Ethics Watch

The Year in Review—The Top 10 (or maybe 11) from 2010

By Nathan M. Crystal

2010 was a particularly active year for significant ethics developments. I have chosen ten cases and opinions that I consider to be the most significant of the year. For a complete discussion of developments during the year year see the website for my book (with Professor Rob Wilcox), the ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT (2010 ed.) available on the Bar's website at www.scbar.org/member_resources/continuing_legal_education/annotated_south_carolina_rules_of_professional_conduct_-_2010_edition.

Malpractice Liability

Liability for alleged errors of judgment. In *Harris Teeter v. Moore & Van Allen*, #26887 (November 1, 2010), the Supreme Court discussed a number of aspects of a legal malpractice case. The case grew out of a lease dispute between Harris Teeter (HT) and its landlord. The dispute went to arbitration, where the arbitrator found that the landlord had the right to terminate the lease. HT then sued Moore & Van Allen claiming that the firm committed malpractice in the handling of the arbitration. The Court held that the record failed to support HT's claims. In particular, the Court held that counsel's decision not to emphasize the damage to HT was a reasonable tactical decision. In the opinion the Court discussed the principles applicable to a malpractice case when the client alleges the attorney made an error of judgment. The Court rejected "as a matter of law any suggestion that a bad result is evidence of the breach of the standard of care." The Court left open the question of whether it would adopt the "judgmental immunity rule," which provides that "there can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment." The Court reaffirmed that the standard of care applicable in legal malpractice cases is "the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." With regard to causation the Court stated that an expert witness must testify that the lawyer's breach of duty "most probably" caused the loss to the client. It is not sufficient for the expert to testify that the lawyer's conduct reduced the chance of success.

Fees and Engagements

Contract attorneys—billing. A firm may bill for the services of a contract attorney as either legal fees or expenses. If the firm bills for the services as legal fees, then the following rules apply: The firm must either adopt the services of the contract attorney as its own and be responsible for the services under Rule 1.1, or it must supervise the services under Rule 5.1. The amount paid by the firm to the contract attorney is a matter of contract between the firm and the attorney and need not be disclosed to the client. The total fee for the services rendered to the client must be reasonable under Rule 1.5(a). If the firm does not adopt the services of the contract attorney as its own or supervise the services, then it cannot bill for the services as legal fees. It must treat the fees as an expense or cost. In that case the details of the arrangement must be disclosed and consented to by the client. *S.C. Bar Ethics Adv. Op. #10-08*.

Contract attorneys—termination. A lawyer working as a contract attorney for a law firm should not assume that the termination of his or her relationship with the firm ends all duties to clients that the lawyer had been representing while at the firm. In *In re Holcombe*, 388 S.C. 510, 697 S.E.2d 600 (S.C. 2010), the lawyer interviewed the client and wrote a letter notifying the opposing party of the firm's representation. The lawyer did no other work on the file before leaving the relationship with the law firm five months later. The lawyer did not notify the client of his departure from the firm and did not clarify with the firm who would have future responsibilities for the matter. The matter was neglected until after the limitations period had expired, and the failure to protect the client was included among the counts in a later disciplinary ruling against the lawyer.

Of Counsel. In *Opinion #10-06* the Ethics Advisory Committee ruled that a lawyer may be "Of Counsel" to more than one firm. However, the implications of such a dual relationship may, as a practical matter, make it impossible for a lawyer to have such relationships. With regard to conflicts of interest, the committee stated: "The two firms effectively become a single firm for purposes of conflict-of-interest and imputed disqualification rules. Clients and former clients of each of the two firms must be considered clients and former clients, respectively, of the other firm for purposes of evaluating conflicts of interest under Rules 1.7, 1.8, 1.9, and 1.10."

Privileges

Attorney-client, work product and common interest privileges. In *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010), an administrative proceeding to determine whether Tobaccoville was a "tobacco product manufacturer" under South Carolina law, the Supreme Court held that documents shared by the Attorney General of South Carolina

with the National Association of Attorneys General (NAAG) in connection with tobacco regulation and enforcement were subject to the attorney-client privilege. The Court reaffirmed the elements required to establish the attorney-client privilege that it had previously stated in *State v. Doster,* 276 S.C. 647, 651, 284 S.E.2d 218, 219-20 (1981). On the facts of the case the Court held that documents were subject to the attorney-client privilege even though a traditional attorney-client relationship did not exist because "the AG is a paid member of the NAAG, and NAAG staff attorneys are available to provide legal advice relating to the MSA and tobacco regulation and enforcement." Id. at 293, 692 S.E.2d at 530.

