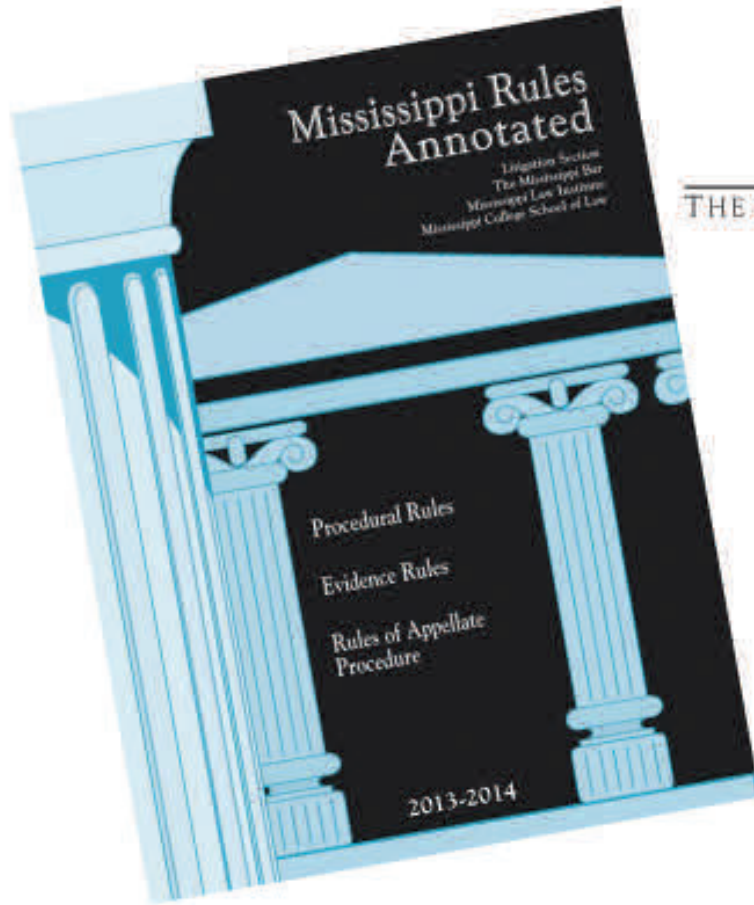
<sup>30</sup> Miss. R. Civ. P. 17(d).

<sup>31</sup> Miss. Code Ann. § 93-19-13 (1976).

<sup>32</sup> *Garrett v. Gay*, 394 So. 2d 321, 323 (Miss. 1981).



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## PIRATES AND ROGUES: EMPLOYEE THEFT OF TRADE SECRETS AND PROPRIETARY INFORMATION

By: Mark Fijman<sup>1</sup>

### I. Introduction

Me? I'm dishonest. And a dishonest man you can always trust to be dishonest. Honestly, it's the honest ones you want to watch out for, because you can never predict when they're going to do something incredibly ... stupid.

~ Captain Jack Sparrow



In the mid-18<sup>th</sup> Century, an owner of a merchant vessel on the high seas would clearly know when his ship came under pirate attack. Cannons would be fired and buccaneers armed with cutlasses would board the vessel, looking to carry off the ship owner's gold and other treasure.

In the modern workplace, the theft of an employer's treasure, *i.e.* trade secrets, proprietary information, customer data, is much less obvious but just as devastating. Unlike the pirates roaming the sea in the late 1700's, this theft is most likely to be carried out by a trusted and supposedly honest employee, usually for the benefit of a business competitor or to assist the employee in setting up his own competing business.

To paraphrase the observation above by the infamous Captain Jack Sparrow from the Pirates of the Caribbean movies, employers need to watch out for the employees they "think" are honest but who are actually getting ready to do something "incredibly stupid" and most likely, illegal.

This is further complicated by the now common "bring your own device" or "BYOD" practice of many employers, who allow employees to use their personal computers and smart phones to perform their workplace duties. When the employee eventually sails out the door to another job, the employer's trade secrets likewise can sail away inside the employee's iPad, iPhone or other device.

According to a 2013 survey conducted by computer security software company Symantec, more than half of departing employees kept confidential information belonging to their former employer and 40 percent planned to use such misappropriated trade secrets in their new jobs.<sup>2</sup>

<sup>1</sup> Mark Fijman is an attorney at Phelps Dunbar, LLP. He primarily represents and advises employers in a variety of employment matters.

<sup>2</sup> Symantec and Ponemon Institute, *What's Yours is Mine: How Employees are Putting Your Intellectual Property at Risk*, SYMANTEC WHITE PAPER (2013)

(<http://www.symantec.com/products-solutions/families/advantages.jsp?fid=data-loss-prevention>).

The purpose of this article is to make employers aware of how such workplace theft can occur, how to best protect and defend your business against any would-be pirates in the workplace and the options for launching a legal counter-attack.

