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DNA TEST AND LAWYER'S TENACITY MAY LEAD TO CLIENT'S EXONERATION

by MARY ALICE ROBBINS

When Entre Nax Karage was released recently from Dallas' Lew Sterrett Criminal Justice Center on a personal recognizance bond after serving almost seven years of a life sentence for murder, Duncanville solo John Hendrik breathed a sigh of relief.

Karage's March 4 release from custody was something Hendrik had hoped to see since Karage was sentenced in 1997. And if not for Hendrik's persistence, Karage likely still would be incarcerated.

"Thank goodness for DNA," says Hendrik, who was

Karage's trial counsel and represents Karage in his current bid for freedom based on DNA evidence that allegedly links another man to the murder victim.

Karage's conviction was "one of my worst moments as a defense attorney," recalls Hendrik, who served as judge of Dallas County Criminal Court at Law No. 8 from 1981 until 1994, when he went into private practice. "I felt partly responsible," says Hendrik, who believed in his client's innocence and was surprised when Karage was convicted.

After Hendrik lost at the trial, Karage decided to hire another attorney to handle the direct appeal,

which the Texas Supreme Court assigned to the 4th Court of Appeals in San Antonio. In *Karage v. State*, the 4th Court affirmed Karage's conviction and sentence in 1999.

According to the 4th Court's opinion, written by Senior Justice Shirley W. Butts, the evidence introduced at Karage's trial was circumstantial. Justice Catherine Stone and Paul Green joined Butts in the opinion.

Butts noted in the opinion that the victim, Nary Na — Karage's 14-year-old girlfriend — had a coat

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TAXING TIMES

by BRENDA SAPINO JEFFREYS
and MIRIAM ROZEN

Troubled Firm Pins Hopes
For Better Future on
Proposed Class-Action Settlement

Jenkins & Gilchrist chairman Thomas Cantrill

Look up. Amid the turbulent skies hovering above Jenkins & Gilchrist these days, one black cloud may soon float away.

On March 5, the Dallas-based firm announced it has agreed to a proposed \$75 million class-action settlement of litigation filed by disgruntled former clients who hired the firm for tax advice.

The proposed settlement of the draining tax litigation still requires the approval of a federal judge and participation by the former Jenkins clients who would fit into the class. The pact, however, ultimately may improve the atmosphere around the 466-lawyer firm, which has been battered by the civil suits filed by former clients and a federal investigation into tax shelters the firm once endorsed but the Internal Revenue Service now doesn't allow. The settlement also may staunch the steady stream of lawyer departures from Jenkins, which had more than 600 attorneys just three years ago.

"The settlement will have a positive effect in a lot of ways," says Thomas Cantrill, a shareholder who was elected chairman of the firm in January. "We are very stable around here now. And we're looking forward to getting back to the practice of the law."

"The publicity surrounding this entire controversy is hard on any organization, and it has not been easy on Jenkins," says Rod Phelan, a partner in Baker Botts in Dallas who led Jenkins' negotiations in the settlement.

But despite its smaller size and tax troubles, the firm says net profits for 2003 were relatively flat compared to the \$81 million Jenkins posted in 2002, although profits per shareholder

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TROUBLED FIRM PINS HOPES FOR BETTER FUTURE ON PROPOSED SETTLEMENT

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improved moderately in 2003. Profits per shareholder totaled \$526,000 in 2002, according to *Texas Lawyer's* annual report on firm finance. [See "Firm by Firm: How They Fared Financially in 2002," *Texas Lawyer*, June 30, 2003, page 25.] The increase in profits per shareholder is because of the loss of lawyers, Cantrill explains.

If the settlement goes through, the firm will bear some of its costs. A lawyer for Jenkens' insurers as well as a plaintiffs' lawyer confirm the proposed settlement calls for Jenkens to contribute \$5.25 million to the pot, insurers to pay \$63.5 million, and three tax shareholders in the Chicago office to contribute. It calls for \$3.96 million from Paul M. Daugerdas, \$1.43 million from Erwin Mayer and \$860,000 from Donna Guerin. The three shareholders did not return, before presstime on March 11, telephone messages left at their offices, and their attorney, Larry Black, a solo practitioner in Austin, was out of the office and did not return two telephone messages.

