South Carolina Bar

House of Delegates

July 30, 2021

South Carolina Bar

July 2021

Dear Member of the House:

The House of Delegates of the South Carolina Bar will convene at on Friday, July 30, 2021, at Tabby Place on the Beaufort Inn property, 809 Port Republic Street, Beaufort, South Carolina. Lunch will be ready at 11:30 p.m. and the business meeting will begin shortly thereafter. When you arrive, please be certain to sign in so that the minutes will reflect your attendance.

The proposed agenda precedes the first tab of the attached book. You may remove for discussion any item from the Consent Agenda before the agenda is adopted at the start of the meeting. Please remember the restrictions on positions which may be supported by a mandatory bar association. There is a brief description of these restrictions behind the agenda.

You are encouraged to participate in thorough debate on agenda items but please respect your fellow House members by making your remarks succinct and pertinent to agenda items being debated.

Please arrive early to review any additional materials which may be distributed at the meeting. Available materials have been sent to you to allow you an opportunity to consult your constituency concerning the matters on the agenda. Please read the materials and obtain input from your peers.

You are cordially invited to a reception in honor of new Bar President Mary Sharp beginning at 4:00 p.m. in the courtyard just outside of the meeting space.

I look forward to seeing and spending some time with all of you in Beaufort. If I can assist you in any way prior to the meeting, please do not hesitate to contact me.

Sincerely yours,

Chris Koon

Christopher R. Koon
Chair

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South Carolina Bar

July 2021

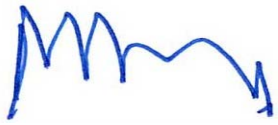
Dear House of Delegates:

Thank you for your service to our Bar through your membership in the House of Delegates. The House sets the policies of the Bar and speaks for all our members. I look forward to discussing with you the matters on our agenda.

Please review your materials and discuss them with the Bar members you represent for their perspective. As always, your attention to and input regarding these matters is very much appreciated.

I am excited to host you in Beaufort and to see you all in person again!

Sincerely,



Mary E. Sharp
President

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AGENDA
SOUTH CAROLINA BAR HOUSE OF DELEGATES
July 30, 2021 @ 11:30 a.m.

CALL TO ORDER SET THE AGENDA		Christopher R. Koon Chair
Welcome to Beaufort		Stephen D. Murray, III Mayor
1.	Approval of Consent Agenda a. Approval of Minutes of Meeting Held on May 6, 2021	Christopher R. Koon Chair
2.	Presentation of Pro Bono Attorney of the Year Awards	Jennifer P. Woodruff Immediate Past Chair
3.	Request from Pro Bono Board to Amend Rule 6.1 of the South Carolina Rules of Professional Conduct	Jennifer P. Woodruff Immediate Past Chair
4.	Request from SLD to Amend Bar Constitution and Division Bylaws	John O. McDougall Division Representative Past President of the Bar
5.	Request from the Professional Responsibility Committee to Establish Attorney Dispute Resolution Program	Thomas A. Pendarvis Committee Member
6.	Request from the Practice and Procedure Committee to Amend Rule 14(e) of the Family Court Rules to Allow for Acceptance of Service	Guy J. Vitetta Committee Chair
7.	Request from Practice and Procedure Committee to Amend Rule 4, SCRCP, in re Serving an Individual in a Foreign Country	Guy J. Vitetta Committee Chair
8.	Request from Practice and Procedure Committee to Add Notes to Rule 11, SCRCP, Following the Decision in *Pee Dee Health Care v. Estate of Hugh S. Thompson*	Guy J. Vitetta Committee Chair
9.	Request from the Unauthorized Practice of Law Committee to Adopt a Regulatory Structure to Address Complaints re UPL	Barbara M. Seymour Subcommittee Chair Robert P. Wood Subcommittee Member
10.	Request from Civil Rights Task Force to Establish Section	Nekki Shutt Task Force Chair
11.	Request from Professional Responsibility Committee to Amend Rule 8.4 of the South Carolina Rules of Professional Conduct	Jill C. Rothstein Committee Chair Kristen E. Small Subcommittee Chair
Recess to Convene Assembly		**Mary E. Sharp** **President**

Keller v. State Bar of California, 496 U.S. 1 (1990)

"Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." 496 U.S. at 13-14.

"Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern." 496 U.S. at 15.

1

Minutes
House of Delegates
May 6, 2021

The House met on May 6, 2021, via video conference. Participating were Shedricka Taccara Anderson; Kenneth C. Anthony, Jr.; Jennifer Ellis Aplin; S. Maria Shiloh Averill; Pamela A. Baker; Martin Rast Banks; J. Leeds Barroll, IV; Cherie T. Barton; Samuel Robert Bass, II; Mark S. Berglind; Susan B. Berkowitz; Natalie Blythe Bialas; Joseph Pawel Bias; Matthew M. Billingsley; Maryann Elizabeth Blake; Margaret Miles Bluestein; Clifford Lewis Bourke, Jr.; James Edward Bradley; Melody Joy Edelman Breeden; Robert Lesley Brown; Twana Nakeya Burris-Alcide; Derek Mitchell Bush; Beverly A. Carroll; George B. Cauthen; Aleksandra Boguslawa Chauhan; Amie L. Clifford; John Ford Connell, Jr.; M. Dawes Cooke, Jr.; Lee Deer Cope; Leslie A. Cotter, Jr.; Elnora Jones Dean; Megan Catherine Hunt Dell; Robert Scott Dover; Martin S. Driggers, Jr.; Walter George Dusky; Megan Sara Ehrlich; John D. Elliott; Scott A. Elliott; Eric K. Englebardt; Frank L. Eppes; Ashley R. Forbes; F. Cordes Ford, IV; Allen O. Fretwell; Debra J. Gammons; Warren V. Ganjehsani; Shauna Lisa Gibson; Tiffany D. Gibson; Harry L. Goldberg; Wm. Douglas Gray; Jack D. Griffeth; William Eugene Grove; Daryl G. Hawkins; Amy L.B. Hill; William Coleman Hubbard; Russell Thomas Infinger; Charles Epps Ipock; Lindsay Anne Joyner; Justin S Kahn; D. Michael Kelly; Catherine H. Kennedy; Charles A. Kinney, Jr.; Francis B.B. Knowlton; Christopher R. Koon; Lanneau Wm. Lambert, Jr.; LeRoy Free Laney; James Edward Lockemy; Joshua Lonon; Jonathan William Lounsberry; Angus H. Macaulay; Pierce Talmadge MacLennan; Christy Elizabeth Mahon; Walter Keith Martens; Karla Cecilia Martinez Lainez; John Lucius McCants; John O. McDougall; Elizabeth Holland McFarland; Sara Leslie McIntosh; David B. Miller; Meredith Brooks Moss; John Hammond Muench; Randall K. Mullins; Adam Christopher Ness; Irish Ryan Neville; Elizabeth Foy Nicholson; Greg Ohanesian; Cashida Nichole Chinwe Okeke; James Graham Padgett, III; Ross Buchanan Plyler; Sheally Venus Poe; Benjamin R. Pogue, III; Michelle Duncan Powers; Edward K. Pritchard, III; Frederick Elliotte Quinn, IV; Jacob Howell Raehn; Robert Lawrence Reibold; Martha M. Rivers Davisson; John E. Rosen; Martha Kent Runey; Nancy Doherty Sadler; Carmelo Barone Sammataro; Stephen T. Savitz; Mary Elizabeth Sharp; Reid T. Sherard; Cheryl D. Shoun; Jane Opitz Shuler; Lana H. Sims, Jr.; Jasmine Denise Smith; Krystal Watson Smith; Lisa Lee Smith; Michael Benjamin Smith; Henry B. Smythe, Jr.; Christian Giresi Spradley; J. Benjamin Stevens; Megan Finch Stevens; Randell Croft Stoney, III; Hal M. Strange; Robert Ernest Sumner, IV; Jeanmarie Tankersley; Heath Preston Taylor; David L. Tedder; John Hagood Tighe; Stephanie Millenbine van der Horst; Michael J. Virzi; Regina B. Ward; J. Calhoun Watson; Frances Ricci Land Welch; Daniel B. White; Richard Giles Whiting; Sheila Marlouvon Willis; Mitchell Willoughby; William Marvin Wilson, III; Carrington Salley Baker Wingard; William K. Witherspoon; David Whitten Wolf; Michael Dennis Wright and Clinton Joseph Yarborough.

Guests present were Steven Epps, The Hon. Stephanie McDonald, and Megan S. Seiner.

Representing the Bar staff were Innis Belton, Mary-Kathryn Craft, Jeremy Frazier, Warren Holland, Charmy Medlin, David M. Ross, Kimberly Snipes, and Kali Turner.

Chair Chris Koon called the meeting to order. A quorum was declared present.

A motion was made to allow privileges of the floor to nonmembers. The motion was seconded, and it was approved.

Chairperson Koon advised the House that Agenda Item 1(d), Request from SLD to Ament the Bar Constitution and Bylaws, had been removed from the agenda. The amended agenda was adopted by acclamation.

A motion was made to approve the Consent Agenda - approval of the minutes of the May 20, 2021 meeting, receipt of March Financial Statements and a request from the Family Law Section to amend Section Bylaws. The motion was seconded, and it was approved

Mr. Epps recognized the Solo and Small Firm Lawyer of the Year, Michael J. Polk.

Mr. Dusky recognized the Law Related Education Lawyer of the Year, Ryan Newkirk.

Ms. Seiner provided a report on the activities of the SC Bar Foundation including the status of IOLTA funds and giving trends. She noted the 50th Anniversary of the Bar Foundation and thanked Bar Officers for their support during the past year.

Under report of the President, Mr. Laney provided an overview of the work of the Bar's Diversity Strategic Plan Implementation Committee and the standing Diversity Committee. He encouraged House members to complete the Your Bar, Your Voice Survey. He provided updates on the Bar Convention, the Lawyers Helping Lawyers program, Continuing Legal Education during COVID, the Civil Rights Task Force and the Supreme Court Historical Society. In closing, he thanked the Chief Justice and the Court and the Bar staff for their support.

The following members were elected to the Nominating Committee: Robert E. Tyson, Jr. of Columbia (Region 2) and David B. Miller of Myrtle Beach (Region 3).

Mr. Tighe presented Bar and CLE Division budgets for 2021-22 and moved approval. The motion was seconded, and it was approved.

Ms. Sharp recognized outgoing Bar President Laney with a commemorative plaque and gift.

There being no further business, the meeting was adjourned.

Minutes
South Carolina Bar Assembly
May 6, 2021

President Laney convened a meeting of the Assembly and declared a quorum was present.

President Laney recognized and thanked outgoing Board members. He called on incoming Bar officers and Board members for installation.

Following the installation of officers and Board members, the Honorable Stephanie McDonald presented brief remarks and installed Mary E. Sharp as President of the South Carolina Bar. Ms. Sharp was recognized to make remarks.

Upon conclusion of the business for which it had convened, the Assembly was adjourned.

2

SOUTH CAROLINA BAR
PRO BONO LAWYER OF THE YEAR

The South Carolina Pro Bono Awards program seeks to identify and honor individual lawyers, small and large law firms, government attorney offices, corporate law departments and other organizations and institutions in the legal profession that have enhanced the human dignity of others by improving or delivering volunteer legal services to our state's low income community. Award recipients may have provided direct representation to individual clients, contributed to the development of innovative programs, impacted legislative efforts or otherwise aided in promoting access to the legal system for those unable to afford those services.

Past Pro Bono Awards

1987	W. Clarkson McDow Jr.
1988	Gary W. Poliakoff
1989	Marcia R. Powell
1990	Jon Rene Josey
1991	Harriet Daniels Hancock
1992	Edward T. Kelaher
1993	George B. Cauthen
	Nexsen Pruet Jacobs & Pollard
1994	Herbert E. Buhl III
	Ellis Lawhorne Davidson & Sims, PA
	Harvey & Battey, PA
1995	Freeman and Skinner
	Robinson, McFadden & Moore, PC
	Trefor Thomas
1996	Bernard J. Warshauer
	Lowery, Thompson & King
	Suggs & Kelly, PA
1997	James G. Long III
	Fairbanks & Lindsay, PA
1998	Julio E. "Rick" Mendoza
	Nelson Mullins Riley & Scarborough, LLP
	Wukela Law Firm
1999	Anderson and Jordan
	Finkel and Altman, LLC
	Eric K. Graben
2000	John R. Lester
	Kathleen Palinski
2001	Daniel J. Fritze
	Nelson Mullins Riley & Scarborough, LLP
	Smalls Law Firm, PC
2002	Anthony C. Hayes
2003	Jan M. Baker
	Moss & Reed, PA
2004	Stuart M. Andrews Jr.
	Robert K. Whitney
2005	The Benjamin Law Firm, LLC
	Jeffery P. Bloom
2006	Jonathan S. Altman
	Stephanie E. Lewis
	D. Peters Wilborn Jr.
2007	Ellis, Lawhorne & Sims, PA
2008	Philip A. Middleton
2009	Kristen E. Horne
	Keri A. Olivetti
2010	Christopher Genovese
	Alex Paterra
2011	Bradford T. Cunningham
	Louis T. "Tom" Runge
	Sowell Gray Stepp & Laffitte, LLC
2012	Jason Scott Luck
2013	Sharon Young Ward
2014	John E. Robinson
2015	Tina Marie Cundari
	Laura Johnson Evans
2016	J. Scott Bischoff II
2017	Megan Dell
2018	Nexsen Pruet Law Firm
2019	Olivia Stafford Jones
2020	Jeffrey W. Kuykendall
	V. Brian Bevon
	Ian Watterson

3

TO: House of Delegates
FROM: Pro Bono Board
DATE: July 12, 2021

RE: Amendment of Rule 6.1, South Carolina Rules of Professional Conduct, Rule 407, South Carolina Appellate Court Rules

The Pro Bono Board submits the following proposed amendment of Rule 6.1 of the South Carolina Rules of Professional Conduct contained in Rule 407 of the South Carolina Appellate Court Rules.

In 1983, the American Bar Association (ABA) adopted the Model Rules of Professional Conduct. Model Rule 6.1 stated the following:

> Rule 6.1 PRO BONO PUBLIC SERVICE
>
> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

South Carolina and twelve other states continue to use this language.[1]

[1] Ala. R. Prof'l Cond. 6.1; Conn. R. Prof'l Cond. 6.1; Del. Lawyers' R. Prof'l Conduct 6.1; Ind. R. Prof'l Cond. 6.1 (Indiana has included additional comments that define the terms "poverty law," "civil rights law," "public rights law," "charitable organization representation," and "administration of justice;" the comments also clarify the phrase "without the expectation of compensation"); Kan. R. Prof'l Cond. 6.1; Ky. R. Sup. Ct. 3.130(6.1) (the comments to the Kentucky rule are the same as the 1983 model rule; however, the rule itself states the following, in pertinent part: " A lawyer is encouraged to voluntarily render public interest legal service. A lawyer is encouraged to accept and fulfill this responsibility to the public by rendering a minimum of fifty (50) hours of service per calendar year by providing professional services at no fee or a reduced fee to persons of limited means, and/or by financial support for organizations that provide legal service to persons of limited means."); Mich. Prof'l Conduct R. 6.1; Mo. R.

The Comments to the South Carolina rule, and for the most part, the rules in the other states that have maintained this version, state the following:

> [1] The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.
>
> [2] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well to do.
>
> [3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the

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Prof'l Cond. 4-6.1; N.D.R. Prof. Conduct 6.1 (North Dakota added the following additional comment: "Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule."); N.J. R. Prof'l Cond. 6.1 (first sentence of rule is from 1993 model rule but remainder is from 1983 model rule); Okla. R. Prof'l Cond. 6.1; PA ST RPC Rule 6.1 (Pennsylvania added the following additional comment: "Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule."); SD ST RPC APP CH 16-18 Rule 6.1 (the South Dakota rule contains the same language as the 1983 model rule; however, the comments are from the 1993 version of the model rule).

> disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

In 1993, the ABA amended Model Rule 6.1 to more specifically define pro bono work. While the methods by which an attorney may provide pro bono assistance were essentially maintained, they were consolidated into two groups. Group A includes the provision of legal services to persons of limited means or to organizations that are designed primarily to address the needs of persons of limited means, while Group B includes the other forms of pro bono legal services. The ABA also added an aspirational goal of 50 hours (or such number of hours a state may choose). The amendment further states that "a substantial majority" of pro bono hours should be provided in the manner set forth in Group A.

> The distinction between parts (a) and (b) is based on the great unmet need for legal services in this country. Several studies have shown that twenty percent or less of the legal needs of low income persons are met in the United States. Long, acrimonious Congressional debates over public funding of the staffed and judicare programs that provide these services have made clear that in the near future adequate funding will not be available. The

> effort to meet this set of legal needs is one of the primary forces that has driven the consideration of mandatory pro bono and the adoption of Model Rule 6.1. The other principal basis for the distinction between (a) and (b) services is that lawyers have a special responsibility for the basic accessibility and functioning of the legal system. The (a) category involves direct legal services to those who cannot afford those services…. The (b) category assumes the functioning of the system and assumes access to justice, but calls on lawyers in other ways.

James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, the Profession and Legal Education*, 13 Law & Ineq. 51, 60 (1995).

Model Rule 6.1, as amended in 1993, stated the following:

> RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE
>
> A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
>
> (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means or
>
> (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:
>
> (1) delivery of legal services at no fee or substantially

> reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
>
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
>
> (3) participation in activities for improving the law, the legal system or the legal profession.
>
> In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

The Comments to the current version of the Model Rule state the following:

> [1] Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for

which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory lawyers' fees in a case originally accepted as pro bono would not disqualify such services from

inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal

system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

As part of the Ethics 2000 amendments, the ABA added the following sentence to the beginning of Model Rule 6.1: "Every lawyer has a professional responsibility to provide legal services to those unable to pay."

Twenty-three states use the current version of Model Rule 6.1.[2] Eight

[2] Alaska R. Prof'l. Cond. 6.1; Ark. R. Prof'l Cond. 6.1; Colo. R. Prof'l Cond. 6.1 (Colorado added the following provision to their rule: "Where constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill their pro bono publico responsibility by performing services or participating in activities outlined in paragraph (b)."; the comments do not include comment 11 to the model rule); Ga. R. Prof'l Cond. 6.1 (does not contain first sentence of the model rule and uses "substantial portion" instead of "substantial majority" in section (a); model rule comment 11 is not included in the Georgia comments); Haw. R. Prof'l Cond. 6.1 (the rule does not include the first sentence of the model rule; section (a) states a lawyer should provide "at least 25 hours" of pro bono service in the manner set forth in that section; the rule also includes the following provision: " In lieu of providing 50 hours of pro bono service, a lawyer may exercise his or her desire to provide pro bono services by contributing at least $500 each year to the Hawai'i Justice Foundation, or an entity that provides legal services at no fee, or at a significantly reduced fee, to persons of limited means."; comment 10 varies slightly from the model rule in order to address the unique provision in the Hawai'i rule); Idaho R. Prof'l Cond. 6.1; Iowa R. Prof. Cond. 32:6.1; La. R. Prof'l Cond. 6.1 (The first sentence of the Louisiana rule states the following: "Every lawyer should aspire to provide legal services to those unable to pay."); Maine R. Prof. Cond. 6.1 (does not contain second sentence of model rule setting forth an aspirational goal; comments vary slightly); Minn. R. Prof'l Cond. 6.1; Mont. R. Prof. Cond. 6.1; Neb. Ct. R. of Prof. Cond. § 3-506.1 (does not contain first sentence of model rule nor an aspirational number of hours; comment 5 differs slightly from the model rule and comments 6, 7, and 8 of the model rule are not included); N.H. R. Prof. Conduct 6.1 (contains an aspirational goal of 30 hours); N.M. R. Prof'l Cond. 16-601; N.M. R. Gov. Bar 24-108; N.C. R. Prof'l Cond. 1.6 (section (b)(1) of the model rule is section (a)(3) of the North Carolina rule and as a result, the references in the comments differ; in addition, comments 5 and 6 to the North Carolina rule differ slightly and the comments do not include comment 9 to the model rule; finally, the comments to the North Carolina rule contain the following paragraph: "Lawyers are encouraged to report pro bono legal services to Legal Aid of North Carolina, the North Carolina Equal Access to Justice Commission, or other similar agency as appropriate in order that such service might be recognized and serve as an inspiration to others."); R.I. R. Prof'l Cond. 6.1 (Rhode Island added the following to comment 12: "This Rule establishes an aspirational goal and not a mandatory obligation for attorneys."); Tenn. Sup. Ct. R. 8, RPC 6.1 (Tennessee added the following to model rule comment 4: " In some cases, a fee paid by the government to an appointed lawyer will be so low relative to what would have been a reasonable fee for the amount and quality of work performed--as in post-conviction death penalty cases--that the lawyer should be credited for the purpose of this Rule as having rendered the services

states have unique rules, and four states do not have a rule addressing pro bono service.

