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Ethics Watch, South Carolina Lawyer, 2008 and Ongoing

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Professionalism is a frequently discussed topic these days: What does professionalism mean? Why has an emphasis on professionalism become necessary? What roles should law schools, the courts, and the bar play in promoting professionalism?

Fortunately, in South Carolina we have a number of institutions and individuals who do much more than talk about professionalism. Rob Wilcox, Associate Dean at the USC School of Law, assisted by Sharon Williams, directs the nationally recognized Nelson Mullins Center on Professionalism. The Center has hosted two national conferences on professionalism issues, sponsors a Web site, and is conducting empirical research with a focus on mentoring. For almost two decades Pam Robinson has been directing USC’s award-winning pro bono program, one of the largest voluntary programs in the country. The Charleston School of Law was founded on a commitment to professionalism and public service. Elizabeth McCullough directs the school’s externship program, which provides students with a wide range of experiences, including many that involve public service.

Any reference to professionalism in this state would be incomplete without mentioning my colleague, John Freeman. John’s service to the bar in this state is legendary: For more than 35 years he taught professional responsibility and related subjects at the USC School of Law, profoundly affecting the thinking of a large segment of the bar. John was the first chair of the Supreme Court’s Commission on Continuing Lawyer Competency and has served on the state’s Judicial Merit Selection Commission for many years. During the last 16 years he has written the Ethics Watch column for this magazine. John’s articles have identified significant recent developments and have provided the bar with his unerring good judgment and practical advice. For me personally, these articles are much more. Anyone who knows John and reads his articles understands that the articles are not just his work—they are John, written with passion, with wit, and with insight into human nature, both good and bad. John has a distinctive voice that is heard by many professionals and that affects their thinking and conduct. No writer could hope for more. All members of the bar owe John our profound thanks for his professionalism, and we look forward to the many other contributions that we know he will make in the future.

Professionalism has many aspects, but one of the central ideas is the duty to report misconduct by other lawyers and judges, found in S.C. Rules of Professional Conduct 8.3(a) and (b). While the general principle is clear, the precise scope of this duty is remarkably vague. On the one hand, the rule appears mandatory, stating that a lawyer “shall” inform the appropriate authority of misconduct by another lawyer or judge. On the other hand, the rule contains a number of qualifications and limitations: The rule only applies if the lawyer “knows” of misconduct by another lawyer or judge. The misconduct must raise a substantial question about the other lawyer’s or judge’s “honesty, trustworthiness, or fitness.” The rule does not require disclosure of information protected by the duty of confidentiality under Rule 1.6. However, the duty of confidentiality is itself subject to a number of exceptions, producing doubt about the relationship between the principle of confidentiality and the duty to report. A recent case from New Jersey, Estate of Spencer v. Gavin, 2008 WL 1848101 (N.J. Sup. App. Div. 2008), provides insight into the scope of the duty to report.

Plaintiffs in the case were three estates of a mother and her two daughters. Attorney Daniel Gavin, a sole practitioner, had prepared the will for the mother and had provided legal services to all of the estates. On the death of the second daughter, Gavin administered all three estates. At the same time Gavin was diagnosed with terminal lung cancer. During the last few years of his life Gavin began to wind down his practice. He referred a number of matters to Dean Averna, who practiced law in the building owned by Gavin. One of the matters involved the formation of a foundation that was to be created under the will of one of the decedents. After he formed the foundation, he drafted a construction contract between the foundation and a builder for repairs of a church.

During this period of time rumors began to circulate in Gavin’s building that he was stealing from the three estates. Averna denied that he knew that Gavin was stealing money or otherwise acting improperly, but another attorney testified that Averna had said that Gavin was “raping and pillaging” the estates. The attorney also stated, however, that Averna did not provide any details about Gavin’s conduct except that Gavin had stolen a pair of wedding rings from one of the estates.

After Gavin’s death a substitute administrator discovered the extent of Gavin’s theft, which investigation revealed to be between $400,000 and $500,000. The estates were able to recover $322,500 of their losses from the state’s client security fund. The estates brought suit against various defendants who may have had some involvement in the thefts by Gavin, one of whom was Averna.

The trial court granted Averna’s
motion for summary judgment on several grounds: lack of causation, absence of attorney-client relationship, and failure to establish any duty owed by Averna to the estates. The appellate division reversed. The court first focused on whether an attorney-client relationship existed between Averna and at least one of the estates. Averna claimed that he had not been retained by any estate; instead, he had been employed by the foundation to be established under one of the wills. The court rejected this argument, finding that the existence of an attorney-client relationship was not as narrow as Averna claimed. First, the foundation that Averna formed was created pursuant to a specific bequest in the will of the second daughter to control a substantial portion of the residual assets in her estate. Second, Averna was paid for his services by the estate. Third, the estate benefited from Averna’s work. Fourth, the executor of the estate, Gavin, was clearly engaged in breach of fiduciary duty and theft. Fifth, Averna did not have a formal engagement agreement confining his representation solely to the foundation or to the executor. Although the fees Averna received were minor, that did not negate the existence of an attorney-client relationship with the estate.

While the court found that there was sufficient evidence to establish an attorney-client relationship between at least one of the estates and Averna, the court went further, holding that there was sufficient evidence to establish a duty by Averna to report Gavin’s theft even if there was no attorney-client relationship. The court concluded that the estates “implicitly relied” on Averna to be faithful to their interests. The court cited two factors to support this conclusion. First, Gavin and Averna had a close working relationship; Gavin had referred 10 to 15 cases to him. This relationship reinforced the fairness of finding a duty running from Averna to the estates. Second, the court cited Averna’s failure to report Gavin’s misconduct under Rule 8.3 as increasing the basis for finding civil liability.

Spencer is a significant case with regard to the duty to report for a number of reasons. First, the case recognizes that in some situations lawyers have a duty to inform affected clients of misconduct by their lawyers in addition to reporting such misconduct to disciplinary authorities, and that breach of this duty may give rise to civil liability to the affected clients. Second, while the court’s holding was limited to situations in which the attorney had actual knowledge of the wrongdoing, the court indicated that actual knowledge can be inferred from the circumstances, and the court left open the possibility that civil liability could be based on circumstances where the attorney had “reason to suspect” wrongdoing. Although disciplinary action under Rule 8.3 is limited to actual knowledge, civil liability does not necessarily have this restriction. Finally, while the ethical duty to report is subject to the ethical duty of confidentiality, civil liability is not so limited because informing a client, whether a current or a former client, of wrongdoing by that client’s attorney does not breach any duty of confidentiality.

From a professionalism perspective, imposing civil liability for failing to inform a client of misconduct by that client’s lawyer is a welcome development. By increasing the incentive for lawyers to report misconduct by other lawyers, it should reduce the amount and consequences of such misconduct. Of course, that means that lawyers may face some unpleasant decisions about reporting the conduct of other lawyers. The court recognized this:

We appreciate that reporting a fellow attorney is not easy or pleasant, and that filing such a report may involve professional and personal repercussions. But the integrity of the profession and the protection of clients cannot be sacrificed for expediency.

The court is expressing a key aspect of professionalism—acting to protect clients or the public interest even when it involves personal or professional difficulty or cost.
“If someone has to go to jail, make sure it’s the client, not you.” — An old joke about criminal defense practice, but one that can also be applied to civil litigation. If someone must pay damages, make sure it’s your client, not you.

The S.C. Supreme Court’s recent decision in Ex Parte Gregory, 2008 WL 2404207 (June 16, 2008) (#26504), provides some important insights into the award of sanctions against lawyers for frivolous litigation and about the exercise of professional judgment.

In 1999 Jerry Bittle sustained a brain injury in an automobile accident. His mother, Annie Melton, retained attorney Gerald Malloy to represent Bittle’s interests. In 2001 a settlement agreement was reached with Bittle to receive $14,868.97. A few months later Melton and Bittle went to Malloy’s office to conclude the settlement. Bittle endorsed the settlement check. Malloy’s secretary said that Bittle would not receive this check, but would receive another check later.

Over the next several years Melton called and visited Malloy’s office several times to determine when she and Bittle would receive their settlement check. Melton also sought the assistance of a North Carolina attorney. However, neither Melton nor the North Carolina attorney was able to reach Malloy.

Melton testified that she thought that Malloy had kept or spent the settlement proceeds. However, she also admitted that she knew that there was not enough money available from the settlement to pay all the medical bills.

In January 2004 Melton retained Gregory. Gregory talked with the insurance adjuster who handled the claim and learned that the settlement check was cashed in August 2001. Gregory also learned that Malloy had not responded to a number of telephone calls from Melton or to an inquiry from the North Carolina attorney. However, Gregory did not attempt to contact Malloy about the matter, nor did he try to obtain a copy of Malloy’s file in the case.

Gregory advised Melton to file a grievance against Malloy in the hope that the grievance would “shake [the money] loose” from Malloy. In June Melton terminated Malloy’s services and retained Gregory to represent her to recover the settlement proceeds. Gregory associated attorney J. Leeds Barroll as co-counsel in the matter. Barroll researched causes of action and drafted the complaint. He asked Gregory whether he should contact Malloy but Gregory stated that he did not think it would “do any good.”

Barroll also concluded that they had to file quickly because the statute would run soon. Because Malloy had not responded to Melton’s requests for information about the settlement funds, Barroll included a cause of action for conversion. Gregory testified that the basis of the conversion claim was failure to account; he stated that he had no knowledge that Malloy had actually converted the settlement funds.

A staff writer for the local newspaper wrote two articles about the case. In one article Gregory stated, “As an attorney [respondent] should have known he couldn’t co-mingle funds,” and “if for some reason he couldn’t disperse the check he should have kept it in a separate fund. Whatever [respondent] did, he shouldn’t have kept it in his pocket and collected all the interest on it.”

After Barroll filed suit, Malloy promptly transferred the settlement proceeds from his trust account to Gregory. Barroll obtained Malloy’s file and deposed the Medicaid agent. He learned that Malloy had been in touch with the Medicaid agent in an effort to reduce the lien. While the contact was minimal, Barroll concluded that the case against Malloy offered little prospect of recovery; he voluntarily dismissed the case seven weeks after it was filed.

Barroll was able to resolve the Medicaid claim; after payment of all fees and expenses, Bittle received approximately $5400.

After dismissal of the lawsuit against him, Malloy filed a motion for sanctions against Melton and Gregory but not against Barroll, contending that the claim against him, particularly the conversion claim, was frivolous. Malloy stated in his affidavit that he was representing Melton and Bittle for free. He further stated he had discussed with Melton and Bittle how to deal with all of the medical liens, which exceeded the amount Bittle was to receive under the settlement. Malloy sought a waiver of the Medicaid lien, but was only able to obtain an agreement for a reduction. Malloy told Melton and Bittle that he might be able to recover funds for Bittle if he held the settlement funds in trust until the statute of limitations expired on the medical provider liens. Malloy held the funds in trust pursuant to this arrangement. The CPA who reviewed Malloy’s trust account stated that the funds never left this account until Malloy wrote the check to Gregory.

Gregory testified that he did not contact Malloy because he felt that Malloy would not respond to
him if Malloy had not responded to his client or a North Carolina attorney. He stated that he thought that it was unnecessary to contact Malloy because he believed that disciplinary counsel would handle the matter. Gregory did not ask for Melton’s file because he did not believe he would learn anything from it.

The trial court found that the conversion claim was frivolous and that Gregory had not conducted a reasonable investigation before filing the claim. The court awarded Malloy $27,364.31 in attorney fees and costs in defending the action and in pursuing the claim for sanctions.

The Supreme Court affirmed. The Court found that under both Rule 11(a) of the South Carolina Rules of Civil Procedure and under the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10, Gregory had filed a frivolous claim. The Court also affirmed the trial court’s award of sanctions.

Sanctions motions against lawyers involve two issues: When is a lawyer subject to sanctions? What sanctions may be awarded? Gregory is significant on both issues. Gregory was subject to sanctions because of his failure to conduct a reasonable investigation into the conversion claim before filing suit. The Court emphasized the following failures in Gregory’s investigation:

• He had time to investigate whether Malloy had contacted Medicaid, but failed to do so. Had he done so he would have learned much sooner that there was no basis for the conversion action.
• He did not request a copy of Malloy’s file.
• He did not attempt to contact Malloy about the matter, even though his co-counsel suggested that he do so.
• He relied on his client’s unsubstantiated statements that Malloy had taken the settlement funds and went so far as to make these accusations to a reporter even though he lacked any basis other than his client’s statements for making these allegations.

While reasonable investigation of a claim is a fundamental aspect of the duty to avoid frivolous claims, the Court in Gregory went further, establishing a per se rule applicable to claims against attorneys not only for misappropriation but also it seems to any malpractice claim. The Court stated: “Our conclusion that an attorney must conduct a reasonable investigation beyond what is related to the attorney by his client is limited to the situation where a client is alleging conversion against his or her former attorney for misappropriation of client funds or legal malpractice” (footnote 3 of the opinion). Although the Court in Gregory was careful to limit its holding to cases by clients against their attorneys, it is not hard to imagine the Court extending the principle of the case to other situations in which the client alleges intentional wrongdoing by a defendant and the only evidence offered by the client is the client’s own testimony, which may be vague, incomplete, or sometimes inconsistent. A prudent lawyer who wishes to minimize the possibility of sanctions in such cases will not rely simply on the client, but will conduct a reasonable investigation before filing suit. The Court in Gregory was careful to state that an attorney “does not have a duty to consult with a potential defendant prior to filing suit.” However, prudent lawyers should seriously consider communicating with the defendant before filing suit unless such a contact could damage the client’s case (fear of destruction of evidence, for example) or unless the statute of limitations is about to run. Any such communication should, of course, comply with Rules 4.2 or 4.3 of the South Carolina Rules of Professional Conduct.

Lawyers should remember that reasonable investigation into the facts before filing suit is only one aspect of avoiding frivolous claims. A filing is frivolous if it is

• not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
• was intended merely to harass or injure the other party; or
• is interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10(A)(4)(a). Once suit is filed a lawyer may be subject to sanctions for making frivolous arguments that are not warranted under the facts or law. Id. §15-36-10(A)(4)(b), (c). With regard to claims for negligence against statutorily designated professionals or against licensed health care facilities based on the negligence of such professionals, the plaintiff must file with his complaint an affidavit of a qualified expert stating that the defendant has committed at least one negligent act or omission and the factual basis for that conclusion, unless an exception to the filing requirement applies. S.C. Code Ann. §15-36-100(B).

Malpractice claims against attorneys are covered by this provision. Id. §15-36-100(G).

Violation of Rule 11 of the South Carolina Rules of Civil Procedure can also be the basis of sanctions, although the Court of Appeals has held that the substance of the rule and the statute are essentially the same. Father v. South Carolina Department of Social Services, 345 S.C. 57, 545 S.E.2d 523 (Ct. App. 2001).

Gregory is also significant on the question of the appropriate sanction for frivolous filings. The Supreme Court upheld an award of attorney’s fees against Gregory that included not only fees for defending the frivolous claim but also fees for bringing the sanctions proceeding. While the Court was applying an earlier version of the Frivolous Civil Proceedings

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(803) 799-2000. Matthew E. Brown has joined the Charleston office located at 151 Meeting St., 29401. (843) 853-5200.

Travis A. Newton announces the relocation of his law firm to 2410 N. Main St., Ste. A, Anderson 29621. (864) 965-9148.

Nexsen Pruet, LLC announces that Stephanie Varbrough has joined the Charleston office located at 205 King St., Ste. 400, 29401. (843) 577-9440. The firm also announces that Ronald B. Cox has joined the Columbia office located at 1230 Main St., Ste. 700, 29201. (803) 771-8900.

Parker Poe Adams & Bernstein, LLP announces that Michael Larsen has joined the firm located at 200 Meeting St., Ste. 301, Charleston 29401. (843) 727-2650.

Pennington Law Firm, LLP announces that Tiffany M. Melchers has joined the firm located at 1501 Main St., Ste. 600, Columbia 29201. (803) 929-1070.

