Annotated Rules CLE – Significant Developments Since the 2009-2010 Edition

Nathan M. Crystal, Crystal & Giannoni-Crystal, LLC
Robert M. Wilcox, Dean, University of South Carolina School of Law

I. *Rule 1.1 and Malpractice Liability*

A. Liability for judgmental decisions

In *Harris Teeter v. Moore & Van Allen*, 390 S.C. 275, 701 S.E.2d 742 (2010), the supreme court discussed a number of aspects of the duty of care in a legal malpractice case. The case grew out of a lease dispute between 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 M&VA 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."

For a discussion of the duty of competency with regard to international transactions, see Nathan M. Crystal, *The Duty of Competency in International Transactions: Parts I & II*, S.C. LAW., Sept., Nov. 2012.

B. Causation

In *Harris Teeter v. Moore & Van Allen*, 390 S.C. 275, 701 S.E.2d 742 (2010), the supreme court stated with regard to causation 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.

C. No expert affidavit required with regard to causation

In *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 about that the defendant breached the standard of care in multiple respects and 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. 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.

D. Statute of Limitations

In *Kimmer v. Wright*, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011), the court of appeals held that the statute of limitations began to run when the attorney informed the client that the client might have a claim against him for prejudicing the client's possible claim for worker's

compensation benefits. The court rejected the client's argument that the statute did not begin to run until the client suffered damages – when the worker's compensation commission had made an adverse ruling on his claim. In dissent, Chief Justice Few argued that a claim did not accrue until the client suffered damage, which was not until the commission ruled against the client. The court also rejected the client's claim for equitable tolling of the statute of limitations.

E. 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*, 395 S.C. 148, 716 S.E.2d 920 (2011).

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. First, the purchaser claimed that as a matter of law the attorney had a nonwaivable conflict of interest in representing the buyer and the seller in the closing of a real estate transaction. The court rejected this claim because the plaintiff had agreed that the claim involved questions of fact for the jury, which had returned a defendant's verdict. 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 Annotation, Multiple Representation in Non-Litigated Matters. 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. The court also rejected the plaintiff's claim that the trial court erred in denying its motion for a new trial with regard to this theory 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. An expert testifying for the defendant opined that the defendant had complied with the standard of care for a real estate attorney and that the firm's engagement agreement limited the scope of representation. Third, the purchaser contended that the attorney breached his fiduciary obligations to the purchaser. The trial court had merged the breach of fiduciary duty and malpractice claims because the court found that they were redundant. The supreme court affirmed holding that a claim for breach of fiduciary duty against an attorney states a cause of action only if it "arises out of a duty *than* one created by the attorney-client relationship or because it is based on different material facts." Fourth, as to the plaintiff's claim for violation of the South Carolina Unfair Trade Practices Act, the court found that the trial court erred in holding that the "regulated industries" exception to the Act applied to the law firm's conduct. Quoting with approval a decision of the Alaska Supreme Court, the court stated that the attorney 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 admit, suspend, discipline, or disbar lawyers. However, on the facts the court found that the defendant had not violated the South Carolina UTPA because the jury had found that the defendants did not engage in deceptive conduct.

F. Spoliation.

The supreme court has 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).

G. Aiding and abetting liability

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. The court of appeals affirmed the trial court's decision to grant a directed verdict for the attorney on all four counts. One of the elements of aiding and abetting a breach of fiduciary duty is "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. With regard to the claim for damages under Code §62-1-106, plaintiffs failed to present any evidence that the attorney engaged in fraud or received a benefit from the husband's actions. The court rejected the plaintiff's argument that the filing of the inventory of assets amounted to fraud under the section because there was no evidence that the attorney knew that any of the filings were false at the time they were made. As to the claim of 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. The record contained 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.

II. *Rule 1.2: Attorney Authority and Limited Engagements*

A. Authority

A lawyer may not endorse a client's name on a settlement check without express authority. See *In re Gagne,* 396 S.C. 247, 721 S.E.2d 781 (2011).

B. Limited engagements

In *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (Ct. App. 2011), 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. See also the *RFT Mgmt.* case above.

In *S.C. Bar* Ethics *Adv. Op*. #10-1, the committee ruled that a lawyer may limit his engagement to the collaborative law process in which the attorney will represent the client only in an effort to reach an amicable settlement, but will withdraw if the parties fail to reach agreement, provided the client gives informed consent to the process. As part of the informed consent, the lawyer should explain to the client that a potential conflict exists in that the opposing party or the opposing lawyer can force the lawyer to withdraw by taking actions that create adversity between the parties.

III. *Rule 1.5: Fees*

A. Rule changes

Rule 1.5 has been amended to add subsection (f) dealing with payment of advance fees.

> (f) A lawyer may charge an advance fee, which may be paid in whole or in part in advance of the lawyer providing those services, and treat the fee as immediately earned if the lawyer and client agree in advance in a written fee agreement which notifies the client:
>
> (1) of the nature of the fee arrangement and the scope of the services to be provided;
> (2) of the total amount of the fee and the terms of payment;
> (3) that the fee will not be held in a trust account until earned;
> (4) that the client has the right to terminate the lawyer-client relationship and discharge the lawyer; and
> (5) that the client may be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.

B. Fees for suspended or disbarred lawyers

A suspended or disbarred attorney is not automatically entitled to fees on a matter on which the attorney worked prior to the attorney's discipline. The court should determine the award of attorney fees on a case-by-case basis using equitable principles. *In re Rabens*, 386 S.C. 469, 688 S.E.2d 602 (Ct. App. 2010).

C. Recovery of fees under fee shifting statutes

In *South Carolina Department of Transportation v. Revels*, 399 S.C. 423, 731 S.E.2d 897 (2012), the court of appeals held that the *Layman* lodestar approach applied to a condemnation proceeding in which the statute provided for fee-shifting. The court explained that *Layman* applies "under a statute that explicitly requires an attorney to state his hours." In *Revels* the court went on to hold that in applying the reasonableness factors of *Jackson v. Speed*, the court was not required to first determine the reasonableness of a contingency fee agreement between the lawyer and client. The court did not decide whether a trial court must consider the contingency fee agreement in determining reasonable compensation because the appellants had not preserved the issue for appeal, but the court seemed to indicate that a trial court could do so and that a determination of a reasonable fee in "an amount close to or equal to the contingency fee contract" would be proper, relying on *Saunders v. South Carolina Public Service Authority*, 2011 WL 1236163 (D.S.C. 2011).

D. Theories for recovery of attorney fees

In some cases attorney fees may be recovered as special damages in a tort action. *See Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012). In addition, attorney fees may be recovered under a theory of implied indemnity when the wrongful act of one person forces another into litigation in which the other incurs expenses including attorney fees. See *Rhett v. Gray*, 2012 S.C. Lexis 375 (Ct. App. 2012).

E. Excessive fees

In re Samaha, 399 S.C. 2, 731 S.E.2d 277 (2012) (charging client 25% fee for "marshaling" assets of her husband's estate when respondent did nothing more than what a personal representative would do for the five percent statutory fee). ***See*** *In re Archer*, 398 S.C. 145, 728 S.E.2d 29 (2012) (finding that lawyer charged excessive fee when lawyer billed Commission on Indigent Defense statutory maximum without disclosing that client's family had paid him $3500). Lawyers may not charge clients for time spent in preparing invoices or for communication with bar associations about complaints by the client. See *In re Nwangaza*, 396 S.C. 235, 721 S.E.2d 777 (2011).

F. Modification of fee agreements

In *Formal Opinion* #11-458 the ABA Committee advised that lawyers could ethically enter into modifications of fee agreements with their clients subject to several limitations. The modification must be reasonable under the circumstances and communicated to and accepted by the client. Periodic incremental increases in a lawyer's hourly rate are permissible if the lawyer communicates this increase at the inception of the relationship and the amount of the increase is reasonable. Modifications that change the basic fee agreement or significantly increase the lawyer's compensation are normally unreasonable unless an unanticipated change in circumstances has occurred. If the modification involves an acquisition by the lawyer of an interest in client property, the modification must comply with Rule 1.8(a).

G. Contract attorneys

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.

IV. *Rule 1.6: Confidentiality*

A. Use of electronic devices

In *Formal Opinion* #11-459 the ABA Committee advised lawyers that they had a duty to inform clients of the risk of possible loss of confidentiality when using devices or e-mail accounts to send or receive electronic communications when significant risk exists that a third party, such as an employer, may gain access to such communications. For a discussion of the obligations of counsel for the employer when counsel receives copies of emails sent from an employee to the employee's attorney. See ABA *Formal Opinion* #11-460.

