Ethics Update

+ some ethics and technology

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Advertising – Legal Information Websites

- EAO #12-03 -- lawyer may not ethically participate in a legal information website that goes beyond general information
- Violations
  - 7.4(b) “expert”
  - 7.1(d) “testimonials”
  - Misleading disclaimer when advice given about particular fact situations

Advertising – Legal Information Websites (2)

- Use of “as is” disclaimer in violation of 1.8(h)
- To extent A-C relationship formed, payment of compensation by provider violates 1.8(f)

Advertising – Legal Information Websites (3)

"Lawyers may participate in such sites only to the extent their participation (1) is limited to providing information of general applicability, and (2) the lawyer's individual responses clearly advise against any reliance on the information as advice or application of it to a specific situation without a more thorough consultation with counsel. . . . When an inquirer attempts to explore specific circumstances with a participating lawyer, the lawyer should decline to respond beyond advising the inquirer to seek legal advice; otherwise, she risks creating an attorney-client relationship."

A comment about LinkedIn

- Problem areas
  - Endorsements
  - Specialization
  - Formation of AC relationship

A comment about LinkedIn (2)

Use a disclaimer --- See my LinkedIn Profile.

I HAVE CREATED MY LINKEDIN PROFILE TO KEEP CONTACTS WITH MY ACQUAINTANCES. THIS PROFILE MAY BE CONSIDERED ATTORNEY ADVERTISING IN SOME JURISDICTIONS. PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. STATEMENTS IN THIS PROFILE ARE NOT INTENDED AS A COMPARISON WITH THE SERVICES OF OTHER LAWYERS. ANY STATEMENTS REFERRING TO MY SERVICES ARE ONLY INTENDED TO REFER TO MY EXPERIENCE. NEITHER THE RECEIPT OF INFORMATION FROM THIS PROFILE NOR THEIR USE, CREATES AN ATTORNEY-CLIENT RELATIONSHIP.

SOME JURISDICTIONS FORBID THE USE OF THE TERMS SPECIALIST OR EXPERT OR SIMILAR. ENTRIES IN THIS PROFILE, AND IN PARTICULAR UNDER SKILLS AND EXPERTISE, ARE NOT INTENDED TO SUGGEST ANY SUCH STATUS IN VIOLATION OF THE APPLICABLE ETHICS RULES.

I MAY BE ENDORSED BY BOTH PROFESSIONALS AND CLIENTS. RULES IN SOME JURISDICTIONS REQUIRE ENDORSEMENTS TO INDICATE WHETHER THE INDORSER IS NOT A CLIENT. BECAUSE LINKEDIN DOES NOT PROVIDE A METHOD FOR SUCH A DESIGNATION, CONSIDER EVERY ENDORSEMENT AS NOT BEING MADE BY A CLIENT.

Advertising – Firm Websites

- Don’t rely on advice of nonlawyer internet professionals for compliance with ethical obligations. *In re Dickey,* 396 S.C. 500, 722 S.E.2d 522 (2012).

Civil Liability – Limitations on Various Cause of Action

- *Gordon v. Busbee*, 397 S.C. 119, 2012 S.C. App. LEXIS 163 (2012), involved claims by the relatives of a decedent against her husband, who held her power of attorney, for misappropriation of the decedent's assets during her lifetime.
- The suit included claims against the husband's lawyer, who became personal representative of his estate after his death, for aiding and abetting breach of fiduciary duty, fraud/fraud benefit under Code §62-1-106, conversion, and conspiracy.

Civil Liability – Limitations on Various Cause of Action (2)

- Aiding and abetting a breach of fiduciary duty requires "the defendant's knowing participation in the breach."
- The plaintiffs failed to present any evidence that the attorney knew about the transfers of money prior to or at the time they were made.
- Negligence or inattention on the attorney's part, even if proved, would not be sufficient to establish liability for aiding or abetting breach of fiduciary duty.

Civil Liability – Limitations on Various Cause of Action (3)

- Filing of the inventory of assets did not amount to fraud because no evidence that the attorney knew that any of the filings were false at the time they were made.
- Of course, if the attorney later comes to know of the fraud, the lawyer has an ethical obligation to correct the misrepresentation, whether made by the client or by the lawyer. See SCRP 3.3(a)(1), (3).