Former shareholders generally agree the firm can afford to be cautiously optimistic because of the proposed settlement.

Former Jenkens chairman David Laney, who left the firm a year ago to join Jackson Walker in Dallas, says, "I think the change in management, plus the beginning of the resolution of this [tax] matter, is a very important stabilizing influence."

Gerald "Jerry" Welch, a former Jenkens shareholder and a partner in Patton Boggs in Dallas, says, "Cantrill is a heads-up guy. They ought to be able to fix things."

Nevertheless, the proposed settlement is far from a fait accompli. The firm and the former Jenkens clients pushing for the deal must overcome a long sequence

of hurdles before the deal is inked, say Cantrill and David Deary, a partner in Shore★Deary in Dallas who negotiated the deal on behalf of the plaintiff class.

Initially, attorneys for Jenkens, and the former Jenkens clients, represented by a team led by Deary, must convince U.S. District Judge Shira A. Scheindlin of New York, who is presiding over *Thomas Denney, et al. v. Jenkens & Gilchrist, et al.*, to certify a class of former Jenkens clients who received tax-strategy advice from Jenkens. Then, the judge must approve the terms of the settlement.

If the judge is persuaded to certify the class and approve the terms, the plaintiffs' lawyers must convince the class members — wealthy people who could number in the hundreds and presumably have the money to hire any lawyers they wish — not to reject the deal. If even one class member decides to opt out, Jenkens could scrap the deal, Deary and Phelan say.

"We think that if there are people thinking about opting out, once they hear the real story and the circumstances, they will choose not to opt out because it will be devastating to them," Deary says.

Phelan agrees, arguing a settlement is far better than a "free-for-all" of litigation.

Plaintiffs' lawyer Blair Fensterstock, who formerly represented some of Deary's clients in another suit filed against Jenkens, says he has been hired by other former Jenkens tax-advice clients who intend to oppose the settlement. Fensterstock, of Fensterstock & Partners in New York, says he does not believe the litigation is well suited for a class, and he believes the proposed settlement is not fair and reasonable. He did not participate in the settlement talks.

Deary and Cantrill say the terms of the settlement call for Jenkens to provide information to the plaintiffs' lawyers as they continue to pursue litigation against other defendants, including the banks and accounting firms that helped structure tax strategies for Jenkens' clients. Jenkens' cooperation in the former clients' pursuit of deeper pockets, Deary says, is what makes the proposed deal so valuable to the plaintiffs. "They are going to provide us with documents on all the tax strategies and [be] fully cooperating [in] interviews and identify how the fees for the tax strategies were distributed among the different parties," he says.

In contrast, the actual dollar amount of the proposed \$75 million settlement does not even cover the legal fees the former clients paid to Jenkens, much less the costs those same clients have or may incur with IRS audits, Deary says.

Phelan says the firm will provide the plaintiffs with information that would otherwise be discoverable in litigation. The discovery is "nothing that we wouldn't be doing anyway," he says.

The proposed settlement also potentially locks in the cash that Jenkens' insurers, including excess carriers such as Lloyds of London, bring to the table, Deary says. Executive Risk Indemnity Inc., the primary insurance



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carrier for Jenkens, earlier balked in court at covering the claims stemming from the tax litigation. Executive Risk filed a suit in October 2003 in the Northern District of Illinois, *Executive Risk Indemnity Inc. v. Jenkens & Gilchrist, et al.*, seeking a declaration of no coverage. Mitchell Orpett, a partner in Chicago's Tribler Orpett & Meyer who represents the insurance company in the suit, declines comment.

But as part of the proposed settlement, say several lawyers involved in the negotiations, the primary and excess insurance companies have agreed to abate coverage claims.

Phelan says, "If it fails, we will be right back where we were, which is the firm claiming coverage."

Life at the firm could significantly improve if the settlement is finalized. *Texas Lawyer* spoke with 11 current and former partners for this story. The majority agree the proposed settlement will put in the past the lion's share of the firm's tax-related troubles and the accompanying negative gossip.

"The firm will survive, but it will, at least in the near term, be different," says former shareholder Toby Gerber, who joined Fulbright & Jaworski in Dallas on March 1 and says the tax issue was not the major reason why he left Jenkens.