Modern technology is having a dramatic impact on the practice of law, producing a wide range of ethical problems. The ABA 20/20 commission has addressed a number of these issues. See the website of the Commission for details of its work. In two articles Professor Crystal has discussed a number of the important issues involving confidentiality and the use of technology: (1) public use of technology, (2) metadata in document transmissions, (3) loss of devices, (4) disposal of devices, (5) outsourcing and the "cloud," (6) use of networking sites, (7) dealing with confidentiality breaches, and (8) provisions in engagement agreements. See Nathan M. Crystal, *Technology and Confidentiality: Parts I & II*, S.C. LAW., Sept., Nov. 2011. See also Stephanie Kimbro & Courtney Kennaday, *Ethics of Virtual Law Practice,* S.C. LAW., March 2012, at 41.

B. Authorized disclosure

See *S.C. Bar Ethics Adv. Op. #12-10* (when spouse and client had previously engaged in adversarial proceedings, lawyer for deceased client should turn over file to spouse as personal representative of the estate of the client only to the extent the attorney can determine that the client specifically authorized disclosure or pursuant to a court order).

In *Formal Opinion #10-456,* the ABA Ethics Committee dealt with the issue of whether a lawyer could voluntarily disclose information requested by a prosecutor that was relevant to the defendant's claim of ineffective assistance of counsel. The committee held that a lawyer generally could not make such a disclosure outside of a formal judicial proceeding.

> Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may

result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

C. Disclosure when lawyers move between firms

In *Formal Opinion #09-455* the ABA Committee concluded that when a lawyer was considering a move to another firm, it was permissible for the lawyer to share limited information with the new firm to check for possible conflicts of interest. While Rule 1.6 does not contain an exception for such disclosures, the committee decided that disclosure was consistent with Rule 1.6 because lawyers and their firms had a duty to check for conflicts of interest, and limited sharing of information was necessary to comply with this duty. Initially disclosures should be limited to names of clients and areas of practice. If possible conflicts surfaced, then disclosure could include issues involved in the relevant matters. If disclosure would jeopardize the attorney-client privilege or otherwise prejudice the client, disclosure would be improper. The committee offered the following examples of when disclosure would be prejudicial: "clients planning a hostile takeover, contemplating a divorce, or appearing before a grand jury." In some situations the moving lawyer and the new firm could employ an independent, intermediary lawyer to analyze and resolve conflicts in confidence. Disclosure to such a lawyer would generally be permissible under Rule 1.6(b)(5). In 2012 the ABA adopted an exception to Rule 1.6 codifying the decision in Opinion 09-455.

D. Attorney-Client Privilege, Common Interest Exception, and Work Product

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 reaffirmed the elements of 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):

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. Id at 651, 284 S.E.2d at 219-20.

The court went on to hold that documents shared by the Attorney General of South Carolina with the National Association of Attorneys General in connection with tobacco regulation and enforcement were subject to the attorney-client privilege. The court stated:

> While the relationship the AG has with the NAAG is not the traditional attorney-client relationship . . . we nonetheless find that these communications may be covered by the attorney-client privilege. As the ALC noted, the AG has not "retained" the NAAG attorneys in this matter or with respect to the disputed documents. However, 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 387 S.C. at 293, 692 S.E.2d at 530.

In *Tobaccoville* the supreme court also held that documents shared by the Attorney General of South Carolina with other attorneys general in connection with tobacco regulation and enforcement 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. For an argument in favor of the doctrine, see John P. Freeman, *The Common Interest Rule*, S.C. LAW. May-June 1995 at 12. The doctrine is recognized, however, in many jurisdictions and by the Restatement (Third) of the Law Governing Lawyers in §76 (2000).

In *Tobaccoville* the supreme court also held that the work product doctrine did not apply to documents shared by the Attorney General of South Carolina with the National Association of Attorneys General in connection with tobacco regulation and enforcement. The doctrine requires a document to 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 to invoke the protection of the work product doctrine. Materials prepared in the ordinary course of business or pursuant to regulatory requirements are not subject to the doctrine. The primary motive for the preparation of the document must be the anticipation of litigation. The court found that work product protection was not available on the facts of the case:

> The work product doctrine is not implicated here because these documents were not created because of the prospect of litigation, but perhaps more accurately were created because of efforts to enforce a settlement from previous litigation. Id. at *Id.* at 294, 692 S.E.2d at 530.

V. *Rule 1.7: Conflicts of Interest*

A. Sexual relations with clients

The rules of professional conduct do not expressly prohibit lawyers from having a sexual relationship with the spouse of a current client. However, the supreme court has warned lawyers that such conduct constitutes a per se violation of the rules because it "creates the significant risk that the representation of the client will be limited by the personal interests of the attorney." *In re Anonymous Member of the South Carolina Bar*, 389 S.C. 462, 699 S.E.2d 693 (2010).

B. Real estate closings

S.C. Bar Ethics Adv. Op. #10-05 (lawyer who represents both borrower and lender at real estate closing must withdraw from representation if lawyer is aware that waiver of appraisal on foreclosure fails to meet statutory requirements; if lawyer represents only borrower, lawyer may ethically disclose the defect to the borrower);

C. Of-Counsel relationships

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."

D. Interlocutory appeal

The South Carolina Supreme Court has 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). However, 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 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.

VI. *Rule 1.8: Miscellaneous Types of Conflicts of Interest*

A. Business transactions with clients

In re Prendergast, 390 S.C. 395, 702 S.E.2d 364 (2010) (disbarring lawyer for, among other reasons, falling to adhere to the mandatory requirements of Rule 1.8(a) in a business transaction with a client).

B. Client gifts to lawyers

In *In re Crummey*, 388 S.C. 286, 696 S.E.2d 589 (2010), the court noted that the lawyer drafting a will for a client had named herself as personal representative and trustee without having the client "seek the advice of other counsel." The case does not state specifically that the failure to obtain independent advice is a violation of the lawyer's duty to the client, but the context suggests the court found the conduct inappropriate. It should be noted that the lawyer had subsequently converted trust funds to her own use, a key fact that may have colored the court's characterization of the entire transaction; see also *In re Samaha*, 399 S.C. 2, 731 S.E.2d 277 (2012) (finding that respondent engaged in misconduct by drafting documents granting himself power of attorney and naming himself as sole trustee and personal representative of his client's estate without advising her to seek outside counsel to review the documents).

C. Aggregate settlements

For a discussion of the many ethical issues involved in aggregate settlements see Nathan M. Crystal, *Ethical Issues in Aggregate Settlements of Non-Class Action Cases: Parts I and II*, S.C. LAW., May, July 2012.

D. Acquiring an interest in litigation

Rule 1.8(i) prohibits a lawyer from acquiring a lien on property that is the subject of litigation but has an exception for "a lien authorized by law to secure the lawyer's fee or expenses." Rule 1.8(i)(1). The South Carolina Committee has advised that lawyers could acquire a mortgage on real property to secure their fees so long as they complied with the requirements of Rules 1.5(a) (reasonable fees); 1.7(a)(2) (informed consent to conflicts); and 1.8(a) (business transactions with clients). *S.C. Bar Ethics Adv. Comm. Ops. #12-07.* See also *S.C. Bar Ethics Adv. Op. #12-02* (advising that under Rule 1.8(i)(2) a lawyer may enter into a

contingent fee agreement to be paid by an interest in property subject to a quiet title action assuming that the lawyer complied with other rules particularly 1.5(a), (c), and 1.8(a)).

VII. *Rule 1.9: Conflicts of Interest Involving Former Clients*

A. Former guardian ad litem

In *Ethics Adv. Op*. #09-12, the Committee ruled that a lawyer who had previously served as guardian ad litem for a child in an abuse and neglect case should not represent the custodial parent in an effort to enforce or modify child support. While it was unclear that the attorney's representation would be adverse to the child, the committee concluded that because of the risk of use of confidential information, the representation was improper. More generally, "[b]ecause of the special nature of a guardian ad litem's role, the guardian ad litem also may not represent a custodial parent in a later action for enforcement or modification of child support."

B. Fiduciary duties to former clients

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." *Spence v. Wingate,* 395 S.C. 148, 716 S.E.2d 920 (2011).