Civil Liability – Limitations on Various Cause of Action (4)

- No conversion -- the attorney properly exercised control as personal representative of the husband's estate over the assets of his estate that were titled in his name at his death; the attorney did not exercise any control over assets in her personal capacity.
- Conspiracy requires parties to conspire for the purpose of harming another causing him special damages.
  - No evidence that the lawyer conspired with the husband or others to harm his wife, nor did the plaintiffs offer any evidence of special damages.

Civil Liability – Expert Affidavit Need not Address Causation

- *Grier v. AMISUB of S.C., Inc.,* 397 S.C. 532, 725 S.E.2d 693 (2012), a medical malpractice action, the plaintiff's expert affidavit was from a nurse who opined that the defendant breached the standard of care in multiple respects and that those breaches were a contributing cause of the decedent's death.
- However, the nurse was not qualified to render an opinion about the cause of death.
- On the defendant's motion, the trial court dismissed the complaint on the ground that the affidavit was defective because it did not contain a competent opinion on causation.

Civil Liability – Expert Affidavit Need not Address Causation (2)

- The Supreme Court reversed. Applying a number of principles of statutory construction, the Court ruled that the statute did not require an opinion on causation. Because Section 15-36-100(B) is unambiguous, its plain language must be applied.
- Language "encompasses only the breach element of a common law negligence claim and not causation. . . ."

Civil Liability – Limited Engagement Agreements and Other Matters

- In *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166 (S.C. 2012), a purchaser of two lots in a real estate development sued the closing attorney on various theories.
- The Supreme Court dealt with a number of aspects of civil liability claims against attorneys.

Civil Liability – Limited Engagement Agreements and Other Matters (2)

- First, although the purchaser claimed that the attorney had a nonwaivable conflict of interest in representing both the seller and the purchaser, the Court rejected this argument because the purchaser had agreed that the claim involved questions of fact for the jury.

Civil Liability – Limited Engagement Agreements and Other Matters (3)

- South Carolina ethics opinions and prior case law have held that a lawyer may represent both a buyer and seller in a real estate transaction provided the clients give informed written consent. See Wilcox & Crystal, ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT 109-110 (2010 ed.).

Civil Liability – Limited Engagement Agreements and Other Matters (4)

- Second, the purchaser contended that the attorney committed malpractice by failing to disclose to the purchaser that the lots being sold were being repurchased by the developer from a prior purchaser under a buy-back agreement and that the developer was financially unable to perform that agreement.

Civil Liability – Limited Engagement Agreements and Other Matters (5)

- The Court rejected the plaintiff's claim because the firm's engagement agreement limited the services that it would perform. The agreement excluded "substantive advice about how or whether to proceed with this transaction" and limited the attorney's services to closing the transaction, preparing a deed of conveyance, and performing ministerial acts associated with real estate closing.

Civil Liability – Limited Engagement Agreements and Other Matters (6)

- Third, the purchaser contended that the attorney breached his fiduciary obligations to the purchaser. The Supreme Court held that a claim for breach of fiduciary duty against an attorney states a cause of action only if it "arises out of a duty *other than* one created by the attorney-client relationship or because it is based on different material facts."
- Therefore the trial court was correct in merging the claims.

Civil Liability – Limited Engagement Agreements and Other Matters (7)

- Fourth, as to the plaintiff's claim for violation of the South Carolina Unfair Trade Practices Act, the trial court erred in holding that the "regulated industries" exception to the Act applied to the law firm's conduct.
- The disciplinary system and consumer protection legislation can coexist as long as the legislature does not attempt to take away the court's exclusive power to regulate lawyers.
- However, on the facts no violation of UTPA because jury found that the defendants did not engage in deceptive conduct.

File Destructions – New Supreme Court Rule 1.15

- Adds paragraph (i) and comments 12 and 13. Revised section (i) requires a lawyer to "securely store a client's file for a minimum of six (6) years after completion or termination of the representation" unless the lawyer delivers the file to the client or the client's designee or the client has authorized in writing destruction of the file and there are no pending or impending proceedings known to the lawyer that relate to the file.

File Destructions – New Supreme Court Rule 1.15 (2)

- If the client does not request the file within six years, the lawyer may treat the file as abandoned and destroy the file, unless the lawyer knows about pending or impending proceedings related to the file.
- When a lawyer destroys a file, the lawyer is required to take reasonable steps to protect client confidentiality. Comments 12 and 13 elaborate on these requirements. Comment 12 refers to shredding as one means of protecting confidentiality. Comment 13 authorizes lawyers to convert files to electronic form provided the lawyer can generate a paper copy.

