

# **Supplement to Annotated South Carolina Rules of Professional Conduct**

## **December 31, 2013**

**Covering Advance Sheets #8-53, February 20-December 31, 2013**

**Ethics Advisory Opinion 13-02 through 13-09**

**ABA Formal Opinions 464 and 465**

**\*Entries with \* are the most recent additions since October 2013**

### **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

rackeering 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.

### **\*Rule 1.5, Fees**

#### ***Attorney Fee Awards (Fee Shifting)***

A court’s denial of a request for appellate costs under SCACR, Rule 222 does not preclude a litigant from pursuing appellate and post-appellate costs under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealer’s Act). A denial of fees under Rule 222, which is discretionary, does not eliminate the statutorily mandated award under the Dealer’s Act. *Austin v. Stokes-Craven Holding Corp.*, 750 S.E.2d 78 (S.C. 2013).

### **Rule 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.

### ***\*Insured-Insurer Conflicts***

*Solving the Problem of the Insurance Defense Triangle*, S.C. LAW., Nov. 2013.

### ***\*Conflicts of Interest in Criminal Litigation***

Petitioner was indicted for various drug charges. Summers, the initial target of the investigation, suggested that petitioner retain her attorney who was at the time representing her against unrelated charges. Strong evidence was presented at trial of Summers' involvement, prompting the trial court to invite petitioner to put forth evidence of Summers' third-party guilt. The attorney did not present any such evidence and petitioner was convicted. Petitioner sought post-conviction relief claiming an actual conflict of interest. In reversing the lower court's denial of the PCR application, the supreme court held that an actual conflict of interest arose from the attorney's simultaneous representation as evidenced by the attorney's failure to pursue the third-party guilt theory. The court also held that the evidence was insufficient to find a knowing and intelligent waiver of the conflict because the only evidence presented was that petitioner was not informed of the precise nature of the conflict. *Jordan v. State*, 2013 WL 6492392 (S.C. 2013).

### ***\*Judicial Disqualification (new annotation)***

The supreme court reversed a decision of the lower court purporting to create a rule that a "judge must grant a recusal motion made during a new trial arising from a [post-conviction relief] hearing in which the judge also sat." The court declined to extend the "*per se* rule that a judge scheduled to hear a PCR matter must, upon request, recuse himself if he presided over the guilty plea, criminal trial, or probation revocation for which PCR is sought." The court noted that the tasks of a retrial judge and a PCR judge in these situations are different -- the latter is often called upon to review his or her own conduct while the former is not. The court also recognized that a retrial judge will often pass upon guilt which is not an issue in a PCR hearing. *State v. Watkins*, 2013 WL 6252433 (S.C. 2013).

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

### ***\*Business Transactions with Clients***

See *In re Papa*, 2013 WL 6492396 (S.C. 2013) (lawyer who agreed to manage a client's insurance proceeds, among other misconduct, deposited funds in an entity owned by the lawyer and engaged in various transactions without complying with the mandatory requirements set forth in Rules 1.8(a) (involving business transactions with clients) and 1.7 (related to concurrent conflicts of interest)).

### ***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. *Energys Delaware, Inc. v. Hopkins*, 401 S.C. 615, 738 S.E.2d 478 (2013) (see also Annotation, Interlocutory Appeal, Rule 1.7).

### **Rule 1.14, Client with Diminished Capacity**

#### ***\*Competency to Waive Counsel in Criminal Cases (new annotation)***

The South Carolina Supreme Court has declined to adopt the heightened competency standard set forth in *Indiana v. Edwards*, 554 U.S. 164 (2008), and instead adheres to the *Faretta v. California*, 422 U.S. 806 (1975) analysis which, so long as defendant makes his request prior to trial, allows for waiver of right to counsel by any defendant competent to stand trial. The only relevant question is whether the waiver is knowing and intelligent. *State v. Barnes*, 2013 WL 5634248 (S.C. 2013).

### **Rule 1.15, Safekeeping Property**

#### ***\*Dispute Over Entitlement to Funds or Property Held in Trust***

A personal injury lawyer was disbarred for routinely failing to pay a medical provider that had a lien against proceeds at the conclusion of each case. The attorney indicated to clients

that he had paid the medical provider but instead used the funds for his own purposes. In at least one instance, the attorney notified the medical provider that a client's case had been dropped when the case had actually been settled. *In re Walker*, 2013 WL 6492394 (S.C. 2013).

