

Ethics Do's and Don'ts

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Virtual South Carolina
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**SOUTH CAROLINA
ASSOCIATION OF COUNTIES**

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SC Ethics and Discipline Update
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PART I. SUMMARIES OF DISCIPLINARY OPINIONS

Criminal Conduct

- (1) Matter of Droese. Lawyer was arrested for possession of a controlled substance. He completed PTI and the charge was dismissed. Lawyer also misappropriated a client's portion of a \$25,000.00 settlement in a personal injury case. Three year suspension, retroactive to May 2014 interim suspension, plus restitution to the Lawyers' Fund for Client Protection, by consent. (Op.#27956, March 18, 2020)
- (2) Matter of Walker. Lawyer is licensed in NY and SC. He pled guilty to third degree reckless assault after becoming intoxicating and severely injuring a woman at his home. Lawyer's license was suspended NY for four months. The Court imposed reciprocal discipline on his SC law licensed. Four month suspension. (Op.#27962, April 8, 2020)
- (3) Matter of Parrott. Lawyer entered an Alford plea to charges of indecent exposure. His three year prison sentence was suspended on service of twelve months' probation. Lawyer's disciplinary history included a four-month suspension in 1997 (for assaulting a person on a beach by removing her bathing suit from behind) and a nine-month suspension in 2017 (for voyeurism by using his mobile phone to video up the skit of a customer in front of him in a grocery store). Disbarred, retroactive to June 2018, by consent. (Op.#27989, August 12, 2020)

Neglect, Incompetence, and Failure to Adequately Communicate with Clients

- (4) Matter of Gaines. Lawyer severely neglected three client matters, including failing to timely file pleadings, missing court dates, failing to communicate with clients or response to requests for return of client files, and failing to refund unearned fees. Lawyer also failed to cooperate in the disciplinary investigation. Two year suspension, retroactive to July 2018 interim suspension, plus restitution to clients and the Lawyers' Fund, by consent. (Op.#27931, November 27, 2019)
- (5) Matter of Dickey. Lawyer neglected four client matters. Lawyer failed to cooperate in the disciplinary investigation. One year suspension, retroactive to February 2015 interim suspension, plus Ethics School and two years' LHL monitoring, by consent. (Op.#27979, June 3, 2020)
- (6) Matter of Smith. Lawyer neglected a car wreck case where the client had incurred \$120,000 in bills. Lawyer failed to advise the client that summary judgment had been

granted to the only properly served defendant, instead constructing an elaborate false narrative about the progress of the case and excuses for why she could not meet with or talk to the client. In another case, Lawyer misled a client into believing she had filed suit for him for two years. He only discovered the lies when he contacted the firm about preparing for trial and was told Lawyer no longer worked there and the firm had no record of his case. Another client learned from the firm that Lawyer had been lying to her about filing a medical malpractice case for seven years. In a fourth matter, Lawyer neglected to file a case for a client and lied about it for six years, even going so far as to creating fake discovery requests to cover for the ruse. Disbarment, by agreement, plus costs. (Op.#27999, October 7, 2020)

