Ethics Watch

The Year in Review
(through November 30, 2011)

By Nathan M. Crystal

Like the previous four years during which I have been writing this column, 2011 was an active year with regard to ethical issues. In my opinion the three most important developments during the year were the amendments to the Rules of Professional Conduct dealing with advertising and solicitation, the two decisions of the S.C. Supreme Court imposing discipline for uncivil conduct, and Formal Opinion 11-459 issued by the ABA Ethics Committee dealing with a lawyer’s obligation to warn a client about risks to confidentiality when the client uses a device or e-mail system involving a significant risk that the communication may be accessible by a third party, such as the client’s employer.

Advertising—Amendments to South Carolina Rules of Professional Conduct

On August 22 the Supreme Court ordered significant modifications to the rules on advertising and solicitation. The following are the major changes made by the Court:

• Deletion of the term “unfair” from Rule 7.1;
• Replacement of the ban on testimonials in Rule 7.1(d) with language allowing testimonials under certain conditions;
• Amendment of Rule 7.2(a) to provide that all advertisements shall be predominately informational such that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication;
• Amendment of Rule 7.2(c)(2) and addition of new Comment [8] to Rule 7.2 to require that a legal service plan or not-for-profit lawyer referral service not be acting in violation of any Rules of Professional Conduct;
• Amendment of new Comment [6] to Rule 7.2 to state that it is the responsibility of the lawyer who disseminates or causes the dissemination of the advertisement to review it for compliance with the South Carolina Rules of Professional Conduct;
• Deletion from Rule 7.3(c) of the requirement that solicitations be filed with the Commission on Lawyer Conduct, together with a $50 filing fee, and addition of electronic solicitations to the types of solicitations for which lawyers must maintain a file;
• Amendment of Rule 7.3(d)(1) to require that e-mail solicitations be labeled as advertising material in the subject line and at the beginning and end of the message in capital letters and prominent type.

Advertising—Groupon and similar services

The use of “daily deal” websites to sell vouchers for discounted legal services when the proceeds of the purchase are split between the lawyer and the service offering the voucher does not violate Rule 5.4(a) prohibiting splitting of legal fees with nonlawyers. The committee found that the payment to the website provider was either “the reasonable cost of advertisements or communications” permitted by Rule 7.2(c)(1) or consistent with the policy of the rule, which was to prevent interference with the lawyer’s independent professional judgment. The committee, however, cautioned attorneys about the possible application of other rules, including Rules 7.1 and 7.2 (advertising), 1.5(b) (scope of representation), 1.15(c) (depositing of unearned fees in trust account), and 1.7, 1.9 (conflicts of interest).


Advertising—Misrepresentation on websites

A basic principle of lawyer advertising is that any advertisement must not be false, misleading, or deceptive. See SCRPC 7.1(a). In In re Wells, 392 S.C. 371, 709 S.E.2d 644 (2011), the S.C. Supreme Court publicly reprimanded a lawyer for violation of this rule. The lawyer had exaggerated his credentials on his website in a number of ways. For example, the website stated that Mr. Wells had “worked in the legal environment for over twenty years” when actually he had been practicing for seven years. The opinion is a checklist of advertising violations that lawyers can commit. The Court rejected the lawyer’s defense that he did not oversee the creation of his advertisements. Lawyers may ethically employ public relations firms, but they must remember that they are responsible for the actions of these contractors. See SCRPC 7.2(d) (advertisement must list name of responsible lawyer) and 5.3 (responsibility of lawyer for conduct of nonlawyer assistants, including contractors).

Appointments—Just compensation for legal services

The Supreme Court accepted the South Carolina Bar’s amicus curiae brief and held that “the Takings Clause of the Fifth Amendment to the United States Constitution is implicated when an attorney is appointed by the court to represent an indigent litigant. In such circumstances, the attorney’s services constitute property enti-
ting the attorney to just compensation.” The Court decided that an award in excess of the statutory maximum of $3500 under S.C. Code Ann. §17-3-50 should be decided by the trial court on a case-by-case basis, subject to an abuse of discretion standard of review. The Court noted that compensation would not be based on the market rate for the lawyer’s services but rather at a reasonable, but lesser, rate that reflects a balance between the difficulty of the case and the attorney’s obligation to defend the indigent. The Court emphasized that its decision in no way changes the nature of the practice of law in South Carolina. The practice of law is a privilege, not a right, subject to regulation by the Court. On the facts of the case, the Court affirmed the trial court’s decision limiting the attorney’s compensation to the statutory maximum of $3500 due to the circumstances of the case involving the “the egregious level of Appellant’s inexcusable conduct and persistent disregard of the trial court’s orders.” Ex Parte Brown, 393 S.C. 214, 711 S.E.2d 899 (2011).

**Appointments—Right to counsel in civil cases**

The U.S. Supreme Court held that in a contempt proceeding where the custodial parent (entitled to receive support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support). However, the State must have alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question of whether the supporting parent is able to comply with the support order. Examples of the procedural safeguards include: (1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. Under the circumstances, Turner’s incarceration violated due process because he received neither counsel nor the benefit of alternative procedures like those the Court described, and thus the Court reversed the S.C. Supreme Court’s decision. *Turner v. Rogers*, 131 S.Ct. 2507 (2011).