John Price Law Firm announces that Max Sparwasser has joined the firm located at 7445 Cross Country Rd., N. Charleston 29418. (843) 552-6011.

Pritchard & Elliott, LLC announces that John C. Hayes IV has joined the firm as special counsel located at 8 Cumberland St., Ste. 200, Charleston 29401. (843) 722-3300.


Robinson, McFadden & Moore, PC announces that Wilson W. McDonald has become of counsel to the firm located at 1901 Main St., Ste. 1200, Columbia 29201. (803) 779-8900.

Rosen, Rosen & Hagood, LLC announces that Daniel F. (Frank) Blanchard III, A. Bright Arail and Andrew G. Gowdown have become members and James A. (Chip) Bruorton IV has become a shareholder of the firm located at 134 Meeting St., Ste. 200, Charleston 29401. (843) 577-6726.

Sexual Trauma Services of the Midlands announces that Genevieve N. Waller has become the Director of Development with offices located at 3700 Forest Dr., Ste. 350, Columbia 29204. (803) 790-8208.

C. Frederick Shipley IV, PC announces that its name has been changed to Shipley & Hayes, PC and that Tressa Hayes has become a shareholder in the firm located at 445 Meeting St., W. Columbia 29169. (803) 794-7588.

Brandon W. Smith announces the opening of Smith Law located at 1111 Bay St., Beaufort 29902. (843) 379-8300. Mary Coleman Smith has joined the firm.

Smith Debnam Narron Drake Saintsing & Myers, LLP announces that Richard J. Steele has joined the firm located at 4601 Six Forks Rd., Ste. 400, Raleigh 27609. (919) 250-2207.

Smith Moore, LLP announces that it has combined offices with Leatherwood Walker Todd & Mann, PC to form Smith Moore Leatherwood, LLP. The firm will have six offices in the Carolinas and Georgia.

The S.C. Department of Education announces that Shelly Bezanson Kelly has become General Counsel and that Karla McLawhorn Hawkins has become Deputy General Counsel to the agency located at 1429 Senate St., Columbia 29201. (803) 734-8783.

Law Offices of J. Van Wyck Taylor, LLC announces that Howard Wilson Taylor has become an associate of the firm located at 9225-B University Blvd., Charleston 29406. (843) 797-2291.

The Tecklenburg Law Firm, LLC announces that Gary E. English has joined the firm located at 215 E. Bay St., Ste. 404, Charleston 29401. (843) 534-2628.

Turner-Vaught Law Firm, LLC announces the opening of its new office located at 1039 44th Avenue N., Ste. 101, Myrtle Beach 29577. (843) 492-0369.

Willson Jones Carter and Baxley, PA announces that Shannon Till Poteat has joined the firm located at 4500 Fort Jackson Blvd., Columbia 29209. (803) 227-2883. Mitchell K. Byrd has become an associate in the Greenville office located at 872 S. Pleasantburg Dr., 29607. (864) 527-3280.

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Sanctions Act (see footnote 1 of the opinion), the current version would seem to lead to the same result. Section 15-36-10(B)(2) authorizes a court to impose “any sanction which the court considers just, equitable, and proper under the circumstances.” Section 15-36-10(G)(1) provides that sanctions can include “an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney’s fees of the prevailing party under a motion pursuant to this section.” Moreover, a court in appropriate cases may impose a fine on the offending lawyer. Id. §15-36-10(B)(2). The opinion does not indicate how much of the $27,000 award was for fees incurred in bringing the sanctions motion, but since the case against Malloy was voluntarily dismissed only seven weeks after it was brought, it seems likely that a substantial portion of the fee award was for bringing the sanctions motion. And of course, there was an appeal, so presumably a supplemental petition could be filed for the fees incurred on appeal. Moreover, whenever a court awards sanctions under the act, it is required to report the matter to the Commission on Lawyer Conduct. Id. §15-36-10(H).

Finally, Gregory provides a significant lesson about the exercise of professional judgment. Gregory made two important choices in the case. He chose not to contact Malloy, and he decided to make remarks to the press that were not supported by the facts. Both choices turned out to be bad mistakes. Malloy, although the winner in the case, was not free from blame. He did not respond to inquiries about the status of the case, resulting in an unhappy client who brought a suit against him that could have easily been avoided. To borrow a line from a famous movie, “What we’ve got here is failure to communicate.” (Cool Hand Luke, 1967).
Plaintiffs who reject settlement offers and go to trial do worse 61 percent of the time, losing an average of $43,000 according to a study published in the September issue of the Journal of Empirical Legal Studies. Randall L. Kiser et al., Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations, 5 J. Empirical Legal Studies 551 (2008). Defendants were wrong in rejecting settlement offers less often, 24 percent of the time, but the wrong decision was more costly, resulting in an average loss to the defendant of $1.1 million. Id. at 566. The results come from a study of more than 2000 trials in the California state courts from 2002 through 2005. Id. at 552. Error rates for plaintiffs are higher in contingency fee cases; for defendants error rates increase when the defendant lacks insurance. Id. at 577. So, it looks like both plaintiffs and defendants would generally fare better by settling rather than going to trial. But what happens if the client refuses to accept a “reasonable” settlement recommended by counsel or reneges on a settlement agreement made by counsel?

1. How should a lawyer ethically handle a client who unreasonably refuses to accept a settlement offer?

Lawyers are agents of their clients. Under agency law and the rules of professional conduct, clients have the right to decide whether to accept or reject an offer of settlement in a civil case or an offer of a plea agreement in a criminal case. See S.C. Rule of Professional Conduct (SCRPC) 1.2(a). In making this decision clients do not always make the best choice, as the empirical evidence mentioned above indicates. In addition, the particular circumstances of plaintiffs and defendants may influence them to make decisions that may appear unwise from the perspective of a reasonable person not affected by such factors. Take the situation of a plaintiff in a personal injury case. A plaintiff who is in need of funds may be willing to accept an offer of settlement that the plaintiff’s lawyer considers inadequate. On the other hand, a plaintiff who is not desperate for funds may be willing to reject a good settlement offer and take the risk of a trial in the hope of a big recovery; when the plaintiff’s lawyer is handling the case on a contingency fee basis and fronting the expenses, the trial costs a plaintiff nothing. A defendant without substantial insurance may be willing to reject a good settlement offer and risk a trial because the defendant cannot afford to pay the settlement and plans to bankrupt against any judgment if it loses.

So what can a lawyer do if a client acts unreasonably with regard to a settlement offer? One possibility is to move to withdraw from the representation. Withdrawal, however, is questionable both practically and ethically. Practically, if the lawyer moves to withdraw, the lawyer may find it difficult to collect his or her fee. The lawyer’s claim for a fee will be reduced to a quantum meruit recovery, rather than the amount set forth in the fee agreement. See Robert M. Wilcox & Nathan M. Crystal, Annotated South Carolina Rules of Professional Conduct 52 (2005 ed.). In addition, the lawyer will not have a claim against any insurance company or successor counsel unless the lawyer’s engagement agreement has a charging lien. Id. at 121. Finally, the client will almost certainly claim that the withdrawal was unjustified, resulting in a forfeiture of the fee.

Ethically, withdrawal is also questionable. A recent ethics opinion from the Oregon State Bar addresses this issue. 68-May Or. St. B. Bull. 9. The opinion considers whether a lawyer may perm issibly withdraw under the equivalent SCRPC 1.16(b) if a client rejects a settlement offer. With some qualifications the opinion concludes that withdrawal would not be ethically permissible under any of the subdivisions of the rule. For example, the rule that is most directly applicable is SCRPC 1.16(b)(4), which allows a lawyer to withdraw if there is a fundamental disagreement with the client. However, the opinion concludes that a lawyer does not have a fundamental disagreement “merely because the client refuses to follow the lawyer’s advice or chooses a course the lawyer believes is unwise, particularly where the decision (settlement) is one that is squarely within the client’s sole control.”

The opinion indicates that in many instances the lawyer must “suck it up” and “continue the representation if withdrawal will be more harmful to the client than continuing the representation would be for the lawyer.”

The opinion attempts to soothe the psyche of a lawyer who faces such a situation: “We can avoid some of the angst of the situation by endeavoring not to take the client’s repudiation personally, and by reminding ourselves that our obligation is to do the client’s bidding and pursue the client’s interest.” While some lawyers may find the counselor’s couch comforting, most will be interested in more tangible advice. What can a lawyer do with the “unreasonable” client who refuses to accept an offer that the lawyer strongly believes is favorable? Consider the following:

Aggressive counseling. With regard to the decision to settle,
lawyers have the right and the obligation to counsel their clients about all aspects of the proposed settlement. SCRPC 2.1. However, the rules provide no guidance on how a lawyer counsels a client. Lawyers have discretion to be matter-of-fact and relatively neutral with regard to giving advice about a settlement, or they can be more aggressive, strongly counseling the client that rejection of the settlement offer would be unreasonable and foolish. “About half of the practice of a decent lawyer is telling would-be clients they are damned fools and should stop,” remarked Elihu Root, a prominent New York lawyer of the early 20th century. Of course, a lawyer who is too aggressive crosses the line from counseling to coercion, but where the line lies is a matter of judgment. In counseling a client, whether neutrally or aggressively, the attorney must take into account the particular circumstances of the client like the ones mentioned above. Lawyers should also consider the insights drawn from psychological studies of the impact of gain or loss on decision making. See Mind Control: The Psychology of Settlement, How to Get What You Want (ABA Annual Meeting 2008), www.abanet.org/media/youraba/200808/article04.html (visited September 21, 2008).

Provisions in engagement agreements. Some lawyers have attempted to deal with the problem of the unreasonable client by including in their engagement agreements provisions that transform the contingency fee into an hourly fee if the client rejects a settlement offer recommended by the lawyer (sometimes called “conversion agreements”). Most courts and ethics advisory committees have concluded that such provisions are improper because they interfere with the client’s right to decide whether to settle the case. See Compton v. Kittleson, 171 P.3d 172 (Alaska 2007) (rejecting hybrid fee agreement as against public policy and citing ethics opinions from several jurisdictions that are in accord).

However, a different provision may meet ethical standards. Suppose the lawyer will be handling the case on a contingency fee basis and advancing expenses. The agreement could provide that the lawyer has total discretion about advancement of expenses. If the lawyer decides not to advance expenses, the lawyer must give the client reasonable notice so that the client has the opportunity to seek funds to pay the expenses. Suppose the client is considering rejecting a settlement offer in a medical malpractice case. (The empirical study cited above finds that the plaintiff’s error rate in medical malpractice cases is 81 percent. 5 Journal of Empirical Legal Studies at 577.) If the client refuses the offer, the case can only proceed to trial if the fees of expert witnesses who must testify have been paid. The lawyer could inform the client that the lawyer has decided not to pay the expenses of any experts and that if the client wants to reject the settlement offer, the client will need to come up with the funds to pay the experts or the case will be dismissed. Coercive? Yes, of course it is, but in a different way than an agreement that converts the fee of the lawyer from contingent fee to hourly basis if the client rejects the settlement offer. First, the expense provision is not triggered solely by the client’s decision to refuse to settle. The client’s rejection of a settlement offer is only one circumstance in which the lawyer could refuse to advance expenses. Second, under a conversion agreement the client would be subject to a “fee surprise” where the amount of the fee owed the lawyer could exceed the settlement. See Compton v. Kittleson above. Under the expense provision the client would not owe the lawyer anything. Finally, it seems unlikely that a court would say that a lawyer is ethically required to spend his own money to pay expenses for the client when the fee agreement does not require the lawyer to do so.

Limited engagement agreements. If a lawyer anticipates before the representation begins that the client may be difficult, the lawyer can simply reject the engagement. Another possibility is to represent the client under a limited engagement agreement in which the lawyer agrees to investigate the case and negotiate a settlement, but does not agree to file suit. If a settlement cannot be reached and suit must be filed, the lawyer’s engagement for that aspect of the case would be subject to separate agreement. Limited engagement agreements are generally permissible provided they are reasonable under the circumstances. See SCRPC 1.2, comments 6-7. One major advantage of the limited engagement agreement is that the lawyer will not be required to obtain court permission to withdraw from the representation because suit has not been filed. See S.C. Bar Ethics Advisory Op. #08-01 (advising that lawyer must obtain court permission to withdraw when matter is pending in court). Of course, in many cases meaningful settlement discussions cannot be conducted until after substantial discovery, which generally can only take place after the lawyer files suit.

2. When is a client bound by a settlement agreement made by counsel?

In South Carolina the beginning point for answering this question is Rule 43(k) of the Rules of Civil Procedure, which provides:

(k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record. Settlement agreements shall be handled in accordance with Rule 41.1, SCRPC.

Under this rule a client would not be bound unless the settlement agreement complied with the rule. To comply with the rule, the consent order or written stipulation must specify the terms of the agreement. Continued on page 17
So far, so clear, but what happens if counsel enters into an agreement that complies with the rule and the client later changes his or her mind? Two situations should be distinguished. Suppose the client had approved the settlement but simply has a change of heart. In that case the lawyer entered into the settlement with actual authority and the client is bound. Opposing counsel could seek a court order to enforce the settlement or bring an independent action on the agreement.

Suppose, however, that the client claims that the lawyer entered into the settlement without authority from the client. What then? The acts of attorneys are binding on their clients through principles of agency law. Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). Lawyers have authority to settle cases on behalf of their clients. Such settlements are binding absent fraud or mistake. Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244 (S.C. Ct. App. 2007). The lawyer’s authority is limited, however, to claims set forth in the pleadings, and any settlement that goes beyond the pleadings must be expressly agreed to by the client. Graves v. Serbin Farms, Inc., 295 S.C. 391, 368 S.E.2d 682 (Ct. App. 1988). A lawyer who enters into a settlement without client authority may be liable to the client for negligent advice with regard to the settlement. Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 488 S.E.2d 334 (1997).

In other jurisdictions, the situation may be different. See Makins v. District of Columbia, 389 F.3d 1303 (D.C. Cir. 2004) (holding that client is not bound by settlement agreement negotiated by attorney when the client has not given the attorney actual authority to settle the case on those terms but has authorized the attorney to attend a settlement conference before a magistrate judge and to negotiate on her behalf and when the attorney leads the opposing party to believe that the client has agreed to those terms). By the way, with regard to authority to enter into settlement negotiations (rather than the authority to enter into settlement agreements), prudent lawyers will include in their engagement agreements a provision authorizing them to enter into settlement negotiations at any time that the attorney believes to be advantageous to the client.

Settlement presents a number of other ethical problems, some of which I will discuss in later columns. One such issue is the scope of the ethical duty to disclose material information during settlement negotiations, as the following story illustrates:

A big-city lawyer was representing the railroad in a lawsuit filed by an old rancher. The rancher’s prize bull was missing from the section through which the railroad passed. The rancher only wanted to be paid the fair value of the bull. The case was scheduled to be tried before the justice of the peace in the back room of the general store. The attorney for the railroad immediately cornered the rancher and tried to get him to settle out of court. The lawyer did his best selling job, and finally the rancher agreed to take half of what he was asking. After the rancher had signed the release and took the check, the young lawyer couldn’t resist gloating a little over his success, telling the rancher, “You know, I hate to tell you this, old man, but I put one over on you in there. I couldn’t have won the case. The engineer was asleep and the fireman was in the caboose when the train went through your ranch that morning. I didn’t have one witness to put on the stand. I should’ve told you, young feller, I was a little worried about winning that case myself, because that durned bull came home this morning.”

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Areas of Emphasis:
Personal Injury
Wrongful Death
Product Liability
Medical Negligence
Construction
Premises Liability
Contracts
Insurance Coverage
At the invitation of the S.C. Supreme Court, the American Bar Association Standing Committee on Professional Discipline assembled a team of investigators to examine and make recommendations to improve the South Carolina disciplinary system for lawyers and judges. The consultation team issued its report in September 2008. The report points out a number of strengths of the South Carolina system. Any system can be improved, of course, and the report includes 17 recommendations for its enhancement. The full report with its recommendations is available on the Supreme Court’s Web site at www.sccourts.org/ABA. The team prepared a separate report for the judicial discipline system. Several of the team’s recommendations for the lawyer discipline system also apply to the system for judicial discipline. This article focuses on the recommendations for the lawyer discipline system.