But former shareholder David Cibrian, who joined Strasburger & Price in San Antonio in February and left in part because of the tax troubles, says, "As a Jenkens alum, I'm very disappointed in the settlement. It looks bad, and as a Jenkens alum, I feel bad."

But the proposed settlement doesn't solve all the firm's problems. The firm is embroiled in a tough courtroom battle with the IRS, which wants Jenkens to reveal the names of 607 clients who received tax-shelter advice from the firm. Jenkens refuses to provide the names, claiming attorney-client privilege.

In *United States of America v. Jenkens & Gilchrist*, filed in 2003 in the Northern District of Illinois, the IRS seeks the names of more than 600 clients who allegedly participated in a "listed transaction" or a "potentially abusive tax shelter" organized or sold by lawyers from the Chicago office of Jenkens.

In the government's Motion for Summary Enforcement of Summonses filed in that case on Feb. 26, U.S.

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Department of Justice lawyers dispute Jenkens' attorney-client privilege claims, alleging "no privilege attaches to the information communicated for the purpose of committing a crime or fraud." In the motion, the DOJ identified Jenkens as "a tax-shelter promoter," and the government's lawyers assert what is known as the crime-fraud exception to attorney-client privilege, an exception more frequently used in racketeering cases against organized crime or drug rings.

Barry Chasnoff, a partner in Akin Gump Strauss Hauer & Feld in San Antonio who represents all the excess insurance carriers for Jenkens, confirms the proposed class-action settlement calls for the insurers to withdraw objections to coverage. But Chasnoff notes that if the government established a crime-fraud exception, it would nullify Jenkens' insurance coverage. Chasnoff says his client will continue an internal coverage review.

"Ultimately, if the settlement is not approved, we have a right at that point to raise coverage defenses if we choose. In the interim, we will continue our coverage investigation," Chasnoff says.

Can We Talk?

Negotiations began, Deary says, when Phelan approached him in November 2003 to discuss a settlement. Deary represents plaintiffs in two Racketeer Influenced and Corrupt Organizations Act suits filed against Jenkens and other defendants in the Southern District of New York. In the suits, former Jenkens clients allege the firm gave them faulty tax advice in 1999 that is now at issue as the IRS examines their tax returns. The suits are *Denney*, filed in 2003, and *Henry Camferdam Jr., et al. v. Ernst & Young International Inc., et al.*, filed in 2002.

Both suits name Jenkens and Daugerdas, along with other accounting firm and financial institution defendants.

After Phelan contacted him, Deary says the two sides negotiated during three separate sessions over the course of several days with mediator Robert Parker, a retired 5th U.S. Circuit Court of Appeals judge from Tyler. Through an assistant, Parker declines to comment.

Deary says he negotiated for the plaintiffs along with Birmingham, Ala., lawyers Joe Whatley Jr., a partner in Whatley Drake, and Ernest Cory, a partner in Cory, Watson, Crowder & DeGaris. Cantrill says four Jenkens lawyers assisted Phelan — tax shareholder Michael Cook and litigation shareholder William Parrish, both of Austin, and Dallas litigation counsel John Gilliam and Marshall Simmons.

Akin Gump's Chasnoff represents the excess carriers, along with lawyers from Boundas, Skarzynski, Walsh & Black in Chicago. Phelan says Jonathan Constine, a partner in Hogan & Hartson in Washington, D.C., represents Jenkens' primary carrier, but Constine did not return a telephone call seeking comment before presstime on March 11.

"The settlement will have a positive effect in a lot of ways," says Thomas Cantrill, who was elected Jenkens' chairman in January.

"We are very stable around here now."

The *Denney* and *Camferdam* suits refer to a tax strategy plan known as Currency Options Bring Reward Alternatives (COBRA), which, as alleged in the complaint in *Camferdam*, creates a paper loss through the use of currency options that would offset a capital gain,

thereby reducing tax bills. But *Camferdam* and the other plaintiffs allege in the complaint that the tax shelter is specifically disallowed in 2000-44, an IRS notice issued in September 2002 titled "Tax Avoidance Using Artificially High Basis." [See "Bitten by a COBRA?" *Texas Lawyer*, March 10, 2003, page 1.]