The rules in most states that have adopted the language of the current version of Model Rule 6.1 contain a 50-hour aspirational or suggested goal.[3] Some states contain a goal of thirty hours,[4] some twenty hours, and some contain no

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without fee. This would also be the case when a lawyer is appointed as counsel in a criminal matter, the fee paid the lawyer is capped at a certain amount, and the lawyer expends significant time working on the case after the capped amount has been exceeded."); Utah R. Prof'l Cond. 6.1 (the Utah rule provides that a lawyer may discharge the responsibility to provide pro bono legal services by making an annual contribution of at least $10 per hour for each hour not provided under paragraph (a) or (b) of the rule to an agency that provides direct services as defined in paragraph (a); the rule also includes a paragraph urging lawyers to report annually, through a simplified reporting form included in the Bar's annual dues statement, whether the lawyer has satisfied the lawyer's professional responsibility to provide pro bono legal services; Utah added comments 9a and 11a to explain those provisions); Vt. R.Pr.C. 6.1; Wash. R. Prof'l Cond. 6.1 (Washington's version of the rule specifies an aspirational goal of thirty hours of pro bono legal services per year rather than fifty, but provides for presentation of a service recognition award to those lawyers reporting to the WSBA a minimum of fifty hours; paragraph (a) of Washington's rule does not specify that the majority of the pro bono legal service hours should be provided without fee or expectation of fee, and the rule does not include the final paragraph of the model rule relating to voluntary contributions of financial support to legal services organizations; Washington added comments 13 through 16 to address those provisions, qualified service providers, and how to calculate pro bono service hours); W.Va. R. Prof'l Cond. 6.1 (the West Virginia rule does not specify a number of aspirational hours, but comment 1 includes the language that the ABA urges lawyers to provide 50 hours of pro bono service annually); WI SCR Ch. 20 SCR 20:6.1; WY RPC Rule 6.1 (the Wyoming rule includes the following paragraph: "In the alternative, a lawyer should voluntarily contribute $500.00 per year to any existing non-profit organization which provides direct legal assistance to persons of limited means such as the Equal Justice Wyoming Foundation, the Wyoming Legal Services Corporation offices, the University of Wyoming College of Law clinics, or some similar organization.").

[3] Alaska; Arizona; Arkansas; Colorado; Georgia; Hawaii; Idaho; Iowa; Kentucky; Louisiana; Maryland; Minnesota; Montana; New Mexico; New York; North Carolina; Rhode Island; Tennessee; Utah; Vermont; Wisconsin; Wyoming.

[4] New Hampshire; Washington

suggested number of hours.[5] The latter, however, do contain the language in Comment 1 that the ABA urges all lawyers to provide a minimum of 50 hours of pro bono services annually.

When the South Carolina Supreme Court decided to publish an annual Pro Bono Honor Roll, the Pro Bono Program received a number of calls from attorneys with questions about what constitutes pro bono legal service. Many callers sought clarification of what constitutes providing professional services at no fee and what is considered a "reduced fee." It was clear from the calls that there are attorneys who do not understand that legal services must have been provided *without expectation of a fee* for the services to be considered pro bono. There is a belief among some attorneys that when a client fails to pay their bill, the legal services have been provided on a pro bono basis. Many callers also inquired as to whether involvement with a variety of charities and organizations constituted pro bono legal work.

The language of the Model Rule itself, as well as the comments, provide clarity as to those questions and other questions that could arise in interpreting the South Carolina Rule for purposes of the South Carolina Supreme Court Pro Bono Honor Roll.

[5] Maine; Nebraska; West Virginia.

More importantly, the Model Rule, as noted earlier, is structured so as to prioritize the need for attorneys to assist persons of limited means in obtaining access to justice. The Model Rule, unlike the South Carolina Rule, states that a *substantial majority* of pro bono legal service should be spent providing legal service *without fee or expectation of a fee* to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations *in matters which are designed primarily to address the needs of persons of limited means*. The Model Rule still recognizes that pro bono service may be rendered by charging a person of limited means a *substantially* reduced fee, providing legal services at no fee or a substantially reduced fee to groups or organizations in other circumstances, or by participating in activities for improving the law, the legal system, or the legal profession, but the comments note those activities should be used to fulfill any remaining pro bono commitment or by government and public sector lawyers and judges who are subject to certain restrictions on their pro bono activities.

Approximately one-quarter of South Carolina's population lives at or below 125% of the federal poverty level, which is the threshold used by most organizations that provide free civil legal assistance. Typically, 86% of the civil legal problems faced by this population go unaddressed or are inadequately addressed because of a lack of resources. A vast majority of those households

experience civil legal problems, including problems with health care, housing conditions, disability access, veteran's benefits, and domestic violence, for which they cannot afford the services of a lawyer. The state's hardworking legal services organizations are simply unable to meet the legal needs of these citizens without assistance from private attorneys.

While South Carolina does not have a mandatory pro bono requirement,[6] adopting the structure of the Model Rule and the comments, which acknowledge "the critical need for legal services that exists among persons of limited means" and that "the provision of pro bono services is a professional responsibility" and "the individual ethical commitment of each lawyer," would place an emphasis on the critical role of pro bono legal service that is not found in the current South Carolina Rule.

Finally, the 50-hour aspirational goal in the Model Rule is consistent with the number of hours chosen by the South Carolina Supreme Court for inclusion on its Pro Bono Honor Roll.

Given the critical need for pro bono legal assistance in South Carolina and the numerous initiatives that are being undertaken to increase pro

[6] To emphasize the fact that adoption of the Model Rule is in no way intended to make pro bono service mandatory or to somehow indicate that there is any intention of moving toward a mandatory requirement, the Pro Bono Board voted to add language to the first paragraph of the Model Rule making it clear that neither the responsibility of providing pro bono services nor the rule are mandatory and shall not be enforced by way of the disciplinary process.

bono service in the state, including the Supreme Court's Pro Bono Honor Roll, which are generating interest and participation by members of the South Carolina Bar, the South Carolina Bar Pro Bono Board believes the time is appropriate to amend Rule 6.1 of the South Carolina Rules of Professional Conduct to conform, substantially, to Model Rule 6.1. A copy of the rule with proposed amendments is attached.

PROPOSED AMENDED RULE 6.1
SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

Rule 6.1 Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. However, neither that responsibility nor this rule are mandatory and failure to meet that responsibility or to comply with the provisions of this rule shall not be enforced through the disciplinary process.

This rule is intended to be aspirational only. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

[1] Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of

statutory lawyers' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial

support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

4

MEMORANDUM

To: SC Bar House of Delegates

From: Carolyn C. Matthews, President
SC Bar Senior Lawyers Division

Date: April 19, 2021

Re: Proposed Amendments to the SC Bar Constitution & Senior Lawyers Division Bylaws

Below are proposed amendments to the SC Bar Constitution and Senior Lawyers Division Bylaws. The Division currently has one representative serving on the Board of Governors and is requesting to have two representatives from the Division serve on the Board of Governors. The Division has over 5200 members, which exceeds the number of members in the Young Lawyers Division, which has two representatives on the Board of Governors.

As required by ARTICLE XII of the SLD Bylaws, the proposed amendments were approved by a vote of two-thirds of the Senior Lawyers Division Ex. Council present and voting. The vote occurred on March 9, 2019, at the Division Annual Retreat.

Senior Lawyers Division Bylaws

ARTICLE VI. Section 1. Representation on the Board of Governors.

The Division is entitled to ~~one~~ two representatives to serve on the Board of Governors as authorized by the Bar Constitution. The representatives shall serve a term of two years and shall be elected by a vote of two-thirds or more of the Division's Executive Council. These representatives shall make reports to the Executive Council as requested by the President.

SC Bar Constitution

ARTICLE VII. The Board of Governors. Section 7.2 Composition.

The Board of Governors is composed of the President, the President-elect, the Immediate Past President, the Secretary, the Treasurer, the president-elect and immediate past president of the Young Lawyers Division, ~~a~~ two representatives of the Senior Lawyers Division, and the Chair of the House of Delegates, all of whom shall be members ex officio, together with two members (the "elected members") from each judicial region and two additional members (the "at large members") who shall be elected as hereinafter provided.

Thank you in advance for your consideration.

5

PENDARVIS LAW OFFICES, PC

October 13, 2020

South Carolina Bar
Professional Responsibility Committeee

RE: Proposed Lawyer-to-Lawyer Dispute Resolution Rule Report

Members of the Professional Responsibility Committee:

This is a report on behalf of the members of the Subcommittee on the proposed Lawyer-to-Lawyer Dispute Resolution Rule.

There is very little empirical data on the number of disputes among lawyers and law firms in South Carolina. The subcommitte did come across a Martindale Hubbell report showing over 800 law firm break ups reported nationwide in 2009. There is, however, a fair amount of anecdotal data suggesting a substantial number of those disputes here in South Carolina and the parties to those disputes incurring substantial legal fees over several years until the matter is resolved.

Information obtained from members of the subcommittee and from conversations with other lawyers who handle disputes between lawyers and disputes between law firms reveals a significant number of disputes between lawyers and disputes between law firms, primarily involving two typical circumstances: 1) lawyer departures from law firms and 2) lawyer charging liens. Subcategories of typical lawyer-to-lawyer disputes subject areas include:

1. Law firm non-compete arrangements;
2. Other law firm restrictions;
3. Matters concerning withdrawing lawyers, including fee allocation and unfinished business;
4. Client file ownership issues;
5. Trust account concerns;
6. Trust account ramifications of client retainers;
7. Timing of trust account disbursements from a trust account;
8. Creditors' claims against trust account funds;
9. Handling left-over client trust account funds;
10. Law firm names, trade names, and telephone numbers;
11. Law firm domain names, websites, and URLs;

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12. Communications – recruitment of law firm employees;
13. Conflicts on interest concerns/disqualifications when law firm hires laterals;
14. Conflicts on interest concerns/disqualifications when law firm hires adverse lawyers;
15. General fee sharing rules;
16. Charging lien concerns;
17. Duty to supervise lawyers and non-lawyers; and
18. Lawyer – law firm advertising post departure.

In addition to the sensitivity of client information that is frequently imbedded in lawyer-to-lawyer disputes, one of the primary issues driving the need for a Lawyer-to-Lawyer Dispute Resolution Rule is the significant legal fees incurred in resolving a growing percentage of lawyer-to-lawyer disputes. The common financial resource disparity between the law firm, on one hand, and the departing lawyer, on the other compounds the delimia in equitably resolving these disputes. Providing an inexpensive remedy designed to streamline the dispute resolution process and at least place the dispute on an immediate mediation/arbitration track with an ability to have the dispute finally resolved in the Circuit Court and Appellate Court should fill a needed gap in the services available to members of the Bar.

It is anticipated that a combination of the filing fees and the lawyer-parties' respective obligations to pay mediation or arbitration fees should be sufficient to support the costs to the Bar to support this program. In the event this propsal is adopted by the Bar and by the Supreme Court, the filing fees could be monitored during the first year and then adjusted if insufficient to cover the support costs.

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RULE _____

South Carolina Appellate Court Rules

RULES OF PROCEDURE

SOUTH CAROLINA BAR ATTORNEY DISPUTE RESOLUTION PROGRAM

RULE 1. CREATION

There is hereby created the South Carolina Bar Attorney Dispute Resolution program ("program").

RULE 2. JURISDICTION

The purpose of the program is to establish procedures for resolving: (1) disputes involving law firm dissolutions or departures of one or more attorneys from a law firm; (2) internal disputes within law firms involving the allocation of fees; (3) disputes involving the allocation of fees between attorneys in different firms; and (4) disputes involving financial matters and property rights within law firms and between attorneys in different law firms. The program is designed to resolve such disputes expeditiously, fairly and professionally, thereby furthering the administration of justice, encouraging the highest standards of ethical and professional conduct, assisting in upholding the integrity and honor of the legal profession, and applying the knowledge, experience and ability of the legal profession to the promotion of the public good. The program is further designed to provide a mandatory procedure for the speedy, private and cost effective resolution of such disputes. A dispute exists when (1) an action has been filed with a Court of Common Pleas in the State of South Carolina or (2) when any party involved in a dispute described in this Paragraph submits a Request to Arbitrate/Mediate to the program.

RULE 3. APPOINTMENT AND TENURE

The program shall be administered by the South Carolina Bar and shall be overseen by a Board consisting of five (5) members of the South Carolina Bar. The President of the South Carolina Bar ("President") shall appoint the members of the Board. Members of the Board shall be appointed for terms of three (3) years or until a successor has been appointed. Where additional members are subsequently appointed, those appointments shall be on a staggered basis so that the number of terms expiring shall be approximately the same each year. The expiration of a term will coincide

with the date of expiration of the term of the incumbent President in the same year. A member of the Board may be reappointed.

RULE 4. DUTIES

The program is authorized to require the arbitration and/or mediation of any dispute under its jurisdiction. The program shall solicit and maintain a list of members of the South Carolina Bar who shall serve as neutrals, either as an arbitrator or mediator (collectively "neutral" or "arbitrator" or "mediator" where appropriate). In compiling the list of neutrals, the program and Board shall consider the following criteria: (1) years of practice; (2) years of practice in South Carolina; (3) specific training or experience; (4) specific training provided by the South Carolina Bar on the relevant Rules of Professional Conduct; (5) minority representation; and (6) other relevant factors. The program shall be responsible for maintaining all files received, assigning neutrals, record keeping and handling administrative tasks. The program may delegate program administrative tasks as appropriate and as approved by the Board. The program shall have the right to decline, to assume or to continue jurisdiction over any dispute when, in the opinion of the assigned or selected neutral, the dispute involves (a) a non-attorney party or (b) a probable violation of the criminal code or Rules of Professional Conduct.

RULE 5. INITIATION OF ARBITRATION AND/OR MEDIATION

All proceedings hereunder shall be initiated when: (1) an action has been filed with a Court of Common Pleas in the State of South Carolina or (2) when any party involved in a dispute listed in Rule 2 submits a Request to Arbitrate/Mediate to the program.

Parties may initially request mediation only, arbitration only, or both mediation and arbitration. Where mediation only is requested, the parties may agree, at the conclusion of mediation, to submit unresolved issues to arbitration, with no additional administrative fee. Where mediation and arbitration is requested, the parties must complete at least one mediation session before proceeding to arbitration.

RULE 6. ASSIGNMENT OF A NEUTRAL:

The program shall assign a neutral in the following manner:

1. Within five (5) days of the filing of the Agreement to Arbitrate/Mediate, the program shall submit simultaneously to each party an identical list of three (3) neutrals randomly selected from the program's list of neutrals;

2. The parties shall have ten (10) days from the mailing date to select a primary neutral and an alternate neutral and inform the program of their mutual selection. If the parties do not reach an agreement on selecting a primary neutral and alternative neutral within ten (10) days, the program shall make the selections and inform the parties of the primary neutral and alternative neutral;

3. In accordance with the parties' selection, the program shall inform the primary neutral of the parties' selection and invite the neutral to serve in the matter. If the selected neutral declines or is unable to serve for any reason, the program shall inform the parties of the same and proceed with informing the alternate neutral of the parties' selection and invite the alternate neutral to server in the matter. If the alternate neutral declines or is unable to server for any reason, the program shall repeat the procedure for the assignment of a neutral until a neutral has been selected who is willing and able to serve as a neutral in the matter.

4. A neutral shall not serve in dual capacities in the same matter. A neutral who served as a mediator in a matter may not also serve as an arbitrator on that case, and vise versa. The mediator and the arbitrator are prohibited from communicating with each other about the case. The mediator may, however, obtain written stipulations at the conclusion of mediation in order to certify unresolved issues for arbitration.

RULE 7. DISQUALIFICATION OF NEUTRAL

The selected neutral shall promptly disclose any circumstance likely to create a presumption of bias or that the neutral believes disqualifies him or her as an impartial neutral. Upon such information, the program shall follow the process of the assignment of a neutral as specified in Rule 6.

RULE 8. SUBSTITUTION OF NEUTRAL

If any neutral should die, withdraw, refuse or be unable to perform the duties of office, the program shall assign a new neutral in the same manner as specified in Rule 6.

RULE 9. SCHEDULING

The initial mediation conference shall be scheduled at the earliest practicable date but in no event shall the initial mediation conference be scheduled for a date later than thirty (30) days from the assignment of a mediator. The initial arbitration hearing shall be scheduled at the earliest practicable date but in no event shall the initial arbitration hearing be scheduled for a date later than forty-five (45) days from the assignment of an arbitrator.

RULE 10. LOCATION OF ARBITRATION AND/OR MEDIATION CONFERENCE

The initial, and subsequent, arbitration and/or mediation conference shall take place at a location mutually agreed upon by the parties and the neutral. If the parties are unable to agree upon a location, the neutral shall designate a neutral location for the mediation conference. For the purposes of this rule, the neutral's office, courthouses, and office of the South Carolina Bar may be considered, without limitation, as neutral locations.

RULE 11. CONDUCT OF MEDIATION

The initial, and any subsequent, mediation conference shall be conducted in accordance with the South Carolina Alternative Dispute Resolution Rules. The mediator shall have the right to determine the format of the initial, and any subsequent, mediation conference. After the first mediation conference, additional conference(s) may be scheduled by mutual agreement of the parties and the mediator.

RULE 12. FINAL NEUTRAL REPORT TO PROGRAM

Upon the conclusion of the mediation conference(s), the mediator shall submit a report to the program indicating whether the matter has been resolved, in whole or in part, or if the matter has not been resolved.

RULE 13. CONDUCT OF ARBITRATION

Arbitration shall be governed by Rule 12 of the South Carolina Alternative Dispute Resolution Rules, unless otherwise stated.

A. Number of arbitrators: The dispute shall be heard and determined by one arbitrator, unless all parties otherwise agree.

B. Supporting Statements: Ten (10) days prior the arbitration, all parties shall provide to the arbitrator, and all other interested parties, a brief written statement setting forth the nature of the dispute, their position, and a description of evidence or expected testimony in support of their position or in opposition to the position of the opposing party or parties.

C. Representation by Counsel: Any party may be represented at the hearing by counsel.

D. Stenographic Record: Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the arbitrator and all other parties of these arrangements in advance of the hearing. The requesting party or parties shall pay the costs of the record. If the transcript is agreed by the parties to be, or determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator and to the other parties for inspection, at a date, time, and place determined by the arbitrator.

E. Attendance at Hearing(s): The arbitrator shall have the power to require sequestration of any witness or witnesses during the testimony of other witnesses. A witness who is a party shall not be sequestered. The arbitrator shall determine the propriety of the attendance of any other person.