The report includes many interesting and specific proposals for improving the South Carolina system, but I want to consider the report more generally. In particular, I will focus on two questions: What are the major themes that emerge from the report? What steps should the Court take to implement recommendations that it concludes are sound as a matter of policy?

As I studied the report, I was struck by two themes that reappeared throughout the document, themes that can be captured in two words: “delay” and “more.”

The problem of delay
Most lawyers who have been involved in the lawyer disciplinary system know that it can be slow, but the statistics provided in the report are striking and disturbing. Caseload statistics from the Office of Disciplinary Counsel (ODC) show that as of the time of the consultation team’s visit in March 2008, the ODC had 778 active cases. Of these, 307 had been outstanding for more than two years. Of this group 104 cases were outstanding for at least four years, and some as many as 11 years. Page 14.

Where does delay occur in the system? The processing of cases begins well. Disciplinary counsel screen complaints and lawyer answers to determine whether the information set forth in these materials if true would constitute misconduct or incapacity. If not, disciplinary counsel should dismiss the complaint or refer it to another agency. Disciplinary Rule 19(a). This process takes an average of only two days, which the report characterized as “admirable.” Page 15. If the matter proceeds to a preliminary investigation and is dismissed at that stage, it takes an average of 97 days, which does not seem unduly long. Page 14.

Suppose, however, that a case against a lawyer goes through the full disciplinary process to decision by the Supreme Court. How long does such a case take on average? The average time for submission of a preliminary investigation report to an investigative panel is 203 days. It takes 519 days on average for completion of a full investigation and authorization of formal charges by an investigative panel. Panels hold hearings on charges on average 184 days after the filing of formal charges. The rules require hearing panels to file their reports within 30 days after receiving the transcript of the hearing, but it may take some time for the court reporter to prepare the transcript, and even then many panels are slow in issuing their reports. Once the hearing is conducted, it takes another 264 days on average after the receipt of the transcript for the hearing panel to issue its report and recommendations. When a matter has been certified to the Court, oral arguments are held on average within 178 days, with a final order issuing 64 days later. Page 14. In other words, completion of a matter from initial complaint to resolution by the Supreme Court takes on average almost four years. Moreover, as noted above, many cases have been outstanding much longer.

The two major points of delay in the process occur during the investigation stage prior to dismissal or filing of formal charges and at the hearing panel report stage. The investigative stage can take anywhere from one to two years. One factor in delay at this stage is the use of Attorneys to Assist (ATA). The Rule on Lawyer Discipline provides for use by the ODC of ATAs, members of the bar appointed by the Court to assist disciplinary counsel. Disciplinary Rule 5(c). ATAs are used principally if not exclusively to conduct preliminary investigations. On average it takes 263 days for an ATA to receive and complete a case. Page 14. Moreover, almost one third of the cases that were outstanding for more than two years had been assigned to ATAs. Page 14. Substantial delay also occurs at the stage of issuance of a report by a hearing panel. The period of time from receipt of a transcript to issuance of a panel’s report takes on average 264 days. Moreover, additional delay can occur when the court reporter is slow in issuing the transcript.

More responsibilities for the Office of Disciplinary Counsel
The second major theme of the report is a series of recommendations that, if adopted, will impose more responsibilities on the ODC.

The report recommends the creation of an Administrative Oversight Committee of the Commission on
Living in a world of the second best

The economic theory of the second best holds that if a condition necessary for an optimal state of affairs to occur is not satisfied, any change in the system may actually make things worse off. While the report of the consultation team has many useful suggestions, the great danger with the report is that adoption of recommendations that impose greater responsibilities on the ODC without increased resources is likely to exacerbate the already unacceptable levels of delay in the system.

To avoid this danger, I suggest that the Court proceed to handle the report as follows:

1. Determine whether a recommendation is sound as a matter of principle assuming that there was adequate funding available to implement the recommendation.

2. Identify and implement as soon as possible those sound recommendations (#1 above) that will decrease the work of the ODC or increase the speed by which the system handles cases, but which do not require additional funding. For example, Recommendation 3 of the report suggests that the Court grant disciplinary counsel increased discretion to institute full investigations and to dismiss cases without the need of approval by an investigative panel. Pages 24-25. Recommendation 8 provides that steps should be taken to increase the use of discipline by consent, including substituting approval by the chair of the hearing panel for approval by the full hearing panel. These rule changes are costless, efficiency improving steps.

3. Rank order other sound recommendations (#1 above) by priority and estimate the cost of implementation of the recommendations both individually and in total. If the cost or possible impact of a recommendation on the system is unclear, the recommendation should be tabled while other recommendations whose cost is clearer are implemented. For example, it is probably very difficult to determine the added cost of the discovery changes recommended by the report. Such a change may turn out to be more burdensome than anticipated. Given the present degree of delay in the system, such a change should be deferred.

The economic theory of the second best holds that if a condition necessary for an optimal state of affairs to occur is not satisfied, any change in the system may actually make things worse off.

(4) Develop a budget plan to increase funding for the ODC.

(5) Implement those sound recommendations (#1) whose costs are reasonably ascertainable in order of priority based on the availability of funding. If a recommendation is too costly to implement, determine if less expensive steps can be taken. For example, the report recommends the abolition of ATAs. Without substantial new funding for the ODC, this may be impossible to do. However, it may be possible to develop a handbook, standards and case deadlines that could reduce the time required for ATAs to complete their cases.

(6) Each year review the progress toward achieving recommendations that the Court has found to be sound.

***

The ABA's Report on the South Carolina Disciplinary System is an important step in the continued improvement of the disciplinary process in this state. The Court should be praised for inviting review of the system. However, the Court should be careful in considering implementation of the report to avoid increasing the problem of delay now encountered in the system.
Here’s a quiz: What are the three most important ethical issues that lawyers face? Answer: Conflicts, conflicts, conflicts.

When dealing with conflicts of interest, lawyers often consider the possibility of obtaining a “waiver” of the conflict. While the term is useful as a short-hand expression, it is inaccurate and misleading in three respects. First, the rules of ethics do not allow a client simply to waive a conflict; the client must give informed consent. Second, the client’s consent must be confirmed in writing. Finally, in some instances conflicts are not consentable.

Consider the situation in which a lawyer is asked to represent multiple parties who are forming a business. What must a lawyer do to obtain an effective consent to a conflict of interest?

Informed consent. S.C. Rule of Professional Conduct 1.0(f) defines informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Comment 6 to SCRPC 1.0 states that informed consent “ordinarily ... will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives.” With regard to conflicts of interest involving multiple clients, comments 16, 17 and 27-31 to SCRPC 1.7 provide further guidance on informed consent. In particular, comment 16 states that when “representation of multiple clients in a single matter is undertaken, the information should include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.”

Consider the following letter to prospective clients:

Dear [name]:

This letter will confirm our understanding about your role in the formation and operation of [name of entity], a corporation that will be created to [description of activities].

It is my understanding that you wish for me to represent both of you in this matter, and to represent the new corporation once it is formed, handling all of the legal work in connection with the formation and operation of this corporation. My fee for this work will be as follows: [Description of fee arrangement.]

The Rules of Professional Conduct for lawyers require me to obtain your informed consent to represent both of you and the corporation and to confirm that consent in writing. In deciding whether you wish to consent to my representation of you and the corporation, please consider the following factors:

Neutrality. Because I will be representing both of you and the corporation, my ethical obligation is to treat you equally, not favoring one of you over the other. I will raise for mutual discussion any issue that I think is material to either of you individually or to the corporation.

Full disclosure/no confidentiality. I have an obligation to provide each of you with complete information relating to my representation. You must understand that any information you share with me is not confidential as to the other party, and I will disclose all material information I receive from you to the other party.

Withdrawal in the event of a dispute. If a dispute develops between the two of you or between you and the corporation that we cannot resolve, I must withdraw from representation.

Attorney-client privilege. If a dispute between the two of you or between you and the corporation results in litigation, any communications among us will probably be admissible in evidence and will not be subject to a claim of attorney-client privilege.

Fees and expenses. If you do not encounter serious disagreements, multiple representation can minimize legal fees and expenses by reducing the number of lawyers involved in the matter. However, if a conflict develops and I am required to withdraw, you will be forced to retain separate counsel unfamiliar with the matter. As a result your legal fees may well increase.

Other problems/alternative of separate representation. Other unforeseen problems can also develop if I represent you and the corporation. These problems can be avoided if each of you hire your own attorney on a fee-for-service...
es basis. Of course, hiring separate attorneys is likely to be more expensive than if you employ only one lawyer.

If you wish me to represent you despite the risks that I have outlined in this letter, I am willing to do so. I will, of course, always attempt to fulfill my obligations as your attorney, and I will inform you if I believe that a conflict of interest has developed.

If you understand the risks involved and are still willing to consent to my representation, please either sign this letter and return it to me, keeping a copy for your files, or send me an e-mail stating your consent. Your consent will also be inferred if by your conduct you indicate that you are authorizing me to proceed with the representation.

Please let me know if you have any questions or concerns about your consent to my representation.

Sincerely,

Name of Firm

We have been advised of our right to separate counsel and of the risks of multiple representation. We hereby consent to [name of firm] representing both of us and the corporation that we plan to form with full knowledge of the possible risks that can flow from such representation.

________________________
________________________

[signatures]

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Confirmed in writing. Some rules of professional conduct require the client to sign the consent. See SCRPC 1.5(c) (contingency fees) and 1.8(a) (business transactions with clients). SCRPC 1.7(b)(4) does not; it only requires that the client’s consent be “confirmed in writing.” See SCRPC 1.0(b). Nonetheless, prudent lawyers will not proceed with the representation without either signed consents from the clients or an e-mail expressing their consent. See SCRPC 1.0(o), authorizing e-mail as a sufficient writing under the rules. Comment 7 to Rule 1.0 indicates that client consent can be inferred from the client’s conduct, and the form presented above includes a sentence to that effect to provide some protection to a lawyer who proceeds with the representation even if the clients fail to sign the consent letter or send a confirming e-mail.

Nonconsentable conflicts. Some conflicts are nonconsentable. The clearest case of a nonconsentable conflict arises in litigation when a lawyer represents multiple clients in a matter before a tribunal and one client is asserting a claim against another client—for example, multiple representation of a driver and passenger in an automobile accident, when the passenger has a claim against the driver. See SCRPC 1.7(b)(3). This rule has no application to business transactions, but even in that setting conflicts are sometimes not consentable. Rule 1.7(b)(1) states that a lawyer may not represent multiple clients in a single matter unless “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” In making this determination a lawyer should consider a number of factors. In a business formation, the following are important considerations:

First, the lawyer must determine whether there is a fundamental antagonism between the parties or whether they appear to have a common interest even though some differences exist. In most business ventures, the latter should be the case; if it is not, the lawyer should not proceed with multiple representation. Comment 27 to SCRPC 1.7 discusses this factor. Second, a lawyer who represents multiple clients in a business formation must be impartial. If the lawyer does not believe that she can be impartial, she should not undertake multiple representation. See comment 29. When a lawyer has a long-standing professional relationship with one of the parties to the business forma-

A lawyer may represent the clients despite the conflict if the clients give their informed consent, confirmed in writing, and the conflict is consentable.
If asked to identify the greatest monsters in movie history, a respondent would probably mention either King Kong or Godzilla. In the 1962 movie, King Kong vs. Godzilla, the two monsters battle off the coast of Japan. King Kong emerges from the ocean, apparently victorious, but onlookers speculate that Godzilla may have survived the clash. They were right, since Godzilla appeared in more than 20 subsequent films.

Modern litigators are participants in a similar epic struggle between two monsters: the disclosure requirements of the rules of discovery and the technological ability to access and produce vast quantities of electronically stored information (ESI).

The federal Rules of Civil Procedure were amended in 2006 to include several provisions to deal with some of the issues involved in electronic discovery. The Federal Courts Law Review housed at the Charleston School of Law recently sponsored a conference on the ethical and legal issues facing lawyers in electronic discovery. Professor Allyson Haynes organized the conference, prepared the materials, and drafted hypotheticals addressed by the panelists, covering topics such as the scope of the duty to cooperate with opposing counsel, methods of production, and preservation of privileges during discovery of electronic material. Professor Haynes deserves the uniformly outstanding praise expressed by the attendees.

A central issue in discovery, particularly with regard to electronic materials, is when must a party preserve such materials? Revised Federal Rule 37(e) provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The commentary provides that good faith may involve a modification or suspension of the operation of a routine electronic system if information is subject to a preservation obligation. Commentary and case law refer to such intervention as a "litigation hold."

Panelists discussed the following hypothetical situation regarding litigation holds:

An employee of Company A has a big disagreement with her superior and speaks to HR about her concerns. She mentions that her boss treats male employees better than he treats her. As in-house counsel, you know the company has a document preservation system that takes a snapshot of the company's e-mails each day and saves it for 90 days, although if an e-mail is written and deleted in the same day it is not backed up. What must you do at this point? What about one month later when the employee files an EEOC claim? What if it is cost and space prohibitive to avoid deletion of documents?

Rule 37(e) does not explain when a potential litigant must institute a litigation hold. It simply refers to the possibility of preservation obligations arising from common law, statutes, regulations, or court orders. It is clear that the obligation to initiate a litigation hold may attach prior to the institution of litigation or formal governmental investigation. In the leading case of Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (Zubulake IV), one of a series of cases in which Judge Shira Scheindlin established many of the basic principles regarding electronic discovery, Judge Scheindlin held in an employment discrimination case that UBS reasonably anticipated litigation five months before the plaintiff filed EEOC charges based on the e-mails of several employees revealing that they knew that plaintiff was planning to sue. Id. at 216-17.

Two organizations provide guidelines that are useful in deciding when a potential litigant must institute a litigation hold: the Sedona Conference and the ABA Section of Litigation. In 2007 the Sedona Conference, a nonprofit organization devoted to study of law and policy in antitrust, intellectual property, and complex litigation, issued a "Commentary on Legal Holds: The Trigger and the Process. Guideline 1 states: "Reasonable anticipation of litigation arises when an organization is on notice of a credible threat that it will become involved in litigation or anticipates taking action to initiate litigation" (emphasis added). Guideline 4 indicates that the determination is based on all the facts and circumstances and specifies factors to be considered. Because the moment that a preservation obligation attaches may be unclear, the Guidelines provide that process is important in determining whether an organization has acted reasonably and in good faith. Process involves identification of a responsible person to determine if a litigation hold should be issued (Guideline 3) and adoption of a policy to guide the decision maker (Guideline 2). The ABA Section of Litigation Civil Discovery Standard 10 provides as follows: "When a lawyer who has been retained to handle a matter learns that litigation is probable or
has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client’s custody or control and of the possible consequences of failing to do so” (emphasis added).

In my opinion the employee’s discussion of the matter with HR should not, absent other factors, trigger a duty to initiate a legal hold. The employee has informed HR that she has a major disagreement with her boss, and she mentions that he treats male employees better than female employees. At this point, litigation does not appear to be probable nor is there a credible threat of litigation. However, other factors could change that conclusion. For example, if the company has received other complaints against the boss, if the employee has retained a lawyer, or if the employee makes specific threats of litigation. See Guideline 4. On the other hand, one month later, when the employee files an EEOC complaint, the preservation obligation clearly attaches.