C. Substantial relationship test

A 2010 Advisory Opinion pulled back from its earlier conclusion and found that "[Advisory Opinion] 84-24 has been overruled and that 90-22 and 05-05 do not accurately reflect the applicability of the 'substantially related' test of Rule 1.9 to the closing-foreclosure paradigm." The Committee then advised that a "lawyer who closes a residential real estate transaction and advises the borrower about mortgages generally, without more, is not prohibited from later representing the lender in a foreclosure action based on post-closing acts or omissions of the borrower." *S.C. Bar Ethics Adv. Op. # 10-03.*

VIII. *Rule 1.14: Clients with Diminished Capacity*

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*, 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 son believed that action was needed to protect his mother from her own behavior, which was characterized as "irresponsible and erratic." The mother later alleged that the actions were taken because of the husband's fear that she would divorce him. She raised a series of claims against the lawyer including breach of fiduciary duty, breach of trust, professional negligence, and conversion. The court held that the mother was not the client of the lawyer and was not owed a duty of care by the lawyer. The court therefore also rejected a conflict of interest claim and upheld a grant of summary judgment for the lawyer on all claims brought by the mother.

IX. *Rule 1.15: Trust Accounts and Client Property*

The supreme court made major changes to Rule 1.15 dealing with disbursement of funds held in trust and with maintenance of client files:

A. Disbursements

Rule 1.15(f) now provides:

> (f)(1) A lawyer shall not disburse funds from an account containing the funds of more than one client or third person ("trust account") unless the funds to be disbursed have been deposited in the account and are collected funds.
>
> (2) Notwithstanding Subsection (f)(1) above, a lawyer may disburse funds from a trust account at the lawyer's risk in reliance on the following deposits when the deposit is made:
>
> > (i) in cash or other items treated by the depository institution as equivalent to cash;
> >
> > (ii) by verified and documented electronic funds transfer;
> >
> > (iii) by a properly endorsed government check;
> >
> > (iv) by a certified check, cashier's check, or other check drawn by a depository institution or an insurance company, provided the insurance company check does not exceed $50,000;
> >
> > (v) by any other instrument payable at or through a depository institution, but only if the amount of such other instrument does not exceed $5,000 and the lawyer has a reasonable and prudent belief that the deposit of such other instrument will be collected promptly; or
> >
> > (vi) by any other instrument payable at or through a depository institution and at least ten (10) days have passed since the date of deposit without notice to the lawyer that the credit for, or collection of, such other instrument has been delayed or is impaired.
>
> If the actual collection of deposits described in Subsections (i) through (vi) above does not occur, the lawyer shall, as soon as practical but in no event more than five (5) business days after notice of noncollection, deposit replacement funds in the account.

New comments 5-11 provide as follows:

[5] The requirement in Rule 1.15(f)(1) that funds be deposited and collected in the lawyer's trust account prior to disbursement is fundamental to proper trust accounting.

[6] Based on the lawyer's relationship with the depository institution or other considerations, deposited funds of various types may be made "available" for immediate withdrawal by the depository institution; however, lawyers should be aware that "available funds" are not necessarily collected funds since the credit given for the available funds may be revoked if the deposited item does not clear.

[7] Subsections (i) through (vi) of Rule 1.15(f)(2) represent categories of trust account deposits which carry a limited risk of failure so that disbursements may be made in reliance on such deposits without violating the fundamental rule of disbursing only on collected funds. In any of those circumstances, however, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. The lawyer's risk includes deposited instruments that are forged, stolen, or counterfeit. If any of the deposits fail for any reason, the lawyer, upon receipt of notice or actual knowledge, must promptly act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such items personally pays the amount of any failed deposit within five (5) business days of receipt of notice that the deposit has failed, the lawyer will not be considered to have committed professional misconduct based upon the disbursement of uncollected funds.

[8] A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than Subsections (i) through (vi) of Rule 1.15(f)(2) may be grounds for a finding of professional misconduct.

[9] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[10] The Lawyers’ Fund for Client Protection provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Under Rule 411, SCACR, each regular member of the Bar is required to make an annual contribution to this fund.

[11] A lawyer’s obligations with regard to identified but unclaimed funds are set forth in the Uniform Unclaimed Property Act, S.C. Code Ann. § 27-18-10, et seq.

B. Collected funds

In *Ethics Advisory Op.* #12-11, the committee advised that ACH electronic transactions were not "collected funds" under Rule 1.15(f)(1) because under ACH rules a deposit could be reversed within five days. An example of a recent case in which a lawyer ran afoul of these and other trust account obligations is *In re Halford,* 392 S.C. 66, 708 S.E.2d 740 (2011). The attorney in that case committed the following violations:

- Failed to transmit the scanned image of a bank deposit before disbursing funds at closing;
- Refunded rather that charging a client's credit card account for a payment;
- Withdrew legal fees paid by clients with credit cards without taking into account credit card company transaction fees;
- Disbursed funds in a real estate transaction without waiting for the lender's check to clear when the lender stopped payment due to a recording defect;
- Failed to reconcile client ledger balances.

Halford received a public reprimand.

While lawyers are ethically authorized to disburse trust funds based on certain types of uncollected funds, the comments make clear that any such disbursement is at the lawyer's risk. See comment 7. Prudent lawyers will only disburse against collected funds or be ready to deposit in trust any deficiency that may occur.

C. Client files

In 2012 the court amended Rule 1.15 adding 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. 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. The comment also directs lawyers to adopt and clearly communicate to clients policies regarding file retention. The rule does not address disposition of file materials that have inherent value, such as wills, securities, or corporate records, but ethics opinions in other jurisdictions have advised that lawyers must preserve or return such property to the client unless the client specifically directs otherwise. See N.Y. City Bar Op. #2010-1. Well-drafted engagement agreements should include a provision on file destruction.

D. Rule 1.15(i) revision

> (i) Absent any obligation to retain a client's file which is imposed by law, court order, or rules of a tribunal, a lawyer shall securely store a client's file for a minimum of six (6) years after completion or termination of the representation unless:
>
> (1) the lawyer delivers the file to the client or the client's designee; or

(2) the client authorizes destruction of the file in a writing signed by the client, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

If the client does not request the file within six (6) years after completion or termination of the representation, the file may be deemed abandoned by the client and may be destroyed unless there are pending or threatened legal proceedings known to the lawyer that relate to the matter. A lawyer who elects to destroy files shall do so in a manner which protects client confidentiality.

New comments 12-13 provide as follows:

[12] A lawyer who destroys a client file pursuant to Paragraph (i) must do so in a manner which protects client confidentiality, such as by shredding paper copies of the file. This rule does not affect the lawyer's obligation to return the client file and other client property upon demand in accordance with Rule 1.15 or the lawyer's obligations pursuant to Rule 1.16(d).

[13] A lawyer may not destroy a file under Paragraph (i) if the lawyer knows or has reason to know that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files. Examples include post-conviction relief and professional liability actions against the lawyer. Nothing in the rule prohibits a lawyer from converting files to an electronically stored format, provided the lawyer is capable of producing a paper version if necessary. Attorneys and firms should create file retention polices and clearly communicate those policies to clients.

E. Amendments to Rule 417 dealing with record keeping

Rule 417 was substantially amended in 2011 to deal with various developments in electronic transactions. See the comments to Rule 1. While electronic transactions and record keeping requirements can be confusing and time consuming, lawyers must remember that they bear ultimate responsibility for compliance with these trust account obligations. See *In re Hatley*, 400 S.C. 470, 735 S.E.2d 488 (2012) (lawyer acknowledged that his failure to properly supervise his staff was due in part to his lack of complete understanding of Rules 1.15 and 417).

In *Opinion #10-02*, the Ethics Advisory Committee ruled that an account for payment of recording and transfer fees was a trust account subject to the requirements of Rule 1.15 and SCACR 417. To avoid these obligations a lawyer could create a separate account into which the lawyer advanced funds. However, if an account contains legal fees or client funds, it is a trust account subject to the requirements governing such accounts. In *Opinion* #12-05 the committee advised that Rule 417 requires the authorized signer on a trust account to be a South Carolina lawyer or a person under the direct supervision of a South Carolina lawyer. Accordingly, the committee ruled that a partner of a firm operating in South Carolina who is admitted to practice in Virginia could not be the authorized signer on the firm's trust account because the partner was not under the direct supervision of a South Carolina lawyer.