## II. The “Pirate” Attack

Worry about your own fortunes gentlemen. The deepest circle of hell is reserved for betrayers and mutineers.

~ Captain Jack Sparrow

The theft of company trade secrets and other information by former employees or executives has become so common, it regularly makes the news. For example, computer chipmaker Advanced Micro Devices recently sued four former employees, alleging they stole hundreds of thousands of documents before leaving to work for a competitor.<sup>3</sup> In August 2012, a former Intel Corporation employee was sentenced to three years in federal prison for stealing Intel’s confidential design information prior to taking a job with another high tech company.<sup>4</sup>

According to a 2010 statistical analysis, the annual costs associated with the theft of trade secrets and intellectual property were estimated at that time to be as high as \$300 billion dollars a year, and that number has only risen in the ensuing years.<sup>5</sup> However, such theft is not limited to large corporations, and businesses of any size can fall victim to such misappropriation.

In the most typical instance, an employer will not be aware its trade secrets or proprietary information have been stolen until it discovers the information is already being used to lure away its business and customers. The following hypothetical scenario illustrates the very real types of improper conduct now common in the American workplace.

Port Royal Industries (“PRI”) is a successful marine engineering company founded twenty-five years ago by its owner, Will Turner. Back when PRI was a small family business, Turner hired Hector Barbossa and Edward Teach for entry level positions. They ultimately became top executives and corporate officers. Turner considers them friends and trusted employees.

Because of the level of trust Turner has in Barbossa, Teach and all of his employees, PRI has never required its employees to sign non-disclosure, non-solicitation or non-compete agreements. Because of the “family business” atmosphere, Turner is somewhat lax about security for the Company’s computer network, where

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<sup>3</sup> Don Jeffrey, *Ex-AMD Workers at Nvidia Lose Bid to End Secrets Lawsuit*, BLOOMBERG.COM (June 10, 2013) (<http://www.bloomberg.com/news/2013-06-10/ex-amd-workers-at-nvidia-lose-bid-to-end-secrets-lawsuit.html>).

<sup>4</sup> Federal Bureau of Investigation Press Release, *Former Intel Employee Sentenced to Prison for Stealing Valuable Computer Chip Manufacturing and Design Documents*, FBI.GOV (Aug. 8, 2012) (<http://www.bloomberg.com/news/2013-06-10/ex-amd-workers-at-nvidia-lose-bid-to-end-secrets-lawsuit.html>).

<sup>5</sup> David S. Almeling, Darin W. Snyder, Michael Sapoznikow, Whitney E. McCollum & Jill Weader, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. R. 291 (2010)

PRI's proprietary designs and customer information are stored. Barbossa has a company-owned laptop which he uses for work, while Teach uses his personal iPad to perform his duties.

Late one Friday afternoon, Turner receives an e-mail from Barbossa, informing him that Barbossa, Teach and three of PRI's top design engineers are resigning, effective immediately.

Turner learns that Barbossa, Teach and the engineers now work for PRI's chief competitor, Black Pearl Enterprises ("BPE"). After the return of Barbossa's company laptop, a preliminary computer forensic examination reveals that days prior to the resignations, Barbossa downloaded thousands of PRI's engineering and design blueprints off its server and copied them onto external hard drives and flash drives. Computer professionals examine PRI's server and determine that the day before he resigned, Teach used his iPad to remotely access and copy PRI's confidential customer and pricing information.

The forensic examination also reveals that months prior to their resignations, Barbossa and Teach engaged in regular e-mail communications with the President of BPE. Among the topics discussed in the e-mails are their plans to leave PRI, how the abrupt loss of the three design engineers will cripple PRI's ability to serve its customers, and PRI's internal pricing information for key customers.

BPE is now aggressively competing against PRI and has been able to underbid PRI on a number of projects using the stolen pricing information. Utilizing the misappropriated design information, which they otherwise would not have been able to obtain through legitimate means, Barbossa and Teach have been able to take a number of key customers away from PRI.

An angry Will Turner contacts the law firm of Davy, Jones & Locker, LLC, to determine the best way to give Barbossa and Teach a legal keelhauling, and makes an appointment to meet with the firm's top employment attorney, Jack Sparrow, Esquire.

Unlike his famous cousin of the same name, Mr. Sparrow has issues with sea sickness, and opted to attend law school as opposed to entering the family business of captaining sailing ships.



The tale of PRI, its mutinous former executives and the piracy of its confidential business information will serve as the backdrop for how employers can avoid finding themselves in the unfortunate position of Will Turner. The advice from Jack Sparrow, Esquire also will show employers how to turn the tide against would-be boardroom buccaneers.

### III. Best Practices to Avoid Trade Secret Theft by Employees

Prepare the cannons, wake all sailors and prepare to repel boarders.