At the Charleston School of Law conference questions were raised about whether a preservation obligation attaches to a plaintiff’s Internet sites, such as Facebook, which may contain embarrassing or detrimental information if the plaintiff has decided to file suit. In my opinion the duty to preserve applies equally to plaintiffs and defendants and turns on the probability of litigation. In fact, the commentary to Sedona Guideline 1 states: “On the plaintiff’s side, a decision, for example, to send a cease and desist letter or to initiate litigation by filing a lawsuit triggers the plaintiff’s duty to preserve.” Members of the audience asked whether it would be proper for a plaintiff’s lawyer to advise his client to comply with the preservation obligation by taking a snapshot of the site, while advising the client to remove the site or the offending material. Perhaps, but such tactics seem risky at best. By way of comparison, could a defendant threatened with litigation delete detrimental e-mails from its servers while preserving hard copy that might be more difficult for the plaintiff to find?

Once a preservation obligation attaches, a potential litigant and its counsel must take reasonable steps to implement the litigation hold. Sedona Guidelines 6 and 7. Guideline 8 sets forth the elements of an effective legal hold:

(a) Identifies people likely to have relevant information to whom a litigation hold should be communicated;
(b) Communicates the litigation hold in an effective manner;
(c) Issued in written form;
(d) Defines information to be preserved and the method of preservation; and
(e) Is reviewed and modified periodically as necessary.

A hypothetical discussed at the conference dealt with the allocation of authority between corporate counsel and outside counsel with regard to the implementation of legal holds:

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Your law firm regularly serves as outside counsel for Company A, which also has an internal legal department. As a cost-saving measure, Company A is increasingly relying on its internal counsel with respect to discovery matters. In its latest litigation involving an internal employment dispute, Company A informs you that your participation in its litigation hold communication process is not necessary. What ethical issues does that raise for you?

In my opinion, if a lawsuit has been filed, litigation counsel cannot simply turn over to the office of corporate counsel compliance with the preservation obligation. Litigation counsel, not corporate counsel, is counsel of record in the case and has the obligation to comply with rules and standards applicable to the litigation. This conclusion does not reflect a lack of trust in the competence of corporate counsel, but rather the principle that obligations of counsel of record cannot be transferred to another lawyer. This principle does not mean that litigation counsel must do all the work involved in implementing a litigation hold. Just as a lawyer may delegate work to a paralegal, a lawyer may delegate aspects of the legal-hold process to the corporate legal department, but litigation counsel remains ultimately responsible for compliance. If outside counsel has not been retained with respect to a matter, then it would be appropriate for corporate counsel to handle the implementation of the litigation hold until litigation counsel is retained.

The consequences of failure to comply with a duty to preserve evidence can be substantial. The doctrine of spoliation of evidence refers to the set of remedies available if a party destroys evidence when it has a duty to preserve the evidence. The remedies may include an adverse inference instruction, dismissal, or an independent tort claim. Both South Carolina state and federal courts recognize the doctrine of spoliation. See King v. American Power Conversion Corp., 2006 WL 1344817 (4th Cir. 2006) (affirming trial court decision to dismiss plaintiff’s complaint because of negligent spoliation of evidence); Austin v. Beaufort County Sheriff’s Office, 377 S.C. 31, 659 S.E.2d 122 (2008) (recognizing torts of negligent or intentional spoliation by third party, but finding that facts did not support claims); Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006) (holding that spoliation of evidence instruction should have been given to jury); Kevin Eberle, Spoliation in South Carolina, 19-Sept. S.C. Law. 26 (2007).

An article in the December 17, 2008, issue of the National Law Journal reports that in the first 10 months of 2008 there were 138 reported opinions dealing with electronic discovery, 25 percent of which involved sanctions issues. The epic battle between King Kong and Godzilla may be ancient movie history, but the modern legal equivalent as discovery meets technology is center stage for today’s litigators.
Almost everything in life that is valuable can also be harmful. And so it is with one of the most valuable assets in the practice of law—an excellent paralegal. Most lawyers use paralegals to perform a wide variety of tasks, both in litigation and transactional matters. As a paralegal becomes more experienced, a lawyer may increasingly rely on the paralegal and feel confident in the ability of the paralegal to perform assigned tasks. But the use of paralegals can be dangerous. New paralegals may be unaware of important ethical obligations of lawyers; even experienced paralegals can become overconfident in their ability and exceed their authority. What steps should lawyers take to protect themselves against ethical problems caused by their paralegals?

Rule 5.3 of the Rules of Professional Conduct provides three levels of ethical obligations in the use of paralegals and other nonlawyer employees (such as secretaries, investigators, or office managers). First, a partner or person having similar managerial authority in the firm or legal organization has an obligation to “make reasonable efforts to ensure that the firm’s conduct is compatible with the professional obligations of the lawyer.” SCRPC 5.3(a). I refer to this as the structural obligation. It requires the firm’s partners to make sure the firm has in place policies and procedures designed to give reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.

Second, a lawyer who has direct supervisory authority over a nonlawyer has an obligation to “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” SCRPC 5.3(b). Supervisors must implement and monitor compliance with the policies and procedures established by the firm and deal with problems that may arise. Finally, a lawyer is ethically responsible for the conduct of a nonlawyer if the lawyer orders the conduct, ratifies the conduct, or fails to take remedial action when the consequences of the conduct can be avoided or mitigated. SCRPC 5.3(c).

Unlike tort law, a lawyer is not vicariously liable in a disciplinary matter for the misconduct of a nonlawyer unless the lawyer failed to comply with one of the obligations in Rule 5.3 (structural, supervisory, or direct responsibility). Cf. In re Anonymous Member of the South Carolina Bar, 346 S.C. 177, 552 S.E.2d 10 (2001) (noting that there is no vicarious ethical responsibility for the misconduct of an associate).

In carrying out the structural obligation, a firm must give paralegals appropriate instruction concerning the ethical aspects of their employment by lawyers. The comments state that the “measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.” SCRPC 5.3, cmt. 1. What type of training and instructions should lawyers give to their paralegals? Paralegals who go through formal training programs may already have received instruction in the ethical obligations of lawyers. If a paralegal does not have such instruction, a firm should provide training to the paralegal on such issues. In preparing training materials, a firm can turn to various sources. Two that are particularly helpful are the ABA Model Guidelines for the Utilization of Paralegal Services (2004) and The Model Code of Ethics and Professional Responsibility of the National Federation of Paralegal Associations (2006), both of which are available on the Internet.

When a firm employs a new paralegal, the firm should impress on the paralegal the importance of ethical obligations in general and should emphasize the most important obligations that paralegals have. The following is a memorandum that firms could give to new paralegals or to other nonlawyer employees to accomplish this goal. While the memorandum contemplates a firm that is relatively large, it can easily be modified to a small firm or even the practice of a solo practitioner:

**Memorandum to New Employees on Ethical Obligations**

Welcome to the firm. As we discussed during your interview, lawyers must adhere to strict ethical obligations. Violation of these obligations can subject lawyers to disciplinary action or civil liability. The following are major points that you should observe. If you have any doubt about your responsibilities, consult with your supervising lawyer.

1. **Identity of supervising attorney and head of section.** All employees should know the attorney who supervises their work, to whom they should go for instructions and if problems arise. All employees should also know the head of the section in which they practice, to whom they should go if problems develop that cannot be resolved by their supervising attorney.

2. **Clear identification of role.** Always identify yourself as a paralegal or an employee working for attorney X. If you believe the other person...
is confused about your role, clarify the matter immediately.

3. **Honesty.** Lawyers and their employees have a strict obligation not to engage in misrepresentation or deception on behalf of clients. Under no circumstances should you lie or deceive anyone in a professional capacity.

4. **Authority and advice.** Some legal work can only be performed by a lawyer. For example, you cannot appear in court or take a deposition. Generally, however, your supervisor may delegate to you any other work provided the work is properly supervised. You are not authorized to send letters on your own or to meet with clients or attorneys for the other party unless so directed by your supervising attorney. You are not authorized to give legal advice of any kind. When authorized by your supervising attorney, you may convey the lawyer's advice either orally or in writing. Normally, advice should be conveyed in writing. If you are conveying advice in writing, give the supervisor a copy of the letter before it is sent. If you are conveying advice orally, make a memorandum of advice conveyed and confirm the accuracy of the advice with your supervisor. If questions arise about any advice that you have communicated on behalf of the supervisor, inform the supervisor and follow his instructions.

5. **Confidentiality.** Rules of Professional Conduct state that all information relating to representation of a client is subject to the duty of confidentiality. You may not discuss cases or client affairs outside the office with spouses, friends, or anyone else, either in formal or informal settings. The appropriate answer to questions relating to cases in which you are involved is, “I’m sorry. I can’t discuss that.”

6. **Conflicts of interest.** When the firm takes on a new matter, it performs a review to determine whether the matter creates a conflict of interest with a current or former client. On occasion conflicts may arise with regard to your former employment. It is also possible that the firm may undertake representation in a matter in which you have a personal or financial interest. Report any such matter immediately to your supervisor.

7. **Contact with opposing party.** Lawyers and their representatives may not communicate in any way with an opposing party who is represented by counsel. All communications must be made only with opposing counsel. Do not contact the opposing party under any circumstances. If the opposing party calls the office, tell the party that you cannot discuss the case with him, direct him to talk with his lawyer, and immediately inform your supervisor.

8. **Contact with opposing counsel.** On occasion opposing counsel may contact you for information or documents relating to a case in which you are involved. Before revealing any information or providing any documents to opposing counsel, inform your supervising attorney of the request and receive instructions.

9. **Contact with jurors.** Lawyers and their representatives cannot communicate in any way with members of the jury in a pending case, with members of the pool from which a jury will be selected, or with family or household members of jurors. This prohibition applies even to informal communications that have nothing to do with a case and even if the juror is unaware that the communication relates to a lawsuit. Avoid any situation in which you might have contact with a member or potential member of the jury or with any family or household member of a juror.

10. **Billing.** This firm typically bills on either a contingent fee or an hourly basis. When the firm bills on a contingent fee basis, the client is normally charged for expenses. Time by secretaries or paralegals is not properly chargeable to clients in contingent fee cases as an expense. When the firm bills on an hourly basis, paralegal time is identified separately from lawyer time. It is improper for a lawyer to charge for your time as the lawyer’s time. The firm records time in units of 1/10th of an hour.

Honesty requires all lawyers and nonlawyers to be completely accurate in recording their time.

11. **Mistakes or problems.** If you make a mistake or if a problem arises, immediately discuss the matter with your supervising lawyer. Cover-up or delay in dealing with a problem is almost always worse than the problem itself.

12. **Misconduct by lawyers or firm employees.** The firm adheres to the highest standards of professional behavior. We expect and hope that you will never face an issue of misconduct by a supervisor, by another lawyer in the firm, or by anyone else associated with the firm. If you do face such a situation, report the misconduct to your supervisor unless the supervisor is involved, in which case you should report to [name]. Misconduct includes the following: improper billing, sexual harassment and other forms of discrimination, substance abuse that is job related, malpractice, and violation of duties to courts.

I have read this memorandum on my ethical responsibilities, and I agree to adhere to its terms. I understand and agree that this memorandum is part of my employment contract. If I violate the terms of this memorandum, I am subject to immediate discharge for cause.

_________________________

Signature

The duty to supervise requires lawyers to remind paralegals of their ethical obligations. At least annually lawyers should require their paralegals to reread and reexecute this memorandum of ethical responsibilities.

When properly trained and supervised, paralegals provide valuable assistance to lawyers. However, lawyers who fail to train and supervise their paralegals risk their licenses.■
Conflicts of interest are one of the most common ethical problems that law firms face. One way of dealing with a conflict of interest is through the informed consent of the affected clients confirmed in writing. SCRPC 1.7(b)(4). See Conflict Waivers [sic?]—A Primer, S.C. Lawyer, March 2009 at 8. Firms can also handle some conflicts through screening (sometimes called a “Chinese Wall”) of the lawyer who is subject to the conflict. But what exactly is screening, when can firms use screening, and what steps are required for an effective screen?

What is screening?

The concept of screening is tied to the principle of imputed or vicarious disqualification found in SCRPC 1.10. Under that rule, if a lawyer in a firm faces a conflict under either Rule 1.7, which deals with conflicts between current clients; under Rule 1.9, which deals with conflicts with former clients; or under Rule 1.8(c), involving preparation by a lawyer of an instrument that makes a substantial gift to the lawyer or a member of the lawyer’s family, that disqualification is imputed to every member of the disqualified lawyer’s firm.

In general terms, screening is a method of avoiding the imputation of a conflict of interest from one member of the firm to other members of the firm. If the firm timely erects a proper screen of a disqualified lawyer (see below), the disqualification does not affect the ability of other members of the firm to represent a client.

When can screening be used?

The basic, but not the exclusive, purpose of screening is to establish procedures to protect against the misuse of confidential information, SCACR 1.0, cmt. 9. When disqualification of a lawyer arises from circumstances other than the possession of confidential information, screening is normally not permitted. In particular, Rules 1.8(a)-(i) set forth a number of situations in which a lawyer has a conflict of interest in connection with representation of a current client. These special conflicts situations cannot be avoided by screening of the affected lawyer from participation in the representation of the client. Similarly, if the disqualification is based on the duty of loyalty rather than the duty of confidentiality, screening is generally not permitted. Thus, concurrent conflicts under Rule 1.7(a) are not subject to screening.

Comment 8 to Rule 1.0 lists rules in which screening is permitted—1.8(l), 1.10(e), 1.11, 1.12, or 1.18, but this list is not exhaustive.

1. Screening of a disqualified lawyer who received confidential information from a prospective client, SCRPC 1.18. If a lawyer interviews a prospective client, but does not undertake the representation, another member of the lawyer’s firm may undertake representation against the former prospective client. If the interviewing lawyer took reasonable steps to avoid exposure to more confidential information than was reasonably necessary to decide whether to undertake the representation and the interviewing lawyer is properly screened from involvement in the matter, SCRPC 1.18(d)(2).

2. Screening of a former government lawyer, SCRPC 1.11. If a government lawyer leaves one government agency either to enter private practice or to work for another agency, the lawyer is disqualified from representing a client in connection with any matter in which the lawyer participated personally and substantially as a public officer or employee, unless the agency gives its informed consent confirmed in writing. If the lawyer joins a private firm, the firm may avoid disqualification by properly screening the disqualified lawyer. See S.C. Bar Ethics Adv. Op. #05-01 (firm may handle civil case against child molester in residential boys home by screening solicitor who joined the firm after prosecuting case against another molester in same home).

3. Screening of a former judge, law clerk, or third party neutral under SCRPC 1.12. Similar to SCRPC 1.11, Rule 1.12 provides that a lawyer shall not represent a person in connection with a matter in which the lawyer previously participated personally and substantially as a judge (or other adjudicative officer), law clerk, or third party neutral (including an arbitrator or mediator). The disqualified lawyer’s current firm may avoid disqualification by properly screening the affected lawyer. SCRPC 1.12(c).

4. Screening of current governmental lawyers under comments 19 and 20 to SCRPC 1.8. SCRPC 1.8(l) prohibits a lawyer from simultaneously serving as advocate in an adversarial proceeding while serving as advisor to the tribunal. However, the prohibition is personal to the affected lawyer. SCRPC 1.8, comment 19. One lawyer in a firm or governmental agency may act as advocate while another serves as advisor provided the lawyers are screened to prevent them from sharing information. SCRPC 1.8, comment 20.

5. Screening of lawyers employed by public defense offices, legal services offices, or other indigent programs under SCRPC 1.10(e) and comment...
9. SCRPC 1.10(e) creates an exception to the rule of imputed disqualification for programs providing legal services to indigent clients, including public defender offices and legal services programs, provided the affected lawyer or lawyers are screened from participation in the representation of the other client and the lawyer retains authority over the objectives of representation. The purpose of the rule is “to increase the number of persons to whom each program can provide legal services, while at the same time protecting the clients from prejudice.” SCRPC 1.10, comment 9.

6. Screening of law clerks and administrative employees under comment 4 to Rule 1.10. If a non-lawyer—such as a secretary, paralegal, or law clerk before admission to the bar—possesses confidential information gained during prior employment by another lawyer about a matter being handled by that person’s current firm, the firm is not disqualified if it effectively screens the disqualified person. SCRPC 1.10, comment 4. See S.C. Bar Ethics Adv. Ops. ##91-12 (paralegal) and 93-29 (secretary).