The failure to maintain adequate records is grounds for discipline even if no client or third party is harmed. In *In re Roy*, 387 S.C. 372, 692 S.E.2d 916 (2010), the lawyer's

accountant regularly reconciled the lawyer's trust account with statements received from the bank. However, the accountant did not follow all of the requirements of Rule 417. Because the overall account balance was positive, the lawyer was not aware that several individual client account ledgers carried negative balances. Also, because of a problem that had arisen out of the lawyer's handling of his own loan refinance and the pay-off of his original loan out of his trust account, the lawyer had inadvertently effectively used the funds of clients temporarily for his own benefit. The court found that no client funds were lost or intentionally misappropriated and issued a public reprimand.

X. *Rule 1.16: Withdrawal*

A lawyer working as a contract attorney for a law firm should not assume that the termination of his or her relationship form the firm ends all duties to clients that the lawyer had been representing while at the firm. In *In re Holcombe*, 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.

XI. *Rule 1.18: Prospective Clients*

In Formal Opinion 10-457, the ABA Ethics Committee dealt with a number of ethical issues raised by lawyers' increasing use of websites to obtain business. One issue examined in the opinion is when a visitor to a lawyer's website becomes a prospective client under Rule 1.18. The committee decided that when a lawyer "discusses" the possibility of representation, the person becomes a prospective client. What amounts to a discussion depends on a variety of factors, including the features of the site.

XII. *Rule 1.19: Succession Planning*

The death or disability of a lawyer from practicing law can be detrimental to a lawyer's clients unless the lawyer has made plans for their orderly protection. By order dated February 11, 2013, the supreme court made two major changes in the rules governing lawyers to deal with succession situations. First, the court created the position of receiver within the Office of Disciplinary Counsel to handle a lawyer's cases if the lawyer had not made plans for orderly succession. See Rule 31 of the Rules on Lawyer Disciplinary Enforcement. Second, the court adopted Rule 1.19 as part of the Rules of Professional Conduct to encourage lawyers to make plans for orderly succession.

A succession plan should identify a successor attorney who is available to take over the lawyer's cases. The rule provides that the South Carolina Bar will maintain a list of attorneys who are available to perform this service, and lawyers may choose one or more lawyers from this list as their successors. Rule 1.19(c) and comment 7. The succession plan may provide for fee sharing with the successor attorney. Rule 1.19(b) and comment 4. The successor attorney should make clients aware of any fee sharing arrangements with the absent attorney or his estate. Comment 4. It appears that fee sharing under this rule does not require compliance with Rule 1.5(e). See comment 8 to Rule 1.5. If the deceased or disable attorney is a member of a firm, the firm may designate a successor under its decision-making procedures. See comment 6.

In addition to identifying a successor attorney, a succession plan should specify in writing information necessary for the successor to carry on the practice of the deceased or disabled lawyer. See comment 2 for a list of information that should be included in a succession plan.

If a detailed succession plan exists, the successor attorney may take over the practice of the deceased or disable lawyer without the need for court appointment. Comment 3. Clients are free to select other counsel if handle their case rather than successor counsel.

Under this rule, lawyers could enter into mutual succession plans with other lawyers in whom they have confidence and whose practices are compatible with their own. In contemplation of death or disability a lawyer may consider selling his practice under Rule 1.17.

The rule encourages lawyers to make succession plans, but failure to do so is not a disciplinary offense. Rule 1.19(a) states that lawyers "should prepare" but does not state that they "shall or must" prepare such plans. Comment 1 states that the rule serves as an "encouragement" to lawyers, especially sole practitioners, to prepare such plans.

XIII. *Rule 3.1: Frivolous Claims*

In *Ex Parte: Bon Secours-St Francis Xavier Hospital, Inc.*, 393 S.C. 590, 713 S.E.2d 624 (2011), the supreme court held that South Carolina Rule 11, unlike the federal rule, adopts a subjective standard for determining whether a filing is frivolous and not interposed for delay. However, the court went on to hold that the rule could still be violated by "a filing that is so patently without merit that no reasonable attorney could have a good faith belief in its propriety." *Id.* at 599, 713 S.E.2d at 628. On the facts of the case the court found that the trial court was correct in deciding that the vexatious removal is sanctionable conduct and that parties will be liable for the unnecessary expense and delay that results from an improper exercise of that right. *Id.*

XIV. *Rule 3.2: Dilatory Tactics*

The supreme court has expressed concern that discovery practice has become a cottage industry of sorts and that the merits of a claim are being relegated to a secondary status. In *Oncology & Hematology Assocs. v. S.C. Dept. of Health & Environmental Control*, 387 S.C. 380, 692 S.E.2d 920 (2010), one party appealed a series of discovery orders issued by the Administrative Law Court (ALC) after the other party had inundated it with discovery requests. The court vacated and remanded, finding that the information and documents required under the discovery orders were not remotely relevant to resolution of the issue before the ALC. The court stated that its willingness to review a discovery order by way of a writ of certiorari would be as rare as the proverbial "hen's tooth" and that it has no desire to micromanage discovery orders. However, the court chose to address the issue generally in hopes of curbing discovery abuses. In the case before it, the court vacated the requests and required the party requesting information to start over with its discovery process.

XV. *Rule 3.3: Candor to a Tribunal*

A. <u>False notarizations</u>

The court has disciplined lawyers for false notarizations of affidavits. In *In re Cerato,* 393 S.C. 625, 714 S.E.2d 282 (2011), the attorney filed seven affidavits in a family court matter stating that the affiants had personally appeared before him. In fact, the attorney had only spoken with the affiants on the telephone. The attorney mistakenly believed that this was a

proper process for notarization. In *In re Robinson*, 393 S.C. 364, 713 S.E.2d 294 (2011), the attorney filed affidavits in federal court showing the signatures of the affiants as "/s/ Witness"; the attorney typed in her name as notary public. The court found that this method of notarization was improper because it amounted to a representation to the court that the document was a conformed copy of an original that was in the possession of the attorney, when in fact no such original existed. In addition, the filing violated federal court rules requiring the filing of scanned copies of affidavits. See also *In re Purvis*, 399 S.C. 378, 731 S.E.2d 888 (2012) (notarization by attorney of affidavits from witnesses based on telephone confirmations with the witnesses rather than personal appearance before the attorney). All three attorneys receive public reprimands. In addition to these cases other lawyers have been disciplined for failure to supervise their staff with regard to proper notarization procedure.

B. Witness testimony

In *State v. Rivera*, #27220 (February 13, 2013), the supreme court dealt with the right of a criminal defendant to testify in his own behalf. In this case it appears that the defendant wanted to testify truthfully that he had committed the murder of which he was accused, rather than perjuriously, but the court's opinion is relevant to the obligations of defense counsel in such a situation. In *Rivera* defense counsel refused to call the defendant as a witness because they believed his testimony was not in his interest; counsel asked the court to decide whether to call the defendant as the court's witness. The court recognized that the defendant had the constitutional right to testify in his own behalf, but then asked the defendant for a proffer of his testimony. The defendant stated that he would testify about the murder of the victim, but would not provide any details. The court then excluded the defendant's testimony on the ground that its prejudicial effect outweighed its probative value. The supreme court held that the defense counsel acted improperly and the trial court erred in its ruling. Defense counsel acted improperly because the defendant had the right to decide whether to take the stand:

> Here, Appellant's attorneys refused to call him to the stand because they felt that his proposed testimony, though relevant, would not be to his advantage. This is not a decision for defense counsel to make. While defense counsel will provide the accused with his or her best judgment and recommendation, the ultimate decision of whether an accused will testify in his or her defense rests exclusively with the accused.

See Rule 1.2(a). The trial court erred because defendant's testimony was highly relevant and the court's reliance on prejudicial impact paternalistically deprived the defendant of his constitutional right to testify. The court also held that the error in the case was structural, not subject to harmless error review.

XVI. *Rule 3.5: Ex Parte Communications*

In re Valenta, 734 S.E.2d 653 (S.C. 2012) (general counsel of South Carolina Department of Motor Vehicles publicly reprimanded for writing letters to magistrates objecting to orders directing the SCDMV to return tickets to magistrate court when matter had been reopened); *In re Cheatham*, 390 S.C. 439, 702 S.E.2d 559 (2010) (reprimanding lawyer for submitting proposed order to judge without service on opposing counsel).

XVII. *Rule 3.8: Prosecutorial Obligations*

A. Lack of probable cause

In re Cushman, #27209 (January 16, 2013) (city prosecutor reprimanded for dismissing certain cases in exchange for contribution by defendant to city "drug fund" when attorney knew that cases could not be successfully prosecuted).