### **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 3.4, Fairness to Opposing Party and Counsel**

#### ***\*Fairness in Pretrial Practice***

During performance of a contract, the subcontractor began sending invoices directing payment to a new bank. The subcontractor later brought suit alleging breach of contract stemming from payments to the wrong bank account. The subcontractor engaged in extensive discovery abuses. In utilizing its inherent power to dismiss the case, the district court found that the subcontractor "made a calculated effort to shield its damages claim from the crucible of discovery by providing false answers to interrogatories, providing false deposition testimony, withholding a large number of relevant documents during discovery, and making late disclosures of material significance that continued until the day before trial was to begin." Further, the client rather than counsel was largely at fault. The court also stated that the discovery abuses resulted in substantial prejudice and earlier attempts to provide remedies, short of dismissal, had failed. The United States Court of Appeals for the Fourth Circuit held that the subcontractor's arguments on appeal were contradicted by the evidence and affirmed dismissal of the case. *Projects Mgmt. v. Dyncorp Int'l LLC*, 734 F.3d 366 (4<sup>th</sup> Cir. 2013).

### **Rule 3.5, Impartiality and Decorum of the Tribunal**

#### ***\*Improper Ex Parte Communication***

See *In re Nelson*, 750 S.E.2d 85 (S.C. 2013) (assistant solicitor suspended for communicating via phone calls and text messages during trial, in a case in which he was not involved, with his cousin who was a juror in the trial).

### **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 5.4, Professional Independence of a Lawyer**

### ***\*Sharing Fees with a Nonlawyer***

A lawyer in a Model Rules jurisdiction faces an ethical quandary when dividing fees for services rendered when working with lawyers from jurisdictions, such as the District of Columbia and the United Kingdom, that permit sharing of legal fees with nonlawyers. Under the typical arrangement which must comply with Rule 1.5(e), the client will receive a single bill for the work of both lawyers. A District of Columbia firm, for example, might ultimately share a portion of the fees earned in the matter with a nonlawyer. The lawyer in the Model Rules jurisdiction does not violate Rule 5.4(a) as a result of the other firm's sharing arrangement so long as there is no interference with lawyer's independent professional judgment. *ABA Formal Op. #464.*

\*The American Bar Association considered "group-coupon" and "deal-of-the-day" marketing programs and distinguished between coupon versus prepaid deals. The Committee generally agreed with state ethics committees that have opined that such arrangements do not constitute impermissible fee sharing and are compliant with Rule 5.4(a). The Committee added, however, "that the percentage retained by the marketing organization must be reasonable" in accordance with Rule 7.2(b)(1). The Committee also noted that while coupon deals can likely be structured for ethical compliance, it is less certain that prepaid deals can observe all applicable rules including those pertaining to advertising, fee sharing, competence, diligence, conflicts of interest, and the proper handling of legal fees. *ABA Formal Op. #465.*

## **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*.

\* The South Carolina Ethics Advisory Committee was presented with a scenario in which a law firm was approached by a real estate agency about becoming a sponsor in order to be listed on the agency’s preferred closing attorney list. The agency and the firm would enter into an advertising agreement requiring the law firm to pay the agency \$350 per month and to provide signage and other physical advertising to be displayed at the agency’s office. In addition, the law firm could attend certain agency meetings or functions and provide training, and the agency would introduce all new agents to the law firm. The committee concluded that this arrangement

violated the prohibition against a lawyer giving “anything of value” for recommendation of the lawyer’s services under Rule 7.2(c). The committee distinguished this arrangement from a transaction on commercially reasonable terms that would justify the deal regardless of referrals. Of significance noted the committee was that the arrangement lacked any non-referral based consideration from the agency to the law firm. *S.C. Bar Ethics Adv. Op.* #13-09.

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**

##### ***\*Violation of a Rule of Professional Conduct***

See *In re Collie*, 749 S.E.2d 522 (S.C. 2013) (placing attorney on interim suspension in accordance with SCACR 413, Rule 17(b) and (c) for continued failure to obtain and monitor an email account in compliance with the SCACR 410(g)).

##### ***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.

#### **Overview of the South Carolina Disciplinary System**

##### ***\*Range of Sanctions***

See *In re Boyd*, 748 S.E.2d 777 (S.C. 2013) (lawyer who continued to represent clients after being suspended and later disbarred engaged in the unauthorized practice of law was held in criminal contempt and sentenced to imprisonment).