~ Captain Jack Sparrow

In their first meeting, attorney Jack Sparrow agrees with Will Turner that Barbossa and Teach are indeed “scurvy dogs, yellow-bellied bilge rats and generally dishonest rapsallions.” However, he advises that PRI could have avoided many of the problems now facing it by having had in place some basic policies and practices. “Not only would these policies have prevented or at least discouraged your two former executives from trying to pillage your business, but it would have given us additional legal claims to bring against these scalawags.” Will asked, “what do we need to incorporate into our HR policies and practices.”

#### A. Confidentiality / Non-Compete / Non-Solicitation Agreements

Sparrow explained, “One of the easiest ways to prevent employees from stealing your company’s confidential information is to simply have them contractually agree in advance not to do it.” For most companies, employee confidentiality is vital to a company’s competitiveness. An employee confidentiality agreement establishes that an employee will keep the employer’s confidential, private, secret and proprietary information private and confidential and that such information will not be disclosed to the general public or to outside third parties, such as competitors. Typically, such agreements also can prevent an employee’s unauthorized use of such information. Employee confidentiality agreements ensure that a company’s private information and valuable knowledge stays where it belongs, within the company.

Sparrow noted that another option would be for PRI to have all of its higher level employees enter into non-compete / non-solicitation agreements. “These type of agreements prevent former employees from competing against you or soliciting your customers for a period of time after they leave the company.”

In Mississippi and most other states, these type of “restrictive employment covenants” are generally not favored, but will be enforced by the courts if the terms of the agreement are reasonable under the particular circumstances. Generally, there are three requirements: (1) the employer has a valid interest to protect; (2) the geographic restriction is not overly broad; and (3) a reasonable time limit is given. The employer bears the burden of proving the reasonableness of the agreement. The reason these types of agreements are construed very narrowly is that most courts recognize that an employer is not entitled to protection against ordinary competition from a departing employee.”<sup>6</sup>

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<sup>6</sup> *Business Communications, Inc. v. Banks*, 91 So.3d 1, 22 -23 (Miss. App. 2011) (citing 54A AM.JUR.2d *Monopolies and Restraints of Trade* § 905 (2009)).



“In your instance” Sparrow observed, “you could justify the first factor because Barbossa and Teach were high level executives with access to confidential business and customer information, as opposed to one of your employees working on the loading dock. Courts look closely at the geographic restrictions of such agreements, because it would be against public policy for the restriction to be so broad as to prevent an individual from earning a living in his or her chosen field. For example, a restriction on competing within the entire United States would be considered overly broad and unenforceable. However, a limitation on competition in specific markets where you currently do business would be more likely to be enforced. As far as time restrictions, most courts will find a period of one to two years to be reasonable and enforceable.”

Sparrow also remarked that to be enforceable, these types of agreements must be supported by sufficient consideration. When Turner looked puzzled, Sparrow explained, “In non-lawyer talk, that means that the employee had to have received something of value in exchange for entering into the agreement.” What constitutes sufficient consideration can vary depending on the specific circumstances. However, in Mississippi and other States, courts have held that continued employment alone can be sufficient consideration to uphold a contract.<sup>7</sup>

If Barbossa and Teach had been required to sign these types of restrictive covenants as a condition of their employment or continued employment with PRI, their actions would serve as the clear basis for a breach of contract claim. “However,” Sparrow noted, “because they never signed an agreement, that is one legal claim unavailable to us.” Turner sighed and noted, “I never expected I would need to have my employees contractually promise not to be dishonest” and he and Sparrow made arrangements for Davy, Jones & Locker, LLC to draft such agreements for PRI to use going forward.

## **B. “BYOD” or Bring Your Own Device Policies**

The subject then turned to Teach’s use of his iPad to access and copy PRI’s confidential customer and pricing information. Sparrow asked “How long has PRI allowed its employees to use their personal computers and devices for work, and what kind of policies do you have in place to regulate how they are used?”

Turner replied, “Well, about two years ago, we started letting employees link their work e-mail to their personal smart phones. Over time, I let people use their personal laptops and tablets because they tended to be more efficient and productive with their own devices. It also saved the company money because it spared us the cost of buying a company-issued gadget. We instead pay a monthly stipend to the employees who use their own devices. We really don’t have any formal policy on how they are used.”

“You’re not alone,” Sparrow said. “In one recent survey, 92% of the companies reported that they had employees using their own personal devices for work. However only 44% of those organizations had ‘bring your own device’ or ‘BYOD’ policies that regulated the use of personal devices in the workplace.<sup>8</sup> Even those employers who have BYOD policies are constantly having to scramble to ensure they are still relevant in light of the constantly changing technology.”

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<sup>7</sup> See *Raines v. Bottrell Ins. Agency, Inc.*, 992 So.2d 642, 645-646 (Miss. App. 2008).

<sup>8</sup> Sam Narisi, *Let Users’ Personal Devices Help: 5 IT Consumerization Policy Keys*, IT MANAGER DAILY (Jan. 25, 2012) (<http://www.itmanagerdaily.com/it-consumerization-policy-keys/>).