F. Continuances and Adjournments: The arbitrator for good cause shown may adjourn the hearing upon the request of a party or upon his or her own initiative.

G. Oaths: The arbitrator shall require witnesses to testify under oath or affirmation administered by the arbitrator or by any duly qualified person.

H. Majority Decision: Whenever there is more than one arbitrator, all rulings of the arbitration panel shall be by majority vote. The award shall also be made by majority vote of all arbitrators, unless the concurrence of all is expressly required by any arbitration agreement between the parties.

I. Order of Proceedings:

1. A hearing shall be opened by the swearing of witnesses by oath or affirmation; by the notation of the place, time and date of the hearing and the presence of the arbitrator and the parties.

2. The arbitrator may vary the normal procedure under which the initiating party first presents its claim, but in any case shall afford full and equal opportunity to all parties for the presentation of relevant proofs.

J. Arbitration in the Absence of a Party: The arbitration may proceed in the absence of any party who, after due notice, fails to be present or fails to obtain a continuance. An award shall not be made solely on the default of a party; the arbitrator shall require the other party to submit such evidence as may be deemed required for the making of any award.

K. Evidence: The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.

L. Evidence by Affidavit: The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after consideration of any objection to its admission.

M. Termination of Hearings: If briefs or other documents are to be filed, the hearings shall be deemed closed as of the final date set by the arbitrator for filing. The time limit within which the arbitrator is required to make an award shall commence to run, in the absence of another agreement by all parties, upon the closing of the hearings.

N. Reopening of Hearings: The hearings may, for good cause shown, be reopened upon the motion of any party at any time before the award is issued but not thereafter.

O. Waiver of Hearings: Upon written consent of all parties, the hearing may be waived and the matter submitted by stipulations and/or written submissions, subject to approval of the arbitrator's right to require further evidence.

P. Communication with Arbitrator: There shall be no *ex parte* communication between any party or other person participating in the process and the arbitrator.

Q. Extension of Time: The parties may modify any period of time by mutual agreement. The arbitrator may, for good cause shown, extend any period of time established by the rules. The arbitrator shall notify the parties of any such extension.

R. Time of Award: The award shall be rendered promptly by the arbitrator and, unless otherwise agreed by the parties, no later than thirty (30) days from the date the hearings are closed.

S. Form of Award: The award shall be in writing and shall be signed either by the arbitrator or by a concurring majority if there be more than one arbitrator. The arbitrator shall not comment on the award following its issuance.

T. Award upon Settlement: If the parties settle their dispute during the course of the arbitration, the arbitrator shall, upon their request, set forth the terms of the agreed settlement in an award.

U. Service of Notice: Each party shall be deemed to have consented that any notice necessary for the processing of the arbitration may be served by US mail to the last known address of the party, its attorney or by personal service.

V. Delivery of Award to Parties: Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the arbitrator(s), addressed to each party at its last known address or to its attorney; personal service of the award, or the filing of the award in any other manner that may be prescribed by law.

W. Expenses: The expenses of witnesses for either party shall be paid by the party producing such witnesses.

X. Appeal: Rule 12(d) of the South Carolina Alternative Dispute Resolution Rules shall govern any appeal, unless all parties agree prior to the service of the award that the arbitration is binding with no appeal.

RULE 14. CONFIDENTIALITY

All proceedings under the program shall be confidential as defined under Rule 8 of the South Carolina Alternative Dispute Resolution Rules.

RULE 15. PROGRAM FEES AND NEUTRAL FEES

An administrative fee of Two Hundred Fifty and no/100 ($250.00) Dollars shall be charged to each party by the program. neutral fees and costs shall be evenly split amongst the parties with the neutral having the right to charge his or her standard and customary hourly rate and costs. The parties shall be required to escrow fees and costs prior to the initial arbitration or mediation in an amount estimated by the neutral. The neutral shall inform the parties of the amount to be escrowed no less than five (5) days prior to the initial mediation conference date or arbitration.

RULE 16. ARBITRATION AND MEDIATION UNDER THIS RULE SHALL FULFILL THE PARTIES' REQUIREMENT TO COMPLY WITH THE SOUTH CAROLINA ALTERNATIVE DISPUTE RESOLUTION RULES

Arbitration and mediation conducted under this Rule shall fulfill the parties' requirement to comply with the South Carolina Alternative Dispute Resolution Rules.

RULE 17. WAIVER OF LIABILITY

Neither the South Carolina Bar, its agents and employees, nor any neutral shall be liable to any party for any act or omission in connection with any arbitration or mediation conducted under these rules. Neither the South Carolina Bar, its agents and employees, nor any neutral is a proper party in any judicial proceedings relating to any arbitration or mediation performed under this program. The South Carolina Bar, its agents and employees, and all neutrals are immune from suit and service of process and shall not appear as witnesses in any subsequent proceedings.

RULE 18. AMENDMENTS TO RULES

Upon approval by the South Carolina Bar's House of Delegates, amendments to these Rules shall be submitted to the Supreme Court of South Carolina for approval. Any amendment to these rules is effective as to any fee dispute filed after the date of approval by the Supreme Court.

6

To: House of Delegates

Date: July 2, 2021

From: Practice and Procedure Committee

Re: Proposed Modification to Rule 14(e), South Carolina Rules of Family Court, to allow acceptance of service

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Currently Rule 14, South Carolina Rules of Family Court, only allows for personal service of a Rule to Show Cause, unless the Court orders otherwise. This would mean that a party would have to request the ability to serve a party by other means when filing their Petition for Rule to Show Cause with the Court. The Practice and Procedure Committee has received a request to modify a portion of Rule 14(e), SCRFC, which is the rule that deals with service of a Rule to Show Cause to include the ability of a party and/or their attorney to accept service of the same by combing the appropriate language from Rule 4(j), South Carolina Rules of Civil Procedure, with the existing Rule 14(e), SCRFC. Below are both the current version of the rule and the proposed modification.

Current version of Rule 14(e), SCRFC:

(e) Service. The rule to show cause shall be served with the supporting affidavit or verified petition by personal delivery of a duly filed copy thereof to the responding party by the Sheriff, his deputy or by any other person not less than eighteen (18) years of age, not an attorney in or a party to the action.

Proposed modified version of Rule 14(e), SCRFC:

(e) Service. The rule to show cause shall be served with the supporting affidavit or verified petition by personal delivery of a duly filed copy thereof to the responding party by the Sheriff, his deputy or by any other person not less than eighteen (18) years of age, not an attorney in or a party to the action; provided, no other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or his attorney, and delivered to the person making service. The acknowledgement shall state the place and date service is accepted.

7

To: House of Delegates

Date: July 2, 2021

From: Practice and Procedure Committee

Re: Proposed Modification to Rule 4, South Carolina Rules of Civil Procedure

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Currently Rule 4, South Carolina Rules of Civil Procedure, does not have specific procedures for serving an individual in a foreign country nor are there any statutes in the South Carolina Code of Law that have specific procedures for the same. The Practice and Procedure Committee proposes adding language from Rule 4, Federal Rules of Civil Procedure, that deal with this process of service. The proposed modification would be the addition of the language referenced below and would not require any modification to the existing language of Rule 4, SCRCP. The addition of such language would be in line with the common law of South Carolina, which states: "Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure. *See* H. Lightsey & J. Flanagan, South Carolina Civil Procedure, (2d ed. 1985)." *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 331, 404 S.E.2d 200, 201 (1991). The proposed amendment is set forth below (the current "Notes" have been removed for easy of reading the proposed amendment).

RULE 4. PROCESS.

(a) **Summons: Issuance.** The summons shall be issued by plaintiff or plaintiff's attorney. Copies of the original summons shall be served upon each defendant.

(b) **Same: Form.** The summons shall be signed by the plaintiff or his attorney, contain the name of the State and county, the name of the court, the file number of the action, and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

(c) **By Whom Served.** Service of summons may be made by the sheriff, his deputy, or by any other person not less than eighteen (18) years of age, not an attorney in or a party to the action. Service of all other process shall be made by the sheriff or his deputy or any other duly constituted law enforcement officer or by any person designated by the court who is not less than eighteen (18) years of age and not an attorney in or a party to the action, except that a subpoena may be served as provided in Rule 45.

(d) **Summons: Personal Service.** The summons and complaint must be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Voluntary

appearance by defendant is equivalent to personal service; and written notice of appearance by a party or his attorney shall be effective upon mailing, or may be served as provided in this rule. Service shall be made as follows:

(1) **Individuals.** Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

(2) **Minors, Incompetents and Persons Confined.** Upon a minor under the age of 14 years, a person judicially declared incapable of conducting his own affairs, or an incompetent person by delivering a copy of the summons and complaint to such minor, or incompetent personally and also a copy to (a) the guardian or committee of such person, or if there be none such within the State upon (b) a parent or other person having the care and control of such person, or (c) any competent person with whom he resides or (d) in whose service he is employed. If the individual upon whom service is made is a minor between the ages of 14 and 18, who lives with a parent or guardian, a copy of the summons and complaint shall likewise be served upon said parent or guardian, if said parent or guardian resides within the State. Service on imprisoned persons or persons confined in a state hospital or similar institution, in or out of this State, shall be made by delivering a copy of the summons and complaint to the confined person personally; and service shall be made by the sheriff of the county in which the person is imprisoned or confined. In cases of persons imprisoned, and patients in a state hospital or similar institution, personal service of process may be made by the superintendent of the institution or by the director of the prison system or by assistants duly designated by the superintendent or the director in writing for the purpose of making service of process, instead of the sheriff. The superintendent or the director or their designated assistants shall not be entitled to any costs therefore. Service on confined or imprisoned persons shall also conform to the provisions of § 15-9-510, S.C. Code, 1976.

(3) **Corporations and Partnerships.** Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) **State of South Carolina.**

(A) **When State a Party.** Upon the State of South Carolina by delivering a copy of the summons and complaint to the Attorney General, or when another official is designated to be served by the statute permitting such action by delivering a copy of the summons and complaint to that official and sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.

(B) **When Unconstitutionality of Statute Is Asserted.** In any action attacking the Constitutionality of a State statute when the State, officer or agency is not made a party, a copy of the summons and complaint shall be sent by registered or certified mail to the Attorney General.

(5) **State Officer or Agency.** Upon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) **Governmental Subdivision.** Upon a municipal corporation, county or other governmental or political subdivision subject to suit, by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon any such defendant.

(7) **Statutory Service.** Service upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule is also sufficient if the summons and complaint are served in the manner prescribed by statute.

(8) **Service by Certified Mail.** Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a sheriff or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

(9) **Service by Commercial Delivery Service.** Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c) by a commercial delivery service which meets the requirements to be considered a designated delivery service in accordance with 26 U.S.C. § 7502(f)(2). Service is effective upon the date of delivery as shown in the delivery record of the commercial delivery service. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a delivery record showing the acceptance by the defendant which includes an original signature or electronic image of the signature of the person served. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the delivery receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

(e) **Serving an Individual in a Foreign Country**. Unless a statute provides otherwise, an individual–other than a minor, or an incompetent person~~, or a person whose waiver has been filed~~ may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

~~(e)~~**(f) Same: Other Service.** Whenever a statute or an order of court provides for service of a summons and complaint or of a notice, or an order upon a party not an inhabitant of or found within the State, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

~~(f)~~**(g) Territorial Limits of Effective Service.** All process other than a subpoena may be served anywhere within the territorial limits of the State, and, when a statute so provides, beyond the territorial limits of the State. A subpoena may be served within the territorial limits provided in Rule 45.

~~(g)~~**(h) Proof and Return.** The person serving the process shall make proof of service thereof promptly and deliver it to the officer or person who issued same. If served by the sheriff or his deputy, he shall make proof of service by his certificate. If served by any other person, he shall make affidavit thereof. If served by publication, the printer or publisher shall make an affidavit thereof, and an affidavit of mailing shall be made by the party or his attorney if mailing of process is permitted or required by law. Failure to make proof of service does not affect the validity of the service. The proof of service shall state the date, time and place of such service and, if known, the name and address of the person actually served at the address of such person, and if not known, then the date, time and place of service and a description of the person actually served. If service was by mail, the person serving process shall show in his proof of service the date and place of mailing, and attach a copy of the return receipt or returned envelope when received by him showing whether the mailing was accepted, refused, or otherwise returned. If the mailing was refused, the return shall also make proof of any further service on the defendant pursuant to paragraph (8) of subdivision (d) of this rule. The return along with the receipt or envelope and any other proof shall be promptly filed by the clerk with the pleadings and become a part of the record. If service was by commercial delivery service, the person initiating the service of process shall make an affidavit identifying the process or other documents served and shall attach to the affidavit a delivery record of the commercial delivery service which shall contain the date, time, and place of delivery, the name of the person served, and include an original signature or electronic image of the signature of the person served. The affidavit and delivery record and any other proof shall be promptly filed by the clerk with the pleadings and become a part of the record.

~~(h)~~**(i) Proof of Service Without the State.** When the service is made out of the State the proof of such service may be made, if within the United States, by affidavit before:

(1) Any person in this State authorized to make an affidavit;

(2) A commissioner of deeds for this State;

(3) A notary public who shall affix thereto his official seal; or

(4) A clerk of a court of record who shall certify the same by his official seal; and,

(5) If made without the limits of the United States, before a consul, vice-consul or consular agent of the United States who shall use in his certificate his official seal.

~~(i)~~**(j) Amendment.** At any time in its discretion and upon terms as it deems just, the court may, by written order, allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

~~(j)~~**(k) Acceptance of Service.** No other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or his attorney, and delivered to the person making service. The acknowledgement shall state the place and date service is accepted.

8

To: House of Delegates

Date: July 2, 2021

From: Practice and Procedure Committee

Re: Proposed inclusion of additional notes in accord with *Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 818 S.E.2d 758 (2018)

The issue Practice and Procedure brings before the House of Delegates is that a conflict exists between Rule 11 SCRCP and the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA), S.C. Code § 15-36-10 regarding the time to file a request for sanctions. This conflict was addressed by *Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 818 S.E.2d 758 (2018) and the Practice and Procedure Committee believes that the attached should be added to the Notes to Rule 11.

The FCPSA requires that any request for sanctions be made within 10 days of a judgement. No such requirement is set forth in Rule 11. The Supreme Court resolved the conflict by adopting a four part test that is fully set forth in our proposed amendment to Rule 11 Notes.

In *Pee Dee* the appellant filed both the FCPSA and the Rule 11 request for sanctions *9 days after* the Court of Appeals ruled on Pee Dee's petition for re-hearing, along with 2 other of Pee Dee's consolidated appeals, *and 4 years after judgement.*

While the Court denied the request for sanctions under the FCPSA, it upheld the request for sanctions under Rule 11 with the application of the 4 part test. We believe that it is important for members of our Bar that this timelines requirement be included in the notes to Rule 11, and request that the House of Delegates approve the same.

Proposed notes for Rule 11, SCRCP, from Pee Dee Health Care, P.A. v. Estate of Thompson, 424 S.C. 520, 818 S.E.2d 758 (2018):

- "Rule 11 clearly does not include a ten-day time limit. It is not possible under our rules of construction to read a ten-day time limit into a Rule that does not contain a ten-day time limit. In respect to timing, therefore, the plain meaning of Rule 11's lack of specific time limit is that there is no specific time limit." 424 S.C. at 531, 818 S.E.2d at 764.

- "Although Rule 11 does not contain a specific time limit, the law does not allow a person to sit on legal rights indefinitely. Therefore, there are a number of important considerations a circuit court must make when determining whether a motion for sanctions under Rule 11 is untimely. The first and most important consideration is whether the court still retains jurisdiction over the case. "The jurisdiction of the circuit court to hear matters after issuance of the remittitur is well established." 424 S.C. at 531, 818 S.E.2d at 764.

- "The second consideration for a circuit court to make is to analyze the timing of the motion in light of the multiple purposes of Rule 11." 424 S.C. at 533, 818 S.E.2d at 765.

- The third consideration a court should make when determining if a Rule 11 motion is untimely is embodied in the common law doctrine of laches, which we have defined as the "neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done" promptly. Jefferson Pilot Life Ins. Co. v. Gum, 302 S.C. 8, 11, 393 S.E.2d 180, 181 (1990)." 424 S.C. at 536–37, 818 S.E.2d at 767.

- "Finally, we come to the basis of the court of appeals' decision finding the motion in this case untimely—reasonableness. As a general proposition, we cannot disagree with the court of appeals' holding "that a party must file a motion for sanctions pursuant to Rule 11 within a reasonable time of discovering the alleged improprieties." 418 S.C. at 570, 795 S.E.2d at 47 (citing Griffin, 525 S.E.2d at 508). Other courts that have addressed the question of the timeliness of a Rule 11 motion have also imposed a reasonableness standard. See, e.g., Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988) (finding the court had jurisdiction to impose sanctions after the plaintiffs voluntarily dismissed the lawsuit under Rule 41, and stating "a party should make a Rule 11 motion within a reasonable time"). We agree with the court of appeals, therefore, that a Rule 11 motion is untimely if the circuit court—considering all relevant circumstances in the context of the litigation—determines the motion was not filed in a reasonable period of time after the discovery of the alleged misconduct." 424 S.C. at 537, 818 S.E.2d at 767.

9

Proposal to Adopt a Regulatory Structure to Address Complaints Regarding Unauthorized Practice of Law

The unauthorized practice of law is an ongoing threat to the citizens of South Carolina, particularly those in lower socioeconomic and immigrant communities. The various schemes include drafting wills and other estate planning documents, advising on divorce and child custody matters, closing real estate transactions, preparing immigration and naturalization paperwork, offering debt relief programs, and negotiating landlord-tenant disputes among many others. While there is no doubt many South Carolinians are caught in access to justice and under-representation gaps, those problems should be solved through authorized and regulated programs and providers. Unfortunately, many nonlawyer legal service providers see these unmet needs as an invitation to capitalize on the lack of knowledge on the part of unwary clients and the lack of enforcement by an overworked system. Although many instances of UPL in South Carolina are well-intentioned, far too many are opportunistic scams that take clients' money and leave their rights unprotected and their interests compromised. For many years, the South Carolina Bar has worked to combat the unauthorized practice of law in our state. However, recent clarifications in the law from the US Supreme Court have curtailed those efforts.

Historically, the Unauthorized Practice of Law Committee of the South Carolina Bar was tasked with receiving and reviewing complaints from Bar members, judicial officers, and the public alleging unauthorized practice of law. Upon receipt of a complaint, the Bar staff liaison to the UPL Committee would review the complaint to determine if it fell within the authority of the UPL Committee. If not, she would forward the complaint to the appropriate office or agency or communicate with the complainant to assist in addressing their concerns. If the complaint did, in fact, allege unauthorized practice of law, the Bar staff liaison would send a copy to the Chair of the UPL Committee. The Chair would either make a determination regarding the complaint or present it to the UPL Committee at its next meeting. The Chair or the Committee would then take some action on the complaint. If the conduct alleged in the complaint did not appear to constitute the unauthorized practice of law, a letter of explanation would be sent to the complainant. If the conduct alleged in the complaint did appear to constitute the unauthorized practice of law and the subject was a nonlawyer, the Committee would either issue a cease-and-desist letter or refer the complaint to the appropriate law enforcement agency, depending on the nature of the conduct and the evidence available. If the conduct alleged in the complaint did appear to constitute the unauthorized practice of law and the subject was an out-of-state lawyer, the Committee would refer the matter to the Commission on Lawyer Conduct. The UPL Committee operated this way for several decades.