B. Disclosure obligations

The disclosure obligation set forth in Rule 3.8(d) is broader than the *Brady* rule in several ways. First, the ethics rule does not require that the exculpatory information be material. The standard under the rule is whether the evidence "tends" to negate guilt, mitigate the offense, or mitigate sentencing. In fact, under the rule it is unnecessary for the information to be admissible in evidence. See *ABA Formal Opinion* #09-454, at 4-5. Second, the rule requires "timely" disclosure of exculpatory evidence. The opinion states that timely disclosure means "as soon as reasonably practical." Timeliness requires disclosure prior to any guilty plea proceeding. *Id.* at 6. In addition, a defendant cannot "waive" the prosecutor's obligations under Rule 3.8(d). *Id.* at 7. Third, prosecutors have an ethical obligation to adopt proper supervisory procedures to comply with their ethical and legal disclosure obligations. *Id.* at 8. For a discussion of the weaknesses of the *Brady* rule, see Nathan M. Crystal, *Disclosure Obligations of Prosecutors*, S.C. LAW., Sept., 2009, at 8. *State v. Geer*, 391 S.C. 179, 705 S.E.2d 441 (Ct. App. 2010) (*Brady* violation occurs when the accused shows evidence (1) favorable to the accused, (2) in possession of or known to the prosecutor, (3) suppressed by the prosecutor, and (4) material to guilt or punishment; solicitor's production of audiotape on eve of trial did not violate *Brady*).

C. Duty to justice

Comment 1 to Rule 3.8 states: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." In *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010), the court cited the prosecutor's obligation to do justice with approval in finding that the solicitor made an improper closing argument in which he referred to the defendant as a "domestic terrorist." 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).

XVIII. *Rule 4.2: Communication with Represented Person*

A. Scope of rule

The rule does not apply when the lawyer is not representing a client in the matter. See *S.C. Bar Ethics Adv. Op.* #11-04 (rule does not apply to "Federal Investigator" provided investigator is not acting at the direction of an attorney).

However, if a party is also a lawyer, contact with other parties should be made only with consent of their counsel. *S.C. Bar Ethics Adv. Op.* ##11-01 and 86-10 (decided under similar language in the Code of Professional Responsibility).

B. Advising clients about communication with adverse party

In *ABA Formal Op.* #11-461 the ABA Committee advised that lawyers had broad authority to advise and assist their clients in communicating directly with adverse parties who were represented by counsel. According to the committee, the attorney could initiate the idea of direct communication rather than only responding to a client inquiry, could comment on and revise a client's written communication, could "script" a client's meeting with the opposing party, and could even draft a settlement agreement to be signed by the opposing party provided the lawyer advised the client to encourage the other party to consult with counsel before making binding obligations. If the lawyer has drafted an agreement for the client to present to the opposing party for execution, according to the committee on the signature page the lawyer should include conspicuous language warning the other party to consult with a lawyer before entering into the agreement. For discussion of the ABA opinion see Nathan M. Crystal, *The "Advice" Exception to the No-Contact Rule,* S.C. LAW., March 2012.

XIX. *Rule 4.4: Respect for Rights of Others*

A. Lack substantial purpose

In *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011), the lawyer wrote a letter on behalf of his client, a church, to town officials accusing them of being "pagans" and attempting to "crucify" his client. The court found that the lawyer had violated Rule 4.4(a): "[I]t is clear Respondent's 'substantial purpose' . . . was to intimidate and embarrass those he perceived as being contrary to his client's legal position." Id. at 588, 707 S.E. at 414. The court rejected Respondent's argument that his conduct was protected because it served other legitimate purposes: "However, the fact that the letter could have served other purposes does not prevent his conduct from being in violation of Rule 4.4(a)." Id. The court also dismissed the attorney's contention that his conduct was constitutionally protected under the First Amendment. Respondent received a ninety-day suspension. See also *In re Hammer*, 395 S.C. 385, 718 S.E.2d 442 (2011) (finding that attorney's witness examination that included questions about sexual orientation, HIV testing, and Alzheimer's Disease when the witness stated that his memory was incomplete violated Rule 4.4(a)).

B. When are communications "inadvertently sent"?

ABA Formal Opinion #11-460 (holding that Rule 4.4(b) does not apply when employer's counsel discovers that contents of employee's workplace computer contain communications between lawyer and employee-client because such emails were not "inadvertently sent" to employer's counsel).

XX. *Rule 4.5: Threatening Criminal Prosecution*

In *In re Griffin*, 393 S.C. 142, 711 S.E.2d 890 (2011), the attorney was disciplined in part for making a settlement proposal in which his client offered not to report alleged professional misconduct of the opposing party, who was an attorney.

XXI. *Rule 5.1: Responsibility for Conduct of Firm Lawyers*

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*.

XXII. *Rule 5.3: Responsibility for Conduct of Nonlawyer Employees and Contractors*

Other cases in which lawyers have been disciplined for failure to supervise staff members or contractors who were able to misappropriate client funds include *In re Stoddard*, 391 S.C. 447, 706 S.E.2d 505 (2011) (paralegal who misappropriated more than $100,000); *In re McClain*, 395 S.C. 536, 719 S.E.2d 675 (2011) (wife who worked as bookkeeper embezzled more than $75,000 from trust account); *In re Weems*, 392 S.C. 70, 708 S.E.2d 742 (2011) (agent of title company hired by attorney to disburse funds from his trust account misappropriated more than $130,000). In all of these cases the attorney failed to conduct monthly reconciliations of his trust account.

Failure by lawyers to properly instruct and supervise their staff with regard to verification of pleadings and execution of affidavits is another area in which lawyers have been subject to discipline. See, e.g., *In re Woods*, 390 S.C. 446, 702 S.E.2d 562 (2010).

XXIII. *Rule 5.4: Independence from Nonlawyers*

A. Discounted services offered by internet sites

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*.

B. Partnership with nonlawyers to provide mediation services

The Ethics Committee was asked to render an opinion on whether it was 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. 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*). The attorney, however, must be careful in avoiding "any appearance that he or she is practicing law concomitantly with the practice of mediation." *Ethics Advisory Opinion #12-06.*

XXIV. *Rule 5.5: Unauthorized Practice*

A. Effect on Mortgage Transactions

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 Bank could not pursue any legal or equitable remedies arising out of the transaction. The supreme court subsequently affirmed but on different grounds. The court did not decide the issue of unauthorized practice. Instead, the court held that the bank did not have a valid mortgage because the husband did not have the authority to grant a mortgage on real estate owned solely by his wife. *Id.*#2010-174086 (July 10, 2013). In *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (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. *Matrix Financial* had held that the decision applied "to all filing dates after the issuance of this opinion." Id. at 140, 714 S.E.2d 535. In *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012), the court clarified that *Matrix Financial* applied to all documents that a party sought to enforce that were filed after the date of the decision, August 8, 2011.

B. Appearances in Court

A non-lawyer representative of a company may not prosecute misdemeanor criminal matters in Magistrate Court on behalf of the company. *See In re Richland County Magistrate's Court*, 389 S.C. 408, 699 S.E.2d 161 (S.C. 2010) (3-2 decision with Justices Toal and Hearn dissenting).

XXV. *Rule 5.6: Restrictions on 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 the conclusion of a Texas Opinion, the committee decided that the proposed agreement by the lawyer violated Rule 5.6(b) because the rule is aimed broadly "at lawyers' access to legal markets and, more importantly, clients' access to lawyers of their

choosing." Thus, under the committee's opinion a settlement agreement could not prohibit a lawyer from advertising for clients against a particular defendant. For a criticism of the decision see Nathan M. Crystal, *Confidential Settlement Agreements: What's Ethically Permitted and What's Not,* S.C. LAW., March 2011.

XXVI. *Rule 6.1: Pro Bono*

A. Indigent defense

The 2012-2013 General Appropriations (A. 288, H. 4813) authorized the South Carolina Commission on Indigent Defense to hire qualified attorneys on a contractual basis to handle court appoints for indigent parties to civil and criminal cases. See Supreme Court Amended Administrative Order, November 2, 2012. Supreme Court Rule 608, Appointments of Lawyers for Indigents, supplements the contractual system and provides for appointment of counsel in counties where the contract system does not apply or where contract attorneys are unable to provide representation for also indigents. See id. ¶7.

B. Constitutional issues

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 entitling 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).