**Civil Liability—Liability to former client for breach of fiduciary duty**

An attorney owes a fiduciary relationship not only to current but also to former clients. The fiduciary duty to former clients “included, among other obligations, the obligation not to act in a manner adverse to her interests in matters substantially related to the prior representation.” The existence of a fiduciary duty is a question of law, while the issue of whether the duty has been breached is a question of fact. *Spence v. Wingate*, 2011 WL 4975190 (S.C. 2011).

**Civil Liability—No cause of action for negligent spoliation**

The Supreme Court held that South Carolina does not recognize a tort of negligent spoliation of evidence whether by a third party or the opposing party to the litigation. The Court gave several reasons for its decision:

- Most states have refused to recognize an independent spoliation tort and continue to rely on traditional non-tort remedies, such as sanctions and adverse jury instructions, for redress.
- Public policy weighs against adoption of the tort. First, other remedies—such as striking a pleading presented by the opposing party—are already available with respect to first-party claims. Second, damages flowing from negligent spoliation are speculative. Third, recognition of the cause of action creates the potential for duplicative and inconsistent litigation.

However, the Court decided that a party could assert spoliation as a defense to an action brought by the opposing party. *Cole Vision Corp. v. Hobb*, 394 S.C. 144, 714 S.E.2d 537 (2011).

**Civil Liability—Opening of default judgment**

The Court of Appeals affirmed the trial court’s denial of appellant’s motion to set aside a default judgment in an action on a guaranty of a promissory note. Appellant claimed that her lawyer, who had represented her in negotiations with the creditor, had abandoned the handling of the lawsuit resulting in her default. The trial court found, however, that the lawyer had twice notified appellant that he could not represent her with regard to the lawsuit because he was not admitted to practice in South Carolina. The Court rejected appellant’s argument that the lawyer failed to comply with the requirement of informed consent necessary to limit representation under SCRCP 1.2(c). The Court held that a violation of the Rules of Professional Conduct was not negligence per se, nor did it create a presumption that a legal duty had been breached. In addition, the Court found that the lawyer had acted with reasonable care in informing appellant that he could not represent her. *ITC Commercial Funding, Inc. v. Crear*, 393 S.C. 487, 713 S.E.2d 33 (Ct. App. 2011).

**Civility**

The Supreme Court has held that violation of the Lawyer’s Oath of Civility is a basis for discipline. While not mentioned as misconduct in Rule 8.4, violation of the oath is a ground for discipline under Rule 7 of the Rules for Lawyer Disciplinary Enforcement. In *In re Anonymous Member of the South Carolina Bar*, 392 S.C. 328, 709 S.E.2d 633 (2011), the Court found that a lawyer violated the civility oath when the lawyer wrote an e-mail to opposing counsel in a domestic case in which he said that he had heard that opposing counsel’s teenage daughter, who had nothing to do with the domestic case, had been detained for buying
cocaína y heroína de un traficante. El e-mail continuó para afirmar que su comportamiento era peor que los acusados que estaban en el caso. La Corte Suprema administró un escándalo privado, pero lo advertió de que la conducta futura de este tipo podría tener consecuencias públicas. La Corte también rechazó el ataque constitucional del abogado en el juramento de cortesía, señalando que el U.S. Supreme Court ha establecido que los abogados no están sujetos a las mismas leyes de primer grado de constitución que los ciudadanos. La Corte afirmó que el abogado’s conducta fue prejudicial al administrador de justicia, porque un ataque personal contra un miembro de la familia o el abogado que representó a alguien, en el que se deliberaron, se hicieron más intensos, y se barrió la capacidad del abogado para actuar de manera objetiva en nombre de su cliente.” Similarmente, en In re White, 391 S.C. 581, 707 S.E.2d 411 (2011), la Corte suspendió a un abogado por 90 días por escribir una carta en nombre de su cliente, un templo, a los funcionarios acusándolos de ser “paganos” y tratando de “crucificar” a su cliente.

**Fees—Propriety of nonrefundable flat fees**

In In re Halford, 392 S.C. 66, 708 S.E.2d 740 (2011), la Corte Suprema modificó una opinión anterior que había dictado que los honorarios fijos no debían depender en el banco del abogado. La Corte afirmó: “La administración de ‘faltar’ es un asunto complejo, y no intenamos que en esta oportunidad se formulen reglas legales para el manejo de ‘faltar’.” Para una discusión de la administración de honorarios fijos, vea mi artículo en el número de julio del South Carolina Lawyer.

**Prosecutorial misconduct**

La Corte ha encontrado que el estado fue excusado de repetir el juicio cuando el fiscal cometió el delito de hacer uso inapropiado de un video y hacer comentarios inapropiados durante su argumento que impulsó al abogado a llevar un movimiento para un juicio justiciero. State v. Parker, 391 S.C. 606, 707 S.E.2d 799 (2011).

**National Developments**

ABA Ethics 20/20 Commission continúa trabajando en revisiones de los Reglamentos de ética que reflejen los cambios en la profesión jurídica, especialmente la globalización y el uso generalizado de tecnología. Para más detalles, vea el sitio web de la 20/20 Commission.

**ABA Formal Opinions**

La Comisión de Ética y Responsabilidad Profesional ha emitido las siguientes opiniones formales:

**11-458**—Changing Fee Arrangements During Representation

**11-459**—Duty to Protect the Confidentiality of E-mail Communications with One’s Client

**11-460**—Duty When Lawyer Receives Copies of a Third Party’s E-Mail Communications With Counsel

**11-461**—Advising Clients Regarding Direct Contacts With Represented Persons.