In 2015, the UPL Committee was forced to change its process and goals when the US Supreme Court issued its decision in N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 135 S. Ct. 1101 (2015). In that case, the high court held that a non-governmental entity, public or private, controlled by active market participants had to operate under a clear articulation of government authority and the active supervision of a governmental

agency in order for its members to be protected by state-action antitrust immunity.[1] Concerned that its members might be subject to civil liability for antitrust activities, the UPL Committee shifted its mission. The Committee now serves as a clearinghouse for complaints, simply referring them to various government and law enforcement agencies, without opining on the legality of the conduct reported in the complaints. The Committee also now focuses on educating the public and the Bar on issues related to the unauthorized practice of law.

Unfortunately, this has left a gap in the protection of the public from the risks associated with unauthorized practice. Many law enforcement agencies are unable or unwilling to pursue investigations and prosecutions of these types of infractions. In addition, often arrest and prosecution is not the appropriate way to address the concerns of the complainants. In order to fill this gap and avoid personal liability of Bar volunteers, the UPL Committee proposes that the Supreme Court establish a Commission on the Unauthorized Practice of Law and authorize the Office of Disciplinary Counsel to review, investigate, and where appropriate, prosecute UPL complaints. The Commission on UPL would function similarly to the Commission on Lawyer Conduct and the Commission on Judicial Conduct, with the assistance of the Commission Counsel. The rules of procedure would be similar to RLDE and RJDE, with the added benefit of authorizing the Commission on UPL to conduct hearings on declaratory judgment petitions filed in the original jurisdiction of the Supreme Court. The UPL Committee currently receives between fifteen and thirty UPL complaints each year. Approximately half of those are against out-of-state lawyers. The additional cost to the current regulatory structure would be negligible as no additional staffing would appear to be necessary. Should costs of operation of the Office of Disciplinary Counsel or the Office of Commission Counsel increase as a result of this new jurisdiction, it could be covered with fees and fines.

With internet accessibility and the rising cost of legal services, the unauthorized practice of law poses a serious and substantial risk of harm to the public. The combined efforts of a regulatory process administered by a Supreme Court commission, investigation and prosecution of criminal activity by law enforcement agencies, and education and awareness initiatives by the South Carolina Bar's UPL Committee will protect the rights and interests of South Carolina citizens.

[1] As a result of this decision, the volunteer members of the North Carolina State Board of Dental Examiners were not entitled to state-action antitrust immunity when the Board interpreted the Dental Practice Act as addressing teeth whitening or when it issued cease-and-desist letters to people who were not licensed dentist offering teeth whitening services to the public.

PROPOSED RULES OF THE COMMISSION ON THE UNAUTHORIZED PRACTICE OF LAW

RULE 1 - PURPOSE

The regulation of the practice of law is critical to protecting the public and ensuring public confidence in the judicial system. These Rules provide a procedure for addressing the Supreme Court's duty to regulate the practice as established by Article V, Section 4, of the constitution and as inherently required in a system of separated powers. These Rules do not supplant any authority vested by acts of the General Assembly to pursue criminal prosecutions for the unauthorized practice of law or the pursuit of any civil remedies that the General Assembly might see fit to enact.

RULE 2 - TERMINOLOGY

The following terminology is used throughout these Rules:

(a) Admonition: a notice sent to a person or entity that identifies activities constituting the unauthorized practice of law. Only in cases where there is little or no known injury to the public or an individual should an admonition be issued.
(b) Commission: the Commission on the Practice of Law.
(c) Commission Counsel: the lawyer responsible for the administration of the Commission, drafting reports, providing legal advice to the Commission, and performing other duties assigned by the Commission. See Rule 6.
(d) Complaint: information in any form from any source received by the Commission that alleges, or from which a reasonable inference can be drawn, that a person or entity has engaged in the unauthorized practice of law. If there is no written complaint from another person, disciplinary counsel's written statement of the allegations constitutes the complaint.
(e) Deferred Action Agreement: an agreement between Respondent and the Commission in which Respondent agrees to cease activities that constitute the unauthorized practice of law and the Commission agrees to seal the records related to the investigation and take no further action as long as Respondent complies with the terms of the agreement.
(f) Disciplinary Counsel: the lawyer responsible for screening and investigating complaints, prosecuting formal charges, and performing other duties assigned by the Supreme Court. See Rule 5.
(g) Formal Charges: the document that charges Respondent with specific acts of unauthorized practice of law.
(h) Panel: the panel of the Commission that conducts hearings on formal charges and other duties as set forth in these Rules. See Rule 4.
(i) Hearing: the public proceeding at which the issues of law and fact raised by the formal charges and answer are tried. See Rule 26.
(j) Investigation: an inquiry into allegations of unauthorized practice of law, including a search for and examination of evidence concerning the allegations. See Rule 19.
(k) Proceedings: all steps in the regulatory system set forth in these Rules.

(l) Public Member: a member of the Commission who has never been admitted to practice law in any jurisdiction, has never held a judicial office, and has never been a certified paralegal or legal assistant.
(m) Record: all documents filed in the case beginning with the formal charges. The record includes a transcript of the hearing on the formal charges.
(n) Respondent: a person or entity about whom an investigation has been initiated or against whom formal charges have been filed.
(o) Screening: examination of a complaint or other information coming to the attention of disciplinary counsel to determine whether the Commission has jurisdiction. See Rule 19(a).
(p) Supreme Court: the Supreme Court of South Carolina.

RULE 3 - THE COMMISSION ON UNAUTHORIZED PRACTICE OF LAW

(a) Commission Created. There is hereby created a Commission on Unauthorized Practice of Law.
(b) Jurisdiction. The Commission shall have jurisdiction over allegations that a person or entity has practiced law in contravention of the statutory and common law of South Carolina.
(c) Appointment of Members. The Commission shall be composed of sixteen members appointed by the Supreme Court. Four members shall be regular members of the South Carolina Bar. Two members shall be judges from the circuit court or family court or masters-in-equity. Two members shall be judges from the magistrate, municipal, or probate courts. Four members shall be certified South Carolina paralegals. Four members shall be public members.
(d) Terms. Commission members shall serve for a term of four years and shall be eligible for reappointment. The initial appointments shall be equally staggered in a manner determined by the Supreme Court.
(e) Removal. The Supreme Court may remove any member of the Commission.
(f) Vacancies. A vacancy shall occur when a Commission member ceases to be eligible to represent the category from which the member was appointed, is removed, or becomes unable to serve for any reason. An appointment to fill the vacancy shall be made by the Supreme Court. A member selected to fill a vacancy shall hold office for the duration of the unexpired term.
(g) Powers Not Assumed. These Rules shall not be construed to deny any court the powers necessary to maintain control over its proceedings or to otherwise enforce the law.

RULE 4 - ORGANIZATION AND AUTHORITY OF THE COMMISSION

(a) Officers. The Supreme Court shall appoint one member to serve as the chair and one member to serve as the vice-chair of the Commission, one of whom is a lawyer and one of whom is a nonlawyer. The vice-chair shall perform the duties of the chair whenever the chair is absent or unable to act.
(b) Panels and Meetings. The members of the Commission shall be divided by the chair into two panels of eight members, with the chair assigned to one panel and the vice-chair assigned to the other. Each panel shall be assigned as equal a division between lawyers, judges, paralegals, and public members as practical.

Panels shall meet when scheduled by the Commission. The full Commission shall meet periodically as determined by the Commission to consider administrative matters. Meetings of the Commission other than periodic meetings may be called by the chair upon the chair's own motion and shall be called by the chair upon the written request of three members of the Commission.

(c) Quorum. Eight members of the Commission and four members of a panel shall constitute a quorum for the transaction of business, so long as at least one member present is a nonlawyer and at least one member present is a lawyer. Where necessary to obtain a quorum for a panel, the chair of the Commission may appoint substitute members from the other panel. In addition, the chair may substitute members from the other panel to promote expertise for an individual matter and to ensure, as is reasonably practical, participation by both lawyers and nonlawyers.

(d) Expenses. Subject to such policies as the Office of Finance and Personnel of the Judicial Branch may establish, members shall be reimbursed for reasonable and necessary expenses incurred pursuant to their duties.

(e) Powers and Duties of the Commission.

(1) The Commission shall have the duty and authority to:

(A) oversee proceedings subject to these Rules;

(B) adopt its own Rules of procedure subject to the approval of the Supreme Court;

(C) issue advisory opinions in accordance with Rule 29;

(D) propose amendments to these Rules to the Supreme Court.

(2) In addition to the duties assigned to commission counsel in Rule 5, the Commission may delegate to commission counsel the duty and authority to:

(A) maintain the Commission's records;

(B) maintain statistics concerning the operation of the Commission and make them available to the Commission and the Supreme Court;

(C) prepare an annual report of the Commission's activities for presentation to the Supreme Court and the public; and,

(D) inform the public of the existence and operation of the regulatory system, including the Commission's address and telephone number, the disposition of each matter other than Deferred Action.

(f) Powers and Duties of Panel. A panel shall have the duty and authority to:

(1) review and decide matters pursuant to Rule 7(a)(4);

(2) rule on pre-hearing motions, conduct hearings on formal charges, and make findings, conclusions, and recommendations to the Supreme Court for disposition of the formal charges, pursuant to Rule 26;

(3) designate a member of the panel to serve as the chair of the panel; and,

(4) declare a matter closed, but not dismissed, after the filing of formal charges.

(g) Recusal. Members of the Commission shall recuse themselves in any matter in which recusal would be required of a judicial officer under the Code of Judicial Conduct.

(h) Complaints Against Members of the Commission. If a complaint is filed against a member of the Commission, the Commission member against whom the complaint has been filed shall not participate in the adjudication of the matter.

RULE 5 - DISCIPLINARY COUNSEL

(a) Appointment. The Supreme Court shall appoint an active member of the South Carolina Bar as the disciplinary counsel. The disciplinary counsel may be removed by a majority vote of the Supreme Court. The disciplinary counsel shall not otherwise engage in the practice of law, except to the extent a staff attorney would be authorized to do so under Rule 506, SCACR, or serve in a judicial capacity.

(b) Powers and Duties. Disciplinary counsel shall have the authority and duty to:

(1) receive and screen complaints, refer complaints to other agencies when appropriate, notify complainants about the status and disposition of their complaints, file and prosecute formal charges, file exceptions to reports issued by panels, and file briefs and other appropriate petitions with the Supreme Court;

(2) maintain permanent records of the operations of disciplinary counsel's office, including receipt of complaints, screening, investigation, and filing of formal charges, subject to the requirements of Rule 20;

(3) compile statistics to aid in the administration of the system, including but not limited to a log of all complaints received and statistical summaries of docket processing and case dispositions;

(4) supervise such other attorneys, investigators, and staff as the Supreme Court might provide;

(5) employ private investigators or experts as necessary to investigate and process matters before the Commission and the Supreme Court;

(6) investigate and, if appropriate, commence and prosecute contempt proceedings in the Supreme Court;

(7) initiate and prosecute proceedings before the Commission and the Supreme Court to enforce orders related to proceedings or related to the practice of law and to seek restraining orders and sanctions in connection with violations thereof; and,

(8) perform other duties at the direction of the Commission or the Supreme Court.

RULE 6 – COMMISSION COUNSEL

(a) Powers and Duties. The Commission may delegate functions to the Commission counsel, including but not limited to the duty and authority to:

(1) advise the panel during its deliberations;

(2) draft advisory opinions, decisions, orders, reports, and other documents on behalf of the panel;

(3) maintain Commission files to monitor the compliance by Respondents with conditions of deferred discipline, discipline, admission, reinstatement, and readmission;

(4) supervise other staff necessary to the performance of the Commission's duties; and,

(5) perform other duties at the direction of the Commission or the Supreme Court.

RULE 7 – DISPOSITION

(a) Dispositions without sanction.

(1) Dismissal. With the approval of the Commission chair or vice-chair, disciplinary counsel may issue notice of dismissal of a complaint to Respondent and

Complainant, if any. Dismissal is appropriate only when a determination is made that either the conduct of Respondent does not constitute the unauthorized practice of law or there is insufficient evidence that Respondent engaged in the unauthorized practice of law.

(2) Closed, But Not Dismissed Letter. With the approval of the Commission chair or vice-chair, disciplinary counsel may issue a letter informing Respondent and Complainant, if any, that the investigation is closed, but the complaint is not dismissed.

(3) Admonition. With the approval of the Commission chair or vice-chair, disciplinary counsel may issue an admonition to Respondent. Respondent may reject the admonition in writing and request that matters raised in the admonition be presented as formal charges. In any subsequent proceeding, an admonition may be presented as evidence if relevant to the proceeding.

(4) Panel Review. If the chair or vice-chair does not approve of the disciplinary counsel's recommendation under subsections (a)(1), (a)(2), or (a)(3) of this Rule, the matter will be submitted to a panel for review. The panel may confer in person, by telephone conference, or by email. Neither the disciplinary counsel nor the chair or vice-chair who denied the dismissal may participate in the conference. The decision of the panel is final.

(b) Sanctions. One or more of the following sanctions may be imposed:

(1) prohibition on engaging in activities through an injunction;

(2) a civil fine, payable to the State of South Carolina;

(3) restitution to persons financially injured;

(4) assessment of the costs of the proceedings, including but not limited to the cost of hearings, investigations, service of process, and court reporter services;

(5) any other sanction or requirement the Supreme Court might determine to be appropriate.

(c) Grounds for Sanction. It shall be a ground for sanction for a Respondent to:

(1) engage in activities construed by Supreme Court Rule or decision to constitute the practice of law unless Respondent is a member of a class of persons or entities authorized by law to undertake those activities;

(2) willfully violate a valid order of the Supreme Court, the Commission, or a panel of the Commission in a proceeding under these Rules; willfully fail to appear personally as directed pursuant to these Rules; or, willfully fail to comply with a subpoena issued under these Rules; and,

(3) willfully fail to comply with any terms of a Deferred Action Agreement.

RULE 8 - PROOF

Charges of the unauthorized practice of law shall be established by clear and convincing evidence. The burden of proof of the charges shall be on the disciplinary counsel.

RULE 9 - RULES APPLICABLE

Except as otherwise provided in these Rules, the South Carolina Rules of Evidence applicable to non-jury civil proceedings and the South Carolina Rules of Civil Procedure

apply when formal charges have been filed. The right to discovery, however, shall be limited to that provided by Rule 25.

RULE 10 - RIGHT TO COUNSEL

Respondent shall be entitled to retain counsel and to have the assistance of counsel at every stage of these proceedings. After appearing as counsel for a Respondent in a matter under these Rules, counsel for Respondent may only withdraw upon leave of the chair or vice-chair of the Commission or the chair of the panel after 10 days' notice to disciplinary counsel and Respondent or, prior to formal charges having been filed, upon stipulation of Respondent, the withdrawing counsel, and disciplinary counsel. Provided, after a matter has been forwarded to the Supreme Court for action, counsel can only withdraw from representation upon leave of the Supreme Court after due notice to Respondent and disciplinary counsel.

RULE 11 - EX PARTE CONTACTS

Pursuant to Rule 7(a), disciplinary counsel may communicate with the chair, vice-chair, or commission counsel before making a determination to dispose of a complaint. Upon the filing of formal charged, members of the Commission and commission counsel shall not engage in *ex parte* communications regarding any matter subject to formal proceeding. *Ex parte* communications shall include any communication that would be prohibited by Section 3B(7) of the Code of Judicial Conduct, Rule 501, SCACR, if engaged in by a judge.

RULE12 - ACCESS TO INFORMATION RELATED TO PROCEEDINGS

(a) General Rule. Except as otherwise provided in these Rules or ordered by the Supreme Court, all complaints, proceedings, records, information, or orders relating to an allegation of unauthorized practice of law shall be public record.
(b) Work Product and Deliberations. Disciplinary counsel's work product, Commission deliberations, and records of the Commission's deliberations shall not be disclosed.
(c) Personnel matters. Matters related to employees and contractors shall not be disclosed.
(d) Protective Orders. The chair or vice-chair may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted in a matter to preserve the confidentiality of the information that is the subject of the application.

RULE 13 - IMMUNITY FROM CIVIL SUITS

Communications to the Commission, commission counsel, disciplinary counsel, or their staffs or contractors relating to allegations of unauthorized practice of law and testimony given in the proceedings shall be absolutely privileged. No civil lawsuit predicated thereon may be instituted against any complainant or witness. Members of the Commission, commission counsel, disciplinary counsel, staff, and contractors shall be absolutely immune from civil suit for all conduct in the course of their official duties.

RULE 14 - TIME, SERVICE AND FILING

(a) Computation of Time. Computation of time under these Rules shall be in the manner provided by Rule 234, SCACR.

(b) Extending and Diminishing Time Prescribed by These Rules.

(1) By the Commission. The chair or vice-chair of the Commission or the chair of the panel before which the matter is pending may extend or shorten the period of time to perform any act required by Rules 19-26. Any request for an extension by a panel shall be considered by the chair or vice-chair of the Commission. No extension over 30 days shall be granted except upon good cause shown. The grant or denial of an extension shall not be subject to an interlocutory appeal.

(2) By disciplinary counsel. Disciplinary counsel may extend the time for the answer due from a Respondent under Rule 23 for one or more periods not to exceed 30 days in the aggregate.

(3) By the Parties. Disciplinary counsel and Respondent may, by written agreement, extend the time to respond under Rule 23 after the execution and delivery by both parties of a Deferred Action Agreement for the duration of the period the agreement is awaiting a final disposition.

(4) By the Supreme Court. Except for those periods of time that maybe extended by the Commission under (1) above, the Supreme Court or any justice thereof may grant an extension of time to perform any act required by these Rules. The Supreme Court or any justice thereof may shorten any time period prescribed by these Rules.

(c) Service. Service upon Respondent shall be made by personal service upon Respondent or Respondent's counsel by any person authorized by the chair of the Commission or by registered or certified mail to Respondent's last known address or address of an authorized agent. Service of all other documents shall be made in the manner provided by Rule 233(b), SCACR.

(d) Filing. When these Rules require filing of a document with the Commission or the Supreme Court, the filing may be accomplished by:

(1) Delivering the document to the Commission or the clerk of the Supreme Court; or

(2) Depositing the document in the U.S. mail, properly addressed to the Commission or the clerk of the Supreme Court, with sufficient first class postage attached. The date of filing shall be the date of delivery or the date of mailing. Any document filed with the Supreme Court or the Commission shall be accompanied by proof of service of such document on all other parties. An electronically transmitted facsimile copy of a document may be accepted for filing; however, an original of the document must be immediately sent by U.S. mail to the clerk of the Supreme Court or the Commission.

RULE 15 - OATHS; SUBPOENA POWER

(a) Oaths. Oaths and affirmations may be administered by any member of the Commission, commission counsel, or any other person authorized by law to administer oaths and affirmations.

(b) Subpoenas for Investigation. At any time after a complaint is received, disciplinary counsel may compel by subpoena the attendance of Respondent (in person or

through agents) or witnesses pursuant to Rule 19(b). Disciplinary counsel may also compel the production of documents (whether in typed, printed, written, digital, electronic, or other format), and other tangible evidence for the purposes of investigation.

(c) Subpoenas for Deposition or Hearing. After formal charges are filed, disciplinary counsel and Respondent may compel by subpoena the attendance of witnesses and the production of documents at a deposition or hearing held pursuant to these Rules.

(d) Enforcement of Subpoenas. The willful failure to comply with a subpoena issued under this Rule may be punished as contempt of the Supreme Court. Upon proper application, the Supreme Court may enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.

(e) Quashing Subpoenas. Any attack on the validity of a subpoena shall be heard and determined by the investigative or panel before which the matter is pending. Any resulting order shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rules 26(c)(7) and 27(a).

