Year-in-Review: Lawyer Ethics & the Discipline Process in 2019

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I. Civil Cases

Derrick v. Moore
426 S.C. 521, 828 S.E.2d 68 (Ct. App. 2019)

Lawyer's fee agreement read: "ANY DISPUTE CONCERNING THE FEE DUE PURSUANT TO THIS AGREEMENT SHALL BE SUBMITTED BY THE DISSATISFIED PARTY FOR A FULL, FINAL RESOLUTION" to the Bar's Resolution of Fee Disputes Board (RFDB). After the case ended, Lawyer sued Client to collect her fee. Client asserted counterclaims and the defense that Lawyer failed to comply with this provision in the fee agreement. Lawyer moved for an order compelling Client to submit to the RFDB. The Court of Appeals held:

- The RFDB provision in the fee agreement is not subject to the Uniform Arbitration Act
- Attorney did not waive the right to enforce the provision because there could be no "dispute" until the client answered the Complaint, denying the fee was owed

Gibson v. Epting
426 S.C. 246, 827 S.E.2d 178 (Ct. App. 2019)

Lawyer had a reverse-contingency fee, based on the amount reduced from the foreclosing bank's deficiency claim, agreed to by email in February. 9 months later, Lawyer was close to getting deficiency waived, Client's separate counsel negotiated the fee down to 1/3 based on the waiver offer and drafted a fee agreement. Client signed it 10 days after the bank agreed to the waiver. Client later alleged $566,666 was an unreasonable fee, claiming she didn't know about the wavier before she signed. She had 2 expert opinions in support, based on the RPC. The court held:

- Client's expert opinions were based on the false premise that she didn't know about the waiver offer when she signed the fee agreement; her separate counsel said she knew.

- "The ethical rules were not designed to be weaponized for use by private litigants."
- The court also didn't like that she claimed her litigation lawyers drafted the fee agreement when it was in fact drafted by her own separate counsel.

Ex Parte Wilson
Op. No. 27919 (S.C. Sup. Ct. filed Sept. 25, 2019)

Lawyer had been disbarred in his home state and was practicing before the federal Department of Labor's ALJ's in South Carolina, bringing Longshoremen's claims. Federal regulations allowed non-lawyers to represent people in that court. Once the court determined he was not a "non-lawyer" under the regulation (because a disbarred lawyer does not qualify as a non-lawyer), it prohibited him from further work in that court. The 9th Circuit Solicitor brought a DJ action to declare his activities the unauthorized practice of law.

The court did declare the conduct to be UPL and gave a thorough explanation of how authorization to practice before a federal court or agency affects the ability of state disciplinary authorities to regulate a lawyer's conduct.

II. Discipline Cases

In re Pyatt
425 S.C. 238, 821 S.E.2d 318 (2018)

- NSF caused by failing to ensure staff got a deposit to the bank on time
- Public Reprimand for not having done monthly reconciliations

In re Newman
425 S.C. 240, 821 S.E.2d 689 (2018)

- The going rate for failure to file income taxes is still a 90-day suspension:
  - Lawyer pled guilty to 2 counts and got a 6-month suspension
- Lawyer also put unearned flat fees directly into operating w/o appropriate language in his fee agreement

In re Meehan
Op. No. 27859 (S.C. Sup. Ct. filed Jan. 16, 2019)

- Resignation In Lieu of Discipline (RILD) in another state is reportable in S.C. (presumably under RPC 8.3(b) & RLDE 29(a))
- The appropriate reciprocal discipline for RILD in Texas (readmission allowed after 5 years) is disbarment in S.C. (RILD in S.C. is permanent)

In re Naderi
426 S.C. 476, 827, S.E.2d 582 (2019)

- Out-of-state lawyers are still getting permanently debarred for mortgage modification scams (California)

In re Ochoa
426 S.C. 483, 827 S.E.2d 586 (2019)

- Same at Naderi (but Florida)
- Lawyer was a solo using stock photos, claiming associated outside lawyers were "of counsel" & part of his "nationwide network of attorneys"
- Part of a growing trend of clever efforts to get the benefits of association with other lawyers without the costs and risks:
    - solos presenting as larger firms based on co-counsel & referral networks
    - out-of-state firms claiming a S.C. office without hiring a S.C. lawyer

In re Gay
427 S.C. 195, 830 S.E.2d 21 (2019)

- "While meeting with one of her criminal clients who was in custody related to a narcotics trafficking case, Respondent instructed the client's girlfriend to remove United States currency and paperwork from the bathroom of the client's home and take the currency and paperwork to an associate of the client."
- Lawyer served one day in jail for an unlawful communication in violation of S.C. Code Ann. § 16-17-430(A)(1).
- 6-month suspension

In re McCarty
___ S.C. ___, 832 S.E.2 606 (Aug. 21, 2019)

- Moonlighting $100,000 in fees using firm resources (staff, computer, letterhead)
    - BUT he ran firm conflict checks, didn't cover it up, repaid fees to firm
    - Testimony conflicted whether the firm prohibited lawyer moonlighting
- Public Reprimand
- Prior range had been from 90-day suspension to disbarment

In re Odom
Op. No. 27918 (S.C. Sup. Ct. filed Sept. 25, 2019)

- Lawyer was convicted of one count of criminal solicitation of a minor & sentenced to 7 year in prison, suspended to five years' probation.
- Disbarred retroactive to his 2006 interim suspension.