Sparrow continued, “While there are a lot of good reasons for having an effective BYOD policy, one key benefit is to prevent the misappropriation of your company’s confidential information. In a recent corporate survey, the most pressing concern was that sensitive information will be on a personal device that is lost, stolen, or in the possession of someone who leaves the company or other theft of data via uploading to a personal device.”<sup>9</sup>

Turner requested that Davy, Jones & Locker, LLC draft a BYOD policy for PRI, and asked, “What should our policy include?” Sparrow said, “There is no ‘one-size-fits-all’ policy, because every business is different and has different security and technology issues. He then outlined the following:<sup>10</sup>

- **Require devices to be pre-approved.** Sparrow pointed out, “Different gadgets have their own pros and cons when it comes to security, and your company’s particular security needs will dictate which ones employees should be allowed to use.”<sup>11</sup>
- **Have mobile device management (MDM) software installed.** “The two non-negotiable elements to look for in an MDM system are the ability to enforce security policies and to wipe remotely the personal devices used by employees.” Sparrow further explained, “Such software typically requires a strong password that’s entered every time the device is turned on; ensures on-device file encryption; disables the camera; and specifies which applications are allowed, banned, or mandatory. It may also allow for monitoring to limit or deny access to certain company information.<sup>12</sup> Data loss prevention (DLP) technologies also can automatically flag when sensitive files are touched or an unusual number of files accessed or copied.”<sup>13</sup>
- **Have employees agree in writing to security provisions.** “You can save yourself a lot of grief if you address the issue with employees on the front end,” Sparrow said. “For example, an employee must agree to have their device remotely wiped if (1) the device is lost, (2) the employee terminates his or her employment, (3) if IT detects a data or policy breach, including unauthorized access to confidential company information, or (4) if there is any virus, malware or similar threat to the security of the company’s data and technology infrastructure.”<sup>14</sup>
- **Have an acceptable business use policy.** The policy should define acceptable business use as activities that directly or indirectly support the business of the company. Devices may not be used for unauthorized storage or transmission of proprietary information belonging to the company or misappropriated from

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<sup>9</sup>Michael Finneran, *BYOD Requires Mobile Device Management*, INFORMATION WEEK.COM (May 7, 2011) (<http://www.informationweek.com/mobility/business/byod-requires-mobile-device-management/229402912>).

<sup>10</sup> See *supra* note 8.

<sup>11</sup> See *supra* note 8.

<sup>12</sup> See *supra* note 8.

<sup>13</sup> Sharon Nelson, *How Digital Forensics Aids in the Investigation of Employee Data Theft*, Ridethelighting.SENSEIENT.COM (May 20, 2013) (<http://ridethelighting.senseient.com/2013/05/how-digital-forensics-aids-in-the-investigation-of-employee-data-theft.html>).

<sup>14</sup> See *supra* note 8.

another company, to engage in outside business activities, to harass others, view pornography, etc.

- **Disciplinary policy.** “Employees need to know there will be consequences for lax computer security when using their own devices for work,” said Sparrow. “The company should reserve the right to take appropriate disciplinary action, up to and including termination for noncompliance with the BYOD policy.”<sup>15</sup>
- **Have a plan for departing employees.** “The company should have a written agreement, signed by the employee, stating that the company’s IT department will be allowed to inspect and delete all confidential information from the device when the employee leaves the company.”<sup>16</sup>
- **Institute specific prohibitions on copying and forwarding of confidential information.** Sparrow noted that a common thread in these types of cases is the downloading and copying of company information onto external hard drives/flash drives, or the forwarding of confidential information by e-mail to an employee’s personal e-mail address.
- **Prepare a Departing Employee Checklist so nothing is ever forgotten.** “The list itself will vary by the individual employer,” Sparrow noted, “but might include changing office lock codes, collecting keys, asking questions about any personal devices that may have company data, having the employees sign a statement acknowledging that all company data has or will be returned and another statement acknowledging that any post-departure access to the network would be a criminal act.”<sup>17</sup>
- **Consider other employment related issues.** For example, a non-exempt employee’s use of a personal smart phone to check and respond to business – related e-mails or voice-mails off-the-clock can potentially expose an employer to liability under the Fair Labor Standards Act for unpaid wages or overtime. A BYOD policy should address when an employee is allowed to use the personal device for business purposes.

Sparrow added that along with the BYOD policy, “You also should have your IT department be on the lookout for any unusual activity that would suggest unauthorized accessing and/or copying of company information.”

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<sup>15</sup> See *supra* note 8.

<sup>16</sup> See *supra* note 8.

<sup>17</sup> Sharon Nelson, How Digital Forensics Aids in the Investigation of Employee Data Theft, Ridethelighting.SENSEIENT.COM (May 20, 2013) (<http://ridethelighting.senseient.com/2013/05/how-digital-forensics-aids-in-the-investigation-of-employee-data-theft.html>).