Trust Account Violations

- (7) Matter of Moody. Lawyer was disbarred in 2014 for misappropriation and has not been readmitted. Two disciplinary matters were subsequently resolved with restitution orders. One involved Lawyer's misappropriation of funds received from a client for the purpose of paying a civil judgment on his behalf. The other one involved Lawyer taking more fees from a settlement than he was entitled to. In that same case, Lawyer also diverted funds from the client's settlement to pay a third party on behalf of another client. Lawyer had been unable to pay the third party because he misappropriated that client's money as well. Restitution ordered. (Op.# 27960 and 27961, April 8, 2020)
- (8) Matter of Anonymous Member of the Bar. Lawyer was employed as President of South Carolina Operations of a large law firm headquartered in Georgia. In that role, Lawyer oversaw communications, business development, and HR for the firm's two offices in SC. However, Lawyer was not involved in operations. As a result of the misappropriation of nearly \$30 million in trust account funds firm-wide, the SC trust accounts incurred several overdrafts. A title company investigation revealed nearly \$650,000 shortfall in four of the firm's SC trust accounts. The misappropriation of funds was part of a fraudulent scheme orchestrated by the firm's CEO and majority owner and the nonlawyer head of the accounting department, both of whom have been convicted of criminal charges related to the theft. The title insurance company covered the losses to the clients. Lawyer admitted that she failed to make reasonable efforts to ensure the firm's SC trust accounts were in compliance with the record-keeping and reconciliation requirements of Rule 417, Lawyer also permitted a number of people to access those accounts without the supervision of a SC licensed attorney. The Court found that Lawyer's "misconduct enabled those with impermissible and unfettered access to misappropriate almost \$30 million." Because of Lawyer's lack of disciplinary history and cooperation in the investigation, the Court elected to impose an anonymous admonition in order to publish the order for the education of the Bar. Admonishment, plus costs, Ethics School and Trust Account School, by consent. (Op.#27973, May 27, 2020)
- (9) Matter of Anonymous Member of the Bar. Lawyer was employed as Senior Managing Attorney in a SC office of a large law firm headquartered in Georgia. Lawyer was also the sole attorney employed in the firm's Columbia office. As a result of the misappropriation of nearly \$30 million in trust account funds firm-wide, the SC trust accounts incurred several overdrafts. A title company investigation revealed nearly \$650,000 shortfall in four of the firm's SC trust accounts. The misappropriation of funds was part of a fraudulent scheme orchestrated by the firm's CEO and majority owner and the nonlawyer head of the accounting department, both of whom have been convicted of criminal charges related to the theft. The title insurance company covered the losses to the clients. Although Lawyer

properly handled the processing of funds for her client's closings, she admitted that she did not have access to the account statements or reconciliations. During the course of the investigation, Lawyer submitted statements and documents to ODC that were prepared or orchestrated by the head of the accounting department, designed to cover up her theft. Lawyer was unaware of the falsity of those submissions. Lawyer admitted that "numerous people forbidden by Rule 417 from having access to South Carolina trust accounts had such access." The Court found that Lawyer's failure to control the accounts and records allowed the misappropriation of client funds. The Court determined that an admonition was warranted, but elected to publish an anonymous opinion "to warn members of the Bar against allowing law firm leadership or staff located outside of South Carolina to have unfettered access and control over South Carolina client funds." Admonishment, plus costs, Ethics School and Trust Account School, by consent. (Op.#27974, May 27, 2020)

- (10) Matter of Collins. Lawyer misappropriated approximately \$440,000 from funds received to settle civil litigation involving his clients. Lawyer pled guilty to related criminal charges. He was sentenced to ten years in prison, suspended to five years on probation, community service, and restitution of \$500 per month. In connection with another case, Lawyer stole about \$72,000 and lied to a judge that the funds remained in trust. Lawyer used misappropriated money for personal debts, cash withdrawals, purchase of office supplies, payroll, phone bills, CLEs, and a political donation. Also, Lawyer agreed to a sanctions order in a civil case without consulting his client. Lawyer paid the sanctions directly. Lawyer's neglect of the case led to summary judgment, about which he failed to inform his client. Disbarment, retroactive to July 2016, by consent. (Op.#27984, June 24, 2020)
- (11) Matter of Wern. For several years Lawyer was only reconciling his trust account once a year. Even then he was not performing the three-part reconciliation required by Rule 417, which Lawyer admitted he had never read. In addition, Lawyer failed to maintain required financial records, including client ledgers. Over about a two year period, there were 290 transfers from the trust account with no notation of the associated client file and no documentation that any of the money taken was earned fees. These bulk transfers of money resulted in disbursement before deposit on 735 client ledgers, with some deficits in the tens of thousands of dollars, and many of the disbursements occurred months before deposit. Lawyer also improperly commingled funds by deposited firm funds into trust and intentionally leaving earned fees in to avoid overdrawing the account. As a result of Lawyer's mismanagement of his trust account and misappropriation of client funds, the account was periodically overdrawn, up to approximately \$425,000.00. The Commission panel recommended a suspension of six weeks after considering ODC's delay of five and a half years in prosecuting the case. Although the Court found ODC's delay "inexcusable" and unreasonable, it determined that Lawyer suffered no prejudice as a result, particularly because he was permitted to practice law (although he was prohibited from accessing his own law firm's trust and operating accounts). In an opinion concurring with disbarment, Justice Few stated that Lawyer's misconduct was not a failure in recordkeeping or reconciliation, but rather deliberate criminal conduct. Justice Few also stated that ODC's failures were the responsibility of the Court. In a dissenting opinion, Justice Hearn found that Lawyer was "careless" and his misconduct was serious, but that it warranted only a one-year suspension. She found that ODC's delay was a mitigating factor. Disbarment, plus costs. (Op.#27998, October 7, 2020)

