# Ethics Watch

## *2009 Ethics in Review*

*By Nathan M. Crystal*

*Highlights*. In 2009 the Supreme Court issued new disciplinary rules governing both lawyers and judges that substantially increased public participation in the disciplinary process. In an important malpractice case, the Court ruled that prospective beneficiaries did not have a cause of action against an attorney who failed to prepare a will for a client. The Ethics Advisory Committee ruled that lawyers could participate in Internet sites that advertised their services, but only if the sites complied with the ethics rules. At the national level, the ABA formed a new commission—the Ethics 20/20 Commission—to recommend changes in the ethics rules resulting from increased globalization and use of technology in the legal profession.

1. *Legal Malpractice: Theories of Recovery and Defenses*. 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.

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.

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).

2. *Formation of Attorney-Client Relationship*. 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.

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.

3. *Communication with Clients*. 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.

4. *Conflicts of Interest*. 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.

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 tes-

tifying 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.

5. *Withdrawal*. 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).

6. *Unauthorized Practice*. 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.

7. *Advertising*. 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 workers' 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.

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 Web site 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 online 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."

8. *Changes in the Disciplinary Rules Governing Lawyers and Judges*. 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 1, 2010, increase public representation in the lawyer disciplinary process from two to 16 members. Six nonlawyer members will join the Commission on Lawyer Conduct immediately, while eight will be added through replacement of attorney members as attrition permits. For the Judicial Conduct Commission, the number of public members increases from two to eight. The Court also granted disciplinary counsel greater discretion in 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.

9. *Selected National Developments*.

**Creation of ABA Ethics 20/20 Commission**, www.abanet.org/abanet/media/release/news_release.cfm?releaseid=730. The ABA last adopted major changes to the Model Rules of Professional Conduct in 2002. This new commission will focus on the extent to which further changes are necessary to deal with the impact of globalization and technology on the legal profession.

**ABA Model Rule 1.10 modified to allow screening of lateral hires**. For a number of years the ABA has debated whether a firm should be disqualified when it hires an attorney who has had a significant involvement in representing a party in a case in which the new firm represents the opposing party. Prior to the change adopted this year, the new firm could not avoid disqualification by screening the disqualified lawyer. The new rule allows screening, but adds a number of safeguards to protect the interest of the former client. South Carolina has not yet adopted the amendment, so screening is not permitted here at this time. See Nathan M. Crystal, *Screening to Avoid Conflicts of Interest: What, When, and How?*, S.C. Law. (Sept. 2009) at 10.

**Formal opinions issued during the year**. The ABA Committee on Ethics and Professional Responsibility issued two opinions during the year:

- #09-454, Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense
- #09-455, Disclosure of Conflicts Information When Lawyers Move Between Law Firms ■