#### IV. Assessing the Damage/Preparing a Case

I leave you people alone for just a minute and look what happens.  
Everything's gone to pot.

~ Captain Jack Sparrow

When a company suspects a former employee has stolen confidential information, time is of the essence, both to prevent additional losses, and to acquire and preserve digital evidence of the employee's wrongdoing to build a case against them. Sparrow told Turner, "A company that sits idly by while its trade secrets are being used unlawfully invites significant commercial harm, and even potentially risks waiving its rights to an injunction to protect those secrets, or even from claiming them as secrets at all. An employer should be ready to immediately implement an action plan."<sup>18</sup> This should include the following:

- Sparrow said, "you need to immediately lock the digital door." "Terminate any remote access privileges or user credentials that the employee may have to company proprietary information, and make sure that all company-issued electronic devices (e.g. laptop, smart phone, tablet, USB and external drives, etc.) have been returned. These steps should have been done at the time of the employee's termination but are sometimes overlooked."<sup>19</sup>
- "Not all the information you need will be on a computer," Sparrow noted. "Interview the employee's manager and co-workers about what the employee was working on, had access to, and whether there was unusual activity during the employee's last days, and whether the employee was acting secretly or left the company on bad terms."<sup>20</sup>
- Pointing to the computer on Turner's desk, Sparrow said, "A common mistake is for employers to immediately re-assign a former employee's computer equipment to another employee without first having it examined by a qualified expert. It is best not to even turn on or 'power-up' any such returned equipment," he warned. "Collect and sequester any electronic media (e.g. smart phones, laptops, and removable hard drives) that the employee used, and store it in a safe location accessible to one or only a few people to ensure the devices are not tampered with and that a chain of custody is preserved."<sup>21</sup>
- "You've already taken one important step," Sparrow said with a smile. "Retain outside counsel experienced in trade secrets and hacking cases to oversee the investigation and analyze the intellectual property and other legal rights which are available."<sup>22</sup>

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<sup>18</sup> Sid Venkatesan and Elizabeth McBride, *Using Computer Forensics to Investigate IP Theft*, LAW TECHNOLOGY NEWS (May 16, 2013) ([http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202600258625&Using\\_Computer\\_Forensics\\_to\\_Investigate\\_IP\\_Theft\\_&slreturn=20130609180154](http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202600258625&Using_Computer_Forensics_to_Investigate_IP_Theft_&slreturn=20130609180154)).

<sup>19</sup> See *supra* note 18.

<sup>20</sup> See *supra* note 18.

<sup>21</sup> See *supra* note 18.

<sup>22</sup> See *supra* note 18.

- Sparrow also strongly stressed that any employer victimized by computer theft needs to “Retain an experienced computer forensic consultant.”<sup>23</sup>

Sparrow told Turner, “While it is tempting for a company to rely on its in-house IT personnel to look for evidence of computer piracy, I always advise retaining an outside computer forensic expert to do the job. They typically have the specialized training and software to analyze the data without altering the contents or operating parameters of the devices and drives in question. This preserves the evidence for any litigation. A common practice is for the forensic expert to create an exact forensic ‘image’ of the device’s hard drive for purposes of analysis, leaving the original device unaltered.”

“What are the computer forensic experts looking for?” Turner asked. “Using specialized techniques and software, they are looking for proof that files or other information have been copied off the device or otherwise misappropriated,” Sparrow explained. “A registry analysis will identify every external device that was attached to the computer by the date the device was connected, the time the device was connected, and the name and serial number of the device that was connected. It won’t tell you who was on the computer at the time or which files were copied, but it will provide some evidence that can be followed up in further discovery that can establish the theft.”<sup>24</sup> For example, Sparrow said, “If an analysis shows that Barbossa’s laptop was used to illegally copy your files, and the copying was done on a date when he was the only one with access to the device that can be strong evidence to support our case.” Sparrow laughed and remarked, “It still amazes me how people will put the most harmful evidence in e-mails and texts, thinking they can destroy the evidence just by hitting ‘delete’. We should be able to get a better idea of what Mr. Barbossa and Teach were up to once we get a good look at their e-mails.”

“In some cases, you have employees who are more sophisticated about their computer theft and this is where computer forensics really pays off,” said Sparrow. “Rather than copying files off a laptop, they may simply copy the entire hard drive using software such as Norton Ghost©, which creates an exact duplicate image which can be transferred to another computer or storage device.<sup>25</sup> They may then try to cover their tracks by using software like EvidenceEliminator© or Evidence-Blaster©.”<sup>26</sup>

“However, this ‘cleverness’ can come back to bite them, said Sparrow. “While they may succeed in overwriting deleted data, making the files unrecoverable, the fact that they installed and then uninstalled evidence wiping software a day or two before they quit will remain in the registry. This raises the interesting question of what type of evidence is more damning, the forensic recovery of deleted files showing proprietary information was on the employee’s computer but deleted, or the presence of unauthorized evidence elimination software that could only be present for the purpose of spoiling the evidence.”<sup>27</sup>

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<sup>23</sup> See *supra* note 18.