7. Voluntary screening to encourage client consent. Even if a conflict of interest is not “screenable”—for example, if the conflict is between current clients in unrelated matters under Rule 1.7—in most situations the affected clients could still give informed consent to the conflict. In order to encourage a client to give informed consent, the firm could offer to erect a screen to prevent any communication between the lawyers handling the matters that are in conflict. See S.C. Bar Ethics Adv. Op. #92-23 (indicating that erection of a screen may be relevant in obtaining a client’s consent).

8. Precautionary screening when doubt of a conflict exists. In some situations the existence of a conflict may be uncertain. For example, under Rule 1.9 a lawyer is only prohibited from undertaking representation against a former client if the matters are substantially related to each other. Whether a substantial relationship exists may be uncertain. See comment 3 to Rule 1.9 for the factors to consider in determining whether a substantial relationship exists. In case of doubt a firm could adopt screening measures as a precautionary device to reduce the likelihood that a court would grant a disqualification motion if one were subsequently filed.

9. Screening when a disqualified lawyer joins a new firm under revised ABA Model Rule 1.10(a)—not yet adopted in South Carolina. In February the ABA adopted revisions to Model Rule 1.10(a) allowing a firm that hires a disqualified lawyer to avoid disqualification by screening the disqualified lawyer. Under the previous version of Rule 1.10, if the lawyer who joined the firm actually possessed confidential information about an adverse party of the new firm, then the firm would be disqualified from handling the case, and screening would not remove the disqualification. Critics of the old rule argued that it unnecessarily limited the ability of lawyers to change firms without providing significant protection to clients. The text of the ABA’s new rule, which is subject to technical amendments, is available at www.abanet.org/cpr/professionalism/home.html.

What steps are required for an effective screen?

SCRPC 1.0(l) contains a general definition of screening: timely adoption by a firm of procedures that are reasonably adequate under the circumstances to isolate the lawyer from participation in the conflict matter so as to protect confidential information. Comments 8 and 9 to that rule are more specific. Based on the rule and comments, the following are important aspects of an effective screen.

1. Prompt implementation of screening procedures. If the affected lawyer or nonlawyer has not yet joined the firm when the conflict is identified, screening procedures should be put in effect before the person joins the firm. If the matter does not arise or is not identified until after the person joins the firm, the firm should erect the screen as quickly as possible.

2. Notice of the screen to lawyers and staff. The notice should identify the disqualified person and matter and should direct lawyers and staff not to communicate with the dis-

Firms can handle some conflicts of interest through screening (sometimes called a “Chinese Wall”) of the lawyer who is subject to the conflict.
affected person with regard to the matter. Several of the screening rules add a requirement that the disqualified lawyer receive no portion of the fee from the matter. See SCRPC 1.11(b)(1), SCRPC 1.12(c)(1), and SCACR 1.18(d)(2)(i). This requirement does not apply to all screens, for example, screens of current government lawyers who would not receive fees for their work.

7. Notice to the affected client or agency to enable it to assure compliance with screening procedures. Several of the rules also require notice to the affected client or agency to assure compliance with screening procedures. See SCRPC 1.11(b)(2), SCRPC 1.12(c)(2), and SCACR 1.18(d)(2)(i)

The ABA amendments to Rule 1.10 dealing with screening of a disqualified lawyer who moves from one firm to another contain further details regarding screening. If the S.C. Supreme Court adopts this amendment, screening under this rule would need to meet these additional requirements.

ALPS congratulates Bob Wells, Executive Director of the South Carolina Bar, for receiving the Bolton Award for Outstanding Bar Leadership.

Mr. Wells is a bar leader who truly epitomizes the highest standard of professional excellence.
Ethics
Watch

Ethical Issues in Using Social Networking Sites
By Nathan M. Crystal

When I started to write this column, my thesis was that social networking sites, such as Facebook, LinkedIn, and Twitter, did not present any novel ethical problems. "There is nothing new under the sun" was to be my subtitle. My argument was that the new social networking sites are simply a form of communication, subject to the same ethical rules that already govern lawyer communications. In one sense this thesis is correct. While there are few opinions, proceedings, or decisions addressing the ethical issues presented by these sites, ones that do exist apply the traditional ethical principles and rules. But in another sense, this thesis misses the point of the social networking technologies. These technologies are a form of communication, but they radically increase the number of people with whom such communications are made, and they transform what are often ephemeral, private experiences into documented public expressions. To claim that social networking sites are not new is a little like saying that the automobile or television were not new because, after all, they were nothing more than forms of transportation or communication. This article, therefore, is a preliminary effort at addressing the application of traditional ethical concepts to the new social networking sites.

1. Confidentiality. Rule 1.6 provides that a lawyer may not reveal information relating to the representation of a client unless the client gives informed consent or some exception applies. A recent article reports that Illinois disciplinary authorities have commenced proceedings against an experienced public defender who reported on her cases in her blog. John Schwartz, A Legal Battle: Online Attitude vs. Rules of the Bar, NY Times, September 12, 2009. Similarly, in using Twitter to tell followers what a lawyer is doing, a lawyer could reveal client confidences. A lawyer might try to protect himself against an allegation of breach of confidentiality by limiting statements to vague, general postings that did not reveal specific client information. Another possibility is to limit communications to public information. Postings or tweets at that level of generality, however, are likely to be uninteresting. Finally, perhaps a lawyer could include in her engagement agreement a provision in which the client consents to the lawyer's using information from a client's case in a posting so long as the client's name and any personal indentifying information were not used. To make sure that the client actually consented, such a provision should probably be separately signed. Moreover, unless the lawyer informed the client of the risks associated with such disclosures, the consent would probably not be informed. See SCRPC 1.0(g) and comments 6 and 7.

2. Trial Publicity. Rule 3.6 prohibits a lawyer from making extrajudicial statements that have a substantial likelihood of materially prejudicing an adjudicative proceeding. Comments by counsel on Twitter, blogs, or other sites about jurors, witnesses, evidence, the judge, or opposing counsel run the risk of violation of this rule, particularly if the matter is a criminal case tried before a jury. Cf. John Schwartz, As Jurors Turn to the Web, Mistrials are Popping Up, NY Times, March 17, 2009.

3. Misrepresentation. Rule 8.4(c) states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." A Texas judge informed the senior partner of a young lawyer's law firm that the lawyer had misrepresented to the court the need for a delay in a trial because of a death in the family. The judge was able to trace the lawyer's actions through her Facebook page. John Schwartz, A Legal Battle: Online Attitude vs. Rules of the Bar, NY Times, September 12, 2009. A Pennsylvania Advisory Opinion found that a lawyer's attempt to use a third person to gain access to a witness's Facebook page as a friend violated Rule 8.4. Pa. Ethics Op. #2009-02. Similarly, job applicants have had offers of employment revoked when employers questioned their professionalism after reviewing their Facebook pages.

4. Ex Parte Communications. Both the Rules of Professional Conduct and the Code of Judicial Conduct prohibit ex parte communications between lawyers and judges about pending matters, with certain limited exceptions. See S.C. Code of Judicial Conduct Canon 3(B)(7): SCRPC 3.5(b). Communications between a lawyer and a judge who are friends on Facebook about a pending case probably violate the rule. See Public Reprimand of B. Carlton Terry Jr., Judicial Standards Commission Inquiry No. 08-234 (April 1, 2009), www.aoc.state.nc.us/www/public/ coa/jsc/publicreprimands/jsc08-234.pdf. It would also be improper for a judge to conduct independent factual research about the parties to a case on the Internet. Id. Rule 4.2 prohibits a lawyer from communi-
5. Advertisements. SCRPC 7.1 provides that a lawyer may not make “false, misleading, deceptive, or unfair communications about the lawyer or the lawyer’s services.” The rule and the comments provide specific applications of this principle. Rule 7.2 imposes a number of restrictions on lawyer advertisements, including a requirement that any advertisement be filed with the Commission on Lawyer Conduct unless it contains only directory information and will not be publicly disseminated. Rule 7.3 deals with solicitation of clients, whether in person, electronically, or by direct mail solicitation. Use of social networking sites poses a number of issues under these rules.

First, is the use of a site an advertisement subject to Rule 7.2, including the filing requirement? Comment 1 to Rule 7.2 states that advertising involves “an active quest for clients.” Thus, if a lawyer is using a site such as LinkedIn, through which people can post resumes, the requirements of Rule 7.2 almost certainly apply. If lawyers want to participate personally in social networking sites without complying with these rules, they should establish a personal page with a site that is not directed at business contacts and avoid any references that could reasonably be interpreted as seeking business, e.g. “My practice involves ... You can contact me at ...” On the other hand, a blog on the law that does not directly seek to promote the lawyer’s practice is probably not subject to Rule 7.2.

Second, if a lawyer uses a site aimed at generating business contacts, like LinkedIn, the lawyer should review the rules carefully when establishing his or her profile. For example, LinkedIn has a section on “specialties.” Lawyers cannot advertise that they are specialists, however, unless they have been certified as a specialist under the state’s certified specialist program. SCRPC 7.4(b). A lawyer could list that the lawyer practices in certain areas, but should include a disclaimer stating that the lawyer is not certified as a specialist by the S.C. Supreme Court.

Third, LinkedIn also has a section on recommendations in which the member can ask other members to recommend the member. Under the South Carolina rules, client testimonials are improper. SCRPC 7.1(d). While there is a substantial question about the constitutionality of this provision—see Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (indicating that truthful advertising may be regulated only if the state establishes a substantial interest in the regulation and the regulation is in proportion to the interest—prudent lawyers will avoid seeking testimonials through social networking sites. In my opinion a lawyer should not be ethically responsible for an unsolicited testimonial from a client, but the lawyer should use reasonable efforts to prevent such


7. Formation of an Attorney-Client Relationship.

LinkedIn has a section on “specialties.” However, lawyers cannot advertise that they are specialists unless they have been certified as a specialist under the state’s certified specialist program.
CODY W. SMITH, JR.

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#00-17 (lawyer may represent only
seller at real estate closing, but if
lawyer provides advice to buyer,
attorney-client relationship may
be formed).

I am sure that I have over-
looked some important ethical
issues with regard to social net-
working sites. My goal, however, is
to alert lawyers to both the old and
the new in these sites. The old in
the sense that traditional rules of
ethics apply to these forms of com-
munications. The new in that the
social networking sites dramatically
increase the number of professional
communications that lawyers can
make, and accordingly increase the
ethical risks associated with such
communications.

The author thanks Barbara
Seymour, Deputy Disciplinary Counsel,
and attorney Melissa Brown for their
insight and comments. This column
offers the views of the author, not nec-
essarily those of Disciplinary Counsel,
the Commission on Lawyer Conduct,
or Ms. Brown.

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South Carolina Lawyer
Ethics Watch

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Changes in the Disciplinary Rules Governing Lawyers and Judges. The Supreme Court adopted action plans for implementing certain recommendations of the ABA review committee on the disciplinary process. Probably the two most important changes are increased participation by nonlawyers in the disciplinary process and increased authority given to disciplinary counsel. Rules adopted by the Court effective January 1, 2010, increase public representation in the lawyer disciplinary process from two to 16 members. Six nonlawyer members will join the Commission on Lawyer Conduct immediately, while eight will be added through replacement of attorney members as attrition permits. For the Judicial Conduct Commission, the number of public members increases from two to eight. The Court also granted disciplinary counsel greater discretion in conducting investigations. The Court carefully considered a number of other recommendations of the ABA advisory committee but rejected suggestions where it was unclear that the benefit would exceed the cost or where increased delay was a likely consequence. In particular, the Court rejected suggestions for increased discovery and for disciplinary counsel to handle presentations before the Character and Fitness Committee.


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

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

Formal opinions issued during the year. The ABA Committee on Ethics and Professional Responsibility issued two opinions during the year:
• #09-454, Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense
• #09-455, Disclosure of Conflicts Information When Lawyers Move Between Law Firms
Attorney-client privilege issues arise frequently in litigation. Two recent cases highlight important substantive and procedural aspects of the privilege.

*Costco Wholesale Corp. v. Superior Court*, 219 P.3d 736 (Cal. 2009), dealt with the issue of when an attorney’s opinion letter is subject to the attorney-client privilege. In 2000 Costco retained an employment law firm to provide legal advice as to whether the managers of its warehouses were exempt from California’s wage and hour laws. An attorney with the firm interviewed two managers, with the understanding that the conversations would remain confidential. The attorney wrote a 22-page opinion letter, which the attorney and Costco understood would be confidential. Several years later Costco employees filed a class action claiming that Costco had misclassified some of its managers as exempt employees. During discovery plaintiffs sought to compel discovery of the opinion letter. Costco objected on grounds of attorney-client privilege and work product. Plaintiffs argued that the letter contained unprivileged information and that Costco had waived the privileges by placing the letter in issue.

The trial court ordered a discovery referee to review the letter. The referee produced a heavily redacted version that disclosed those portions of the letter involving “factual information about various employees’ job responsibilities” because this information was not protected by either the privilege or the work product doctrine. The California Supreme Court reversed the decision of the Court of Appeals. In doing so the Court made three important rulings with regard to the attorney-client privilege.

First, substantively the Court held that the letter was protected in its entirety irrespective of its content:

> [W]hen the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged. In sum, if, as plaintiffs contend, the factual material referred to or summarized in Hensley’s opinion letter is itself unprivileged it may be discoverable by some other means, but plaintiffs may not obtain it by compelling disclosure of the letter. 219 P.3d at 743.

Second, as a matter of trial procedure, the Court held that under the California Evidence Code, the trial court could not order an in camera review of the communication to determine if it was subject to the attorney-client privilege. The Court outlined the proper procedure for dealing with such cases. If a party seeks to obtain material that the possessor claims is subject to the attorney-client privilege, the trial court must first determine based on an analysis of the facts surrounding the communication (but not the communication itself) if the communication was a confidential one between attorney and client. If the party seeking discovery of the communication claims that it was made to an attorney acting in a nonlegal capacity (a member of a board of directors, a business advisor, or a trustee, for example), the court must decide if the dominant purpose of the relationship was legal advice. If not, the privilege does not apply and the communication must be disclosed. Similarly, if a party claims that protection of the attorney-client privilege has been waived (for example, by disclosure to a third party), the court must assess this argument without reviewing the communication itself. The Court noted that the party claiming the privilege could always voluntarily disclose the communication in camera to rebut an argument that the privilege does not apply. In addition, if the trial court finds that the privilege does not apply or has been waived, it can then order an in camera review of the communication to determine if some form of protection is nonetheless warranted.

Finally, as a matter of appellate review, the Court held that use of a prerogative writ to obtain immediate appellate review was proper because the party who is subject to a discovery order requiring it to reveal confidential information would be faced with the intolerable choice to either succumb to an order to disclose the material or refuse to disclose and face possible sanctions for contempt.

While the California Supreme Court in *Costco* allowed immediate appeal of an order directing disclosure of material subject to a claim of attorney-client privilege, the U.S. Supreme Court reached the opposite conclusion as a matter of federal law in *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009). Carpenter brought suit against Mohawk Industries for wrongful termination of his employment relationship. Carpenter claimed that Mohawk fired him because he complained that the company was hiring undocumented aliens. He sought to compel information concerning his meeting with counsel retained by the company and the company’s decision to fire him. The district court held that the material was subject to attorney-client privilege but ruled that the company had waived the privilege by contending that Carpenter’s termination was justified in connection with a class action suit against the company. The district court refused
to certify the case for interlocutory appeal under 28 U.S.C. §1292(b).
Carpenter sought to appeal, but the Court of Appeals dismissed for want of jurisdiction, finding that an order compelling production of material arguably subject to attorney-client privilege was not appealable under the collateral order exception to the final judgment rule for appeals. Resolving a split among the circuit, the Supreme Court affirmed, holding that the collateral order exception

**South Carolina appellate courts have not dealt with the issue of whether an opinion letter from lawyer to client...is subject to the attorney-client privilege in its entirety.**

did not apply to denial of claims of attorney-client privilege.