III. Rule Changes

Rule 1.6, Comment 7

No public records exception for advertising

[7] Disclosure of information related to the representation of a client for the purpose of marketing or advertising the lawyer's services is not impliedly authorized because the disclosure is being made to promote the lawyer or law firm rather than to carry out the representation of a client. Although other Rules govern whether and how lawyers may communicate the availability of their services, paragraph (a) requires that a lawyer obtain informed consent from a current or former client if an advertisement reveals information relating to the representation. This restriction applies regardless of whether the information is contained in court filings or has become generally known. See Comment [3]. It is important the client understand any material risks related to the lawyer revealing information when the lawyer seeks informed consent in accordance with Rule 1.0(g). A number of factors may affect a client's decision to provide informed consent, including the client's level of sophistication, the content of any lawyer advertisement and the timing of the request. General, open-ended consent is not sufficient.

IV. Rule Change Proposals

Rule 13, RLDE

immunity for filing a disciplinary complaint

The PR Committee has approved a proposal that the court adopt an amendment to the immunity rule. Rule 13 currently provides "absolute immunity" from civil liability for any complainant who files a grievance against a lawyer. Unfortunately, there is a widespread misconception that this is also disciplinary immunity for lawyers who violate the Rules in the filing of a complaint against another lawyer (e.g., dishonestly or solely to gain a civil advantage). This proposal would not change the operation of the rule but would clarify that it does not provide such disciplinary immunity but only immunity from civil suits. The House of Delegates has approved the proposal, and the Bar has forwarded it to the court for consideration.

Rule 1.10

screening lawyers for conflicts

The PR Committee has approved a proposal that the court adopt screening procedures to prevent imputed conflicts within a firm, consistent with the Model Rule and with screening procedures elsewhere in the S.C. Rules (1.11 for government lawyers moving into private practice and 1.18 for conflicts related to prospective clients). The Bar approved it, but the court sent it back for more clarification. The committee is working on revised white paper to re-submit the proposal to the House of Delegates.

Rule 3.8(g) & (h)

post-conviction evidence of innocence

The PR Committee and the Bar have proposed that the court adopt a modified version of these Model Rule subsections to require prosecutors to disclose post-conviction evidence of innocence and, if it's within the prosecutor's jurisdiction, to investigate whether further evidence may confirm innocence. If the evidence is clear and convincing, the rule requires the prosecutor to take reasonable steps to remedy the conviction. The House of Delegates has approved the proposal, and the Bar has forwarded it to the Court for consideration.

Rules 7.1-7.5

communication & advertising

The PR Committee has approved a proposal that the court revise the advertising and communication rules to accomplish several goals:

- eliminate misunderstandings about what is and is not advertising by changing the title of Rule 7.2 to "communications concerning a lawyer's services"
- codify the "accolades" opinion (S.C. Bar EAO 17-02)
- expand the referral fee prohibition to including giving or promising anything of value in exchange for referrals, but also to create two exceptions consistent with the ABA Model Rules:
    - nominal gifts
    - a mutual exchange of referrals between lawyers if:
        - it's not exclusive
        - the client is informed, and
        - it's in the client's best interest.
- limit the solicitation regulation to only those sent to people known to be in need of legal services
- eliminate the 30-day waiting period for solicitations in personal injury and wrongful death cases
- eliminate the antiquated special rules for patent & admiralty lawyers

The proposal has been approved by the PR Committee and will be presented to the House of Delgates at the January meeting.

V. Ethics Advisory Opinions

S.C. Bar EAO 18-04

using "reply-all" in an email copied to opposing party

Lawyer A sends an email to Lawyer B and copies Lawyer A's client. Lawyer A has not expressly consented to Lawyer B communicating with Lawyer A's client. The committee first noted that Rule 4.2 does allow consent to be implied, but opined that the mere fact that a lawyer copies her own client on an email does not constitute implied consent to a "reply to all" response. Additional circumstances may amount to implied consent, including whether the matter is adversarial, whether the substance of the email is merely scheduling availability, and whether such group emails are the normal course of business with a sophisticated client.

S.C. Bar EAO 19-01 & ABA Formal Op. 487

hold only disputed portion of funds in trust
successor counsel fees not governed by 1.5(e)

Client entered into a contingency fee agreement with Lawyer A, who did some initial work, then client fired Lawyer A and hired Lawyer B. Lawyer A asserted a charging lien for 15% of any recovery. Lawyer B settled the case, and Client doesn't want Lawyer A to get any fee. The committee reminded lawyers that they must hold the disputed portion of funds in trust and must pay the undisputed portion to the parties entitled to them, including the undisputed portion of Lawyer B's fee.

Similarly, the ABA clarified in June that this scenario does not require client consent because, as the comments note, it is not governed by Rule 1.5(e)'s client consent requirement for "division of fees between lawyers who are not in the same firm." Comment 8 to Rule 1.5 notes that client consent is not required under (e) for fee splitting in successor counsel scenarios.

S.C. Bar EAO 19-02

selling a judgment against a client

Lawyer obtained a judgment against a client for an unpaid fee. The committee opined that a lawyer may sell such a judgment to a third party but may not disclose any information related to the representation to that third party, despite that the lawyer may have already properly revealed confidential information during the litigation that resulted in the judgment. Although Rule 1.6(b)(6) allowed Lawyer to reveal confidential information "to establish a claim or defense … in a controversy between the lawyer and the client," the committee opined that the "controversy" exception does not extend to post-judgment collection.

S.C. Bar EAO 19-03

investing in a cannabis business

Lawyer wants to purchase an interest in a publicly traded company involved in the cultivation, production, management, and distribution of cannabis in those states where growing,

selling, and using cannabis are allowed under state law, although they remain illegal under federal laws that the federal government is not enforcing in those states. The committee opined that whether it is unethical depends on:

1. whether merely owning an interest in such a company is a criminal act, and
2. if so, whether it is the kind of criminal act that is misconduct under Rule 8.4 (i.e., if it reflects adversely on the lawyer's honesty trustworthiness or fitness to practice law, or if it is a crime of moral turpitude)