File Destructions – New Supreme Court Rule 1.15 (3)

- Suggested engagement provision:
  - Entitled to receive your file
  - Written request
  - If none will keep for 6 years, after than if have not received will treat as abandoned and can destroy
  - Will take reasonable steps to protect confidentiality
  - Can convert to electronic form
  - Inherently valuable material must be kept, e.g. wills

Practice with Nonlawyers

- *EAO #12-06* advises that it is proper for a lawyer who has her own practice and who is also a certified civil court mediator to form a partnership or agreement with several non-lawyers who are trained mediators to provide mediation services. The organization would operate for a profit, in which the lawyer would share.

Practice with Nonlawyers (2)

- Rule 5.4 prohibits a lawyer from sharing legal fees with a nonlawyer. Rule 7.2(c) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's legal services.
- The committee reasoned that neither rule was applicable because both concern legal services while "mediation is not the practice of law and … admission to the Bar is not a prerequisite to service as a mediator." (*Ethics Advisory Opinion #94-10*).

Practice with Nonlawyers (3)

- The attorney, however, must be careful in avoiding “any appearance that he or she is practicing law concomitantly with the practice of mediation.”

Practice with Nonlawyers (4)

- Consider also the possible applicability of SCPC 5.7 dealing with ancillary services.
  - (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law related services, as defined in paragraph (b), if the law related services are provided:
  - (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law related services knows that the services are not legal services and that the protections of the client lawyer relationship do not exist.

Other Opinions of Interest

- *Ethics Advisory Opinions ##12-02 and 12-07* advise lawyers that Rule 1.8(i) authorizes them to take a mortgage in property that is the subject of litigation to pay or secure their fees, but they must comply with a number of other rules, in particular Rules 1.5, 1.7(a)(2), and 1.8(a).

Other Opinions of Interest (2)

- *Opinion #12-08* provides guidance to lawyers in dealing with audits by title companies of their trust accounts.
- *Opinion #12-05* warns lawyers that SCACR 417 requires a licensed South Carolina lawyer to be the authorized signer for South Carolina trust accounts.

National Developments

- The *ABA Ethics 20/20 Commission* is nearing completion of its work on revisions to the Model Rules to reflect major changes in the legal profession, especially globalization and widespread use of technology.

National Developments (2)

- During its August 2012 Annual Meeting, the ABA House of Delegates approved a number of changes to the Model Rules and comments and related rules based on the recommendations of the Commission. The recommended changes are in the following areas: (1) technology and confidentiality, (2) technology and client development, (3) outsourcing, (4) practice pending admission, (5) admission by motion, and (6) detection of conflicts of interest and confidentiality.

National Developments (3)

- New language added to comment 6 to Rule 1.1:

"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, <u>including the benefits and risks associated with relevant technology, . . .</u>"

- New section 1.6(c):

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

National Developments (4)

- In addition, the Commission has prepared white papers on a number of issues for which it will not propose rule changes, such as the ethical aspects of litigation finance. See the website of the ABA 20/20 Commission for details about its work.

Ethics and Technology – A Few Thoughts

- Need for engagement provisions
  - Use of technology
  - Confidentiality and workplace communication
  - File storage and destruction
- If you are interested in sample provisions, feel free to contact me at nmcrystal@cgcfirm.com.

Ethics and Technology (2)

- Electronic discovery and misdirected communications.
- Federal Court
  - SC Rule of Prof. Conduct 4.4(b)
  - FRCP 26(b)(5)(B)
  - FRE 502

Ethics and Technology (3)

- State Court
  - SCRP 4.4(b)
  - SCRCP 26(b)(5)
  - No equivalent to FRE 502
  - South Carolina probably follows subject matter waiver approach
    - Marshall v. Marshall, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984), the court stated: "Any voluntary disclosure by a client to a third party waives the attorney client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject. Id. at 538, 320 S.E.2d 46-47.

Ethics and Technology (4)

- Waiver can also occur in other ways:
  - See Hege v. Aegon USA, LLC, 2011 U.S. Dist. Lexis 50113 (2011) (insurance company's defense of reasonableness and good faith placed advice of counsel at issue)

Ethics and Technology (5)

- Need for “claw back agreements” to protect against inadvertent disclosure.
- To be fully effective need to be incorporated into court order. FRE 502(d).
- Careful drafting is important.
- Claw back agreement could be part of general protective order or could be separate.
- With regard to protective order consider including provisions prohibiting use or disclosure of material obtained in discovery outside proceedings in connection with case absent consent of disclosing party, otherwise material may appear on Internet.