The Court recognized the importance of the attorney-client privilege but posed the question as “whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.” The Court concluded that post-judgment appeals were generally sufficient to protect the rights of litigants and to maintain the integrity of the attorney-client privilege. Appellate courts can protect against violation of the privilege by reversing trial court decisions on appeal and remanding for new trials in which the privileged material is excluded. In addition, litigants have several potential avenues of appellate review aside from the collateral order exception: First, the district court may be persuaded to certify the question for immediate appeal. Second, the litigant could refuse to comply with the order, incur sanctions or a contempt order, and appeal from these final orders. Third, a litigant could seek review by writ of mandamus. The Court pointed out that any harmful “spillover” effects of disclosure to other related cases could be minimized through protective orders. On the other hand, allowing piece-meal appeals would seriously undermine the efficient administration of justice.

What is the situation under South Carolina law with regard to the substantive and procedural issues raised in these two cases? **With regard to appealability**, discovery orders, including an order compelling production of material arguably subject to the attorney-client privilege, are interlocutory and therefore are not immediately appealable. *Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 582 S.E.2d 405 (2003). A party may refuse to comply with the order, be held in contempt, and appeal from the final order of contempt. *Id.* However, the Supreme Court has the power to grant a writ of certiorari to consider an appeal based on exceptional circumstances. See *Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009). It should be noted that appellate courts review decisions regarding the attorney-client privilege under a limited abuse of discretion standard. *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (2005). **With regard to in camera review**, the S.C. Supreme Court has held that trial courts should determine the application of the privilege by examining all the facts and circumstances without first requiring disclosure of the claimed privileged material. *State v. Doster*, 276 S.C. 647, 284 S.E.2d 218 (1981). However, if necessary to determine the application of the privilege, a court may examine the material in camera to make the determination of whether the privilege applies. *Tucker, supra.* **With regard to the substantive issue in Costco**, South Carolina appellate courts have not dealt with the issue of whether an opinion letter from lawyer to client containing factual as well as legal information is subject to the attorney-client privilege in its entirety. If this issue arises, the reasoning of the court in *Costco* is likely to be influential.
During the last several months lawyers, judges, legislators, and members of the public have been engulfed in discussion over the Segars-Andrews case. On December 18, the Judicial Merit Selection Commission issued its report in which it found by a vote of 7-3 that Judge Segars-Andrews was unqualified for reelection to the Family Court of the Ninth Judicial Circuit, seat 1.

The Commission’s decision to find her unqualified was based solely on her conduct in dealing with a disqualification motion in a divorce case. Judge Segars-Andrews had conducted the hearing and had issued her Instructions for Order in the case to be prepared by the wife’s counsel when she mentioned the case to her husband, who reminded her that his partner had been cocounsel with one of the wife’s lawyers in a personal injury case that had been concluded about a year earlier. The case resulted in a large fee to her husband’s firm; his share was about $300,000. Judge Segars-Andrews disclosed these facts to the parties and initially indicated that she had a financial and continuing relationship with her husband’s law firm, which raised suspicions about her impartiality that were compounded by connections between opposing counsel and her husband’s law firm and by her service on the board of the Office of Judicial Conduct.

Three members of the Commission dissented. They concluded that she acted in good faith, and there was “no showing of a pattern of misconduct or that Judge Segars-Andrews is otherwise unfit to serve as a judge.” Judge Segars-Andrews filed suit against the Commission, claiming that the Commission was unconstitutionally organized because it contained six members of the legislature. She argued that membership on the Commission by six legislators violated the state constitutional prohibition against dual office holding, that majority voting control of the Commission by members of the legislature was inconsistent with the constitutional provision creating the Commission because it did not ensure independence from the legislature, and that the Commission’s decision violated the principle of separation of powers because the Commission was in essence reversing decisions made by the judiciary.

The Supreme Court decided on January 23 to hear the case in its original jurisdiction. On March 23 the Court rejected her arguments and dismissed the complaint against the Commission.

While Judge Segars-Andrews’ case is now over, it raises some important issues and indicates some structural defects in our judicial selection process on which I wish to comment. In particular, I write on four points raised by the case. Two deal with the procedures for judicial disqualification, while two deal with the process used by the Judicial Merit Selection Commission.

1. Changing the standard for appellate review of judicial disqualification decisions. In order to reverse a decision based on a judge’s refusal to disqualify himself or herself, the appellant must show “prejudice.” This was the standard used by the Court of Appeals in affirming Judge Segars-Andrews’ decision not to disqualify herself. However, prejudice is almost impossible to prove. Such a high standard leaves litigants who claim that a judge should be disqualified with the feeling that their allegations have not been heard and that they have not received their day in court. I suggest that the Supreme Court reconsider the prejudice standard for review of disqualification decisions. Instead, the appellate court should consider the merits of the motion for disqualification. If the court finds that the judge should have disqualified himself or herself, then prejudice should be presumed and the case should be reversed for a new trial before a different judge, unless the other party is able to show that the judge’s participation was not prejudicial. This approach is based on the principle that an impartial judge is a fundamental

2. Giving counsel discretion to inform the court of circumstances known to counsel that might reasonably lead to the judge’s disqualification.

Counsel for the husband complained that while Judge Segars-Andrews may have honestly forgotten about the relationship between her husband’s firm and the wife’s cocounsel, the cocounsel for the wife almost certainly knew about the relationship and should have disclosed it to the court. This charge is not well founded because even if cocounsel knew about the relationship, his duty of confidentiality to his client would preclude disclosure of the matter to the court. See SCRPC 1.6. Rule 3.3, the duty of candor to the court, is an exception to the duty of confidentiality to the client, but disclosure of information that would be the basis of a judge’s disqualification is not covered by Rule 3.3. I suggest that the Professional Responsibility Committee consider proposing an amendment to Rule 3.3 that would give lawyers professional discretion to reveal to the court information that the lawyer reasonably believes raises a substantial question of whether the judge is disqualified. Such a rule should not be burdensome on the bar. Judges already have an obligation to keep reasonably informed of their personal and financial relationships and those of their spouses that could lead to disqualification (Code of Judicial Conduct, Canon 3(E)(2)), so the rule would apply only when a judge either forgot about the matter or concluded privately that it was not disqualifying. Disclosure by counsel could prevent judges from being placed in the awkward situation that Judge Segars-Andrews faced of being on the verge of issuing a final order only to learn of possibly disqualifying circumstances.

3. Changing the Commission’s procedure for handling complaints against judges to increase the likelihood that the Commission’s decision will be based on the judge’s entire record. Under current Commission rules if an individual wishes to testify at the judge’s public hearing, the individual must complete a sworn affidavit. Commission Rule 13. If the individual submits a timely affidavit, the practice of the Commission is to allow the person to testify against the judge, Commission Rule 15(c), unless the individual has made repeated complaints against the same judge. The judge receives the individual’s affidavit and has the right to respond both in writing and at the hearing. At the conclusion of the hearing the Commission decides what recommendation to make regarding the judge. Rule 15(d).

In my opinion this procedure has two flaws. First, it gives undue weight to individual complaints. The fact that the judge may have handled thousands of cases with competence and ethical propriety is hardly mentioned or considered. The Commission has created citizens committees throughout the state to evaluate judges and provide recommendations to the Commission. The Low Country Citizens Committee gave Judge Segars-Andrews a recommendation of “well qualified” on all criteria used by the Commission, but this recommendation was apparently given little or no weight by the Commission. Second, the Commission’s current procedure has the members of the Commission making a decision immediately after the hearing. If a judge is at risk of losing his or her job, a more deliberative approach seems appropriate. I suggest that after a public hearing, if the Commission tentatively votes to find a judge unqualified, the Commission should not release its decision or the individual votes of its members. Instead, the Commission should inform the judge that the Commission recommendation is deferred until a final hearing. At the final hearing the judge should be allowed not only to present evidence to refute the particular complaint against the judge, but should also be allowed to present evidence bearing on any of the categories on which the Commission evaluates the judge. Representatives of the relevant citizens committee, bar associations, and other organizations should also be allowed to present evidence. This procedure will increase the likelihood that the Commission’s decision on the judge is based on the judge’s entire record, not an isolated instance.

4. Developing a standard for deciding when a judge is unqualified based on conduct in a single case. The Segars-Andrews case presents a stark question: When should a judge be found unqualified based on the judge’s actions in a single case? It is clear that a judge’s conduct in a single case can and should sometimes be the basis of finding the judge unqualified. Examples are obvious: a judge who accepts a bribe or one who makes sexual advances to a party. Putting aside these extreme cases, it should not be sufficient to find a judge unqualified that the judge has, according to a party or the Commission, made a mistake and a litigant is left with the feeling that justice was not done. We want judges to make as few mistakes as possible, but a decision that at the time seems correct may in hindsight be viewed as a mistake. The subjective feelings of the litigants are relevant to an evaluation of a judge but cannot be determinative because their attitudes are not objective. I offer the following two suggestions: A judge should be found unqualified if the judge has engaged in a series of actions or evidences a pattern of behavior that casts substantial doubt on the judge’s competency, honesty, temperament, or judgment. If the judge is being evaluated

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be devoted to trial issues. Not only are trial-related CLEs easily available at the Bar Convention via the Trial and Appellate Advocacy Section’s seminars, but several other trial-related courses are offered, including Judge Joe Anderson’s The Art of Advocacy and the S.C. Defense Trial Attorneys’ week-long skills course. The Bar recently held its first ever three-day NITA trial skills workshop and also offers many trial skills courses online.

Great Britain does so much to ensure advocacy in their courtrooms. We should take the best of their system and make ours better.

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based on the judge’s conduct in a single matter, however, the standard should be more demanding before the judge is found unqualified. I suggest that Commission members use the following standard in this situation: Does the judge’s conduct in this matter create such a high level of doubt about the judge’s competency, honesty, temperament, or judgment that the judge should not be allowed to continue to serve? Under this standard the judge who takes a bribe or engages in sexual advances should clearly not be reappointed. I propose these standards, not as rules, but as guidelines for members of the Commission to use in discussions with their fellow members and as the basis for making their individual decisions.

The Segars-Andrews case is unfortunate no matter how you look at it. A litigant feels that justice was not done. A judge who has served the state well for 16 years, who is highly regarded by the bar, and who was found to be well qualified by the local citizens committee is losing her job. The Supreme Court faced difficult constitutional issues that pitted the judicial system against the legislature. Perhaps adoption of the recommendations in this article might reduce the risk that such a situation could reoccur.
The modern era for lawyer advertising began with the Supreme Court’s decision in *Bates v. Arizona State Bar*, 433 U.S. 350 (1977). In *Bates* the Court held that truthful advertising in newspapers about the price and availability of certain routine legal services was entitled to constitutional protection under the First Amendment. Since *Bates* the Supreme Court has decided a number of lawyer advertising cases. With rare exceptions, the Court has invalidated state ethics rules that prohibited or restricted lawyer advertising. Despite these decisions, state supreme courts have generally been hostile to lawyer advertising and have continued to impose numerous restrictions on such communications. The recent decision of the Second Circuit in *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010), provides further support for the view that advertising rules currently on the books in many states, including several of the South Carolina rules, are unconstitutional.

In 2007 the appellate divisions of the New York Supreme Court, which have the authority under New York law to issue rules of ethics governing the profession and to discipline attorneys, adopted substantial revisions to New York’s disciplinary rules regulating lawyer advertisements and solicitations. The amendments that were the subject of the court’s decision include prohibitions on:
- client endorsements or testimonials for law firms with respect to a matter that is still pending;
- portrayals of judges or fictitious law firms;
- attention-getting techniques that have no relationship to legal competence;
- use of trade names, nicknames, or symbols that imply an ability to obtain results in a matter;
- any form of lawyer-initiated communication seeking clients for personal injury or wrongful death arising out of a specific incident within 30 days after the incident occurs. *Id.* at 84-85.

Plaintiff Alexander & Catalano (A&C) is a personal injury law firm that employs various forms of advertisements in the broadcast and print media, including jingles, special effects (wisp of smoke and electrical currents around the firm’s name), dramatizations, and comical scenes. The advertisements depicted firm attorneys towering above buildings, running to clients so fast that they appear to be blurs, and providing legal assistance to space aliens. The ads referred to the firm as “heavy hitters” and employed phrases such as “think big” and “we’ll give you a big helping hand.” *Id.* at 83-84.

The Court of Appeals, largely affirming the district court, found that New York’s content-based rules limiting lawyer advertising were unconstitutional, with the exception of the rule prohibiting portrayals of fictitious law firms. Also affirming the lower court, the Court of Appeals found that the 30-day moratorium on lawyer-initiated communications seeking personal injury clients was constitutional. *Id.* at 83.

The State of New York argued that it could bar lawyer advertising that was “irrelevant, unverifiable, and noninformational,” even if it did not meet the standard for regulation of commercial speech. *Id.* at 88. The court rejected this argument. Reviewing past Supreme Court decisions, the court found that commercial speech was entitled to First Amendment protection so long as it was not misleading or concerning unlawful activity. *Id.* at 88.

Under this standard the court found that the prohibition on the portrayal of fictitious law firms was constitutional. *Id.* at 89-90. The court noted, however, that its decision was limited to portrayal of membership in a fictitious law firm, e.g. “The Dream Team.” It would not necessarily preclude a portrayal of a lawyer in the firm arguing against a fictitious law firm. *Id.* at 90.

The court applied the test for constitutionality of regulation of commercial speech from the *Central Hudson* case:

[1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.


Turning to the content-based restrictions, the court considered the state’s argument that it had a substantial interest in these restrictions because they were designed to prohibit advertisements from containing deceptive or misleading content. *Id.* at 90. The court agreed with the state on this point, finding this to be a substantial interest. *Id.* at 91. The court also found a second substantial interest in protecting the legal profession’s image and reputation. *Id.*

The third prong of the *Central Hudson* test requires the regulation to materially advance the state’s interest. Here the state’s burden cannot be satisfied by speculation or conjecture, but must be supported by evidence.
The evidence submitted by the state consisted of (1) history, consensus, and common sense, (2) existing unchallenged rules of the New York Code of Professional Responsibility, and (3) the New York State Bar Association’s Task Force Report. The state failed to present any statistical or anecdotal evidence of consumer complaints of advertising that the rules sought to prohibit, nor did the state present evidence of studies from other jurisdictions. Id. at 92.

With regard to client testimonials, the court found that the Task Force Report did not support total prohibition of client testimonials, nor did common sense justify an absolute ban. Id. at 92.

As to portrayals of judges, the court agreed that a portrayal showing or implying an ability to influence the judge would be constitutional because such an advertisement would be misleading and would involve illegal activity. However, A&C’s portrayal of a judge stated that the judge was there to make sure the trial was fair. This type of advertisement was not misleading and might well be informative. Id. at 93.

The state argued that the prohibition on irrelevant techniques was constitutional because it materially advanced the state’s interest in factual, relevant attorney advertisements. The court disagreed. It noted that irrelevant and misleading were not the same, and the state had not introduced any evidence to show that the advertising techniques in question were misleading. In fact, the Task Force Report did not include recommendations to prohibit this form of advertising. Moreover, the court noted that common sense did not support the conclusion that ordinary consumers would be misled into thinking that attorneys in A&C were taller than buildings or could run so fast that they became blurs. Id. at 93-94.

The prohibition on nicknames, mottos, or trade names suffered a similar fate. While the opinion recognized that names that implied an ability to achieve a result were usually misleading, the court nonetheless struck down the statute because of lack of evidence. In particular, the Task Force Report failed to recommend outright prohibition of all trade names or mottos. Id. at 94.