RULE 16 - DEFERRED ACTION AGREEMENT

Disciplinary counsel and Respondent may enter into a Deferred Action Agreement in which Respondent acknowledges that specified activities constitute the unauthorized practice of law, provided that Respondent consents to sanction(s) to be imposed without further proceedings in the event of a determination by the chair or vice-chair of the Commission that Respondent has recommenced all or some of those activities. A Deferred Action Agreement may only be used when there is little or no injury to the public or the legal system. The agreement shall be approved by a panel pursuant to Rule 21(c) before it becomes effective. If Respondent enters into a Deferred Action Agreement within thirty days of preliminary notice of the complaint in accordance with Rule 19(c), the Deferred Action Agreement and all materials related to the matter shall be confidential. If the chair or vice-chair subsequently determines that Respondent has not complied with the Deferred Action Agreement, all records related to the matter shall become public as set forth in Rule 12.

RULE 17 - INTERIM ORDER

(a) Imminent Harm. Upon receipt of sufficient evidence demonstrating that Respondent poses a substantial threat of serious harm to the public or to the administration of justice, the Supreme Court may order a person to appear at a hearing before a panel at a time certain but not less than twenty-four hours from the time the order is entered. After the hearing is concluded, the panel may seek injunctive relief from the Supreme Court.

(b) Failure to Respond to Subpoena. Upon receipt of sufficient evidence demonstrating that Respondent has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, upon motion of the disciplinary counsel, the Supreme Court may issue such orders as appropriate to protect the public from activities by Respondent.

(c) Order to be Public. Any order issued pursuant to this Rule shall be public.

RULE 18 - NOTIFICATION TO COMPLAINANT; NO RIGHT TO REVIEW

If the complainant is known, disciplinary counsel shall notify the complainant in writing of receipt of the complaint and of the final disposition of a proceeding under these Rules. Notification of final disposition shall be mailed within 20 days of the decision disposing of the proceeding. Although entitled to notice, a complainant is not a party to the proceeding and is not entitled to appeal or otherwise seek review of the dismissal or other disposition of a proceeding.

RULE 19 - SCREENING AND INVESTIGATION

(a) Screening. Disciplinary counsel shall evaluate all information coming to the Commission's attention by complaint or from other sources that alleges the unauthorized practice of law. If the alleged activity would not constitute unauthorized practice if it were true, disciplinary counsel shall advise the source or, if appropriate, refer the matter to another agency. If the information raises allegations that would constitute unauthorized practice if true, disciplinary counsel shall conduct an investigation.
(b) Disciplinary counsel shall conduct or supervise all investigations, including conducting interviews and examining evidence to determine whether grounds exist to support the allegations of unauthorized practice.
(c) Preliminary Notice. Prior to filing formal charges, disciplinary counsel shall notify the Respondent of the investigation and of the opportunity to submit information or meet with disciplinary counsel.
(d) Subsequent Complaints. The investigation can be expanded if deemed appropriate by disciplinary counsel. Disciplinary counsel has the discretion to combine subsequent complaints with a pending investigation or conduct a separate investigation. Disciplinary counsel may amend formal charges to include information received related to additional unauthorized misconduct in a subsequent complaint or revealed in an investigation.
(e) Any person giving testimony pursuant to Rule 19 shall be entitled to obtain a transcript of his or her testimony from the transcribing court reporter upon paying the subscribed charges unless otherwise directed by an investigative panel for good cause shown.

RULE 20 - USE OF ALLEGATIONS FROM DISMISSED CASES

A complaint dismissed or closed, but not dismissed prior to the filing of formal charges may be re-opened by disciplinary counsel and used for any purpose pursuant to these Rules.

RULE 21 - CONSENT AGREEMENT

(a) Agreement. At any stage in the proceedings, Respondent and disciplinary counsel may agree to the imposition of a stated sanction(s) in exchange for Respondent's admission of any or all of the allegations involved in the proceedings. If the agreement is entered into after the filing of the formal charges, the agreement shall admit or deny the allegations contained in the formal charges. If the agreement is

entered into before the filing of the formal charges, the agreement shall contain the specific factual allegations that Respondent admits have been committed and the applicable Rules and decisions of which the activities have been in contravention. The agreement shall be signed by disciplinary counsel, by Respondent, and by Respondent's counsel, if any. The signature of counsel on the agreement shall indicate that counsel has advised Respondent regarding the agreement and that counsel believes Respondent is voluntarily entering into the agreement with a full understanding of the effect of the agreement.

(b) Affidavit. Respondent shall also sign an affidavit stating that:
(1) Respondent consents to the sanction(s);
(2) the consent is voluntarily given;
(3) the matters admitted in the agreement and the facts stated in the affidavit are true.

(c) Submission to Panel. The agreement and affidavit shall be submitted to a panel. The panel shall either reject the agreement or submit the agreement and affidavit to the Supreme Court if it determines the agreement should be accepted. A panel shall, however, finally approve or disapprove a Deferred Agreement without submitting the matter to the Supreme Court.

(d) Action by Supreme Court. If the panel submits the matter to the Supreme Court, the Supreme Court shall either reject the agreement or issue a decision that shall be based on the agreement. The decision shall comply with the requirements of Rule 27(e).

(e) Effect of Rejection of Agreement. If an agreement is rejected by the panel or the Supreme Court, the proceedings shall continue. The rejected agreement and affidavit shall be withdrawn and shall not be used against Respondent in any further proceedings.

(f) Briefs and Oral Arguments. The Supreme Court may require the parties to submit briefs or participate in oral arguments in connection with the agreement. Either Respondent or disciplinary counsel may move before the Supreme Court for permission for the parties to file briefs, to have oral arguments, or both in connection with the agreement, but the Supreme Court, in its discretion, may proceed to take action on the agreement without briefs, without oral arguments, or without either, notwithstanding a request from one or both of the parties.

RULE 22 - FORMAL CHARGES

(a) If after investigation, the disciplinary counsel determines that there is sufficient evidence to prove that Respondent engaged in the unauthorized practice of law and an agreement pursuant to Rule 16 or 21 has not been executed, the disciplinary counsel shall file formal charges with the Commission.

(b) The formal charges shall give fair and adequate notice to Respondent of the nature of the alleged misconduct. Disciplinary counsel shall file the formal charges with the Commission. Disciplinary counsel shall cause a copy of the formal charges to be served upon Respondent or Respondent's counsel and shall file proof of service with the Commission.

RULE 23 – ANSWER

(a) Time. Respondent shall file a written answer with the Commission and serve a copy on disciplinary counsel within 30 days after service of the formal charges, unless the time is extended by the panel.
(b) Waiver of Privilege. The raising of a mental or physical condition as a defense constitutes a waiver of any medical privilege.

RULE 24 - FAILURE TO ANSWER; FAILURE TO APPEAR

(a) Failure to Answer. Failure to answer the formal charges shall constitute an admission of the factual allegations.
(b) Failure to Appear. If Respondent should fail to appear when specifically so ordered by the panel or the Supreme Court, Respondent shall be deemed to have admitted the factual allegations that were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at such appearance. Absent good cause, the panel or Supreme Court shall not continue or delay proceedings because of Respondent's failure to appear. A willful failure to appear before a panel or the Supreme Court may be punished as a contempt of the Supreme Court.

RULE 25 – DISCOVERY

(a) Exchange of Witness Lists. Within 20 days of the filing of an answer, disciplinary counsel and Respondent shall exchange the names and addresses of all persons known to have knowledge of the relevant facts. Disciplinary counsel or Respondent may withhold such information only with permission of the chair of the panel, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to Respondent. The chair's review of the withholding request is to be *in camera,* but the party making the request must advise the opposing party of the request without disclosing the subject of the request. The panel shall set a date for the exchange of the names and addresses of all witnesses the parties intend to call at the hearing.
(b) Other Evidence. Disciplinary counsel and Respondent shall exchange:
  (1) non-privileged evidence relevant to the formal charges, documents to be presented at the hearing, witness statements and summaries of interviews with witnesses who will be called at the hearing (for purposes of this paragraph, a witness statement is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded); and
  (2) other material only upon good cause shown to the chair of the panel. Provided, copies of transcripts of testimony taken by a court reporter pursuant to Rule 15(b) may be obtained by the parties from the court reporter at the expense of the requesting party and need not be made available to the requesting party by the opposing party unless not otherwise available or otherwise directed under 25(h).
(c) Depositions. Depositions shall only be allowed if agreed upon by the disciplinary counsel and Respondent, or if the chair of the panel grants permission to do so

based on a showing of good cause. The chair may place restrictions or conditions on the manner, time and place of any authorized deposition.

(d) Exculpatory Evidence. Notwithstanding any other provision of this Rule, Commission Counsel shall provide Respondent with exculpatory evidence relevant to the formal charges.

(e) Duty of Supplementation. Both parties have a continuing duty to supplement information required to be exchanged under this Rule.

(f) Completion of Discovery. All discovery shall be completed within 60 days of the filing of the answer.

(g) Failure to Disclose. If a party fails to timely disclose a witness's name and address, any statements by the witness, summaries of witness interviews, or other evidence required to be disclosed or exchanged under this Rule, the panel may grant a continuance of the hearing, preclude the party from calling the witness or introducing the document, or take such other action as may be appropriate. In the event disciplinary counsel has not timely disclosed exculpatory material, the panel may require the matter to be disclosed and grant a continuance or take such other action as may be appropriate.

(h) Resolution of Disputes. Disputes concerning discovery shall be determined by the chair of the panel. Review of these decisions shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rules 26(c)(7) and 27(a).

RULE 26 – HEARING

(a) Scheduling. Upon receipt of Respondent's answer or upon expiration of the time to answer, the panel of the Commission shall schedule a public hearing and notify disciplinary counsel and Respondent of the date, time, and place of the hearing.

(b) Hearing Panel. The hearing shall be conducted by the panel, one member of which shall be designated as the chair. See Rule 4(f).

(c) Conduct of Hearing.

(1) All testimony shall be given under oath or affirmation.

(2) Disciplinary counsel shall present evidence on the formal charges.

(3) Disciplinary counsel may call Respondent as a witness.

(4) Both parties shall be permitted to present evidence and produce and cross-examine witnesses.

(5) The hearing shall be recorded verbatim and a transcript shall be promptly prepared and filed with the Commission. A copy of the transcript shall be made available to Respondent at Respondent's expense.

(6) Disciplinary counsel and Respondent may submit proposed findings, conclusions, and recommendations for dismissal or sanction(s) to the panel within 30 days after the filing of the transcript.

(d) Submission of the Report. Within 60 days after the filing of the transcript, the panel shall file with the Supreme Court the record of the proceeding and a report setting forth a written summary, proposed findings of fact, conclusions of law, any minority opinions, and recommendations for dismissal or sanction(s). The panel shall at the same time serve the report upon Respondent and Commission Counsel.

(e) Combining Cases for Hearing. Upon motion of either party after 10 days' notice to the opposing party, a panel may combine for hearing two or more formal charges

pending against a Respondent that have not been heard or may reconvene to hear additional formal charges against a Respondent filed prior to issuance of a panel report concerning formal charges already heard by that panel.

RULE 27 - REVIEW BY SUPREME COURT

(a) Briefs of disciplinary counsel and Respondent. Within 30 days of the service of the panel report, disciplinary counsel and/or Respondent may serve and file a brief setting forth and arguing any exceptions taken to the findings, conclusions or recommendations made by the panel. Within 30 days after service of the brief, the opposing party may serve and file a brief in response. Within 15 days of the service of the response, the party who filed the brief containing exceptions may serve and file a reply brief. The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.

(b) Form, Content and Number of Briefs. The form and content of the briefs shall, to the extent possible, comply with the requirements of Rules 208 and 238, SCACR. The number of briefs to be served and filed shall be the same as that required for final briefs under Rule 211(a), SCACR.

(c) Supplementary Filings and Oral Argument.

(1) If the Supreme Court desires an expansion of the record or additional findings, it shall remand the case to the panel with appropriate directions and withhold action pending receipt of the additional filing.

(2) The Supreme Court may order additional briefs or oral arguments as to the entire case or specified issues.

(d) Stay for Further Proceedings. If, during review by the Supreme Court, the Commission receives another complaint against Respondent, disciplinary counsel shall advise the Supreme Court. The Supreme Court may stay its review pending the Commission's determination of the second complaint. The Supreme Court may issue a single order covering all recommendations from the Commission against Respondent.

(e) Decision.

(1) The Supreme Court shall file a written decision dismissing the case or imposing sanction(s). Unless otherwise ordered by the Supreme Court, the decision shall be effective upon filing.

(2) The Supreme Court may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission.

(3) The Supreme Court may assess costs against Respondent if it finds Respondent has committed the unauthorized practice of law. Unless otherwise ordered by the Court, costs shall be paid within 30 days of the filing of the opinion or order assessing costs.

(f) Rehearing. A petition for rehearing must be served and filed within 15 days after the filing of the decision or order.

(g) Recusal. A justice of the Supreme Court shall not participate in any proceeding where recusal is required under the Code of Judicial Conduct.

(h) Notice of Decision. The Commission shall transmit notice of all sanctions imposed against Respondent to the solicitors of all circuits in which Respondent resides,

engages in business and engaged in the unauthorized practice of law and to the South Carolina Bar.

RULE 28 - DECLARATORY JUDGMENT

(a) A person or entity unsure about whether certain actions constitute the unauthorized practice of law may ask the Commission to create a record through proceedings by which a declaratory judgment may be rendered by the Supreme Court. The Commission may decline to initiate proceedings. Only after such a declination may the person or entity bring an *ex parte* action in the Supreme Court seeking a declaratory judgment.

(b) The Commission on its own initiative may identify activities about which it is unclear whether those activities constitute the practice of law, whether by lack of prior decision or Rule or by change in circumstances. The Commission shall frame the issues, publish notice of a public hearing, conduct a proceeding to elicit a sufficient basis upon which to make a recommendation and recommend to the Supreme Court, as needed, issuance of a declaratory judgment; addition, amendment, or repeal of a Rule; or, other action.

RULE 29 – ADVISORY OPINIONS

(a) The Commission may render written advisory opinions upon request from individuals or entities concerning the propriety of contemplated conduct.

(b) All requests for advisory opinions shall be in writing, addressed to the Commission and signed by the requestor. All opinions rendered by the Commission shall be in writing. An advisory opinion shall, within the body of the opinion, state the facts on which it is based. The name of the requestor shall not be contained in the opinion and shall remain confidential. A copy of each opinion shall be filed with the Clerk of the Supreme Court. Upon filing with the Clerk of the Supreme Court, opinions shall become a matter of public record. All other files and records of the Commission regarding advisory opinions shall be confidential and shall not be disclosed except upon order of the Supreme Court.

(c) All opinions shall be advisory in nature only. No opinion shall bind the Supreme Court in any proceeding properly before that body. However, in the discretion of the Supreme Court, conduct in compliance with an opinion of the Commission may be considered as evidence of a good faith effort to avoid the unauthorized practice of law.

10

PROPOSAL TO FORM A CIVIL RIGHTS LAW SECTION
OF THE SOUTH CAROLINA BAR
(Rev. 7-8-2021)

BACKGROUND: In the Fall of 2020, the South Carolina Bar Association stood up a Civil Rights Task Force, for the purpose of exploring how the Bar could address this issue and related substantive practice areas. Prior to standing up the Task Force, approximately 60 Bar members had already expressed interest in participating. The Bar tapped Nekki Shutt to chair the Task Force. Between Bar members who expressed interest and practitioners who work in this area, the Task Force was assembled and currently includes the following Bar members:

1. Andrews, Stuart
2. Bender, Jay
3. Bryant, Christopher James
4. Burke, Lewis
5. Derfner, Armand
6. Dunn, Susan
7. Erickson, Eric
8. Evering, Sidney
9. Hall, Kevin
10. Harrison, Patricia Logan
11. Harvin, Doward Keith
12. Hightower, Kay
13. Mills, J. Christopher
14. Sellers, Bakari
15. Shutt, Nekki
16. Strickland, Judge
17. Washington, Ayesha
18. White, Andrea

The Task Force has met monthly for the last seven months. We have conducted research into what civil rights law groups other state bar associations, the Federal Bar Association, and the American Bar Association have. In the process, the Task Force concluded unanimously to recommend standing up a section for Civil Rights Law. Unlike the Bar's Diversity Committee, which promotes diversity and inclusion generally throughout the Bar, the purpose of the Civil Rights Law Section would be to support and promote the practice of civil rights law in the State of South Carolina.

Task Force Chair Nekki Shutt appeared at the South Carolina Bar's Board of Governor's meeting on June 10, 2021 to present this proposal. The BOG voted unanimously to advance the Task Force's formation of a Section.

Today, we ask the House of Delegates to also approve formation of a Civil Rights Law Section effective August 1, 2021, with initial dues to be paid by January 1, 2022.

The Task Force has prepared the attached draft Bylaws as **Exhibit 1**.

A list of South Carolina Bar members who expressed interest in participating in a civil rights group is attached as well as **Exhibit 2**.

SECTION MISSION: The purpose of this Section shall be to promote and further to support South Carolina practitioners who work in the area of constitutional and civil rights practice and policy, to educate other South Carolina Bar members about these practice areas, to promote these practice areas, and to work with the community at large to identify and address civil rights issues affecting historically-marginalized populations. Constitutional and civil rights practice and policy includes but is not limited to the following areas: (1) criminal justice issues like police misconduct, excessive force, prisoner rights, and similar litigation under 42 U.S.C. § 1983; (2) disabilities and special needs law under the Rehabilitation Act (29 U.S.C. §§ 42 U.S.C. 701-97b) and the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213); (3) education law under Title IX (10 U.S.C. §§ 1681-1688); (4) election law; (5) employment law under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e to 2000e-17) which includes protection for race, nationality, color, sex, age, religion, disability, sexual orientation, and gender identity; (6) free speech, freedom of the press, and First Amendment law; (7) the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680); (8) healthcare; (9) housing and public accommodations; (10) LGBTQ rights; (11); Native American and tribal rights; (12) privacy law; (13) racial injustice; (14) religious freedoms; (15) poverty; (16) homelessness, (17) treatment of the elderly, and (18) voting rights.

- Organizing CLEs: We already have three CLEs planned for the next 12 months. They include:
    - August 19, 2021 - **Justice Deferred**: Half day CLE built around the new book authored by South Carolina Bar member, Armand Derfner, and Clemson Professor Orville Vernon Burton on race and the U.S. Supreme Court. The book comprehensively charts the Court's race jurisprudence in 200 cases.
    - Fall 2021 – **The Legacy of Justice Ruth Bader Ginsburg**: Full day CLE on her jurisprudence, her work in South Carolina, and her role as a cultural icon. The CLE will feature Judge Nancy Gertner, a retired federal judge who clerked for Justice Ginsburg and whose book on her drops this Fall. Judge Gertner is on the Harvard faculty.
    - January 2022 – **Section 1983 demystified**: A half day CLE at the SC Bar Convention on the nuts and bolts of how to bring a lawsuit under 42 U.S.C. section 1983.
- Hosting a Listserv for members.
- Publishing a newsletter.
- Establishing a landing page for this practice area on the Bar's website.
- Creating a speaker's bureau.
- Promoting the development of sound laws and policies in the civil rights field.
- Maintaining high standards of professional competence and ethical conduct in the practice of civil rights law.
- Recommending submission of amicus briefs on civil rights issues to the Board of Governors as warranted.

- Serving as a resource for the public on civil rights law.
- Advancing student interest in civil rights practice.

Respectfully submitted by:

Nekki Shutt
Chair, SC Bar Civil Rights Task Force

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BYLAWS OF THE EMPLOYMENT AND LABOR LAW SECTION OF THE SOUTH CAROLINA BAR

ARTICLE I
Name and Purpose

Section 1. This Section shall be known as the Employment and Labor Law Section of the South Carolina Bar.