Conflicts of Interest

(12) Matter of Bannon. Complainant had two cases, one in which his parental rights were terminated and one in which he was charged with CSC. Complainant was represented by the same attorney in both cases. Lawyer represented the adoptive couple who was adverse to Complainant in the TPR action. Lawyer was also involved in the CSC matter, as an appointed special prosecutor. Sometime later, Lawyer hired Complainant's attorney to work in his law firm. Lawyer engaged in a conflict of interest when he became involved in a related matter for the adoptive couple adverse to Complainant. Public reprimand, by consent. In an unrelated PCR matter, Lawyer failed to timely file his client's action. He had advised his client that he would not file the PCR action until he was paid in full. The client's family member paid the fee, but due to a clerical error in Lawyer's office, the payment was not reflected in the file. In imposing discipline, the Court cited Comment 5 to Rule 1.5, which states that a fee agreement "may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest." The Court held that "[o]nce a lawyer accepts employment, the lawyer may, with reasonable warning, withdraw from representation due to the client's substantial failure to fulfill an obligation to pay for the lawyer's services. However, a lawyer may not condition the duties of representation on the payment of fees." Public Reprimand, plus Ethics School and costs, by consent. (Op.#27933, December 18, 2019)

Dishonesty and False Witnessing

- (13) Matter of Sloan. Lawyer altered and falsified records related to billable hours and client expenses, including time entries and receipts. Lawyer misled clients about the status of cases he neglected. Three year suspension, retroactive to January 2017, by consent. (Op.#27936, January 22, 2020)
- (14) Matter of Brooks. In February 2019, Lawyer was admitted to the SC Bar on her Wyoming Uniform Bar Exam score. She provided false and misleading information to the Office of Bar Admissions in connection with her application to be admitted in SC. In that application, Lawyer failed to disclose one of two arrests for DUI. She also failed to identify all of the states where she had sought admission or to be truthful about her reasons for withdrawing her application filed in Wyoming. The truth was that Wyoming's Character and Fitness Committee was investigating her submission of a falsified document. Lawyer also provided false information in connection with her applications for admission to North Carolina and Idaho. Finally, although Lawyer did disclose a second DUI arrest, she failed to disclose other charges related to that arrest or her failure to comply with the terms of her release pending resolution of those charges. Disbarment, retroactive to October 2019 interim suspension. (Op.#27984, June 24, 2020)

Unauthorized Practice of Law

- (15) Matter of Rawlinson. Lawyer was administratively suspended for failure to comply with MCLE requirements. While on suspension, Lawyer represented a client in a conference call with the solicitor and the judge. The judge advised Lawyer that he would not be heard because of his suspension. Subsequently, the solicitor contacted Lawyer to advise that a court date had been set. Lawyer falsely stated that he had

“clearance” to resume practice. Lawyer then failed to appear at the hearing. He later sent an email to the solicitor stating that he was just “waiting on approval,” suggesting that he had petitioned for reinstatement, which he had not done. Also while on suspension, Lawyer collected advance payments for legal services from clients, signed up new clients, communicated with opposing counsel, and even appeared on behalf of a client at a mediation. In other matters, Lawyer failed to communicate with clients regarding his suspension and allowed their legal matters to languish. Lawyer revealed that he was suffering from depression. Lawyer charged “non-refundable” flat fees in several cases, which he did not hold in trust. He did not have the proper language in a written fee agreements that would allow him to use those fees prior to earning them. Lawyer did not adequately respond to disciplinary authorities. He failed to refund those fees when he was suspended. 18 month suspension, retroactive to July 2018 interim suspension, plus restitution to clients, payment of costs, and up to three years of mental health treatment monitoring, by consent. (Op.# 27926, November 6, 2019)

Failure to Cooperate with Disciplinary Investigation

- (16) **Matter of Crews**. Lawyer’s law license in NC was suspended for thirty days for failure to cooperate in a disciplinary investigation in that state. The SC Court imposed reciprocal discipline. Thirty day suspension. (Op.#27987, July 15, 2020)