<sup>24</sup> Bruce A. Olson, *Helping an Attorney Prove an Employee Theft/Theft of Trade Secrets Case with Computer Forensic Evidence: Part 2*, ONLAW TRIAL TECHNOLOGIES (June, 2, 2010) (<http://www.dfinews.com/articles/2010/06/helping-attorney-prove-employee-theft/theft-trade-secrets-case-computer-forensic-evidence-part-2>).

<sup>25</sup> See *supra* note 24.

<sup>26</sup> See *supra* note 24.

<sup>27</sup> See *supra* note 24.



Sparrow also noted that computer forensic information is important in determining what business losses can be attributed to the employee theft. “In any lawsuit, you’ll bear the burden of having to prove money damages because of Barbossa and Teach’s wrongdoing.”

### V. Legal Action Against Former Employees and Others

Send this pestilent, traitorous, cow-hearted, yeasty codpiece to the brig.

~ Captain Jack Sparrow

Turner banged his fist on the table and demanded, “Is there anything I can do right now to stop these rogues? I’m afraid that by the time we get to trial, they’ll have already sunk my business using my own trade secrets against me.”

Sparrow said, “The first thing we can do is to ask the court to grant some immediate injunctive relief. Injunctive relief is an equitable remedy granted when money damages would not be enough to compensate you for your losses if an injunction was not granted.”

“The type of injunctive relief we’ll seek is a temporary restraining order or ‘TRO’ against Barbossa, Teach and BPE to prevent them from disclosing or utilizing PRI’s trade secrets. We’ll later move the court to leave it in place until our lawsuit can be decided on the merits. To obtain a TRO, we’ll have to convince the court of four things: (1) that we’re likely to succeed on the merits of our claims, (2) that PRI is being irreparably harmed by the improper disclosure and use of its trade secrets, (3) that Barbossa, Teach and BPE will not suffer irreparable harm if the TRO is granted, and (4) that the public interest is served by issuing the injunction.”

Turner thought about what Sparrow had explained and said “Well, if I’m going to have to convince the court I’ll succeed on the merits of my claims, I guess I better know what kind of claims I can bring. I think we’ve clearly and painfully established that it was a mistake for me not to have Barbossa and Teach under a restrictive covenant, and that rules out a breach of contract claim,” said Turner. What other options do I have?”

Sparrow chuckled and said, “There’s more than one way to have these treacherous scoundrels walk the plank!”

#### A. Mississippi Uniform Trade Secrets Act

“In your case, there is statutory protection against the theft of your trade secrets by your former executives,” said Sparrow. “Mississippi, like many other States, has adopted the Uniform Trade Secrets Act. The purpose of the Mississippi Uniform Trade Secrets Act<sup>28</sup> (“MUTSA”) is to prevent a person or business from profiting from a trade secret developed by another, because it would allow them to acquire ‘a free, competitive advantage.’<sup>29</sup> To establish a claim of trade secret misappropriation under MUTSA, we would have to be able to show: (1) that a trade secret existed; (2) that the trade secret was acquired through a breach of a confidential relationship or

<sup>28</sup> MISS. CODE ANN. § 75-26-1 *et seq.*

<sup>29</sup> *Omnitech Intern, Inc. v. Clorox Co.*, 11 F.3d 1316, 1325 (5<sup>th</sup> Cir. 1994).

discovered by improper means; and (3) that the use of the trade secret was without the plaintiff's authorization.”<sup>30</sup>

“So can you tell me what is considered a trade secret under MUTSA?,” Turner asked. Sparrow explained that under the Act, “A trade secret’ means information, including a formula, pattern, compilation, program, device, method, technique or process, that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”<sup>31</sup>

“Skip the legal jargon,” Turner demanded, “What the heck does that mean?” “In essence,” Sparrow said, “It means that a trade secret is something that is valuable to your business because it is not generally known outside your business, you take reasonable efforts to keep it secret, and the only likely way your competitor could find out about it would be by stealing it or through other improper means.” Sparrow noted, “It would seem that the engineering designs that were stolen would meet the definition under MUTSA.”

“Would the customer information they took also be considered a trade secret?” Turner asked. Sparrow nodded “Courts interpreting this section of the MUTSA have consistently held that lists of current and prospective customers, the requirements of customers, and other proprietary business information can constitute a trade secret.”<sup>32</sup>

Sparrow continued, “MUTSA refers to the theft of trade secrets as misappropriation. That means the acquisition of a trade secret by someone who knows or has reason to know that it was acquired by improper means, such as theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy. It also includes the disclosure or use of a trade secret without consent by someone who used improper means to acquire knowledge of the trade secret. For example, if an ex-employee spilled the company secrets to a business rival, who starts using the trade secrets.”

