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). *S.C. Bar Ethics Adv. Op. #11-04.*

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-

tling 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. Hobbs*, 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 SCRPC 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. Crerar*, 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

cocaine and heroin from a drug dealer. The e-mail went on to claim that this conduct was far worse that the allegations that opposing counsel was making in the domestic case. The Supreme Court administered a private reprimand, but it warned the bar that future conduct of this type could result in a public sanction. The Court also rejected the lawyer's constitutional attacks on the civility oath, pointing out that the U.S. Supreme Court has held that lawyers are not entitled to the same First Amendment protections as ordinary citizens. The Court further found that the lawyer's conduct was prejudicial to the administration of justice because a personal attack on a family member of opposing counsel "can only inflame the passions of everyone involved, make litigation more intense, and undermine a lawyer's ability to objectively represent his or her client." Similarly, in *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011), the Court administered a 90 day suspension to a lawyer who wrote a letter on behalf of his client, a church, to town officials accusing them of being "pagans" and attempting to "crucify" his client.

Fees—Propriety of nonrefundable flat fees

In *In re Halford*, 392 S.C. 66, 708 S.E.2d 740 (2011), the Supreme Court modified an earlier opinion that had seemed to hold that flat fees must be deposited in the lawyer's trust account. The revised opinion stated: "The handling of 'flat fees' is a complex matter, and we do not intend in this opinion to set forth a categorical rule addressing 'flat fees.'" For a discussion of the proper handling of flat fees, see my column in the July issue of the *South Carolina Lawyer*.

Prosecutorial misconduct

The Court has found that the State was barred from retrying the defendant when the prosecutor engaged in misconduct by making improper use of a video and improper comments during closing argument that goaded defense counsel into making a motion for a mistrial. *State v. Parker,* 391 S.C. 606, 707 S.E.2d 799 (2011).

National Developments

ABA Ethics 20/20 Commission continues to work on revisions to the Model Rules to reflect major changes in the legal profession, especially globalization and widespread use of technology. See the website of the 20/20 Commission for detail about these proposals.

ABA Formal Opinions

The ABA Committee on Ethics and Professional Responsibility has issued the following formal opinions:
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. ■