PART II. NONDISCIPLINARY CASES OF INTEREST

- (17) **Unauthorized Practice of Law by Debt Collection Company**. Restaurant discontinued contracted services of its linen provider based on unsatisfactory performance. The linen provider hired The Murkin Group, LLC, a nonlawyer debt collector, to collect liquidated damages set forth in the contract. Restaurant hired a lawyer to help resolve the dispute. When settlement negotiations broke down, Restaurant’s lawyer filed a declaratory judgment action in the original jurisdiction of the Supreme Court to determine whether some of Murkin’s activities constituted the unauthorized practice of law. The Court held that Murkin’s activities exceeded mere debt collection, including negotiation of the dispute over terms of the contract, advising the linen company regarding legal strategy, controlling when an attorney would be brought in on behalf of the linen company and claiming it would control the actions of such an attorney, threatening to file suit and bring certain claims, giving legal opinions and interpreting the contract. The Court held that this was not merely collecting a debt, but rather a contract dispute. A nonlawyer debt collector engages in the unauthorized practice of law by advising a client on what legal action to take, whether to hire a lawyer, whether to accept a settlement offer, and what damages are available. A nonlawyer is not authorized to negotiate resolution of a dispute beyond the value of the claim. In re The Murkin Group, LLC, Op. #27957 (March 18, 2020)
- (18) **Court of Appeals Clarifies the Lawyer As Witness Rule**. In this legal malpractice action, the Court of Appeals explained the often misunderstood Lawyer Witness Rule, Rule 3.7, RPC. Plaintiff/Buyer of commercial real estate sued Defendant/Closing Attorney alleging failure to identify certain liens, lawsuits, and leases, relying instead on Seller’s attorney’s title search. Plaintiff/Buyer’s Attorney had handled negotiations

of liens and resolution of the ensuing lawsuits, then represented Buyer in the legal malpractice action. Plaintiff/Buyer's Attorney took the deposition of Defendant/Closing Attorney, asking specific questions about conversations between the two attorneys during the time of the sale. Defendant/Closing Attorney then moved to disqualify Plaintiff/Buyer's Attorney, asserting he was a necessary witness to certain issues. The Court of Appeals upheld the lower court's disqualification on the grounds that the testimony of Plaintiff/Buyer's Attorney was relevant to disputed, material questions of fact and there was no other evidence available to prove those facts. If Plaintiff/Buyer's Attorney were allowed to represent Plaintiff/Buyer at the trial, it would likely confuse the jury. However, Plaintiff/Buyer's Attorney was only disqualified from the trial of the case and his law firm was not disqualified at all. This case is an important reminder of the limitations on the Lawyer as Witness rule: (1) disqualification only applies if the lawyer/witness's testimony relates to a contested fact; (2) a lawyer/witness does not have to be the only witness to an event or circumstances in order to be disqualified; (3) the "substantial hardship" exception only applies when the client can show that disqualification would result in "hardship beyond the normal expense and delay a litigant would experience with a change of counsel;" (4) Rule 3.7 disqualification does not impute to other attorneys in the lawyer/witness's law firm; and, (5) Rule 3.7 disqualification is limited to the trial, so the lawyer/witness may still represent the client in handling any aspect of the case other than presenting the case to the jury. Fine Housing Inc. vs. Sloan, Ct. App. Op. #5761 (August 19, 2020)

PART III. SC BAR ETHICS ADVISORY OPINIONS*

- (19) **SC Bar Opines that Attorney Hired by Insurance Carrier May Appear on Behalf of Missing Client.** "Attorney may appear for and defend an Insured who cannot be located at the request of the Insurance Carrier if Insurance Carrier's insurance contract with the Insured gives it the right to retain counsel to defend claims made against the Insured. Where a person has, by contract, including insurance contract, delegated authority to another to choose counsel, conduct the defense of a claim, and perhaps even settle a matter within certain boundaries, an attorney may reasonably rely upon the instruction of the person's agent, in this situation Insurance Carrier, to appear and conduct the defense of the case in the absence of any direction from the missing Insured to the contrary." (EAO#19-04)
- (20) **SC Bar Clarifies Obligations of Successor Counsel to Honor Fee Lien.** Contingency fee Client fired Firm A and hired Firm B. Firm A asserted charging lien for 15% of settlement and costs advanced. Firm B paid over the costs, but does not want to honor the lien. The Advisory Committee advises that under Rule 1.15(e) Firm B must first determine if Firm A's claim is frivolous (the Committee did not give an opinion on that). If Firm B determines that Firm A's claim is not frivolous, Firm B must hold 15% of the fee in trust until the dispute between the firms is resolved. Firm B is free to disburse the remaining portion of the fee. EDITOR'S NOTE: While not mentioned in the opinion, it is important to remember that this scenario represents a