Under the fourth prong of the Central Hudson test there must be a reasonable “fit” between the state’s interest and the means chosen to advance the interest. Id. at 95. Under this prong, even if the regulations involved in the case had passed the third prong, the court would still have found them to be unconstitutional because they wholly prohibited communications that were only potentially misleading. Id. at 96. As the court stated, “the categorical nature of New York’s prohibitions would alone be enough to render the prohibitions invalid.” Id. at 96. In addition, the state failed to show how any potential abuses could not be avoided through less restrictive means, such as disclaimers. Id. at 96.

The court then turned to the moratorium provision. In Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995), the Supreme Court upheld the constitutionality of a Florida rule prohibiting direct mail solicitations of accident victims and their families in personal injury cases for 30 days after the accident occurred. The New York statute went further because it applied to all media through which a lawyer might communicate with victims or their family members, including television, newspaper, and Internet advertisements. Based on concessions of the state, the court construed the rule not to apply to broad generalized mailings, generalized advertisements that referred to an attorney’s past experience even when they appeared near news stories about the particular occurrence, and advertisements informing readers of the attorney’s past experiences with the particular product where the product has caused repeated personal injury problems. Id. at 97. In essence, the rule as interpreted only applies when the communication mentions the specific occurrence giving rise to the claim. Indirect references to the attorney’s ability to handle cases involving the occurrence would be permissible. For example, an advertisement about the lawyer’s experience in handling past airline disaster cases would be permitted under the statute as presented to the court.

As so construed, the court upheld the constitutionality of the statute prohibiting communications within 30 days after the occurrence. The court found that the state had a substantial interest in protecting the privacy of victims and their families and the reputation of lawyers. The focus of its analysis was on whether the statute was narrowly tailored. Unlike the rule in Went for It, the statute applied to any form of communication. Nonetheless, the court found a reasonable fit between the state’s interest and the scope of the regulation. The court found that a technologically specific restriction was not constitutionally required. The impact on privacy of victims and their families was essentially the same, whether the affirmative act of the recipient involved walking to the mailbox and opening a letter or picking up a paper or turning on a radio or television. Id. at 99. While the Internet may have once required more affirmative conduct than these other forms of communication, this is no longer true. Thus, the court concluded that for the purpose of analyzing the validity of this regulation, a distinction among media was not significant. Id. at 100.

Alexander v. Cahill is the most significant case on lawyer advertising since the Supreme Court decided Went for It in 1995. The news for opponents of lawyer advertising is not good. Under Alexander any restriction must be supported by significant evidence. Even if regulators produce evidence to support the restriction, categorical bans are likely to be found to be unconstitutional. Finally, a state may be able to extend the moratorium on direct mail communications with accident victims and their families to the media in general, but only to communications that specifically refer to the occurrence giving rise to the claim. With regard to South Carolina, the reasoning of Alexander calls into question a number of South Carolina Rules of Professional Conduct.
Disclosure Obligations of Prosecutors

By Nathan M. Crystal

Directly across from the desk of the prosecutor hangs a small, black and white photograph. It shows a thin, aging man, unshaven, holding the bars to his cell with both hands. The photograph seems more than a moment in time. It appears to be a video of a man not moving, only staring with vacant eyes. It is said that a picture is worth a thousand words, but what does this photograph mean? Its placement indicates that it is significant, but how and why? Is the man in the photograph a famous killer that the prosecutor was able to convict? Viewed this way, the photograph is a trophy. Or, is the photograph a statement that the work of the prosecutor can deprive individuals of one of their most fundamental rights—their liberty? Considered from this perspective, the photograph is a reminder to the prosecutor of his obligation not simply to convict, but to do justice. Probably the most important aspect of the prosecutor’s obligation to do justice is the duty to disclose exculpatory material. But this obligation, like the photograph in the prosecutor’s office, is ambiguous.

Consider the following hypothetical: The defendant is accused of robbery of a convenience store. The clerk on duty at the time of the robbery and a customer in the store have identified the defendant in a lineup. Both are very confident of their identifications. The prosecutor has learned from the police that a second customer was about to enter the store when she witnessed the robbery taking place. The second customer was unable to identify the defendant at a photo lineup. That customer has told the police, however, that she was very frightened by the situation and was only able to obtain a quick look at the robber. What are the prosecutor’s obligations?

Under a line of cases beginning with Brady v. Maryland, 373 U.S. 83 (1963), the U.S. Supreme Court has held that prosecutors have an obligation under the due process clauses of the Fifth and Fourteenth Amendments to disclose exculpatory evidence that is material to the guilt or sentencing of a defendant. The duty to disclose also applies to evidence that would tend to impeach the credibility of a government witness whose testimony was central to the government’s case. Giglio v. United States, 405 U.S. 150 (1972).

While the disclosure obligations set forth in Brady and Giglio appear to be broad, they are in fact quite limited. First, the prosecution’s duty to disclose turns on whether the evidence is “material.” The Supreme Court has defined evidence as material “when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” Cone v. Bell, 129 S.Ct. 1769, 1783 (2009). Prosecutors who do not wish to disclose evidence can often justify nondisclosure (at least in their own minds) by reasoning that the evidence is not material. In the hypothetical store robbery, the prosecutor could decide that the second customer’s testimony does not provide a reasonable probability that the result would have been different. Two witnesses are positive in their identifications, the second customer’s ability to observe was impaired, and the second customer has only failed to identify the defendant rather than rejecting the defendant as the perpetrator.

Second, the duty to disclose under the Brady/Giglio rule does not have a specific time for disclosure. Delay in disclosure is harmful to the defense in itself, but becomes even more significant in light of the Supreme Court’s decision in United States v. Ruiz, 536 U.S. 622 (2002).
exculpatory or sentencing material. ABA Model Rule 3.8(d) provides that in a criminal case a prosecutor shall “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.” The rule has been adopted in almost all states, including South Carolina.

Recently the ABA Committee on Ethics and Professional Responsibility issued Opinion #09-454 discussing the obligations of prosecutors under Rule 3.8(d). Both the text of the rule and the opinion make clear a number of important differences between the constitutional standard and the ethics rule for disclosure. 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. 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 practic-al.” 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.

Despite the existence of this ethics rule, for many years ethics charges against prosecutors for failing to disclose exculpatory or mitigating material were rare. However, in recent years this “hands off” attitude by disciplinary authorities toward prosecutors seems to be changing. In the highly-publicized Duke Lacrosse case in 2007, North Carolina prosecutor Michael Nifong was disbarred for improper prejudicial pretrial publicity and failure to disclose exculpatory material. This year California prosecutor Benjamin Field was suspended for four years for misconduct including intentionally withholding key evidence from the defense in two cases. Criminal charges against U.S. Senator Ted Stevens were dismissed because the prosecutors withheld exculpatory evidence. The case has prompted a review by the Justice Department of its policies on disclosure and renewed calls for amendment to Federal Rule of Criminal Procedure 16 to broaden the disclosure obligations of prosecutors. While the trend in the case law is to hold prosecutors ethically responsible for violation of their disclosure obligations, there are exceptions. The Ohio Supreme Court recently, and in the opinion of this author erroneously, held that the Ohio ethics rule, which was very similar to the ABA Model Rule, was equivalent to the constitutional standard, and only required disclosure of “material” information. See Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125 (Ohio 2010).

South Carolina is one of few states that has a significant body of case law on the disclosure obligations of prosecutors. Our Supreme Court has disciplined solicitors for violation of Brady obligations. See In re Grant, 343 S.C. 528, 541 S.E.2d 540 (2001); Cf. In re Humphries, 354 S.C. 567, 582 S.E.2d 728 (2003) (deputy solicitor suspended for one year for failure to disclose recording of conversation between defendant and his counsel). In addition, the Court has held that a solicitor is subject to discipline for failure to properly supervise a deputy solicitor with regard to his disclosure obligations. In re Myers, 355 S.C. 1, 584 S.E.2d 357 (2003). The South Carolina Bar Ethics Advisory Committee has opined that a prosecutor has a duty to reveal to the defense that police officers gave false and incomplete statements to their superiors during an official department investigation in all cases in which any one of the officers will be a witness during trial, thereby placing the officer’s credibility at issue. S.C. Bar Ethics Adv. Op. #03-11.

The S.C. Supreme Court, however, has not faced the issue of whether a solicitor is subject to discipline for failure to comply with the requirements of Rule 3.8(d) when those obligations go beyond what is legally required. Because of the limitations of the Brady rule, serious enforcement of Brady obligations must be through the disciplinary process. In the opinion of this author, the S.C. Supreme Court should follow ABA Opinion #09-454 and reject decisions like the Ohio Supreme Court’s decision in Kellogg-Martin.

With regard to post-conviction disclosure, solicitors in South Carolina do not have any legal or ethical obligation to disclose exculpatory material. South Carolina has not adopted ABA Model Rules 3.8(g) and (h), which require disclosure of exculpatory evidence post conviction in some situations. South Carolina does have a statutory procedure by which defendants who have been convicted of certain serious offenses may apply for post-conviction testing of DNA evidence. S.C. Code Ann. §17-28-10 et seq. The statute provides that solicitors may consent to such testing. Id at. §17-28-110. The statute does not apply to non-DNA evidence that comes to the attention of a solicitor after a conviction. Thus, with regard to post-conviction disclosure, solicitors have substantial discretion as to whether to consent to DNA testing and whether to disclose non-DNA exculpatory evidence.

Few solicitors will have photographs on their walls of individuals who have been imprisoned, but any conscientious solicitor will at least have a mental image of the potential fate of a defendant. Whether the image is physical or mental, however, there should be no ambiguity in the minds of solicitors as to their obligations. Their commitment is to justice, and as the U.S. Supreme Court has said on numerous occasions, the “prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.” Cone v. Bell, 129 S.Ct. 1769, 1783 n. 15 (2009).
Ethics Watch

In the hypothetical presented, the potential client would probably be treated as a prospective client because a person talking with a lawyer's assistant and providing information to the assistant would have a reasonable expectation of forming an attorney-client relationship. If the person provided the assistant with damaging confidential information, such as the fact that the prospective client had committed adultery, that would preclude the lawyer from handling a case on behalf of the other spouse under Rule 1.18(c).

What can a lawyer do to avoid the possible disqualification resulting from meeting personally or through an assistant with a prospective client? There are several options: First, before undertaking an initial interview the lawyer could seek the prospective client's informed consent to representation of the adverse party and to the use of any information revealed in the interview if an attorney-client relationship is not formed and the adverse party later seeks to retain the lawyer in connection with the matter. Comment 5 to Rule 1.18 expressly recognizes this possibility. The consent must be carefully drafted because informed consent requires the lawyer to communicate "reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(g) and comments 6-7.

Some attorneys may feel uncomfortable seeking such a broad informed consent from a prospective client either because they find it objectionable to use confidential information against a former prospective client or because they are concerned that a prospective client would be offended by such a request and seek representation elsewhere. Instead, the attorney could establish a firm policy aimed at reducing the possibility of receiving disqualifying confidential information during an initial interview. For example, the following notice could be given:

Thank you for expressing an interest in retaining this firm. The first step in the process is for you to provide us with basic information about you and your case so that we can determine whether we are in a position to handle your case and if so the terms of our engagement. Please do not share with us any confidential information. At this stage please limit the information you give us to answers to the questions posed by me or my assistant. Such a policy is, of course, no guarantee that the lawyer will not receive disqualifying confidential information because the client may ignore the warning and blur out the information anyway, but it does reduce the possibility.

A third possibility builds on the first and second; it involves a limited informed consent coupled with an effort to reduce the likelihood that disqualifying confidential information is received at the initial interview. This approach deals specifically with the possibility that such information is in fact received by an assistant. Consider the following consent by the client:

Consent to Conditions of Initial Interview

Thank you for expressing an interest in retaining this firm. The first step in the process is for you to provide us with basic information about you and your case so that we...
can determine whether we are in a position to handle your case and if so the terms of our engagement. **Please do not share with us any confidential information.** At this stage please limit the information you give us to answers to the questions posed by me or my assistant.

If this firm is not engaged to represent you in this matter for any reason, we reserve the right to represent any party, including a party adverse to you, with regard to this matter. If this firm undertakes such representation, we will not disclose or use against you any information that you provided to us. In addition, my assistant will be screened from any participation in this matter using the screening procedures set forth in the South Carolina Rules of Professional Conduct. We understand that you may feel unwilling to discuss your case with us under these conditions. If so, we regret not being able to represent you. On the other hand, your consent to these conditions will allow us to proceed with an evaluation of your case.

As to the prospective client, this third possibility should avoid disqualification because the prospective client has given informed consent as permitted by Rule 1.18, and this consent is less extreme than the blanket consent discussed above. As to the other spouse, this third possibility only works to avoid disqualification if the lawyer did not receive any disqualifying confidential information from the prospective client directly or through the assistant about the case. If the lawyer did receive such information and undertook representation of the other spouse, the lawyer would violate his duties to the other spouse by failing to use the information. In addition, if the other spouse sought to retain the lawyer, the lawyer would need to obtain the informed consent of the other spouse to the relationship because the firm’s relationship with the first spouse would probably constitute a conflict, although a waivable one, under Rule 1.7(a)(2) (interest of a third person, the former prospective client).

Finally, if the lawyer works in a firm, the lawyer could refuse to handle the case on behalf of the other spouse, but another lawyer in the firm could represent the other spouse with the first lawyer screened from any participation in the matter. Rule 1.18(d)(2). The rules define the procedure for screening. See Rule 1.0(m) and comments 8-10. If an assistant was involved in receiving the information, it would be necessary to screen the assistant as well. Rule 1.18(d)(2) also requires that written notice be promptly given to the prospective client of the screening.

This hypothetical assumes the prospective client is legitimately seeking the services of the attorney. If the prospective client already has or contemplates retaining other counsel, and is simply trying to disqualify the lawyer with whom the contact is made, the prospective client should not be entitled to any protection. Cf. S.C. Bar Ethics Adv. Op. #04-07 (holding that a lawyer may not advise a client to consult with a lawyer for the purpose of creating a conflict of interest).

2. Hypo 2: waiving the attorney-client privilege. **Client comes to attorney’s office to discuss the client’s domestic case. Client is accompanied by a friend or family member who is providing support and advice to client. Does the presence of the friend or family member constitute a waiver of the attorney-client privilege?**

The general rule is that for a communication to be subject to the attorney-client privilege it must be in confidence between lawyer and client. If a third person is present, the communication is no longer in confidence. The leading case in South Carolina on this issue is Marshall v. Marshall, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984). In Marshall the court of appeals held that any voluntary disclosure by a client to third parties waives the privilege not only as to the specific communication but also as to all communications between attorney and client on the same subject. The attorney in that case had routinely sent copies of correspondence with his client, the wife, to her father, who was acting as surety for her legal fees. The court found that an attorney-client relationship did not exist between the attorney and the father simply because the father was responsible for the legal fees. Therefore, the father was a third person, and communications to him amounted to a waiver of the privilege.

The rule stated in Marshall is followed by the majority of courts regardless of whether the disclosure occurs in a testimonial or nontestimonial setting. The Restatement (Third) of the Law Governing Lawyers states:

> General waiver of all related communications is warranted when a party has selectively offered in evidence before a factfinder only part of a more extensive communication or one of several related communications, and the opposing party seeks to test whether the partial disclosure distorted the context or meaning of the part offered.

If partial disclosure occurs in a nontestimonial setting or in the context of pretrial discovery, a clear majority of decisions indicates that a similar broad waiver will be found, even though the disclosure is not intended to obtain advantage as a possibly misleading half-truth in testimony. §79, comment f.

South Carolina courts have not defined what is meant by "subject matter," and there is no clear test in other jurisdictions. The fundamental test is one of fairness, which is based on the totality of the circumstances. See Paul R. Rice, Attorney-Client Privilege in the U.S. §9.31 (on Westlaw).