The U.S. Supreme Court held that where the custodial parent (entitled to receive the 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, 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).

XXVII. *Rule 7.1: Communications about Lawyers' Services in General*

A. Revisions to rule

A lawyer shall not make false, misleading, or deceptive, ~~or unfair~~ communications about the lawyer or the lawyer's services. A communication violates this rule if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

(d) contains a testimonial about, or endorsement of, the lawyer

(1) without identifying the fact that it is a testimonial or endorsement;

(2) for which payment has been made, without disclosing that fact;

(3) which is not made by an actual client, without identifying that fact;

and

(4) which does not clearly and conspicuously state that any result the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate similar results can be obtained for other clients.

(e) contains a nickname, moniker, or trade name that implies an ability to obtain results in a matter.

B. False and deceptive websites

In *In re Wells*, 392 S.C. 371, 709 S.E.2d 644 (2011), the South Carolina Supreme Court publicly reprimanded a lawyer for use of a website that violated Rule 7.1(a) and other rules. The lawyer had exaggerated his credentials in 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 had failed to 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).

A young lawyer received a public reprimand for using profiles on internet websites that contained:

1. material misrepresentations of fact by overstating and exaggerating the lawyer's reputation, skill, experience, and past results;
2. a form of the word "specialist" even though the lawyer was not certified by the Court as a specialist;
3. statements likely to create unjustified expectations about the results the lawyer could achieve; and
4. descriptions and characterizations of the quality of the lawyer's services.

The Court warned lawyers not to rely on the advice of internet company representatives, whether lawyers or nonlawyers, about compliance with ethical obligations. *In re Dickey*, 396 S.C. 500, 722 S.E.2d 522 (2012).

C. Informational websites

In *Ethics Advisory Opinion #12-03* the Ethics Advisory Committee decided that a lawyer could not ethically participate in a legal information website that goes beyond general information because the content of the website violated several ethics rules, including making a misleading disclaimer of an attorney-client relationship when participating lawyers gave legal advice based on detailed factual submissions; reference to testimonials or endorsements that did not comply with Rule 7.1(d); use of an "as is" disclaimer that might be viewed as an attempt to limit prospectively malpractice liability in violation of Rule 1.8(h); and use of the term "expert" in violation of Rule 7.4(b). Finally, to the extent that the website resulted in the formation of an attorney-client relationship, receipt of compensation by the lawyer from the service provider violated Rule 1.8(f) dealing with restriction on payments to lawyers from anyone other than the client. The committee's opinion went beyond the specifics of the particular website in question to discuss the propriety of lawyer participation in information websites in general:

> 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.

See also Nathan M. Crystal, *Ethical Issues in Using Social Networking Sites*, S.C. LAW., Nov-Dec. 2009, at 8.

D. Unjustified expectations

Advertisements of a lawyer's achievements on behalf of a client, such as won-lost records, amounts of favorable verdicts, or transactional successes for clients are likely to create unjustified expectations. See comment 3. If the advertisement of results is in connection with a client testimonial, it must "clearly and conspicuously state that any result the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate similar results can be obtained for other clients." See Rule 7.1(d)(4). If such an advertisement is not in connection with a client testimonial, this disclaimer is not mandatory, see comment 3 ("may preclude"), but prudent lawyers will include the clear and conspicuous disclaimer for all results-obtained advertisements, whether in connection with a client testimonial or not.

Lawyers should avoid statements that compare their services with other lawyers, either explicitly or implicitly. For example, a statement that the lawyer is "very experienced" is implicitly a comparison with other lawyers. If a lawyer makes such a statement, the lawyer should be prepared to provide factual supporting documentation. A better approach is to avoid the comparison by making the statement purely factual, for example "15 years experience handling plaintiff product liability claims." Of course, any such factual statements must be truthful. See, e.g. *In re Dickey, supra.*

XXVIII. *Rule 7.2: Advertising*

A. Rule changes

(a) Subject to the requirements of this Rule and Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media. 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.

. . .

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service, which is itself not acting in violation of any Rule of Professional Conduct; and

(3) pay for a law practice in accordance with Rule 1.17.

. . .

~~(f) A lawyer shall not make statements in advertisements or written communications which are merely self laudatory or which describe or characterize the quality of the lawyer's services; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients.~~

B. Applying the informational content requirement

The South Carolina Supreme Court has added a number of restrictions on lawyer advertising not found in the Model Rules. Prior to 2011, the South Carolina rules contained section 7.2(f), which stated: "A lawyer shall not make statements in advertisements or written communications which are merely self laudatory or which describe or characterize the quality of the lawyer's services." This rule has been deleted and replace with a more general focus on information. Rule 7.2(a) now provides:

> 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. (emphasis added)

See also comment 4, which elaborates on the informational requirement. In practice the informational-content requirement may be difficult to apply. Does a billboard showing a picture of the members of the firm comply? One could argue that such an advertisement is not predominantly informational because it provides no information, only an emotional response to the image of the members of the firm. On the other hand, we gather information from our senses, and we form impressions of others based on how they appear. Such an advertisement is also a far cry from flashing lights and sirens that the court probably had in mind when it adopted this rule. See *S.C. Bar Ethics Adv. Op.* #12-09 (out-of-state firm with South Carolina office may have a billboard in South Carolina showing all members of firm).

Advertisements about lawyers' fees must disclose whether the client is responsible for expenses and, in percentage fee cases, whether the fee is computed before or after the deduction of expenses. Rule 7.2(f). Lawyers must honor fees that they advertise for at least 90 days, unless the advertisement specifies a shorter period. Fees in publications issued annually must be honored for one year following publication. Rule 7.2(g). An advertisement must disclose the geographic area in which the lawyer practices. Rule 7.2(h).

C. Deletion of filing requirement; record keeping

Lawyers are responsible for the content of advertisements or solicitations that they placed or disseminate. Rule 7.2(b) specifically imposes upon the lawyer a duty to review such communications before they are issued "to reasonably ensure … compliance with the Rules of Professional Conduct. Prior to 2011 the court required filing of lawyer advertisements and direct mailing with the Commission on Lawyer Conduct, but the court has deleted these requirements. The lawyer continues to have a duty, however, to retain a copy or recording of every advertisement for two years after the last dissemination of the communication. In addition to keeping a copy or recording, the lawyer must retain "a record of when and where it was disseminated." Rule 7.2 (b). Comment [6] states that the recordkeeping requirement is designed to "facilitate enforcement" of Rule 7.2. The rule and its comments no longer refer specifically to retaining copies of electronic communications such as websites. However, to the extent that such communications would continue to fall within the broad definition of advertisements or solicitations, law firms may be required to capture every version of their website in some reviewable form.

D. ABA guidance

In Formal Opinion #10-457, the ABA Ethics Committee dealt with a number of issues raised by lawyers' increasing use of websites to obtain business. The committee discussed (1) information about lawyers, their firms, and their clients; (2) information about the law; (3) the consequences of website visitor inquiries, and (4) the use of warnings or cautionary statements

XXIX. *Rule 7.3: Solicitation*

A. Rule changes

The supreme court has deleted the filing requirement for written, recorded, or electronic communication, but attorneys must maintain records of such communications for two years. See Rule 7.3(c).

The rule now provides for the following disclosure when the solicitation is by computer: "If the solicitation is made by computer, including, but not limited to, electronic mail, the words "ADVERTISING MATERIAL," printed in capital letters and in prominent type, shall appear in any subject line of the message and at the beginning and end of the communication." Rule 7.3(d)(1).

B. Use of discount coupons

In *In re Anonymous Member of the South Carolina Bar*, 386 S.C. 133, 687 S.E.2d 41(2009), the supreme court dealt with the issue of whether a lawyer's distribution of discount coupons to local realtors and lenders for real estate financing violated the rules on solicitation. The court held that the distribution 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. In its opinion the court affirmed the "Welcome Wagon" ethics advisory opinions ##03-08 and 96-27. The court rejected opinion #07-09, issued after respondent began his distribution of coupons, which held that the issuance of coupons to mortgage loan originators and real estate agents violated Rule 7.3(d) unless the coupons had the disclaimer language required by the Rule.