Deary says the proposed class will include any individual who received tax advice from Jenkens and suffered damages, meaning they had to file an amended tax return or were audited by the IRS and had to pay



Former Jenkens chairman David Laney, now at Jackson Walker, says, "I think the change in management, plus the beginning of the resolution of this [tax] matter, is a very important stabilizing influence."

an "assessment." Deary says he represents about 100 former Jenkens clients who are being audited, but an unknown number of others would become members of the class if the IRS learns their identities and audits them.

Stephen Malouf, a solo practitioner in Dallas, who represents a former Jenkens client who filed a suit in state court, says his client plans to participate in the settlement.

Office Space

Even if the settlement goes through, Jenkens' troubled past still may affect its future.

Cantrill, chairman for three-and-a-half years in the late 1980s, says he will stay in the job for the near term, but wants to return to his estate-planning practice. Cantrill became managing shareholder in January, succeeding William Durbin, who stepped down just weeks after he was re-elected. Durbin was re-elected last fall to a third one-year term as chairman and chief executive officer of Jenkens, but he said in January he resigned from the post to return to his practice full time. [See "Inadmissible," *Texas Lawyer*, Jan. 19, 2004, page 3.]

Durbin says Jenkens shareholders did not ask him to step down from the chairmanship. He says he and

an ad hoc group of shareholders had a discussion after his re-election about leadership at the firm and they decided it was best to have a new leader.

"It was time for change. I had initiated a lot of [organizational] change within the firm that necessarily was resisted, or understandably was resisted by some," Durbin says.

Durbin managed the firm for two years; he succeeded longtime chairman Laney, who decided against running for election to a 12th, one-year term as chairman after Durbin started mounting a campaign for the job in 2001. [See "Jenkens Gains New Leader, But Loses Lawyers to Layoffs," *Texas Lawyer*, Jan. 14, 2002, page 6.]

The firm expanded dramatically under Laney's watch. Jenkens grew from 425 lawyers on April 1, 1999, to 627 lawyers on April 1, 2001, but slipped to 518 lawyers two years later, and 466 today.

Some of the growth came in Chicago, where tax lawyer Daugerdas joined Jenkens in January 1999, along with five partners from Chicago's Altheimer & Gray. The Chicago office got a big boost a year later when about 20 lawyers from the Chicago office of Houston-based intellectual property firm Arnold, White & Durkee joined the firm.

The growth in Chicago was part of the firm's aggressive expansion plan, which culminated with its entree into New York when Jenkens merged in December 2000 with Parker Chapin. [See "Two Texas Firms Announce Upcoming Mergers," *Texas Lawyer*, Dec. 18, 2002, page 8.]

In the past 18 months, however, that growth has reversed dramatically. Some of the lawyers who have left Jenkens in recent months say the firm's tax-advice troubles were not a factor in their decisions to leave. Others acknowledge they were bothered by it.

Others left simply because the firm's progress toward becoming a national firm had slowed with all the lawyer defections. Gerber, the bankruptcy lawyer who joined Fulbright, says he represents large financial institutions in bankruptcies, and "it was just getting increasingly difficult for my clients and for me to thrive within the restrictions."

A critical question for Jenkens' future lingers: Will the proposed settlement slow the flow of lawyers out of Jenkens, which now has more space than attorneys?

A day before the March 5 settlement announcement, Joyce Mazaro, who previously led Jenkens' franchise and distribution practice, and six other lawyers from Dallas and Washington, D.C., announced they were joining Haynes and Boone on March 15. Also on March 5, three shareholders in the financial institutions practice group in Washington, D.C., left Jenkens to join Luce Lehman Gorman Pomeroy & Schick on March 8.

Mazaro says the firm's tax troubles were not a factor in her decision to leave Jenkens, but she was attracted to Haynes and Boone's reputation for teamwork and to its strong international practice. Richard Garabedian, one of the financial institutions shareholders who joined Luce Lehman, says it was difficult for his group's practice to "gain momentum" in Jenkens' relatively small Washington office.

The harsh reality for Jenkens is that the D.C. office just became even smaller in terms of lawyers. For the firm, the arithmetic isn't pretty. Only seven revenue-producing lawyers now occupy spaced leased for 16 in the downtown D.C. office, Cantrill confirms.

But the Jenkens chairman, bolstered by the hope of the proposed settlement, remains steadfast. "We're going to be hiring," Cantrill says. "We can hire more lawyers."

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