2009 SIGNIFICANT DEVELOPMENTS IN SOUTH CAROLINA LEGAL ETHICS

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PART II -- SIGNIFICANT CASES AND ETHICS OPINIONS IN 2009

A. Legal Malpractice

1. Theories of Recovery:

(a) Breach of fiduciary duty to former client. *Spence v. Wingate*, 2009 WL 2989556 (S.C. Ct. App. 2009).

In *Spence v. Wingate*, 684 S.E.2d 188 (S.C.Ct. App. 2009), the Court of Appeals held that Spence stated a cause of action for breach of fiduciary duty against Wingate. Wingate had previously represented Spence in negotiations with her four sons to reach an agreement regarding division of her husband's probate estate. During these negotiations Spence had informed Wingate that her husband had attempted to make her the sole beneficiary of his group life insurance policy. After her husband's death Wingate became attorney for the estate. Spence alleged that Wingate never terminated their attorney-client relationship, that he informed her that she did not need an attorney, and that he protected the interest of the estate rather than her interest with regard to the policy. The lower court had granted summary judgment for Wingate based on Code section 62-1-109, which provides that an attorney for an estate does not have an attorney-client relationship with any of its beneficiaries. The Court of Appeals reversed, holding that fiduciary duties to a former client on a related matter were separate and distinct from any duties arising as a result of Wingate's role as attorney for the estate. Accordingly, the statute did not insulate Wingate from liability.

(b) Liability to prospective beneficiaries of a nonexistent will. *Rydde v. Morris,* 381 S.C. 643, 675 S.E.2d 431 (2009).

In *Rydde v. Morris,* 381 S.C. 643, 675 S.E.2d 431 (2009), the Supreme Court held that an attorney who failed to prepare a will for a client was not liable to prospective beneficiaries. The court concluded that the attorney did not have a duty to prospective beneficiaries of a nonexistent will. In dictum the court indicated that it might recognize a cause of action on behalf of non-client intended beneficiaries of an executed will if the beneficiaries showed that the testator's intent had been defeated or diminished by the negligence of the attorney. Id. at 647, 675 S.E.2d at 433.

2. Defenses. Equitable estoppel to prevent attorney from asserting the statute of limitations as a defense. *Kelly v. Logan, Jolley, & Smith, L.L.P.,* 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009).

An attorney may be equitably estopped from asserting the statute of limitations as a defense. See *Kelly v. Logan, Jolley, & Smith, L.L.P.,* 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009). To establish equitable estoppel, the plaintiff must prove that he (1) lacked knowledge and the means of obtaining knowledge of the actual facts and (2) relied on the conduct of the party to be estopped. Id. at 638, 682 S.E.2d at 7 (rejecting claim of estoppel on the facts).

B. Formation of Attorney-Client Relationship

1. Requesting a continuance for another lawyer. *S.C. Bar Ethics Adv. Op.* #09-11.

A lawyer may appear on behalf of another lawyer to request a continuance for the second lawyer's client without forming an attorney-client relationship with the second lawyer's client, but the second lawyer should communicate with his client about the appearance. *S.C. Bar Ethics Adv. Op.* #09-11.

2. Standard real estate transactions. *S.C. Bar Ethics Adv. Op.* #09-07.

In *Opinion #09-07* the committee advised that in the standard real estate transaction in which the borrower retains the lawyer, and the lawyer handles the closing using the lender's closing package, the lawyer represents only the borrower and not the lender. The lender's instructions to the lawyer to ensure that the documents are properly executed do not create an attorney-client relationship between the lender and the lawyer. However, if the lawyer reviews the documents for the lender or provides an opinion to the lender, an attorney-client relationship is formed.

C. Communication with Clients

1. Advising clients about title insurance. *S.C. Bar Ethics Adv. Op.* #09-03.

A lawyer who is a licensed agent for two title companies does not have an obligation to his client to obtain the insurance from the cheaper insurer, but the attorney does have an obligation to communicate with his client to explain the premium difference and other relevant information so that the client can make an informed choice of the company from which the policy will be acquired. *S.C. Bar Ethics Adv. Op.* #09-03.

2. Continuances. *S.C. Bar Ethics Adv. Op.* #09-11. See above.

D. Conflicts of Interest

1. Imputed disqualification for public defenders and other legal services providers. *S.C. Bar Ethics Adv. Op.* #09-02.

If lawyers in a public defender's office who represent codefendants comply with the requirements of Rule 1.10(e)(1) and (2), they need not obtain the informed consent of the defendants to the representation under Rule 1.7. Consent is unnecessary even if the codefendants will testify against each other. However, if the requirements of Rule 1.10 are not met, then informed consent under Rule 1.7 is necessary for lawyers in the public defender's office to undertake the multiple representation. *S.C. Bar Ethics Adv. Op.* #09-02.

2. Law clerks and paralegals as witnesses. *S.C. Bar Ethics Adv. Op.* #09-05.

In *S.C. Bar Ethics Adv. Op.* #09-05 the committee advised that the advocate-witness rule does not prohibit a lawyer from handling a litigation matter when his law clerk will be testifying as a witness regarding the clerk's telephone interview with a witness likely to be called by opposing counsel because Rule 3.7 does not apply to employees of law firms.