Section 2. The purpose of this Section shall be to promote and further the objectives of the South Carolina Bar within the particular fields of law indicated by the name of the Section, and to that end, to further the development, study and administration of employment and labor law.

ARTICLE II
Membership

Section 1. Each member of the Section shall pay to the South Carolina Bar annual Section dues of $15.00. The Council, at any regular meeting, may change the annual section dues to the extent determined necessary. Any such change in Section dues must be approved by the House of Delegates of the South Carolina Bar. Thereafter, said dues shall be paid in advance each year, beginning on the January 1st next succeeding each enrollment. Any member of this Section whose annual dues shall be more than seven months past due shall thereupon cease to be a member of this Section. Members so enrolled and whose dues are so paid shall constitute the membership of this Section. Anyone becoming a new member after November 1st of any year shall, upon payment of one full year's dues, be credited as paid through December 31st of the following year.

Section 2. Voting and privileges of the floor at any meeting of the Section shall be limited by the Bylaws of the South Carolina Bar to members in good standing as of thirty (30) days prior to the opening day of that meeting, as determined by the membership list, certified to the Section Secretary, by the Executive Director, such list to be open for inspection at any meeting for which it is certified.

ARTICLE III
Officers

Section 1. The officers of this Section shall be a Chair, a Chair-Elect, a Vice Chair and a Secretary.

Section 2. There shall be a Council, the voting membership of which shall consist of the Chair, Chair-Elect, Vice Chair, Secretary, the Immediate Past Chair, the Committee Chairs, and Section representative to the House of Delegates.

Section 3. The Chair-Elect, Vice Chair, and Secretary shall be nominated and elected, in manner hereinafter provided, at each annual meeting of this Section, to

hold office for one year beginning July 1st and ending June 30th, and until their successors shall have been elected and qualified. No officer shall succeed himself or herself in the same office except that person may hold the office of Secretary for not more than two successive one-year terms.

Section 4. Any vacancy existing in membership on the Council shall be filled by the Council until the next annual meeting at which time the membership shall elect a replacement member. Such replacement member shall serve only to the end of the term to which his or her predecessor was elected.

Section 5. If any elected member of the Council shall fail to attend three successive meetings of the Council, and such failure has not been excused for cause by the Chair or the majority vote of the Council, the Chair may, by letter to all Council members, declare such member to have automatically resigned and he or she shall be replaced for his or her unexpired term as provided in Section 4 of this Article.

Section 6. At the end of his or her term the Chair-Elect shall automatically assume the office of Chair and thereupon the immediately retiring Chair shall become and remain a member of the Council for the ensuing year.

ARTICLE IV
Nomination and Election

Section 1. Not later than June 30th of each year, the Council shall meet and nominate Officers, Council Members, Committee Chair and Section Delegate for the ensuing year. The nominations proposed shall be by the concurring vote of not less than the majority of the members of the Council, shall be published in the *South Carolina Bar News*, or otherwise mailed or communicated to the membership through U.S. mail, email, posting to the Website generally accessible to the membership, or any other method permissible under the South Carolina Bar rules and policies.

Section 2. No later than September 1st not less than ten members of this Section, in good standing, may file, by mail, with the Chair of this Section a petition containing signatures and printed names and addresses of the Section members nominating a candidate for one or more of the offices to be filled. Such petitions must be accompanied by the written consent of any person nominated. Nominations will be closed on September 2nd.

Section 3. All elections may be by written ballot unless otherwise ordered by resolution duly adopted by the Section at its annual meeting at which the election is held. Should there be more than two nominations for any one office, that candidate receiving the highest vote shall be declared elected. If two candidates receive an equal number of the votes cast, the Council in office at the time of the election shall, by majority vote, declare the winner.

Section 4. At the completion of a term, the Immediate Past Chair continuing as a member of the Section in good standing, shall become the Section Delegate to the House of Delegates for a one-year term. If for any reason an Immediate Past Chair cannot serve, a nominee for Section Delegate to the House of Delegates may be

nominated and elected in the same manner as Council Members. Any Section Delegate to the House of Delegates may be elected to succeed him or herself.

ARTICLE V
Duties of Officers

Section 1. Chair. The Chair shall be the Chief Executive Officer of the Section during his or her term of office, and, in the carrying out of his or her administrative duties, shall make all such appointments to the general committees and be possessed of such authority as is customarily associated with such office. The Chair, or successively the Chair-Elect or Vice Chair in the absence of the Chair, shall preside at all meetings of the Section and of the Council.

Section 2. Chair-Elect. Upon the death, resignation or during the disability of the Chair, or upon his or her refusal to act, the Chair-Elect shall perform the duties of the Chair for the remainder of the Chair's term, except in case of the Chair's disability, and then only during so much of the term as the disability continues.

Section 3. Vice Chair. Upon the death, resignation or during the disability of the Chair-Elect, or upon his or her refusal to act, the Vice Chair shall perform the duties of the Chair-Elect for the remainder of the Chair-Elect's term, except in case of disability of the Chair-Elect, and then only during so much of the term as the disability continues.

Section 4. Secretary. The Secretary shall keep a true record of the proceedings of all meetings of the Section and of the Council. He or she, in conjunction with the Chair, as authorized by the Council, shall attend generally to the business of the Section and he or she shall review the record of all monies appropriated to and expended for the use of the Section.

ARTICLE VI
Duties and Powers of the Council

Section 1. The Council shall have the general supervision and control of the affairs of the Section, subject to the provisions of the Constitution and Bylaws of the South Carolina Bar and the Bylaws of the Section. It shall authorize all commitments or contracts which shall entail the payment of money, and shall authorize the expenditures of all monies appropriated for the use or benefit of the Section. It shall not, however, authorize commitments or contracts which shall exceed the estimated receipts from dues, sales of Section publications, and appropriations of the Section for such fiscal year, provided, however, that the balance of the reserve fund credited to the Section shall be available for use by Council.

Section 2. A majority of the Council shall constitute a quorum for the transaction of business.

Section 3. The Council may authorize the Chair to appoint committees from Section members to perform such duties and exercise such powers as the Council may

direct, subject to the limitations of these Bylaws and the Constitution and Bylaws of the South Carolina Bar.

Section 4. Any action required or permitted to be taken at any meeting of the Council may be taken without a meeting, if, prior to such action, a written consent or consents thereto have been filed with the Chair and signed by a majority of all members of the Council and such consent or consents are filed by the Secretary with the proceedings of the Council.

Section 5. The Council shall fill interim vacancies in the office of Chair, Chair-Elect, Vice Chair, Secretary, or Section Delegate among their own members.

Section 6. The Council shall have complete authority to act on behalf of and to bind the Section on any and all matters arising between meetings of the Section.

Section 7. The Council may authorize such committees as it deems necessary or desirable to carry out the activities and work of the Section, may terminate any of such committees as circumstances warrant, and may appoint such special committees as herein provided.

ARTICLE VII
Meetings

Section 1. An annual meeting of the Section may be held at a date and time determined by the Chair, with such program and order of business as may be arranged by the Council not inconsistent, or in conflict, with any program or directive of the South Carolina Bar.

Section 2. Special meetings of the Section may be called by the Chair, upon approval by the Council at such time and place as the Council may determine.

Section 3. The members of the Section present at any meeting shall constitute a quorum for the transaction of business.

Section 4. All binding actions of the Section shall be by a majority vote of the members present.

ARTICLE VIII
Motions-Resolutions-Procedures

Section 1. Limitation on Speaking. No person, except an invited speaker, shall speak in any meeting of the Section more than five minutes at a time nor more than twice on one motion or resolution.

ARTICLE IX
Miscellaneous Provisions

Section 1. The fiscal year of the Section shall be the same as that of the South Carolina Bar.

Section 2. All bills incurred by the Section before being forwarded to the Executive Director of the South Carolina Bar for payment, shall be approved by the Council or its designated representative.

Section 3. Any action by this Section pertaining to legislation, or South Carolina Bar policy, or public policy, must be approved by the Board of Governors or House of Delegates of the South Carolina Bar before the same becomes effective as the action of the South Carolina Bar.

Section 4. The Chair shall have the right and responsibility to keep good order and run the meeting of the Section in such a manner as to allow all person eligible to speak equal opportunity to do so.

ARTICLE X
Amendments

These Bylaws may be amended at any annual meeting of the Section by a majority vote of the members of the Section present and voting, provided such proposed amendment shall not be inconsistent with the Constitution and Bylaws of the South Carolina Bar. Such amendment, however, will not become effective until it has been approved and ratified by the House of Delegates of the South Carolina Bar.

Approved at the HOD meeting on January 19, 2012.

EXHIBIT 2

Name	Organization	Street Address
Brook Bowers Andrews	U.S. Attorney's Office	1441 Main St.
Allison Dawn Argoe	Goldfinch Winslow LLC	11943 Grandhaven Drive
Annie Day Bame		451 South Pickens Street
Lauren Alexis Barnes	S.C. Attorney General's Office	Office Of The Attorney General
Maryann Elizabeth Blake	Maryann Blake, Attorney at Law, LLC	PO Box 2161
Maisha Mstari Blakeney	Johnston Allison & Hord, PA	843 Sebring Dr. Apt 301
Cameron Jane Blazer	Blazer Law Firm, P.C.	1037-D Chuck Dawley Blvd.
Elizabeth Marie Bowen		1418 Laurel Street, Suite A
Barbara Murcier Bowens	U.S. Attorney's Office	1441 Main St., Ste. 500
Brennan Tyler Brooks	Law Office of B. Tyler Brooks, PLLC	4050 Yellowfield Way
Christopher James Bryant		700 Thirteenth Street NW
Cody James Burgin	Robert J Reeves PC	PO Box 1297
M. Malissa Burnette	Burnette Shutt & McDaniel, PA	PO Box 1929
Robert J. Butcher	The Camden Law Firm, PA	PO Box 610
James Christopher Clark	McAngus Goudelock & Courie, LLC	PO Box 1349
Jennie E Clark	Jennie Elizabeth Clark Attorney at La	35 Dinwood Cir
Jack E. Cohoon	Burnette Shutt & McDaniel, PA	PO Box 1929
Gregory Brian Collins	Savage Royall & Sheheen	PO Drawer 10
Michael Thomas Cooper	McLeod Law Group, LLC	3 Morris Street
Lir Patrick Derieg		436 Greene Street
Allison Krause Elder		146 W Mcelhaney Rd
Eric J. Erickson	Erickson Law Firm, LLC	One Beaufort Town Center
Sha'Mya LaTaye Green		1831 West Evans Street
Shanise Alise Betty Greenfield		655 H Fairview Rd
Doward Keith Karvel Harvin	The Law Office of Doward Keith Harv	Attorney Doward Keith Harvin
Olivia Hassler	Strom Law Firm, LLC	6923 North Trenholm Road
Margaret McClurkin Held	Third Circuit Solicitor's Office	215 North Harvin Street
Brittany Sharmaine Holmes	Brittany Holmes Law	PO Box
Cassandra L. Hutchens	Jamrosyk Law Firm, LLC	21 Gamecock Avenue
Bryan S. Jeffries	S.C. Human Affairs Commission	1026 Sumter St. Ste. 101
Jessica Elizabeth Kinard	Jessica E. Kinard, Attorney at Law, LL	PO Box 333
Courtney Michelle Laster	S.C. State Ethics Commission	SC State Ethics Commission
Carey Taylor Markel	Office of Disciplinary Counsel	POB 12159
Kathleen McColl McDaniel	Burnette Shutt & McDaniel, PA	PO Box 1929
John Christopher Mills	J. Christopher Mills, LLC	2118 Lincoln Street
Ivory L. Narcisse		2014 Graham Rd
Nicole Lynne Paluzzi	Charleston Pro Bono Legal Services	PO Box 1116
Jacqueline Marie Pavlicek	City of Columbia	PO Box 667
Adam Protheroe	S.C. Appleseed Legal Justice Center	1518 Washington Street
Phyllis Alesia Rico Flores	City of Charleston	Municipal Court
John Edward Robinson	Law Offices of John E. Robinson, LLC	PO Box 670
Laura W. Robinson	Laura Robinson Law, LLC	16 New Street
Nekki Shutt		PO Box 1929
Amy Miller Snyder	Clawson & Staubes, LLC	1000 E. North St.
Steven R. Spreeuwers	Lindemann, Davis & Hughes, PA	PO Box 6923
Leonidas Emanuel Stavrinakis	Stavrinakis Law Firm	One Cool Blow Street, Ste. 201

Ellen S. Steinberg	Charleston County	1720 Sam Rittenberg Blvd
Wesley Aaron Vorberger	Greenville County Sheriff's Office	4 Mcgee Street
Kathleen Ashley Warthen	Richland County Public Defender's O	1701 Main St.
Kyle Jason White	White, Davis & White Law Firm, PA	209 E. Calhoun St.
Ralph James Wilson, Jr.	Ralph Wilson Law PC	PO Box 860

11

MEMORANDUM

July 12, 2021

TO: SC Bar House of Delegates
FROM: Jill Rothstein, Chair, Professional Responsibility Committee
RE: Proposed Amendments to Rule 8.4, SC Rules of Professional Conduct

> *A lawyer . . . is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.*
>
> --Preamble, SC Rules of Professional Conduct

It is time—actually, it is long *past* time—for the South Carolina Bar to have uncomfortable conversations. It is long past time for the South Carolina Bar to face difficult truths. It is long past time for the South Carolina Bar to take a concrete, visible, *enforceable* step toward resolving entrenched patterns that, by demeaning and degrading some members of the Bar, weaken the entire legal community of this State. To that end, the Professional Responsibility Committee submits proposed new RPC 8.4(h) and comments [5] through [12] (collectively, "proposed rule 8.4(h)") for consideration by the House of Delegates.

Proposed rule 8.4(h) is not modeled on ABA Model Rule 8.4(g). The PR Committee previously recommended against adoption of Model Rule 8.4(g), in part because it may infringe on attorneys' First Amendment Rights.[1] Instead, proposed rule 8.4(h) addresses harassing and discriminatory *conduct*.

BACKGROUND

Rejection of ABA Model Rule 8.4(g) in 2017

The ABA adopted Model Rule 8.4(g) in August 2016, and immediately began pressing for its incorporation in to individual states' rules of professional conduct. On September 29, 2016, the ABA's Center for Professional Responsibility wrote to Chief Justice Pleicones, urging adoption of 8.4(g).

Chief Justice Pleicones referred the letter to the PR Committee for a recommendation regarding the adoption or rejection of Model Rule 8.4(g) *as written*. At that time, the task of the PR Committee was solely to make an up-or-down recommendation on the Model Rule, not to propose alternatives. The PR Committee discussed Model Rule 8.4(g) at length during several meetings in the fall of 2016, and ultimately voted to recommend against adoption. The PR Committee's report and recommendation was submitted to the House of Delegates at its January 2017 meeting.

On June 20, 2017, the South Carolina Supreme Court issued an order declining to adopt Model Rule 8.4(g). The Court's order acknowledged the view of the Commissions on Lawyer and Judicial Conduct "that discrimination and lack of diversity within the legal profession are issues that should be addressed in some fashion." Although the

[1] Indeed, a federal district court recently struck Pennsylvania RPC 8.4(g), which was modeled on ABA Model Rule 8.4(g), on the grounds that it violated the First Amendment. *See Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020).

Supreme Court stated its willingness to consider proposed alternatives to Model Rule 8.4(g), to the best of the PR Committee's knowledge, no such proposal has ever been submitted.

Renewed Calls for Change in 2020

In his 1960 speech "The Rising Tide of Racial Consciousness," Dr. Martin Luther King, Jr., deplored the "dearth of positive leadership" on issues of racial justice in America. In the aftermath of George Floyd's death at the hands of Minneapolis police on May 25, 2020, five Black women lawyers demonstrated their courage and leadership by organizing the Lawyers Standing Against Racial Injustice Protest in Columbia on June 4. Members of the South Carolina Bar called on Bar leadership and Bar members to offer more than platitudes about increasing diversity in the Bar. Speakers at the protest explicitly called on the South Carolina Bar to do more to address racial injustice within the legal profession.

The protest in Columbia sparked a letter-writing campaign calling for the Bar to revisit the issue of addressing bias and discrimination and, specifically, to adopt Model Rule 8.4(g). Some of these letters were submitted to the PR Committee. The question of Model Rule 8.4(g) was placed on the agenda for the June 19, 2020 meeting of the PR Committee.

Following the June 19 meeting, outgoing PR Committee Chair Michael Virzi, and incoming Chair Jill Rothstein, asked 11 PR Committee members to serve on a subcommittee to make a recommendation regarding possible amendments to the RPC to address bias and discrimination in the legal profession. The members of the Subcommittee are:

Greg Adams	Yvonne Murray-Bowles
Rachael Anna	Tucker Player
Grady Anthony	Leslie Simpson
Susie Campbell	Kirsten Small, Chair
Amy Hill	La'Jessica Stringfellow
Dave Maxfield	

The Subcommittee had its first meeting on July 1, 2020, and met nearly every week through the summer and fall of 2020.

The Subcommittee's Work

The Subcommittee's first task was to study the issues and make a recommendation to the PR Committee regarding whether the RPC should be amended to explicitly address harassing and discriminatory conduct as an ethical issue. The second task was to draft a specific proposal that would be appropriate for South Carolina lawyers while avoiding the constitutional problems of Model Rule 8.4(g).

In its early meetings, the Subcommittee identified three questions as focus areas:

(1) Is there need for new language in the SC RPC addressing bias and discrimination, or are these issues adequately addressed by the RPC—particularly, the Lawyer's Oath and Rule 8.4—as currently written?

(2) What are the constitutional limitations on professional discipline of lawyers, especially as related to First Amendment concerns?

(3) Very few states have adopted Model Rule 8.4(g), but many states' RPC explicitly address bias and discrimination. What can the Subcommittee learn from the experiences of other states?

The Subcommittee formed three sub-groups to study these issues and report back to the rest of the Subcommittee. The Subcommittee's findings were reported to the PR Committee and are set forth below.

FINDINGS

1. The Current SC Rules of Professional Conduct Do Not Adequately Address Harassing and Discriminatory Conduct

1.1 Current Rule 8.4

As currently drafted, South Carolina Rule of Professional Conduct 8.4 provides:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) commit a criminal act involving moral turpitude;
>
> (d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (e) engage in conduct that is prejudicial to the administration of justice;
>
> (f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> (g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The only mention of harassment and discrimination is found in Comment [3]:

> [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

South Carolina Rule 8.4 includes subsection (c), providing it is professional misconduct

to commit a crime of moral turpitude, that does not appear in Model Rule 8.4.

1.2 Current SC Rule 8.4 Is Inadequate

As currently drafted, SC Rule 8.4 does not specifically prohibit harassing and discriminatory conduct by lawyers; it merely addresses the issue obliquely in Comment [3]. Most concerning to the Subcommittee was the fact that Rule 8.4(e) applies only to conduct "in the course of representing a client." This limitation means that a lawyer cannot be disciplined under Rule 8.4(e) for any of the following:

- "Office banter" among attorneys that demeans and degrades paralegals and other law firm staff;[2]
- Posts on an attorney's personal and law firm social media accounts making veiled threats and accusing school board members and administrative staff (not all of whom are parties to litigation in which the attorney is involved) of, *inter alia*, testing fraud and affiliation with the KKK;[3] or
- Telling a law student intern that if she does not give the attorney sexual favors he will make a negative recommendation regarding her application for admission to the bar.[4]

On May 1, 2019, the South Carolina Supreme Court issued regulations for mandatory continuing legal education for judges, members of the SC Bar, and foreign legal consultants. *See* SC R. App. P., Appendix C to Part IV. Requirement II(A)(2) states that an appropriate topic for legal ethics/professional responsibility (LEPR) credit is "instruction focusing on the elimination of bias in the legal profession," including "programming designed to educate lawyers on the recognition, identification, prevention, and elimination of bias in the legal setting as well as programming on diversity in the legal profession."