“MUTSA also prohibits the use of trade secrets by a company which ‘has reason to know’ that the material constitutes a trade secret. This is known as constructive knowledge (versus actual knowledge). In other words, even if a company was unaware it possessed purloined trade secrets, it can still be prosecuted under Mississippi law if it *should* have known.”<sup>33</sup>

Sparrow added, “With what we know right now, it looks like we have a good claim of misappropriation of trade secrets against Barbossa and Teach. In addition, we also should be

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<sup>30</sup> See *Union Nat'l Life Ins. v. Tillman*, 143 F. Supp.2d 638, 643 (N.D. Miss. 2000).

<sup>31</sup> MISS. CODE ANN. § 75-26-3(d).

<sup>32</sup> See *ACI Chemicals, Inc. v. Metaplex, Inc.*, 615 So.2d 1192, 1195 (Miss. 1993) (holding that trade secrets may be a list of customers and “may relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management”) (quoting *Cataphote Corp. v. Hudson*, 422 F.2d 1290, 1293-94 (5<sup>th</sup> Cir. 1970)); see also *Zoecon Indus. v. American Stockman Tag Co.*, 713 F.2d 1174, 1179 (5<sup>th</sup> Cir. 1983) (noting that customer information can constitute a trade secret because it gives its owner “an advantage over competitors who did not have the information”).

<sup>33</sup> Rich Stim, *Mississippi Trade Secret Law*, NOLO LAW (2013) (<http://www.nolo.com/legal-encyclopedia/mississippi-trade-secret-law.html>).

able to go after BPE, because they clearly had reason to know that the information they were using belonged to PRI and was acquired by improper means. Under the Act, we can seek injunctive relief against them all and also seek money damages for the business losses they've caused to PRI.”

### **B. Computer Fraud and Abuse Act**

“Because of the way Barbossa and Teach stole information from PRI’s computer system, you also can assert a claim under federal law, said Sparrow. Sparrow continued, “The Computer Fraud and Abuse Act (“CFAA”) provides civil remedies for certain types of misuse of computers and computer files.<sup>34</sup> “This law was originally enacted to bring criminal charges against computer hackers, but the civil component of the statute allows employers to seek damages against former employees for misuse of a protected computer,” Sparrow noted. “CFAA defines a ‘protected computer’ as a computer ‘used in interstate or foreign commerce or communication’<sup>35</sup> so a protected computer, in effect, could include any computer connected to the Internet.<sup>36</sup>

CFAA prohibits numerous types of conduct, including the theft of data from a protected computer and the unauthorized access of a protected computer resulting in damage to a protected computer.<sup>37</sup> Sparrow pointed out to Turner “The crucial evidence to support a successful CFAA claim will be the information you obtain from the forensic examinations you conduct early in the litigation process”

### **C. Breach of Fiduciary Duty**

“What really bothers me about all this is that these two mutinous swine were my top executives and officers in the company and they were actively conspiring with my competitor. They were supposed to be working on behalf of PRI,” Turner said to Sparrow. “Surely that can’t be legal! Is it legal?”

“No, it’s not,” said Sparrow. Because they were trusted high level executives and corporate officers, they owed a legal duty of care and loyalty to your company. Because they clearly and intentionally worked against the best interests of PRI, we have a strong claim against them for breach of fiduciary duty!”

Sparrow explained to Turner that in Mississippi, a corporate officer has a duty of care which is defined by the Mississippi Supreme Court as follows:

A director or officer has a duty to the corporation to perform the director’s or officer’s functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person

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<sup>34</sup> 18 U.S.C. § 1030, *et seq.*

<sup>35</sup> 18 U.S.C. § 1030(e)(2)(b).

<sup>36</sup> See *United States v. Drew*, 259 F.R.D. 449, 458 (C.D. Cal. 2009).

<sup>37</sup> 18 U.S.C. § 1030(a).

would reasonably be expected to exercise in a like position and under similar circumstances.<sup>38</sup>

Sparrow continued, “The second fiduciary duty that all officers owe to their employer is that of loyalty, good faith and fair dealing. Officers have a duty to exercise ‘the utmost good faith and loyalty’ to the corporation.<sup>39</sup> This includes the duty to refrain from engaging in self-dealing activities.”<sup>40</sup>

“In this case, Barbossa and Teach are clearly fiduciaries because of their high level positions within the company. However, courts have recognized that even lower level employees, such as a store manager or an office manager, also may owe such fiduciary duties to their employer, depending on the individual circumstances.”