In the hypothetical presented, what can a lawyer do to avoid waiver of the privilege? The first option is to inform the client of the scope of the attorney-client privilege and the possibility of waiver by disclosure of privileged communications.
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to third parties. The friend or family member could be excused from any attorney-client meetings, and the client could be warned not to share attorney-client communications with this person. However, in some cases the client may want and need the support and advice of a friend or family member. One possible way of maintaining this relationship while preserving this privilege is for the person to be appointed by the client as an agent of the client for the purpose of receiving and making communications related to the case. Communication of information to or from an agent is protected by the attorney-client privilege. Restatement (Third) of the Law Governing Lawyers §70 and comment f (2000). Consider the following agency agreement:

Appointment of Agent

The undersigned, _________ (client) hereby appoints _________ (agent), and agent hereby agrees to act as agent for client for the purpose of receiving or conveying information or documents related to the representation by _________ (attorney) of the client. Agent understands and agrees that he may be asked to participate in meetings involving the client’s case. Agent further understands and agrees that he is subject to a duty of confidentiality. Agent agrees not to use or reveal any information obtained by agent in connection with this agency to anyone without the consent of the client. Agent further understands and agrees that he has no decision-making authority with regard to client’s case; the agency is limited to receipt and delivery of information or documents.

While the two hypotheticals I have discussed in this article arise in domestic practice, issues involving prospective clients and waiver of the attorney-client privilege often arise in business matters and non-domestic litigation. Many of the principles and suggestions discussed in this article would apply in those settings as well.
2010 was a particularly active year for significant ethics developments. I have chosen ten cases and opinions that I consider to be the most significant of the year. For a complete discussion of developments during the year see the website for my book (with Professor Rob Wilcox), the ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT (2010 ed.) available on the Bar's website at www.scbar.org/member_resources/continuing_legal_education/annotated_south_carolina_rules_of_professional_conduct_-2010Edition.

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

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

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

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

Privileges Attorney-client, work product and common interest privileges. In Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 692 S.E.2d 526 (2010), an administrative proceeding to determine whether Tobaccoville was a “tobacco product manufacturer” under South Carolina law, the Supreme Court held that documents shared by the Attorney General of South Carolina
with the National Association of Attorneys General (NAAG) in connection with tobacco regulation and enforcement were subject to the attorney-client privilege. The Court reaffirmed the elements required to establish the attorney-client privilege that it had previously stated in State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 219-20 (1981). On the facts of the case the Court held that documents were subject to the attorney-client privilege even though a traditional attorney-client relationship did not exist because “the AG is a paid member of the NAAG, and NAAG staff attorneys are available to provide legal advice relating to the MSA and tobacco regulation and enforcement.” Id. at 293, 692 S.E.2d at 530.

However, in Tobaccoville the Court held that the work product doctrine did not apply with regard to the documents shared with the NAAG because a document must be prepared “in anticipation of litigation.” This requirement is met when the preparer faces an actual or potential claim; the mere possibility of a claim is insufficient. Materials prepared in the ordinary course of business or pursuant to regulatory requirements are not subject to the doctrine. The Court found that work product protection was not available on the facts of the case, so recognition of the common interest doctrine was not subject to the doctrine. The Court further held that the documents were subject to the “common interest doctrine.” The Court noted that the doctrine was not a privilege but rather an exception to the rule that disclosure of material subject to the attorney-client privilege amounts to a waiver of the privilege. The Court limited its decision to the particular facts of the case, so recognition of the common interest doctrine in criminal or civil cases in South Carolina remains unresolved. Id. at 295, 692 S.E.2d at 531.

Conflicts of Interest

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

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

Unauthorized Practice

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

Practice Restrictions

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

Advertising and Solicitation

Distribution of coupons and brochures. In In re Anonymous Member of the South Carolina Bar, 386 S.C. 133, 687 S.E.2d 41 (2009) (decided December 21, 2009), the Supreme Court held that a lawyer’s distribution of discount coupons to local realtors and lenders for real estate financing did not amount to in-person solicitation in violation of Rule 7.3(a) because the lawyer did not personally contact the intended recipients nor did the lawyer have any control or
supervision over the realtors or lenders. The Court also held that the distribution did not amount to direct mail solicitation in violation of Rule 7.3(d) because not all of the recipients were in need of legal services. See also Ethics Adv. Op. #09-14 (holding that targeted mailings to residents in specific geographical areas or specific communities were not direct mail solicitations subject to the disclosure requirements of Rule 7.3(d); however, depending on the circumstances the mailings could be subject to restrictions contained in other rules).

Professional Obligations

Secret recording. The Supreme Court has rejected a proposal from the Bar to amend Rule 8.4 to permit lawyers acting in their personal capacity to secretly record matters when permitted by law. The Bar had proposed the amendment to address an issue considered by the Ethics Advisory Committee in Opinion #08-13. E-Blast, April 13, 2010.
Confidential Settlement Agreements: What’s Ethically Permitted and What’s Not

By Nathan M. Crystal

In litigation parties often negotiate for confidentiality provisions in connection with settlement agreements. A wide range of motivations can prompt one or both parties to seek such arrangements. For example, defendants in product liability cases may be worried that publicity about the existence or settlement of litigation could prompt other cases or could increase settlement values. Confidentiality provisions with regard to litigation generally fall into two categories: private confidentiality agreements and court orders providing for confidentiality or sealing of records.

Legal restrictions on confidentiality provisions

In most jurisdictions confidentiality agreements are enforceable and court-ordered confidentiality is permissible. Some jurisdictions allow private confidentiality agreements but restrict the use of court orders sealing documents and settlement agreements to situations in which a court finds that the private interests in confidentiality outweigh the public interest in access to information. South Carolina and Texas have adopted this approach. S.C. R. Civ. Proc. 41.1; Tex. R. Civ. P. 76a. The Florida Sunshine in Litigation Act goes further, prohibiting both court orders and private confidentiality agreements dealing with a “public hazard.” Fla. Stat. Ann. § 69.061.

Ethical restrictions on confidentiality provisions

To the extent that a confidentiality agreement is regulated by rule of procedure or statutory law, a lawyer must comply with those rules. See SCRPC 3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on the assertion that no obligation exists).

A South Carolina lawyer who negotiated a confidentiality agreement that calls for court-ordered confidentiality in connection with a case pending in state court must comply with South Carolina Rule of Civil Procedure 41.1. A similar rule (but with some important differences) applies to cases in federal court in South Carolina. See Local Rule 5.03. A South Carolina lawyer appearing pro hac vice in a Florida or Texas case would have to comply with the rules of those jurisdictions. See SCRPC 8.5(b)(1) (for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits govern unless the rules provide otherwise).

Rule of Professional Conduct 5.6

In addition to the legal restrictions on confidentiality agreements, lawyers must comply with Rule 5.6 of the Rules of Professional Conduct. That rule states that a “lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.” The rule applies to both sides of a settlement agreement. Thus, it is improper for a defense counsel to offer a settlement agreement that violates Rule 5.6(b). See Fla. St. Bar Comm. on Prof. Ethics, Op. #04-02 (2005).

Rule 5.6(b) prohibits agreements that directly restrict the practice of law. See ABA Formal Op. #93-371 (settlement agreement prohibiting plaintiff’s lawyer from representing future clients against defendant). The rule is based on three policies: First, permitting such provisions restricts the public’s access to lawyers of their choice. Second, negotiation of such provisions creates a conflict of interest between current clients, prospective clients, and the personal interests of lawyers. Finally, use of such agreements could provide current clients with benefits that bear little relationship to the merits of their claims. See ABA Formal Op. #93-371. The rule applies not only to private settlement agreements, but also to settlements with government entities. ABA Formal Op. #95-394. Similarly, a provision in the employment agreement of corporate counsel prohibiting counsel from representing anyone in the future against the corporation is improper. ABA Formal Op. #94-381.

The rule has been criticized, however, on two grounds. First, the rule impedes settlement because it prevents the parties from agreeing to a provision that the defendant would find valuable and that the plaintiff and his lawyer may be willing to accept. Second, the policy reasons supporting the rule do not withstand analysis and have no empirical support. For example, the argument that the rule restricts the public’s access to lawyers of their choice is dubious because many highly competent lawyers are willing to handle cases against the defendant even if the lawyer who entered into a no-sue agreement could not do so. See Stephen Gillers & Richard W. Painter, Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements, 18 Geo. J. Legal Ethics 291 (2005).

Rule 5.6(b) has been applied to indirect as well as to direct restrictions on the practice of law. An indirect restriction is one that does not specifically prohibit a lawyer from representing future clients, but has an impact on the lawyer’s ability to do so. The Colorado Bar in Op. #94 (1993) advised that provisions in a settlement agreement preventing counsel for the plaintiff from subpoenaing certain records or fact witnesses, preventing plaintiff’s
counsel from using a certain expert, and imposing forum and venue limitations in future cases against the defendant were improper under Rule 5.6(b).

In Ethics Advisory Op. #10-04, the South Carolina Committee advised that another type of indirect restriction on the practice of law was improper. That opinion dealt with a proposed settlement agreement in which the defendant agreed to pay the plaintiff a sum of money. As part of the proposed settlement, 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, i.e. trucking. The lawsuit against the defendant was a matter of public record, and nothing was filed under seal. The settlement agreement did not require court approval. In Opinion 505 (1994) the Texas Ethics Committee had found that prohibitions on "solicitations" by lawyers violated Rule 5.6(b) because solicitations were part of the practice of law. The South Carolina Committee went further: "We need not come to the same conclusion, as Rule 5.6 was not intended to merely protect against specific practice-of-law prohibitions but is aimed more 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. In addition, the committee advised lawyers not to become parties to client settlement agreements: "For Rule 1.6-protected information, the lawyer's participation in the agreement is unnecessary. For unprotected information, the lawyer's participation is improper."

Should indirect restrictions on the practice of law be found to violate Rule 5.6(b)? The answer depends on whether one views the policy arguments in favor of the rule as persuasive. The article by Professors Gillers and Painter makes a strong case that they are not. While Gillers and Painter argue for rule change, that is a long-term, speculative possibility. Their analysis can, however, inform the interpretation of the rule. Under this view indirect restrictions should be narrowly construed.

If the view of this article—that Rule 5.6(b) should be narrowly construed when applied to indirect restrictions on the practice of law—is accepted, how should such restrictions be treated? I suggest three categories. Some indirect restrictions should be per se improper. In this category would fall extreme restrictions that, while not explicitly preventing representation of future clients, would substantially interfere with the handling of future cases. The Colorado opinion discussed above is an example of an indirect restriction that should be per se improper. This restriction interferes with the lawyer's independent professional judgment in handling future cases and is inconsistent with the lawyer's obligation to competently represent future clients.

Similarly, a prohibition on the lawyer's use of information obtained during the representation of a client should be improper. In ABA Formal Op. #00-417, which was cited by the South Carolina Committee in Opinion #10-04, the ABA committee ruled that an agreement by counsel not to use information was improper because it would as a practical matter prevent the lawyer from representing future clients in violation of Rule 5.6(b). However, the committee held that a provision in which a lawyer agreed not to disclose (rather than use) information related to the representation was permissible because such a provision was nothing more than what is required by the Model Rules absent client consent. A settlement agreement prohibiting a lawyer from disclosing information obtained in a prior case, but not barring use of such information, would not prevent a lawyer from taking on new cases involving the same products or defendants. A lawyer could use information obtained in a prior case without disclosing the information in several ways. For example, the lawyer could use his knowledge of a prior case to plan strategy and formulate discovery requests without directly disclosing the information. It is unclear, however, whether courts will accept the distinction drawn by the ABA Committee. Compare Bassman v. Blackstone Assoc., 718 N.Y.S.2d 826 (App.Div.2001) (settlement agreement with confidentiality provision as to terms of settlement and settlement negotiations prohibited the law firm that entered into the agreement from representing future similarly situated clients against the defendant because disclosure of the confidential information is "necessarily implicated" in the future representation) with Tradewinds Airlines, Inc. v. Soros, 2009 WL 1321695, at *9 (S.D.N.Y. May 12, 2009) (rejecting Bassman at least as applied to a standard confidentiality agreement and finding that such an interpretation would violate New York ethics rules).

The second category would consist of indirect restrictions that the client has the right to insist on, even over the objection of the lawyer. A provision requiring the terms of a settlement to be kept confidential as in ABA Opinion #00-17 is an example of such a provision. The client has the right to confidentiality of the terms of the settlement, and the lawyer has no right to disclose this information without client consent.

The third category would involve restrictions on the future activity of the lawyer that the client has no right to control. For example, advertising for future clients, like that involved in S.C. Op. #1-04, is an activity that the client has no right to control. If the defendant offered such a provision, it would be up to the lawyer to decide whether to accept it. The client would have no right to insist that the lawyer accept such a provision. The situation is no different from one in which the client asked the lawyer to cut his fee in order to settle the case. The scope of a lawyer's practice is the lawyer's property. The client is free to ask but cannot demand that the lawyer sell any portion of his right to practice law. The client may
be annoyed, but the fact of client annoyance does not create a client right. See Gillers & Painter, supra at 315-316. Any compensation for the restriction would belong to the lawyer because the lawyer is selling his rights. Of course, any such agreement between the plaintiff's lawyer and the defendant must be fully disclosed to the client, and the client must give informed consent confirmed in writing because the agreement poses a risk of a material impact on the lawyer's representation of the client, Rule 1.7(a)(2) and 1.7(b). The client would, therefore, have a veto right over such an agreement, but could not insist on it.

Under the analysis of this article, an agreement that required plaintiff's counsel to turn over any discovery materials produced during the litigation should not be treated as violative of Rule 5.6(b). Such a provision would have only a negligible impact on the right of plaintiff's counsel to represent future clients because the lawyer could request such materials in future litigation. In the meantime, however, the defendant would have control of the materials. A defendant who reasonably anticipated similar litigation in the future could not, however, destroy such material because the defendant and its counsel would have a duty to institute a litigation hold. See Nathan M. Crystal, Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds, 43 Akron L. Rev. 715 (2010). A provision requiring the plaintiff and its lawyer to turn over the discovery materials in the case would fall into the second category of indirect restrictions discussed above because the client has the right to the file in the case. The client could insist on this provision even over the lawyer's objection. If the proposed agreement required the lawyer to turn over his entire file, including work product, the portion dealing with work product, in which the lawyer has at least a partial property interest, would fall in the third category and would be subject to the lawyer's agreement. Cf. New Mex. Bar Op. 1985-5 (finding that a provision in a settlement agreement requiring plaintiff's counsel to turn over work product material violated DR 2-108(b), predecessor to Rule 5.6(b)).

Some defendants have attempted to avoid the restriction of Rule 5.6(b) by entering into retainer or consulting agreements with counsel for the plaintiff. Through such an agreement, the defendant attempts to become a current client, preventing the adverse counsel from undertaking representation against i: under Rule 1.7(a)(1). Of course, if the consulting agreement is a secret arrangement between plaintiff's counsel and the defendant and its counsel, not disclosed to the plaintiff, it should be improper because it violates Rule 1.7 (conflict between multiple clients and conflict arising from lawyer's financial interest). See Adams v. BellSouth Telecommunications, Inc., 2001 WL 34032759, at 5-6 (S.D. Fla. 2001). Even if it is not secret, the lawyer must be careful to comply with the consent and disclosure requirements of the rules in order to engage in multiple representation. See In re Brandt/Griffin, 10 P3d 906 (Or. 2000). However, if the consulting agreement is fully disclosed to the client and the client gives informed consent, it should be proper. Prudent counsel would also disclose the agreement to the court as well. If the consulting agreement is truly not part of the settlement and in fact occurs after the settlement is reached, it should not be subject to Rule 5.6(b).

A tension exists between the public policy in favor of promoting settlements and the policy arguments justifying prohibitions on agreements restricting the practice of law. This article argues that when it comes to indirect restrictions on the practice of law, the policy in favor of settlements should generally prevail. Rule 5.6(b) should be narrowly construed when applied to indirect restrictions. Based on this analysis, the South Carolina Committee's Opinion #10-04 was wrongly decided. Since the opinion is only advisory, lawyers considering this and similar agreement could seek court approval of the provision. ■