

Supplement to Annotated South Carolina Rules of Professional Conduct

August 7, 2013

Covering Advance Sheets #8-35, February 20-August 7, 2013

Ethics Advisory Opinion 13-02 through 13-06

Rule 1.1, Competency

Requirement of Expert Testimony

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

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

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

Advocate's Defamation Privilege

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

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

Assisting Unlawful Conduct

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

Rule 1.7, Conflict of Interest: Current Clients

Material Limitation on Representation

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

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

Compensation and Direction by Third Person

The South Carolina Ethics Advisory Committee answered several questions related to attorneys retained and paid by a nonprofit organization to represent a client. Under the facts presented, the nonprofit would deposit funds into the attorney's trust account for expenses related to the representation. The committee reached the following conclusions: ownership of funds deposited into the trust account must be determined by the nonprofit and the client with those parties resolving any disputes; guided by achievement of the goals of representation, the attorney decides how to use the funds and the nonprofit cannot direct the representation or determine goals; the attorney must inform the client about the arrangement, obtain informed consent from the client, protect client confidences, and keep the client informed about the amount and status of the funds; and the nonprofit can only place limitations on use of the funds to the extent it requires the funds be used for actual expenses incurred as to a particular matter and the attorney's professional judgment cannot be compromised. *S.C. Bar Ethics Adv. Op. #13-04*.

Rule 1.9, Duties to Former Clients

Interlocutory Appeal (new annotation)

Denial of a motion by a company to disqualify an attorney who previously represented the company in a variety of employment law matters, terminated representation, and later represented a former employee of the company in defending a suit brought by the company is not immediately appealable. The dangers presented can be redressed on appeal or an appeal may

become unnecessary depending on the outcome of the case. *Energys Delaware, Inc. v. Hopkins*, 401 S.C. 615, 738 S.E.2d 478 (2013) (see also Annotation, Interlocutory Appeal, Rule 1.7).

Rule 3.8, Special Responsibilities of a Prosecutor

Vindictive Prosecution (new annotation)

A defendant was indicted for murder, exercised her right to a jury trial, and a not guilty verdict was returned. After the acquittal, the defendant was indicted for accessory after the fact to a felony, was tried without a jury, and was convicted and sentenced. The court noted that there are rules in place to protect against vindictive prosecution in response to a defendant asserting a statutory or constitutional right, such as the right to a jury trial. However, only certain limited circumstances raise a presumption of prosecutorial vindictiveness. The court held that an acquittal by a jury on one charge followed by an indictment on a separate charge, without more, does not raise a presumption of prosecutorial vindictiveness. Further, the defendant failed to show actual vindictive prosecution. *State v. Blakely*, 402 S.C. 650 (S.C. Ct. App. 2013).

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

Practice of Law by Nonlawyers

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

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

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

Rule 7.1, Communication Concerning a Lawyer's Service

False, Deceptive, and Misleading Communications

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

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

Rule 7.2, Advertising

Paying to Have Services Recommended

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

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

Rule 8.4, Misconduct

Conduct Prejudicial to the Administration of Justice

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