The wording of this recent regulation makes clear that bias does exist in the legal profession in South Carolina; otherwise, there would be no need for training to eliminate it. Additionally, the Supreme Court's order rejecting Model Rule 8.4(g) highlighted the statement of the Commissions on Lawyer and Judicial Conduct that "discrimination and lack of diversity within the legal profession are issues that should be addressed in

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[2] *Iowa Supreme Court Atty Discipline Bd. v. Watkins*, 944 N.W.2d 881 (2020) (attorney's conduct toward his employees included sexually driven "jokes," demeaning and degrading comments about employees and others, and displaying sexually graphic pictures violated Iowa RPC 8.4(g), prohibiting "sexual harassment or other unlawful discrimination in the practice of law").

[3] *Leigh v. Avossa*, No. 16-cv-8162, 2017 WL 2799617 (S.D. Fla. June 28, 2017) (finding such conduct violated Florida RPC 8.4(d), providing it is professional misconduct "to knowingly, or through callous indifference, disparage, humiliate or discriminate" against litigants, witnesses, and others). … . *In re Robinson*, 209 A.3d 570 (Vt. 2019) (attorney tossed paperclips into employee's cleavage

[4] *Cincinnati Bar Ass'n v. Young*, 731 N.E.2d 631 (Ohio 2000) (finding such conduct violated Ohio DR 1-102(B), which provides, "A lawyer shall not engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability").

some fashion."

1.3 The Problem of "Proof"

Many members of the Bar who opposed Model Rule 8.4(g) in 2017 were skeptical of (or outright rejected) the possibility that discrimination and harassment might be problems within the Bar. The same skepticism was expressed by some members of the PR Committee during consideration of Proposed Rule 8.4(h). Generally speaking, these persons were concerned about the wisdom of adopting a new ethical rule without empirical data—in other words, proof—that (1) there is an existing problems of harassment and discrimination; and (2) that the new rule would be have a measurable impact on such conduct.

This is not surprising. As lawyers, we are taught not to assume and not to accept claims at face value; we insist upon sound reasoning informed by proven facts. It is not unreasonable for members of the Bar to expect the same of proposals for new disciplinary rules.

The members of the Subcommittee agree on the importance of having data quantifying the existence and scope of discrimination and harassment within the South Carolina legal community. Pursuant to its Five-Year Strategic Diversity Plan, in May 2021 the Implementation Committee conducted a confidential survey of all South Carolina Bar members. The results of this survey will obviously provide important information on these issues.

Respectfully, however, requiring statistically verified evidence or some other form of "proof" singles out this particular change to the RPC for and imposes a burden not required of other proposed rule changes.

1.4 The RPC Should Explicitly Bar Discrimination and Harassment

It is to be hoped that every lawyer in South Carolina would agree that discrimination and harassment have no place in the practice of law. And yet, there is no dispute that discrimination and harassment is a daily experience for many Bar members. In various ways, the state Bar, local bar associations, law firms, and individual lawyers have made sincere efforts to decrease discrimination and increase diversity. These efforts have included formation of committees to facilitate panels and additional actions to review the policies and procedures within the Bar, that have been proven to contribute to discrimination and bias. In addition, law firms, corporate legal departments, and other organizations have implemented some type of diversity training to deal with apparent bias and/or lack of diversity within their own walls.

However well intentioned, these efforts often fail to accomplish their stated goals, unless the goal is a mere check mark ("Yep, we got ourselves a diversity committee.") The simple reality is that a one-time diversity training that a lawyer is forced to attend will not solve the problems of bias and discrimination. Nor will one-on-one discussions about bias, discrimination and harassment solve problems that are systemic.

2. The Constitutional Boundaries of Attorney Discipline

One of the major concerns expressed regarding Model Rule 8.4(g) was that it authorized discipline based on the content of an attorney's ideas, opinions, or beliefs, in violation

of the First Amendment. These concerns were top-of-mind throughout the process of drafting proposed rule 8.4(h).

The First Amendment problem exists because discipline for discrimination and harassment is frequently premised on words spoken or written by the attorney. *See, e.g.*, *In re Hammer*, 395 S.C. 385, 718 S.E.2d 442, (2011) (disciplining attorney who "asked improper questions during [a] deposition," including questions about the witness's sexual orientation); *In re Anonymous Member of the S.C. Bar*, 392 S.C. 328, 709 S.E.2d 633 (2011) (disciplining attorney who wrote letter claiming opposing counsel's daughter was a drug addict); *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011) (disciplining attorney who wrote letter referring to town officials as "pagans" and questioning whether the Town Manager had a soul); *In re Golden*, 329 S.C. 335, 496 S.E.2d 619 1998 (disciplining attorney who verbally degraded and demeaned witness during deposition and called opposing party a "mean-spirited, vicious witch").

2.1 The Constitution Permits Some Regulation of Attorney Speech

The Supreme Court has long recognized that attorneys are subject to restrictions on speech that do not apply to non-lawyers. In *In re Sawyer*, 360 U.S. 622 (1959), Justice Stewart cast the deciding vote for reversal of discipline imposed on an attorney who criticized the prosecution of her clients and the conduct of the ongoing trial. In doing so, he recognized that an attorney's ethical duties "may require abstention from what in other circumstances might be constitutionally protected speech." *Id.* at 646-47 (Stewart, J., concurring in the result). The First Amendment, Justice Stewart observed, does not permit "a lawyer [to] invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct":

> A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> ***Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.***

Id. (emphasis added).

Three decades after *Sawyer*, the Supreme Court confirmed, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991), that the state's authority to regulate attorney speech is greatest when the speech occurs in the courtroom.[5] For example, "[a]n attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal." (citing *Sacher v. United States*, 343 U.S. 1 (1952), which affirmed contempt citations based on attorneys' obstructive conduct during a criminal trial); *cf. Sawyer*, 360 U.S. at 647 (Stewart, J., concurring in the result) (reasoning that attorney should not have been disciplined when she did not attempt "to

[5] The *Gentile* Court also recognized the state's authority to regulate attorney speech in the context of solicitation of clients. *See id.* This authority is not unlimited, either. *See In re Primus*, 436 U.S. 412 (1978) (reversing suspension based on South Carolina attorney's solicitation of involuntarily sterilized women for *pro bono* representation by the ACLU; holding that attorney's communication to victim "comes within the generous zone of First Amendment protection reserved for associational freedoms").

obstruct or prejudice the due administration of justice").

The *Gentile* Court also made clear that "[e]ven outside the courtroom" lawyers may be "subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile*, 501 U.S. at 1071. The right of the state to impose such restrictions "reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice." *In re Snyder*, 472 U.S. 644 (1985).

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess . . . Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

Id.

> The United States Supreme Court has noted that lawyers are not entitled to the same First Amendment protections as laypeople. … Moreover, attorneys' "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." … "Even outside the courtroom, . . . lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be."

In re Anonymous, 392 S.C. at 335, 709 S.E.2d at 637 (citing *Snyder*; quoting *Sawyer* and *Gentile*).

2.2 *Gentile* Requires a Balancing of Attorneys' First Amendment Rights Against the State's Interest in Regulating Attorney Conduct

Following a courthouse-steps press conference on behalf of a recently indicted client, Gentile was disciplined for violating Nevada Supreme Court Rule 177, which prohibited a lawyer from making extrajudicial statements the lawyer "knows or reasonably should know … will have a substantial likelihood of materially prejudicing an adjudicative proceeding." A majority led by Chief Justice Rehnquist held that this rule struck an appropriate balance between lawyers' First Amendment rights and the state's interest in regulating professional conduct.

The Court held, as an initial matter, that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976)," in which the Court recognized a "heavy presumption" against the constitutionality of prior restraint on press coverage of criminal proceedings. *See Stuart*, 427 U.S. at 558. Reviewing prior decisions addressing lawyers' First Amendment rights in the solicitation of clients, the majority noted, "In each of these cases, we engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a

lawyer's First Amendment interest in the kind of speech that was at issue." *Id.* at 1073.

The Court held that this balancing test should also apply to restrictions placed on a lawyer's speech in the context of adjudicative proceedings, and held that Rule 177 passed muster under this test:

> The "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, for it is ***designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech.***

Id. at 1075.[6]

2.3 Content-Based Restrictions on Attorney Speech Are Presumptively Unconstitutional

In *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the Court struck down a California law that required doctors to provide certain information about the availability of abortion and family planning services to patients. As a content-based regulation of speech, the law should have been subject to strict-scrutiny analysis, but the Ninth Circuit held that state regulation of "professional speech" need not pass strict scrutiny.

Reversing, the Supreme Court flatly rejected the notion that a state's authority to confer professional licenses carries with it the power to dictate the content of professional speech. In articulating its holding, the majority recognized the critical distinction between regulation of speech *qua* speech, and the regulation of conduct accomplished through speech:

> [T]his Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals." … This Court's precedents do not permit governments to impose content-based restrictions on speech without persuasive evidence … of a long (if heretofore unrecognized) tradition to that effect.
>
> This Court's precedents do not recognize such a tradition for a category called "professional speech." This Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." Second, under our precedents, ***States may regulate professional conduct, even though that conduct incidentally involves speech.***

Becerra, 138 S. Ct. at 2371-72 (citations omitted; emphasis added).

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[6] A different majority, led by Justice Kennedy, reversed the discipline on the grounds that Rule 177, as interpreted by the Nevada Supreme Court, was void for vagueness. *Id.* at 1048-51. Justice Kennedy's majority held that the "safe harbor" in Rule 177(3), which authorized certain statements "notwithstanding" the prohibition of statements likely to prejudice adjudicative proceedings, misled Gentile into thinking his press conference was permissible.

2.4 Conclusion: To Pass Constitutional Muster, an Ethical Rule Barring Discrimination and Harassment Must Focus on Attorney Conduct, Not Attorney Speech

Taken together, *Gentile* and *Becerra* establish the following principles:

- The state has a legitimate interest in regulating the speech of attorneys as officers of the court, *i.e.*, in the context of adjudicative proceedings, whether inside or outside a courtroom. Restrictions on such speech must be narrowly tailored to advance the state's interest in the integrity of adjudicative proceedings.
- The state's authority to license professionals does not encompass the power to impose content-based restrictions on professional speech. Such restrictions are presumptively unconstitutional and are subject to strict-scrutiny analysis.
- States may regulate professional conduct, even if such conduct incidentally involves speech. A lawyer cannot escape discipline for unethical conduct on the grounds that the misconduct was accomplished through the mechanism of oral or written expression.

3. Approaches Taken by Other States

To date, only four states have adopted Model Rule 8.4(g).[7] However, at least 25 states have adopted a rule of professional conduct, other than Model Rule 8.4(g), that explicitly prohibits bias, discrimination, and/or harassment by lawyers.[8] In all, therefore, 29 states now have rules of professional conduct that explicitly address discrimination and harassment by lawyers.

These numbers show, first, that South Carolina is hardly alone in rejecting Model Rule 8.4(g). They also show, second, that South Carolina is slipping behind the curve, becoming part of a shrinking minority of states that do not address directly, in their rules of professional conduct, the problem of discrimination and harassment by lawyers.

On a more positive note, the fact that 25 states have already adopted anti-discrimination/anti-harassment rules means that in adopting its own rule, South Carolina can draw on the example of other states that have already wrestled with the

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[7] Maine, New Mexico, Pennsylvania, and Vermont. As noted *supra*, Pennsylvania's version of Model Rule 8.4(g) has been struck as unconstitutional. *See Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020).

[8] California (Rule 8.4.1), Colorado (Rule 8.4(g), (h), (i)), District of Columbia (Rule 9.1), Florida (Rule 8.4(d)), Idaho (Rule 4.4(a)(1)), Illinois (Rule 8.4(j)), Indiana (Rule 8.4(g)), Iowa (Rule 8.4(g)), Maryland (Rule 8.4(e)), Massachusetts (Rule 3.4(i)), Michigan (Rule 6.5), Minnesota (Rule 8.4(g), (h)), Missouri (Rule 8.4(g)), Nebraska (Rule 8.4(d)), New Hampshire (Rule 8.4(g)), New Jersey (Rule 8.4(g)), New York (Rule 8.4(g)), North Dakota (Rule 8.4(f)), Ohio (Rule 8.4(g)), Oregon (Rule 8.4(a)(7)), Rhode Island (Rule 8.4(d)), Texas (Rule 5.08), Washington (Rule 8.4(g), (h)), and Wisconsin (Rule 8.4(i)). Additionally, Arkansas has adopted a modified version of Comment 3 to Rule 8.4, stating that "conduct prejudicial to the administration of justice" includes "discriminatory conduct" based on "any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute."

problem of how to address discrimination and harassment without infringing on constitutional rights.

Based on its study of other states' rules, the Subcommittee identified certain characteristics of state rules that seemed more likely to survive constitutional scrutiny. Such rules tended to:

- Define prohibited conduct in terms of either (a) existing federal, state, or local law prohibiting discrimination; or (b) an identifiable target (*e.g.*, "a person," "another," or "parties, counsel, witnesses, or others");

- Require a nexus between the prohibited conduct and the lawyer's status as a lawyer (*e.g.*, "in the practice of law," "in connection with the lawyer's professional activities");

- Prohibit only intentional misconduct, either by including a scienter requirement (*e.g.*, "knowingly" or "willfully") or by prohibiting conduct that can only be committed intentionally (*e.g.*, "harass," "engage in," or "take action"); and

- Provide, either in the rule or the comments, clear, plain-language explanations of the scope of the rule.

RECOMMENDATION

Proposed Rule 8.4(h) and Proposed Comments [5] through [12]

Proposed Rule 8.4(h) draws on existing South Carolina sources (including the Rules of Professional Conduct and statutory law); Supreme Court authority regarding regulation of lawyer conduct, particularly in relation to attorneys' First Amendment rights; and language previously adopted by one or more other states.

The text of Proposed Rule 8.4(h) is set forth below. and Comments [5] through [12] are set forth in full below. Additionally:

- **Appendix A** sets forth the PR Committee's proposed changes to SC RPC 8.4 in redline and strikeout.

- **Appendix B** provides an annotated version of Proposed Rule 8.4(h) and Comments [5] through [12], with explanations of drafting choices and references to source material.

Proposed Rule 8.4(h) provides that it is professional misconduct to:

> engage in conduct that the lawyer knows or reasonably should know is discrimination or harassment based on race, color, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status that (1) violates a federal, state or local statute or ordinance that prohibits discrimination or harassment or (2) reflects adversely on the lawyer's fitness as a lawyer.

> For purposes of this paragraph, whether conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of the totality of the circumstances. Circumstances that may be relevant include: (1) the seriousness of the conduct; (2) whether the conduct was knowing or intentional; (3) whether the lawyer knew that the conduct was prohibited by statute or ordinance; (4) whether the conduct was part of a pattern of prohibited conduct; or (5) whether the conduct was committed in connection with the lawyer's professional activities.

With respect to (1), federal statutes prohibiting discrimination are long established and are not constitutionally suspect either on their face or, except in very rare cases, as applied.

With respect to (2), "reflects adversely on the lawyer's fitness as a lawyer" is a standard that appears throughout the RPC and that currently governs attorney conduct through Rule 7(a) of the Rules of Disciplinary Enforcement.

The second sub-paragraph of the Proposed Rule provides that determining whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness to practice law requires consideration of the "totality of circumstances." This is a test that appears throughout criminal and civil law that is routinely understood to entail a case-by-case determination that takes into account all relevant facts and circumstances.

The PR Committee also proposes new Comments [5] through [12]:

> [5] "Discrimination" means unjust or prejudicial treatment based on the grounds of race, color, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status, and may include harmful verbal or physical conduct that manifests bias or prejudice toward others.
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> [6] "Harassment" means a pattern of intentional, substantial, and unreasonable intrusion into the private or professional life of a targeted person or group that serves no legitimate purpose and would cause a reasonable person or group member to suffer mental or emotional distress, and may include harmful verbal or physical conduct that manifests bias or prejudice toward others.
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> [7] The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (h).
>
> [8] Declining representation, limiting one's practice to particular clients or types of clients, and advocacy of policy positions or changes in the law are not regulated by paragraph (h).
>
> [9] Nothing in paragraph (h) limits a lawyer's ability to advocate fully and zealously on behalf of a client. However, full and zealous advocacy does not encompass and will not excuse conduct that exploits any characteristic or status that the lawyer knows or reasonably should know is not relevant to any legal or factual issue in dispute, including race, color, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. Legitimate advocacy respecting the foregoing factors does not violate paragraph (h).

> [10] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (h).
>
> [11] Paragraph (h) does not limit the ability of lawyers to engage in constitutionally protected activities, including expressing opinions about controversial and/or political topics; however, a lawyer cannot invoke the constitutional right of free speech to immunize the lawyer from even-handed discipline for proven unethical conduct.
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> [12] "Professional activities" encompasses a lawyer's role as a representative of clients and an officer of the legal system. Such role includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; attendance or participation in continuing legal education programs; and operating or managing a law firm.

The proposed comments further clarify the conduct-based scope of Proposed Rule 8.4(h). The key terms "discrimination" and "harassment" are defined in terms of conduct and, in the case of the definition of "harassment," using language from an existing South Carolina statute. The Proposed Comments reaffirm that Proposed Rule 8.4(h) fully protects an attorney's professional role as a zealous advocate and personal status as a private citizen, while emphasizing that neither of these roles will shield attorneys from discipline for conduct that otherwise violates the Proposed Rule. *See In re Sawyer*, 360 U.S. at 646 (Stewart, J., concurring) (rejecting any "intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct").

Finally, the Proposed Comments make clear that Proposed Rule 8.4(h) is grounded in longstanding norms that govern the conduct of members of the South Carolina Bar.

Proposed Rule 8.4(h) Is Constitutional on Its Face

From a constitutional standpoint, the Proposed Rule is appropriate as written. Consistent with *Gentile* and *Becerra*, the Proposed Rule focuses on conduct, not speech. It makes use of existing standards familiar to South Carolina attorneys. Regarding, in particular, the use of the phrase "reflects adversely on the lawyer's fitness as a lawyer," South Carolina currently considers character and fitness when granting or denying admission to the Bar. There is no reason why consideration of a lawyer's fitness to practice should cease when a lawyer is sworn in as a member of the Bar. In fact, Supreme Court precedent authorizes states to refuse bar admission to a candidate with admittedly racist views. In Illinois, an applicant for the bar openly belonged to an organization that supported white supremacy. He had no criminal record or other issues that would justify his denial of a license. The Illinois Bar denied his request on the basis that he "lacked the character and fitness to be licensed as a lawyer." Hale appealed on the basis that his denial violated his First Amendment Rights. It was sustained on appeal, and the US Supreme Court denied certiorari. *Hale v. Comm. on Character & Fitness for Ill.*, 335 F.3d 678 (7th Cir. 2003).

Proposed Rule 8.4(h) Fills Gaps in the Existing Rules of Professional Conduct

The following hypotheticals are offered as illustrations of how Proposed Rule 8.4(h) would work in practice.

Hypothetical 1: A male attorney verbally harasses a female paralegal in his law firm, calling her a "stupid, fat whore" and, in the presence of other attorneys, uses foul language to criticize her level of education.[9]

Is this conduct subject to discipline under the existing Rules?

No. Although the attorney's conduct clearly manifests bias or prejudice on the basis of sex, it is not subject to discipline because it did not occur "in the course of representing a client."

Would this conduct be subject to discipline under Proposed Rule 8.4(h)?