E. Withdrawal

Protecting the client's interests with regard to appeal. *S.C. Bar Ethics Adv. Op.* #09-04.

How should an attorney proceed if the attorney believes the client has grounds for appeal, but the client does not want the attorney to handle the appeal? In a criminal case in which counsel has been appointed to represent an indigent defendant, counsel has a duty to file the notice of appeal. See SCACR 602(e)(1) The Ethics Advisory Committee has advised that the duty arguably applies to any criminal case. *S.C. Bar Ethics Adv. Op.* #09-04. In a civil case the lawyer's obligations are not so clear. Often attorneys can comply with their ethical obligations to protect a client's interests under Rule 1.16(d) by clearly advising the client of the specific time limits and administrative requirements for filing an appeal. If a client wishes to proceed pro se, it may be sufficient to supply the client with a notice of appeal along with clear instructions for perfecting the appeal. If the time for filing the appeal is short, the attorney may have an ethical obligation to file the appeal and then move to be relieved as counsel of record by the Court of Appeals. Id. The committee cautioned attorneys against going beyond what was required by Rule 1.16(d).

F. Unauthorized Practice.

Real estate closings for out-of-state closing coordinating company. *S.C. Bar Ethics Adv. Op.* #09-01.

In *Adv. Op.* #09-01 the South Carolina committee discussed the propriety of a South Carolina lawyer handing real estate closings only for an out-of-state real estate closing coordinating company. The committee decided that such participation was not per se improper, but an attorney could not simply rely on the representations of nonlawyers that other steps in the real estate closing process had been properly completed.

G. Advertising

1. Prohibition against false, deceptive, or misleading advertisements. *In re Anonymous Member of the South Carolina Bar*, 2009 WL 3246806 (S.C. 2009).

In *In re Anonymous Member of the South Carolina Bar*, 2009 WL 3246806 (S.C. 2009), the Supreme Court held that a television advertisement stating that the attorney would "work to protect" jobs of worker's compensation claimants did not amount to a false or misleading statement that claimants would not lose their jobs. The case also discusses constitutional principles governing restrictions on lawyer advertising.

2. Internet companies that provide information about lawyers. *S.C. Bar Ethics Adv. Op.* #09-10.

In *Opinion #09-10* the Ethics Advisory Committee held that a lawyer may ethically "claim," adopt, or endorse information about the lawyer contained on a commercial website that provides information about lawyers, but if the lawyer does so the lawyer must make sure that the information about the lawyer complies with Rules 7.1 and 7.2. In particular, the committee stated that attorneys must file such on-line listings with the Commission on Lawyer Conduct unless they are limited to directory information, must not allow client testimonials in such sites, and must avoid comparative language. The committee also decided that a lawyer could ethically seek and list peer ratings so long as they were not presented in a misleading manner. The committee advised that if any part of the listing could not be conformed to the rules of ethics, "the lawyer should remove his or her entire listing and discontinue participation in the service."

3. Social Networking Sites. See Nathan M. Crystal, *Ethical Issues in Using Social Networking Sites*, S.C. Lawyer (Nov. 2009).

H. National Developments of Note

1. Creation of ABA Ethics 20/20 Commission, http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=730

"Technological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structure. Technologies such as e-mail, the Internet and smart phones are transforming the way we practice law and our relationships with clients, just as they have compressed our world and expanded international business opportunities for our clients." said Lamm.

The ethics commission will review lawyer ethics rules and regulation across the United States in the context of a global legal services marketplace.

Preliminary Issues Outline http://www.abanet.org/ethics2020/outline.pdf

2. ABA Model Rule 1.10 modified to allow screening of lateral hires.

3. ABA Formal Opinion #09-454, Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense.

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

4. ABA Formal Opinion #09-455, Disclosure of Conflicts Information When Lawyers Move between Law Firms.

When a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest. Although Rule 1.6(a) generally protects conflicts information (typically the “persons and issues involved” in a matter), disclosure of conflicts information during the process of lawyers moving between firms is ordinarily permissible, subject to limitations. Any disclosure of conflicts information should be no greater than reasonably necessary to accomplish the purpose of detecting and resolving conflicts and must not compromise the attorney-client privilege or otherwise prejudice a client or former client. A lawyer or law firm receiving conflicts information may not reveal such information or use it for purposes other than detecting and resolving conflicts of interest. Disclosure normally should not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.1

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The Supreme Court adopted action plans for implementing certain recommendations of the ABA review committee on the disciplinary process. Probably the two most important changes are increased participation by nonlawyers in the disciplinary process and increased authority given to disciplinary counsel. Rules adopted by the court effective January 10, 2010, increase public representation in the lawyer disciplinary process from 2 to 16 members. Six nonlawyer members will join the Commission on Lawyer Conduct immediately, while 8 will be added through replacement of attorney members as attrition permits. For the Judicial Conduct Commission the number of public members increases from 2 to 8. The court also granted disciplinary counsel greater discretion conducting investigations. The court carefully considered a number of other recommendations of the ABA advisory committee but rejected suggestions where it was unclear that the benefit would exceed the cost or where increased delay was a likely

consequence. In particular, the court rejected suggestions for increased discovery and for disciplinary counsel to handle presentations before the Character and Fitness Committee.