*NOTE: Ethics Advisory Opinions (EAOs) are issued by a committee of the South Carolina Bar. They are not approved by the Commission on Lawyer Conduct or the Supreme Court of South Carolina and have no binding effect. Practitioners are advised to read the full text of EAOs to ensure applicability and to consult with experienced ethics counsel or the SC Bar before proceeding with a questionable course of conduct.

dispute between the predecessor and successor firms, not a dispute between the predecessor firm and the client. Comment [8] to Rule 1.5 specifically states that client consent is not required in this scenario: “[W]hen a client has hired two or more lawyers in succession on a matter and later refuses to consent to a discharged lawyer receiving an earned share of the legal fee, [Rule 1.5’s fee sharing provision] should not be applied to prevent a lawyer who has received a fee from sharing that fee with the discharged lawyer to the extent that the discharged lawyer has earned the fee for work performed on the matter and is entitled to payment.”

- (21) **SC Bar Offers Guidelines for Insurance Defense Attorneys to Reduce Fees to Facilitate Settlement.** In response to an inquiry from an attorney hired to defend a client by an insurance company, the Ethics Advisory Committee stated that the attorney was not permitted to contribute his own money to facilitate a settlement that favored his client. However, the attorney is permitted to reduce his flat fee to give the insurance company more money to put towards the settlement offer. According to the Committee, this arrangement (similar to a plaintiff’s attorney agreeing to reduce the contingency fee to afford the client more money) the attorney must only do so if it is in the interest of the client and must ensure that the client and the insurance company consent. (EAO #20-01)
- (22) **SC Bar Authorizes Use of Competitive Keyword Advertising.** The Ethics Advisory Committee has determined that “a lawyer may purchase an internet competitive advertising keyword that is the name of another lawyer or law firm, in order to display a ‘sponsored’ website advertisement.” The Committee warned that all of the advertising provisions in the Rules of Professional Conduct apply to internet advertising and that lawyers must “ensure that no derogatory or uncivil message is conveyed.” Also, the Committee confirmed that “surreptitious redirection from a competitor’s website to a lawyer’s own web page via a hyperlink is prohibited under our Rules.” (EAO #20-02)

PART IV. RECENT RULE REVISIONS AND PROPOSALS

- (23) **ABA Revamps Model Lawyer Advertising and Solicitation Rules.** At its meeting in August 2018, the ABA House of Delegates adopted changes to the Model Rules of Professional Conduct that regulate lawyer advertising (Rule 7.1 – 7.5). The changes include elimination of several content and format restrictions, address issues related to technology and social media, permit nominal hospitality gifts to referral sources, and permit direct solicitation of potential clients in most business and transactional matters. The SC Bar House of Delegates in 2020 sent a proposal to adopt some, but not all, of the ABA changes. Non-ABA changes would include permitting advertising accolades and awards (such as Super Lawyers), eliminating the 30-day waiting period to solicit personal injury clients (except in cases of wrongful death), and
- (24) **Supreme Court Reminds Lawyers that Informed Consent is Required to Reference Client Matters in Advertising; No “Generally Known” Exception.** The SC Bar petitioned the Supreme Court for an amendment to Rule 1.6 that would allow lawyers to reveal citations to published opinions without being required to obtain client consent. The Court declined to amend the rule as proposed by the Bar. Instead, the

Court amended Rule 1.6 to add a new comment reminding lawyers that Rule 1.6 requires them to obtain informed consent from clients before revealing information about the representation to advertise the lawyers' services. The comment further clarifies this obligation applies regardless of whether any information revealed is contained in court filings or has become generally known.

- (25) **Supreme Court Amends RPC to Address Digital Competence.** The Court has adopted new language in Rule 1.1 that reminds lawyers that ethical competence includes "a reasonable understanding of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit information related to the representation of a client." Along the same lines, the Court added a new paragraph to Rule 1.6 that a "reasonable effort to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client" is part of the lawyer's confidentiality obligation. The new Comment [20] provides extensive guidance on securing clients' digital data.



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