Probably. First, to the extent the conduct is severe and pervasive, it may create a hostile work environment in violation of federal anti-discrimination law. Second, and depending upon the totality of the circumstances, these facts could support a conclusion that the attorney's offensive, gender-based mistreatment of an employee reflects adversely on the attorney's fitness as a lawyer.

Hypothetical 2: An attorney tweets, on a personal Twitter account, "The Bible says Adam and Eve, not Adam and Steve."

Is this conduct subject to discipline under the existing Rules?

No. Regardless of the content of the tweet, it did not occur "in the course of representing a client."

Would the lawyer be subject to discipline under Proposed Rule 8.4(h)?

No, even though some would perceive this comment as offensive and homophobic. First, the tweet does not violate any federal, state, or local law prohibiting discrimination or harassment on the basis of sexual orientation. To the contrary, the tweet is pure speech and reflects the attorney's personal religious views. it is entitled to near-absolute protection under the First Amendment. Second, the circumstances do not support a conclusion that the tweet reflects adversely on the attorney's fitness as a lawyer. The tweet has a purpose (expression of the attorney's personal views) other than to embarrass, delay, or burden a person on the grounds of sexual orientation. And, the tweet was not made in connection with the attorney's professional activities, but rather on the attorney's personal social media account.

Hypothetical 3: Several attorneys use their firm's internal messaging system as a forum for a long-running, daily group chat where they frequently refer to judges, opposing counsel, and litigants using racist, sexist, and homophobic slurs.[10]

Is this conduct subject to discipline under the existing Rules?

No. Although the attorneys' statements in the chat group clearly manifest bias or prejudice on the basis of race, sex, and sexual orientation, this conduct did not occur "in the course of representing a client."

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[9] *See Disciplinary Counsel v. Skolnick*, 104 N.E.3d 775 (Ohio 2018).

[10] *See Attorney Grievance Commission v. Markey*, 230 A.3d 942 (Md. 2020).

Would the lawyer be subject to discipline under Proposed Rule 8.4(h)?

Yes. While the attorneys' participation in the chat group does not appear to violate any federal, state, or local law, the conduct occurred in connection with the attorneys' professional activities (they used their firm's internal messaging system, during business hours, to participate in the group chat) and reflects adversely on their fitness as lawyers.

Hypothetical 4: A lawyer decides that, due to historical oppression of women, she will only represent women, not men.[11]

Is this conduct subject to discipline under the existing Rules?

No. Regardless of whether this conduct manifests bias or prejudice on the basis of sex, there is nothing to indicate that the attorney's decision to accept only female clients is prejudicial to the administration of justice.

Would the lawyer be subject to discipline under Proposed Rule 8.4(h)?

No. Per Proposed Comment [8], "[d]eclining representation [or] limiting one's practice to particular clients or types of clients" does not violate the Proposed Rule.

Hypothetical 5: Professing a sincerely held religious belief that Black people are inherently inferior, a lawyer announces that Black employees will be paid 50% less than White employees, regardless of qualifications.

Is this conduct subject to discipline under the existing Rules?

No. Regardless of whether this conduct manifests bias or prejudice on the basis of race, it does not occur in the course or representing a client.

Would the lawyer be subject to discipline under Proposed Rule 8.4(h)?

Yes. The lawyer's personal religious views are not subject to discipline, but the lawyer cannot deploy those personal views as a shield from discipline for improper conduct. *See* Proposed Comment [11]. The conduct at issue—paying equally qualified Black employees less than White employees—violates federal anti-discrimination law. Additionally, the conduct reflects adversely on the attorney's fitness as a lawyer, in that it has no substantial purpose other than to burden Black employees on the basis of their race, is both serious and intentional, and occurs in the context of the practice of law.

CONCLUSION

Proposed Rule 8.4(h) is not a panacea; even if it is adopted, much work will still be needed to build a truly diverse Bar. But neither is it an empty gesture. If the South Carolina Bar wants to end racial injustice, it must first sweep its own porch. Establishing a disciplinary mechanism is necessary so that lawyers will understand that while they may have whatever viewpoints they like, there will be consequences for discriminatory and harassing conduct, which stands in the way of South Carolina lawyers working together to solve the racial injustice in our own community.

Some members of the South Carolina Bar sincerely desire change but are fearful of

[11] *See Nathanson v. Mass. Comm'n Against Discrimination*,15 Mass. L. Rptr. 761 (Mass. Sup. Ct. 2003).

drawing back the curtain, lest our legal community be shamed by what is uncovered. They are privileged to avert their eyes from the burdens imposed daily on their fellow professionals for no better reason than that they are *different*—they have dark skin, or two X chromosomes, or a foreign accent, or a limp. By failing to address discrimination and harassment, the RPC serve only to perpetuate these ills. By their current silence, the Rules of Professional Conduct tacitly condone behavior that no member of the Bar should tolerate and that no one associated with the legal community—whether as litigant, witness, employee, or counsel—should have to endure.

PROPOSED AMENDMENT TO RULE 8.4, SC RULES OF PROF'L CONDUCT

Approved by SC Bar Professional Responsibility Committee 11/20/2020. Additions to the current rule are shown in underline, deletions are shown in ~~strikeout~~.

8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) commit a criminal act involving moral turpitude;

(d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(e) engage in conduct that is prejudicial to the administration of justice;

(f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law~~.~~ ; or

(h) engage in conduct that the lawyer knows or reasonably should know is discrimination or harassment based on race, color, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status that (1) violates a federal, state or local statute or ordinance that prohibits discrimination or harassment or (2) reflects adversely on the lawyer's fitness as a lawyer.

For purposes of this paragraph, whether conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of the totality of the circumstances. Circumstances that may be relevant include: (1) the seriousness of the conduct; (2) whether the conduct was knowing or intentional; (3) whether the lawyer knew that the conduct was prohibited by statute or ordinance; (4) whether the conduct was part of a pattern of prohibited conduct; or (5) whether the conduct was committed in connection with the lawyer's professional activities.

Comments

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the

administration of justice are in that category. The South Carolina version of this Rule also specifically includes criminal acts involving moral turpitude as professional misconduct. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

~~[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (c) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (c). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

[4~~3~~] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[~~5~~4] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[5] "Discrimination" means unjust or prejudicial treatment based on the grounds of race, color, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status, and may include harmful verbal or physical conduct that manifests bias or prejudice toward others.

[6] "Harassment" means a pattern of intentional, substantial, and unreasonable intrusion into the private or professional life of a targeted person or group that serves no legitimate purpose and would cause a reasonable person or group member to suffer mental or emotional distress, and may include harmful verbal or physical conduct that manifests bias or prejudice toward others.

[7] The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (h).

[8] Declining representation, limiting one's practice to particular clients or types of clients, and advocacy of policy positions or changes in the law are not regulated by paragraph (h).

[9] Nothing in paragraph (h) limits a lawyer's ability to advocate fully and zealously on behalf of a client. However, full and zealous advocacy does not encompass and will not excuse conduct that exploits any characteristic or status that the lawyer knows or reasonably should know is not relevant to any legal or factual issue in dispute, including race, color, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. Legitimate advocacy respecting the foregoing factors does not violate paragraph (h).

[10] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (h).

[11] Paragraph (h) does not limit the ability of lawyers to engage in constitutionally protected activities, including expressing opinions about controversial and/or political topics; however, a lawyer cannot invoke the constitutional right of free speech to immunize the lawyer from even-handed discipline for proven unethical conduct.

[12] "Professional activities" encompasses a lawyer's role as a representative of clients and an officer of the legal system. Such role includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; attendance or participation in continuing legal education programs; and operating or managing a law firm.

APPENDIX B: EXPLANATION OF DRAFTING CHOICES

This annotated version of Proposed Rule 8.4(h) and Comments [5] through [12] is intended to aid consideration by the House of Delegates through explanations of drafting choices.

*Numbers in **{bold curly brackets}** in the text of Proposed Rule 8.4(h) and the Comments correspond to explanatory notes that follow. To distinguish them from the text of the proposed Rule and Comments, the explanatory notes are indented and* rendered in a different typeface.

8.4 **MISCONDUCT**

It is professional misconduct to:

. . .

(h)[1] **{1}** engage in conduct that the lawyer knows or reasonably should know is discrimination or harassment based on race, color, sex, religion, national origin, disability, age, sexual orientation, **{2}** gender identity, or socioeconomic status that **{3}** (1) violates a federal, state or local statute or ordinance that prohibits discrimination and harassment or **{4}** (2) reflects adversely on the lawyer's fitness as a lawyer.

{1} **"engage in conduct … that the lawyer knows or reasonably should know is discrimination or harassment based on [listed factors]."** This language is intended to make absolutely clear that Rule 8.4(h) applies only to conduct, and to incorporate a scienter standard. The terms "know" and "reasonably should know" are defined in RPC 1.0(h) and (l), respectively.

{2} **"gender identity"** The Supreme Court has held that discrimination based on gender identity constitutes discrimination based on sex, and as such it is prohibited by Title VII of the Civil Rights Act. *See Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020). Including gender identity in the proposed rule's list of protected characteristics simply clarifies this point.

{3} **"(1) violates a federal, state or local statute or ordinance that prohibits discrimination and harassment"** This language is drawn from Rule 8.4(j) of the Illinois Rules of Professional Conduct. Several other states' versions of RPC 8.4 include similar language prohibiting "unlawful" conduct.

Illinois RPC 8.4 provides that no charge of professional misconduct can be brought until a court or administrative agency has found the lawyer to have violated a statute prohibiting discrimination. The PR Committee did not include this restriction in the proposed rule.

As an initial matter, at least four other states explicitly reference violation of law as ground for discipline. *See* Minnesota RPC 8.4(h) ("is prohibited by federal, state, or local statute or ordinance"); New York RPC 8.4(g) ("unlawfully discriminates"); Ohio RPC 8.4(g) ("discrimination prohibited by law"); Pennsylvania RPC 8.4(g) ("harassment or discrimination as defined in applicable federal, state, or local law"). **Out of all five, Illinois is alone in requiring an adjudication of guilt as a prerequisite to filing a disciplinary complaint.** New York requires the complainant to complete administrative or legal

[1] The ABA Model Rule addressing discrimination and harassment was 8.4***(g)***. However, because South Carolina's version of Rule 8.4 includes a subsection (c) that does not appear in the model rule, our Rule 8.4 already has a subsection (g). Consequently, the proposed Rule is 8.4***(h)***.

proceedings before filing a disciplinary complaint and provides that a finding of guilt is prima facie evidence in a disciplinary action, but it does not prohibit a disciplinary action when administrative or legal proceedings have not resulted in a finding of guilt. Minnesota, Ohio, and Pennsylvania do not impose any prerequisites.

The PR Committee elected not to follow Illinois in making an adjudication of guilt a prerequisite to disciplinary action. There are several reasons for this:

(a) Confusion of disciplinary rules with civil liability. The disciplinary process is not a substitute for civil liability under anti-discrimination statutes. Rather, it is intended to hold attorneys accountable for unethical conduct, protect the public, and preserve the integrity of the judicial system in South Carolina. Reference to federal and state anti-discrimination law serves these purposes by identifying the severity of the conduct prohibited by the proposed rule. An adjudication requirement, however, would serve only to limit the Supreme Court's authority to supervise members of the bar through appropriate discipline. Regardless of whether such a limitation is appropriate in Illinois, the PR Committee's view is that such a restriction is not appropriate for South Carolina. Some of the reasons for this conclusion are set out in (b) and (c), below.

(b) Unfairness caused by pressure to settle meritless claims. Presumably, the adjudication requirement of Illinois Rule 8.4(j) is intended to protect lawyers from disciplinary complaints based on unfounded claims of discrimination. The PR Committee's concern is that an adjudication requirement operates more as a sword than a shield. The threat of disciplinary proceedings is likely to create undue pressure on lawyers to settle weak or meritless claims in order to avoid an unfavorable verdict—which will then serve as *prima facie* evidence of an ethical violation.

(c) Unfairness caused by delay. An adjudication requirement will delay the filing of a disciplinary complaint, perhaps for years, until there is an adjudication.

(i) Unfairness to the lawyer. This delay is unfair to the lawyer, because a finding of liability under federal or state law will not bring matters to a conclusion, but rather will simply start another round of proceedings. Without an adjudication requirement, meritless allegations can be resolved efficiently in parallel proceedings. At the same time, the ODC would retain the discretion, in appropriate cases, to suspend disciplinary proceedings until court proceedings are resolved.

(ii) Unfairness to the complainant. A complainant may not wish to pursue a damages claim against the accused lawyer, but an adjudication requirement forces complainants to do so.

(iii) Unfairness to the public. The necessary consequence of an adjudication rule is that if a complainant is unwilling or unable to litigate a civil claim against the lawyer to verdict and through appeal, no disciplinary complaint will ever be filed and the lawyer will never be held accountable for his or her actions. In such cases, an adjudication requirement undermines a core function of the disciplinary process.

{4} **"reflects adversely on the lawyer's fitness as a lawyer"** There is no question that conduct that reflects adversely on a lawyers fitness to practice law is subject to discipline even when it does not involve criminal conduct or result in a criminal conviction. Rule 7(a) of the Rules for Disciplinary Enforcement provides:

> It shall be a ground for discipline for a lawyer to ...

(5) engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or ***conduct demonstrating an unfitness to practice law***. (emphasis added)

{5} For purposes of this paragraph, whether conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of **{6}** the totality of the circumstances. Circumstances that may be relevant include, but are not limited to: (1) the seriousness of the conduct; (2) whether the conduct was knowing or intentional; (3) whether the lawyer knew that the conduct was prohibited by statute or ordinance; or (4) whether the conduct was part of a pattern of prohibited conduct; or **{7}** (5) whether the conduct was committed in connection with the lawyer's professional activities.

{5} **"For purposes of this paragraph"** This phrase was added to clarify that the test articulated here is specific to Paragraph (h).

{6} **"the totality of the circumstances."** The "totality of the circumstances" test is a bedrock of civil and criminal litigation. It is universally understood as requiring consideration of each and every circumstance that is relevant to a given situation. Illinois and Minnesota also require a "totality of the circumstances" analysis, and they likewise include that requirement in the substantive rule rather than in the comments. The searching inquiry under the totality of the circumstances test protects lawyers from unjustified discipline in matters where emotions are likely to run high and objective proof may be lacking.

{7} **"whether the conduct was committed in connection with the lawyer's professional activities"** Illinois and Minnesota also list this factor as a consideration in the totality of the circumstances analysis. The PR Committee concluded that a nexus to a lawyer's professional activities should be a factor rather than a requirement. This approach is consistent with 8.4(b), (c), and (d), none of which requires that the conduct subject to discipline occur in connection with the lawyer's professional activities.

COMMENTS

{8} ~~[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice.~~ **{9}** ~~Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

{8} The PR Committee recommends the deletion of Comment 3 and the incorporation of some of its language into proposed Comments 9 and 10. Since Proposed Rule 8.4(h) prohibits discrimination and harassment based on protected categories, there is no longer any need for Comment 3's awkward attempt to shoehorn these principles into Rule 8.4(e).

Deleting Comment 3 does not render Rule 8.4(e) a dead letter. The Supreme Court has applied Rule 8.4(e) to a broad range of circumstances that have nothing to do with discrimination or harassment. *See, e.g.*, *In re Houston*, 415 S.C. 594, 784 S.E.2d 238, 240 (2016) (failure to file appellate briefs, nonpayment of videographer and court reporters); *In re Samaha*, 417 S.C. 421, 790 S.E.2d 391 (2016) (forgery of closing documents); *In re Nelson*, 406 S.C. 201, 750 S.E.2d 85 (2013) (ex parte contact with juror during trial).

{9} **"Legitimate advocacy … violation of this rule."** The PR Committee believes these two sentences provide important clarification of that the proposed rule should not be construed to interfere with a lawyer's representation of a client. However, they are no longer applicable to Comment 3. Accordingly, they have been moved to proposed Comments [9] and [10].

[5] **{10}** "Discrimination" means unjust or prejudicial treatment based on the grounds of race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status, and may include harmful verbal or physical conduct that manifests bias or prejudice toward others.

[6] "Harassment" means a pattern of intentional, substantial, and unreasonable intrusion into the private or professional life of a targeted person or group that serves no legitimate purpose and would cause a reasonable person or group member to suffer mental or emotional distress, and may include harmful verbal or physical conduct that manifests bias or prejudice toward others.

[7] The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (h).

{10} Many critics of Model Rule 8.4(g) were concerned about vagueness and overbreadth. The PR Committee sought to avoid these issues by using words with known and accepted legal meanings and by providing concrete definitions, drawn from existing sources wherever possible.

> Discrimination. The first phrase of the definition is derived from dictionary definitions of the term, including the Oxford English Dictionary. The second phrase is taken from Model Rule 8.4(g) and is intended to be illustrative of the type of conduct that constitutes discrimination under the proposed Rule.
>
> Harassment. The definition of "harassment" is drawn from the South Carolina Criminal Code. Defining harassment in terms of the Criminal Code serves two purposes: (1) it adopts existing language that is enforceable and not subject to challenge on constitutional grounds; and (2) it emphasizes the serious nature of the prohibited conduct.
>
> The use of language drawn from a criminal statute in proposed Comment 6 cannot plausibly be read as incorporating the high standard of proof required for a criminal conviction of a crime. Proposed Comment 6 merely describes the kind of conduct that may amount to a violation of professional ethics under the proposed Rule.

[8] **{11}** Declining representation, limiting one's practice to particular clients or types of clients, and advocacy of policy positions or changes in the law are not regulated by paragraph (h).

{11} Model Rule 8.4(g) has been criticized on the grounds that it enshrines viewpoint discrimination and subjects lawyers to discipline for expressing dissenting views or representing politically disfavored clients. Proposed Comment 8 is intended to make clear that proposed Rule 8.4(h) is viewpoint-neutral. The notion that a lawyer could be subject to discipline based on who the lawyer does (or does not) represent is fundamentally contrary to the ideals of our profession.

[9] Nothing in paragraph (h) limits a lawyer's ability to advocate fully and zealously on behalf of a client. However, full and zealous advocacy does not encompass and will not excuse conduct

that exploits any characteristic or status that **{12}** the lawyer knows or reasonably should know is not relevant to any legal or factual issue in dispute, including race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. **{13}** Legitimate advocacy respecting the foregoing factors does not violate paragraph (h).

[10] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this paragraph (h).

{12} **"the lawyer knows or reasonably should know"** This phrase was added based on comments by the PR Committee that the boundaries of relevance may not always be easily discerned. Addition of this phrase is intended to make clear that only intentional violations of this norm are subject to discipline.

{13} **"Legitimate advocacy ... violation of this rule."** To further clarify the scope of the proposed Rule, these two sentences from former Comment 3 have been retained as the last sentence of proposed Comment 9 and as a new proposed Comment 10.

[11] Paragraph (h) does not limit the ability of lawyers to engage in constitutionally protected activities, including expressing opinions about controversial and/or political topics; however, **{14}** a lawyer cannot invoke the constitutional right of free speech to immunize the lawyer from even-handed discipline for proven unethical conduct.

{14} Proposed Comment 11 is intended to express the unremarkable principle that a lawyer who engages in unethical conduct should not be able to avoid discipline by asserting the First Amendment. *See, e.g.*, *In re White*, 391 S.C. 581, 590, 707 S.E.2d 411, 416 (2011). The text is taken from Justice Stewart's eloquent expression of this principle. *See In re Sawyer*, 360 U.S. 622, 646 (1959) (Stewart, J., concurring) (rejecting any "intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct").

[12] "Professional activities" encompasses a lawyer's role as a representative of clients and an officer of the legal system. Such role includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; attendance or participation in continuing legal education programs; and operating or managing a law firm as a representative of clients and an officer of the legal system. Such role includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; attendance or participation in continuing legal education programs; and operating or managing a law firm.