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## Defense bar stunned to find docket-control committee already at work

By Phillip Bantz  
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During her state of the judiciary address earlier this year, South Carolina Supreme Court Chief Justice Jean H. Toal announced she was forming a committee to address the sticky problem of managing the state's criminal docket – the source of a longstanding power struggle between prosecutors and the defense bar.

“No judge can run these court dockets,” Toal said in her February speech. “It is a joint cooperative partnership between clerks of court, solicitors, public defenders, defense attorneys and all others involved in the system. And I believe we can make progress without it having to be a ‘me against you’ and ‘us against them’ situation.”



But five months later, the divide seems greater than ever, according to leaders of the defense bar. They were dismayed to discover earlier this month that the new docket committee had been meeting without their knowledge and is composed entirely of former and current solicitors. Not only that, but the group appears to be on the verge of issuing a proposal that would allow prosecutors to maintain significant control over the docket during the early stages of a case.

“No process which shuts out this point of view can be seen as fair and it immediately guarantees that any plan generated will be suspect,” Kitty Sutton, executive director of the S.C. Association of Criminal Defense Lawyers, stated in a news release. “To approach this process in such a way is not only illogical, it directly contradicts promises that were previously made. ... We expect the Court to acknowledge the importance the defense plays and not treat our public and private defenders as second-class citizens.”

The docket control tug-of-war came to a head last fall when the S.C. Supreme Court ruled in *State v. K.C. Langford III* that a state law giving solicitors exclusive control over scheduling criminal trials was unconstitutional and ripe for abuse.

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- **Civil Practice – No Appellate Review of Remand Order** *E.D., a minor v. Pfizer Inc.* : The 4th Circuit dismisses for lack of jurisdiction an appeal from an order remanding to state court this suit against pharmaceutical companies filed by 19 families alleging injury to children because their mothers took Zolofit during pregnancy; Congress has sharply proscribed review of a district court’s remand order, and none of the exceptions to this prohibition apply in this case.
- **Environmental CERCLA Discovery Rule Preempts Statute of Repose** *em>Waldburger v. CTS Corp.* North Carolina landowners who discovered their well water has concentrated levels of carcinogens may sue defendant CTS Corporation in a nuisance action; the 4th Circuit says the discovery rule of the federal CERCLA statute preempts the 10-year limitation period under a North Carolina statute of repose.

In an administrative order, the court laid the groundwork for a judge-controlled docket, including a process for dismissing cases when solicitors took too long to set trial dates. But the court later suspended that order in response to concerns about the new system overwhelming judges and court staff, and instead created the committee to work on a solution.

The court's five justices signed an order which stated that the committee would "include a wide range of stakeholders including representatives from the South Carolina Solicitors' Association, the South Carolina Public Defender Association, the South Carolina Clerks of Court Association, Court Administration, the practicing bar and the judiciary."

E. Charles Grose Jr., a Greenville defense lawyer who argued on behalf of the Public Defender Association in *Langford*, said he had been waiting for Toal to make an announcement that she was seeking candidates to serve on the committee. Then he read in his local newspaper that the group was nearly done with its work.

"I've been looking for an announcement and I never received one," he said. "The fact that the committee is all former and current prosecutors, I think it really calls into question the public confidence in the ability of the judiciary to have control of the docket."

The executive director of the S.C. Commission on Indigent Defense, T. Patton Adams IV, said he recently spoke with Toal about the committee and was told that the solicitor members were discussing the court's docket management computer system and the defense bar's involvement was unnecessary.

Attempts to reach Toal July 11 were unsuccessful. She was quoted in a GreenvilleOnline.com report as saying, "We are very close in my view to having something that I think will acknowledge the good systems that are in place but also develop a template that will require this type of management everywhere."

The proposal is expected to be similar to the case management system in which the solicitors run the docket until a case reaches a certain age, then the circuit's chief administrative judge can step in and take the reins, said committee member Tommy Pope, a York County state legislator and a former solicitor.

It also "does not run counter" to solicitor-backed legislation that Pope co-sponsored this year, he said. The bill, which drew opposition from the defense bar after breezing through the House, would make a slight tweak to the current docket control law by removing the word "exclusively" as it pertains to solicitor power. The bill is with a Senate subcommittee.

"We've set it [the bill] aside to see if we can solve the problem instead of getting all, 'Whose got the biggest power, is it the court or the General Assembly?'" said Republican Sen. Greg Hembree of Horry County, another former solicitor appointed by Toal to the docket committee.

Calling the committee an "informal thing ... more of a conversation," Hembree said the defense bar will get to have its say after the solicitors issue a proposal. "We're looking out for those guys. We don't want to sneak up on them," he said.

"I think if we get this all squared away, then nobody's going to pay any attention to *Langford*," added Hembree, who believes the case was wrongly decided. "Even if you've got silly laws on the books you work around them and get things done."

Still, he was unsure about how any proposal that keeps a solicitor-controlled docket – the only one left in the nation – could be found constitutional in light of *Langford*, which has been championed by the defense bar. "I don't know how they're going to deal with that down the road," he said. "They do *Langford* and then they turn to us and say, 'How are we going to fix it?'"

- Civil Rights – ACA Employer Mandate Upheld on Remand *Liberty University Inc. v. Lew* On remand from the U.S. Supreme Court, the 4th Circuit says the Anti-Injunction Act does not bar a pre-enforcement challenge to the employer and individual mandates of the Patient Protection and Affordable Care Act, plaintiffs have standing to challenge the mandates, Congress acted within the scope of its constitutionally delegated powers when it enacted the employer mandate and neither mandate violates plaintiffs' First Amendment protections.
- Tort/Negligence – Wrongful Death – Electrical Substation – Trespasser *Asher v. Duke Energy Carolinas, LLC* Plaintiff's allegations -- that defendant failed to properly close its electrical substation's gate or to properly inspect and maintain the substation -- are insufficient to state a claim for negligence against a trespasser. The court grants defendant's motion to dismiss without prejudice to plaintiff's opportunity to amend her complaint.

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