Looking through copies of the e-mails between Barbossa and Teach and the President of BPE, Sparrow said, “In these e-mails, your two back-stabbing executives are actively discussing with your chief competitor how to do damage to PRI. They’re doing this while serving as company officers and top executives who are ‘supposed’ to be working in the best interests of your company. This is hardly the conduct of loyal employees acting in good faith. These e-mails are ‘the smoking gun’ in our breach of fiduciary duty claim against them! Plus, juries generally don’t care for sneaky dishonest employees who are foolish enough to discuss all their wrongdoing in an e-mail.”

Turner asked, “Is there any type of claim we can bring against BPE? What about the engineers who left with Barbossa and Teach? They had to have known what those two pieces of shark bait were up to, and helped them to steal our information!”

Sparrow nodded and said, “A person or a corporation ‘who knowingly joins with or aids and abets a fiduciary in an enterprise constituting a breach of the fiduciary relationship becomes jointly and severally liable with the fiduciary for any profits that may accrue.’ In other words, if BPE, its President or your former engineers knowingly helped Barbossa and Teach in breaching their fiduciary duties to PRI, they also can be held liable for money damages. This could include any profits they made utilizing PRI’s information.”

#### **D. Tortious Interference with Business Relations / Civil Conspiracy**

“I’d really like to sink these sea rats” Turner said. “Is there one more claim I might be able to bring?” Sparrow laughed, “How about two?”

“One potential claim against them would be for tortious interference with business relations. To prove such a claim, we would have to show (1) their acts were intentional and willful; (2) their acts were calculated to cause damage to PRI in its lawful business; (3) the acts

<sup>38</sup> *Omnibank of Mantee v. United Southern Bank*, 607 So.2d 76, 84 (Miss.1992).

<sup>39</sup> *Rogers v. The Mississippi Bar*, 731 So.2d 1158, 1168 (Miss. 1999) (citing *Ellzey v. Fyr-Pruf, Inc.*, 376 So.2d 1328, 1332 (Miss. 1979)); see also *Hill v. Southeastern Floor Covering Co.*, 596 So.2d 874 (Miss. 1992) (citing *Fought v. Morris*, 543 So.2d 167,171 (Miss. 1989)); *Gibson v. Manuel*, 534 So.2d 199, 201 (Miss. 1988).

<sup>40</sup> *Rogers*, 731 So.2d at 1168.

were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of BPE or its President, and (4) actual damage and loss resulted.”<sup>41</sup>

“In our case, I think we’ll be able to prove all of that. First, their actions were clearly intentional and willful because we can show this scheme had been in the works for months. Second, their acts were calculated to cause damage to PRI, by taking away its business and customers using stolen information. Third, BPE has no lawful right to be using your information against you. Finally, we can show PRI has suffered actual damage because of their wrongful actions.”

Sparrow continued, “Another possible claim would be for civil conspiracy. Conspiracy requires a finding of “(1) two or more persons or corporations; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result.”<sup>42</sup> The purpose of the conspiracy has to be to accomplish an unlawful purpose or a lawful purpose unlawfully.”<sup>43</sup>

“In your case, Barbossa, Teach, BPE, its President and your engineers had the goal of hurting PRI’s business and clearly agreed on how they were going to go about it. Further, the unlawful acts involved the breach of fiduciary duty, violations of MUTSA and CFAA when they stole your information, as well as their tortious interference with your business relations.”

## VI. Conclusion

Well, then, I confess, it is my intention to commandeer one of these ships, pick up a crew in Tortuga, raid, pillage, plunder and otherwise pilfer my weasely black guts out.

~ Captain Jack Sparrow

As illustrated by the fictional pirate tale above, dishonest employees rarely let you know in advance of their intention to “raid, pillage, plunder and otherwise pilfer” your company’s trade secrets. However, employers who put in place the proper policies and practices are less likely to find themselves in the position of the overly trusting Will Turner, and better prepared for any legal battles against pirates and rogues in the workplace.

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<sup>41</sup> *MBF Corp. v. Century Business Comm., Inc.*, 663 So.2d 595, 598 (Miss. 1995); *see also Accord McFadden v. U.S. Fidelity and Guaranty Co.*, 766 So.2d 20, 22-23 (Miss. App. 2000).

<sup>42</sup> *See Gallegos v. Mid-South Mortg. & Inv., Inc.*, 956 So.2d 1055 (Miss. App. 2007).

<sup>43</sup> *Mississippi Power & Light Co. v. Coldwater*, 106 So. 2d 375, 381 (Miss. 1958); *Shaw v. Burchfield*, 481 So. 2d 247 (Miss. 1985); 15A C.J.S. Conspiracy § 1(2).



## 2013 Annual Section Meeting Review

On Friday, July 12, 2013, at the MS Bar Convention, the Litigation Section presented a 2 hour CLE program entitled “The Fourth Amendment in an Age of DNA, Drones and Dogs.” The featured speaker was Donald F. Samuel, of Garland, Samuel & Loeb, a nationally recognized speaker on these issues.



Attendees enjoying the 2013 Litigation Section Annual Meeting at the MS Bar’s Annual meeting

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