C. Targeted mailings

In *Ethics Adv. Op*. #09-14, the Committee dealt with the propriety of targeted mailings to residents in specific geographical areas or specific communities. The committee ruled that in general such letters were not direct mail solicitations subject to the disclosure requirements of Rule 7.3(d). The committee stated: "General mailings setting forth the Lawyer's availability and areas of practice and which are targeted to certain neighborhoods do not constitute mailings to prospective clients known to been in a need of specific legal services, except in circumstances where the lawyer does in fact know that the recipient is in need of legal services." However, the committee pointed out that depending on the circumstances the mailings could be subject to other rules. For example, if the mailing related to a specific occurrence or specific matter, Rules 7.3(g) and (h) would apply. In addition, if the mailing related to an action for personal injury or death, the thirty-day waiting period of Rule 7.3(b)(3) would apply. Moreover, the letter would be an advertisement subject to the rules governing advertising, including the prohibition against false and misleading communications under Rule 7.1.

XXX. *Rule 7.4: Fields of Practice and Specialization*

In *In re Anonymous Member of the South Carolina Bar*, 386 S.C. 133, 687 S.E.2d 41(2009), the supreme court held that advertisements on respondent's website stating that he and two of his associates were "experts" or "specialists" in real estate violated Rule 7.4(b) because they were not certified specialists under South Carolina rules. In light of mitigating circumstances -- immediate removal of the offending language by Respondent and no showing of harm to anyone -- the court concluded that there was minor misconduct warranting a letter of caution. See also *Ethics Advisory Opinion #12-03* (advising that lawyer could not participate in legal information website that, among other violations, included use of the term "expert" in violation of Rule 7.4(b)).

It would be misleading for lawyers to describe themselves as "practicing in a partnership" when they do not share profits and other aspects of an organization other than expenses. *S.C. Bar Ethics Adv. Op.* #12-02.

XXXI. *Rule 8.1: Bar Admission and Disciplinary Matters*

Under Rule 8.1(b) lawyers are subject to discipline for failing to respond to lawful demands for information in connection with disciplinary proceedings. See *In re Thomson*, 389 S.C. 24, 698 S.E.2d 625 (2010). Numerous disciplinary opinions have included, as an additional ground for discipline, the lawyer's failure to respond to disciplinary counsel in a timely manner. The failure to cooperate in a timely manner with a disciplinary investigation is a separate ground for discipline and may be the sole basis for discipline if the matter being investigated initially is dismissed. In *In re Galmore*, 388 S.C. 375, 697 S.E.2d 541 (S.C. 2010), the lawyer failed on multiple occasions to requests by disciplinary counsel for information. That failure was cited as a separate ground for public reprimand.

XXXII. *Rule 8.3: Reporting Misconduct*

A. Rule change

"(a) A lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Commission on Lawyer Conduct in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint."

A lawyer must report any arrest for a serious crime within fifteen days of being arrested. The duty to report extends also to any charge of a serious crime brought against the lawyer by indictment, information, or complaint, without regard to whether the lawyer has been arrested. Rule 8.3(a). A serious crime is defined in Rule 1.0(n) and in Appellate Court Rule 413 to include any felony. A non-felony crime also is a serious crime if it "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." A series of specific criminal activities that qualify as serious crimes is delineated in Rule 1.0(n), including interference with the administration of justice, deceit, misappropriation, willful failure to file income tax returns, and other similar crimes. Conspiracy or solicitation to commit a serious crime is also included within the definition.

XXXIII. *Rule 8.4: Misconduct*

A. Recent examples of misconduct

See *In re Longtin*, 393 S.C. 368, 713 S.E.2d 297 (2011) (imposing discipline for failure to pay case-related expenses to a third party).

In re Sprouse, 387 S.C. 582, 693 S.E.2d 409 (2010) (disbarred on multiple counts of mail, wire or bank fraud and money laundering).

In re Lovelace, 395 S.C. 146, 716 S.E.2d 919 (2011) (suspension for crime of assault involving slapping a deposition witness in the face after an altercation).

In re Boyd, 388 S.C. 516, 697 S.E.2d 603 (S.C. 2010) (lawyer deposited fee payments into his personal account instead of directing the fees to the law firm).

In re Atwater, 385 S.C. 257, 684 S.E.2d 557 (2012) (neglect in handling case for ten years amounts to conduct prejudicial to the administration of justice).

B. 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.

C. Incivility

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 email 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 email 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 US 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." For a somewhat similar case decided under Rule 4.4(a) see in *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011), where 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.

D. Mitigating factors

In *In re Ervin*, 387 S.C. 551, 694 S.E.2d 6 (2010), the court considered evidence provided at the disciplinary hearing, but not previously disclosed in a criminal investigation, to conclude that the facts surrounding the incident were "not as reprehensible as reported" initially by the

alleged victim. While serving as an assistant solicitor, the lawyer had been arrested for pointing and presenting a firearm at another driver in a road rage incident. The charge was dismissed after the lawyer completed pre-trial intervention. At the disciplinary hearing, the lawyer presented evidence that a passenger in the other car had first displayed a weapon. Finding that the complainant had lied about the details of the incident and that the lawyer had demonstrated "genuine remorse," the court found that the lawyer violated Rule 8.4 and displayed poor judgment, imposing a six-month retroactive suspension, instead of a longer suspension recommended by the hearing panel.

Supplement to Annotated South Carolina Rules of Professional Conduct
October 7, 2013

Covering Advance Sheets #8-42, February 20-October 2, 2013
Ethics Advisory Opinion 13-02 through 13-08

Rule 1.1, Competency

Requirement of Expert Testimony

An attorney, who acted as both a real estate closing attorney for a client and as a title insurance agent for the insurance company at a closing, issued a title insurance commitment and policy to the client. The client alleged that the attorney entered into an oral contract insuring, among other things, that the lots would be ready for immediate sale without restrictions or assessments and the client would not be responsible for homeowner's association fees. After finding that the attorney's actions at closing constituted the practice of law, summary judgment was affirmed in favor of the attorney because the client failed to file the required affidavit of an expert witness in support of the professional negligence claims. However, summary judgment in favor of the insurance company was reversed because genuine issues of fact remained concerning the existence of the alleged oral contract by which the insurance company could be bound through the actions of its agent, the attorney. *H&H Johnston, LLC v. Old Republic Nat'l Title Ins. Co.*, 2013 WL 2422867 (S.C. Ct. App. 2013).

Liability to Client for Breach of Contract, Breach of Fiduciary Duty, and Other Liabilities

An attorney was hired to close a real estate transaction and discovered a large judgment lien when conducting a title search. The attorney claimed that he reached an oral agreement with creditor's attorney to resolve the lien. After closing, the creditor's attorney denied that any agreement existed and refused to release the property from the judgment lien. The buyer made a claim on the title insurance policy and the title insurance company paid a sum to the judgment creditor to release the lien. The title insurance company brought suit against the attorney who reimbursed the title insurance company to settle the suit. The attorney brought a suit against the seller, a client, on theories of unjust enrichment and equitable indemnity. After setting forth the principle that the role of an attorney in a real estate transaction is to protect the participants from various dangers, the court held that the attorney failed to establish the elements for either theory citing the fault of the attorney throughout its opinion. *Inglese v. Beal*, 742 S.E.2d 687 (S.C. Ct. App. 2013).

Advocate's Defamation Privilege

A lawyer risks liability for defamation when making improper statements outside the courtroom. A plaintiffs' attorney was quoted in a printed article as stating that the defendant engaged in a "classic racketeering scheme" and a "blatant case of indentured servitude," that defendant's actions set "the community back 150 years," and defendant "created a perfect racketeering enterprise, just like Tony Soprano." The targets of the comments brought defamation suits and were awarded substantial damages, however, the proceedings were vacated

and remanded on procedural grounds. The case is also very interesting on the procedural point of when the time for filing an answer runs when a case has been remanded to state court after removal to federal court; the trial court found that the lawyer had defaulted in the malpractice case because he missed the deadline for filing. *Limehouse v. Hulsey*, 744 S.E.2d 566 (S.C. 2013).

Assisting Unlawful Conduct

In *Formal Opinion* #463, the ABA Committee on Ethics and Professional Responsibility stated that lawyers who follow the ABA's Good Practice Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing are acting consistently with their duties under the Model Rules.

Rul 1.6, Confidentiality of Information

Privileged Communications

Communication with Law Firm In-House Counsel: Does the Privilege Apply?, S.C. LAW., Sept. 2013.

Confidentiality, Privilege, and Work Product: Some Important Differences, S.C. LAW., July 2013.

Disclosure of Conflicts Information when Lawyers Move Between Firms

So You Are Thinking About Moving – A Primer on Ethical Obligations of Departing Lawyers and Their Firms, Part I and II, S.C. LAW., March & May, 2013.