However, in *Tobaccoville* the Court held that the work product doctrine did not apply with regard to the documents shared with the NAAG because a document must be prepared "in anticipation of litigation." This requirement is met when the preparer faces an actual or potential claim; the mere possibility of a claim is insufficient. Materials prepared in the ordinary course of business or pursuant to regulatory requirements are not subject to the doctrine. The Court found that work product protection was not available on the facts of the case because the documents "were created because of efforts to enforce a settlement from previous litigation." Id. at 294, 692 S.E.2d at 530 (emphasis added).

In *Tobaccoville* the Court further held that the documents were subject to the "common interest doctrine." The Court noted that the doctrine was not a privilege but rather an exception to the rule that disclosure of material subject to the attorney-client privilege amounts to a waiver of the privilege. The Court limited its decision to the particular facts of the case, so recognition of the common interest doctrine in criminal or civil cases in South Carolina remains unresolved. Id. at 295, 692 S.E.2d at 531. The doctrine is recognized, however, in many jurisdictions and by the Restatement (Third) of the Law Governing Lawyers in §76 (2000).

Conflicts of Interest

Appeal. The State cannot directly appeal a pretrial order disqualifying an assistant solicitor from a case on the grounds of a conflict of interest. *State v. Wilson,* 387 S.C. 597, 693 S.E.2d 923 (2010). The Court had previously held that "an order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed" under S.C. Code § 14-3-330. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). The Court based the distinction in *Wilson* on the ground that the disqualification of a solicitor does not affect a party's right to retain counsel of his or her choosing.

Duties to impaired individuals. A lawyer who is hired by members of the immediate family to protect a person with diminished capacity may encounter a challenge raised on behalf of the person for whom protection is sought. The Court has declined to find a duty owed to an impaired person simply because the lawyer is retained by the person's attorney-in-fact. In *Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions,* 388 S.C. 394, 697 S.E.2d 551 (2010), the husband and son of a woman sought a lawyer's assistance to protect property of the woman from foreclosure. The son held his mother's power of attorney. The mother later raised a series of claims against the lawyer. The Court held that the mother was not the client of the lawyer and was not owed a duty of care by the lawyer.

Unauthorized Practice

Unauthorized practice by banks. The ramifications of a lender engaging in the unauthorized practice of law may include an inability to enforce any rights under the transaction. In *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), the bank processed a line of credit secured by a mortgage on real estate without the involvement of a lawyer. The bank later sought to foreclose the mortgage. Finding the bank's actions to be the unauthorized practice of law, the Court of Appeals held that the bank could not pursue any legal or equitable remedies arising out of the transaction. In *Matrix Financial Services Corp. v. Frazer*, 2010 WL 3219472 (S.C. 2010), the Supreme Court cited *Coffey* and found that a lender who engages in the unauthorized practice of law in the refinancing of a mortgage has unclean hands and cannot assert any equitable claim.

Practice Restrictions

Settlement agreements restricting the practice of law. In *Ethics Advisory Op. #10-04*, the committee dealt with a proposed settlement agreement in which the defendant sought confidentiality of the amount of the settlement and an agreement from the plaintiff's lawyer in which the lawyer agreed not to use the defendant's name for "commercial or commercially-related publicity purposes." The agreement would allow the attorney to state that a settlement was reached against a certain industry. The lawsuit against the defendant was a matter of public record. The settlement agreement did not require court approval. Agreeing with a Texas Opinion, the committee concluded that "solicitation" of future clients was part of the practice of law and could not be restricted by private agreement to an extent greater than it is restricted by the rules and applicable law. Thus, under the committee's opinion a settlement agreement could not prohibit a lawyer from advertising for clients against a particular defendant.

Advertising and Solicitation

Distribution of coupons and brochures. In *In re Anonymous Member of the South Carolina Bar*, 386 S.C. 133, 687 S.E.2d 41 (2009) (decided December 21, 2009), the Supreme Court held that a lawyer's distribution of discount coupons to local realtors and lenders for real estate financing did not amount to in-person solicitation in violation of Rule 7.3(a) because the lawyer did not personally contact the intended recipients nor did the lawyer have any control or

supervision over the realtors or lenders. The Court also held that the distribution did not amount to direct mail solicitation in violation of Rule 7.3(d) because not all of the recipients were in need of legal services. See also *Ethics Adv. Op. #09-14* (holding that targeted mailings to residents in specific geographical areas or specific communities were not direct mail solicitations subject to the disclosure requirements of Rule 7.3(d); however, depending on the circumstances the mailings could be subject to restrictions contained in other rules).

Professional Obligations

Secret recording. The Supreme Court has rejected a proposal from the Bar to amend Rule 8.4 to permit lawyers acting in their personal capacity to secretly record matters when permitted by law. The Bar had proposed the amendment to address an issue considered by the Ethics Advisory Committee in *Opinion #08-13*. E-Blast, April 13, 2010. ■