Rule 1.7, Conflict of Interest: Current Clients

Material Limitation on Representation

A government attorney who has been or expects to be furloughed may defend the attorney's agency or command against furlough-related complaints provided the attorney reasonably believes that the attorney can provide competent and diligent representation to the client and obtains informed consent confirmed in writing. It is unlikely that the attorney can reasonably have this belief if the attorney pursues or intends to pursue the attorney's own furlough-related complaint. *S.C. Bar Ethics Adv. Op.* #13-06.

Rule 1.8, Conflict of Interest: Current Clients: Specific Rules

Compensation and Direction by Third Person

The South Carolina Ethics Advisory Committee answered several questions related to attorneys retained and paid by a nonprofit organization to represent a client. Under the facts presented, the nonprofit would deposit funds into the attorney's trust account for expenses related to the representation. The committee reached the following conclusions: ownership of funds deposited into the trust account must be determined by the nonprofit and the client with those parties resolving any disputes; guided by achievement of the goals of representation, the attorney decides how to use the funds and the nonprofit cannot direct the representation or determine goals; the attorney must inform the client about the arrangement, obtain informed consent from the client, protect client confidences, and keep the client informed about the

amount and status of the funds; and the nonprofit can only place limitations on use of the funds to the extent it requires the funds be used for actual expenses incurred as to a particular matter and the attorney's professional judgment cannot be compromised. *S.C. Bar Ethics Adv. Op.* #13-04.

Opposing a Lawyer Relative

The South Carolina Ethics Advisory Committee resolved an inquiry from an attorney who represented clients in family court against the South Carolina Department of Social Services (DSS) as part of the attorney's private practice. The attorney's spouse, also an attorney, formerly worked for DSS and the two attorneys did not work at the same firm. The Committee found no ethical violation from the inquiring attorney defending clients or serving as a guardian for clients against whom the attorney's spouse litigated cases on behalf of DSS. Rule 1.8(k) (opposing a lawyer relative) did not preclude representation because the attorney's spouse was no longer employed by DSS. In addition, Rule 1.9 (duties to former clients) is related solely to conflicts between an attorney and parties formerly represented by that attorney, and Rule 1.11(b) (conflicts for former government employees) contemplates imputation of conflicts to a former government lawyer's firm and not to family members. *S.C. Bar Ethics Adv. Op.* #13-08.

Rule 1.9, Duties to Former Clients

Interlocutory Appeal (new annotation)

Denial of a motion by a company to disqualify an attorney who previously represented the company in a variety of employment law matters, terminated representation, and later represented a former employee of the company in defending a suit brought by the company is not immediately appealable. The dangers presented can be redressed on appeal or an appeal may become unnecessary depending on the outcome of the case. *Enersys Delaware, Inc. v. Hopkins*, 401 S.C. 615, 738 S.E.2d 478 (2013) (see also Annotation, Interlocutory Appeal, Rule 1.7).

Rule 3.3, Candor Toward the Tribunal

False Statements to a Tribunal

In a foreclosure action where an attorney petitions the court for a fee award in excess of what the client is obligated to pay the attorney, the terms of the representation must be disclosed to the tribunal. *S.C. Bar Ethics Adv. Op.* #13-07.

Rule 3.8, Special Responsibilities of a Prosecutor

Vindictive Prosecution (new annotation)

A defendant was indicted for murder, exercised her right to a jury trial, and a not guilty verdict was returned. After the acquittal, the defendant was indicted for accessory after the fact to a felony, was tried without a jury, and was convicted and sentenced. The court noted that there are rules in place to protect against vindictive prosecution in response to a defendant asserting a statutory or constitutional right, such as the right to a jury trial. However, only certain limited circumstances raise a presumption of prosecutorial vindictiveness. The court held that an acquittal by a jury on one charge followed by an indictment on a separate charge, without

more, does not raise a presumption of prosecutorial vindictiveness. Further, the defendant failed to show actual vindictive prosecution. *State v. Blakely*, 402 S.C. 650 (S.C. Ct. App. 2013).

Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law
Practice of Law by Nonlawyers

Lenders do not engage in the unauthorized practice of law when they prepare and record loan modification documents without the participation of attorneys. The court distinguished loan refinancing, which does require the participation of an attorney. *Crawford v. Cent. Mortg. Co.*, 744 S.E.2d 538 (S.C. 2013).

A non-attorney who represents a business entity in probate court to make a claim against an estate and petitions for allowance of the claim does not participate in the unauthorized practice of law because no specialized legal knowledge is needed to do so. *Medlock v. Univ. Health Services, Inc.*, 743 S.E.2d 830 (S.C. 2013).

Husband obtained a line of credit from a bank by granting a mortgage on a home in which he had no interest. Wife held sole title to the home and was unaware of the transaction. The bank did not perform a title search and there was no attorney participation. The bank later brought a foreclosure action after the husband had died. The court of appeals held that the bank's actions constituted the unauthorized practice of law and barred the bank's legal and equitable claims. The supreme court declined to resolve whether the bank participated in the unauthorized practice of law and held the central issue to be that the bank could not foreclose on an invalid mortgage. *Wachovia Bank, N.A. v. Coffey*, 2013 WL 3461691 (S.C. 2013).

Rule 5.6, Restrictions on Right to Practice
Restrictions on Lawyers Leaving a Firm
So You Are Thinking About Moving – A Primer on Ethical Obligations of Departing Lawyers and Their Firms, Part I and II, S.C. LAW., March & May, 2013

Rule 7.1, Communication Concerning a Lawyer's Service
False, Deceptive, and Misleading Communications

The ABA Committee on Ethics and Professional Responsibility has advised that judges may use social networks, but they must be careful to comply with a variety of obligations under the Code of Judicial Conduct. See *ABA Formal Opinion* #462.

A California attorney was disciplined for sending letters to at least two South Carolina residents that contained material misrepresentations and omitted necessary facts in violation of Rule 7.1. The letters stated that the residents were potential plaintiffs in a "national lawsuit" and directed them to contact the attorney's office to avoid being "excluded as a plaintiff." The attorney also committed multiple Rule 7.3 violations. Although not licensed in South Carolina, the attorney's conduct was subject to discipline under SCACR 418. *In re Van Son*, 742 S.E.2d 660 (S.C. 2013).

Rule 7.2, Advertising

Paying to Have Services Recommended

The South Carolina Advisory Committee was presented with an inquiry from a law firm that had been approached by a real estate brokerage company which sought to form a partnership to serve as a title insurance agency. The law firm would rent space next to the real estate agency, the parties would create an LLC to act as the title insurance agency, the title insurance agency would write title insurance on each real estate transaction in which the law firm participated, and the title insurance agency would split premiums received between the law firm and the real estate agency consistent with their ownership interests. The committee concluded that the law firm could rent space from the real estate agency to become one of the agency's "preferred attorneys" so long as the rental agreement was commercially reasonable and fair market rent was paid. The "give anything of value" language of Rule 7.2(c) would not be implicated under this mutually beneficial arrangement. Also, the law firm could ethically create the LLC and split the profits without violating Rule 5.4 because the activities would not constitute the practice of law and legal fees would not be collected. *S.C. Bar Ethics Adv. Op.* #13-03.

A group advertising scheme was analyzed by the South Carolina Ethics Advisory Committee with the primary issue being whether the arrangement constituted permissible reasonable costs of advertising or an impermissible for profit referral service. A for-profit, non-lawyer, out-of-state advertising company offered cooperative television advertising. A rotation would be established with the attorney at the top of the list receiving the next call from the advertising call center before moving to the bottom of the list. The cost to participate would be based on the attorney's pro-rata share of the costs of the advertising company, regardless of the number of calls or cases obtained by the attorney. The committee concluded that the arrangement constituted reasonable costs of advertising and cautioned compliance with other advertising rules. *S.C. Bar Ethics Adv. Op.* #13-05.

Rule 8.4, Misconduct

Conduct Prejudicial to the Administration of Justice

An attorney appointed in a Rule 608 case who retains an investigator who the attorney instructs not to commence work until pre-approval for reimbursement is obtained from the South Carolina Commission on Indigent Defense (CID) does not ethically have any payment obligation to the investigator if the investigator begins work prior to pre-approval and the CID refuses to pay for work performed prior to approval. *S.C. Bar Ethics Adv. Op.* #13-02.