South Carolina Bar

House of Delegates

SC Bar Convention

January 19, 2017

South Carolina Bar

January, 2017

Dear Member of the House:

Happy New Year everyone! Welcome to the 2017 House of Delegates.

The House of Delegates of the South Carolina Bar will convene promptly at 11:00 a.m. on Thursday, January 19, 2017, in the Regency Ballroom at the Hyatt Regency Greenville during the Bar Convention. When you arrive, please be certain to sign in so that the minutes will reflect your attendance. Lunch will be served at the start of the meeting. We will begin the business portion of the meeting as soon as practicable thereafter.

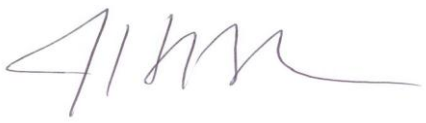
The proposed agenda precedes the first tab of the attached book. You may remove for discussion any item from the Consent Agenda before the agenda is adopted at the start of the meeting. Please remember the restrictions on positions which may be supported by a mandatory bar association. There is a brief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

I look forward to our first House of Delegates meeting of 2017 and to seeing and spending some time with all of you in Greenville. If I can assist you in any way prior to the meeting, please do not hesitate to contact me.

Sincerely yours,



J. Hagood Tighe
Chair

950 Taylor St. | PO Box 608 | Columbia, SC 29202 | PHONE 803.799.6653 | FAX 803.799.4118 | www.scbar.org

South Carolina Bar

January, 2017

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.

During the course of the meeting, a portion of our agenda is allotted for me to address the House with brief remarks and a summary of mid-year highlights. I am excited about sharing a few of those activities with you.

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 visit with you and other members of our Bar as we attend the Convention and take advantage of what it has to offer this year in Greenville.

I look forward to seeing you there!

Sincerely,

William K. Witherspoon

William K. Witherspoon
President

950 Taylor St. | PO Box 608 | Columbia, SC 29202 | PHONE 803.799.6653 | FAX 803.799.4118 | www.scbar.org

AGENDA
SOUTH CAROLINA BAR HOUSE OF DELEGATES
JANUARY 19, 2017 @ 11:00 A.M.

	CALL TO ORDER SET THE AGENDA	J. Hagood Tighe Chair
	WELCOME TO GREENVILLE	Hon. Knox H. White Mayor
1.	Approval of Consent Agenda a. Approval of Minutes of Meeting Held on May 19, 2016 b. Receipt of November Financial Statements c. Request from Fee Disputes Board for Rule Changes d. Notification of Bar Position on Alimony Reform	J. Hagood Tighe Chair
2.	Recognition of Law Day Essay Contest Winner	Hon. J. Mark Hayes, II Circuit Court Judge
3.	Report of the President	William K. Witherspoon President
4.	Report from South Carolina Bar Foundation, Inc.	Sidney J. Evering, II Foundation President
5.	Request from Professional Responsibility Committee to Amend Rule 5.1, SCRPC	Kirsten E. Small Committee Chair Harvey M. Watson, III Committee Member
6.	Request from Professional Responsibility Committee to Amend Rule 13 of the SC Rules for Lawyer Disciplinary Enforcement	Kirsten E. Small Committee Chair Michael J. Virzi Committee Member
7.	Request from Professional Responsibility Committee to Oppose ABA Proposed Amendments to Rule 8.4, SCRPC	Kirsten E. Small Committee Chair
8.	Request from Elder Law Committee and Probate and Estate Planning and Trust Section to Propose Legislation to Overrule Holding in *Fabian v. Lindsay*	Kathryn C. DeAngelo Committee Member Douglas B. O'Neal Section Council Member
9.	Request to Amend Rule 410(h)(1)(F), SCACR	Julie J. Moose 12th Circuit Representative

10.	Consideration of Amendments to the Bar Constitution and Bylaws	Beverly A. Carroll Secretary
11.	Nomination of Members of Commission on Continuing Legal Education and Specialization	Beverly A. Carroll Secretary
Adjournment to Convene Assembly		William K. Witherspoon 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 19, 2016

The House met on May 19, 2016, at the SC Bar Conference Center in Columbia. Present were: Daniel Joseph Ballou; A. Parker Barnes, III; J. Leeds Barroll, IV; Samuel Robert Bass, II; Shaheena R. Bennett; Mark S. Berglind; Susan B. Berkowitz; J. Steedley Bogan; James Edward Bradley; M. Malissa Burnette; George P. Callison, Jr.; Michael S. Cashman; George B. Cauthen; Nicholas J. Clekis; Amie L. Clifford; M. Dawes Cooke, Jr.; Lee Deer Cope; Leslie A. Cotter, Jr.; John Vernon Steensen Crangle; Robert Scott Dover; Daniel L. Draisen; Martin S. Driggers, Jr.; Rhett C. Dunaway; Anne S. Ellefson; John D. Elliott; Eric K. Englebardt; Michele Patrao Forsythe; Allen O. Fretwell; Rosalyn Woodson Frierson; Debra J. Gammons; Kenneth S. Generette; C. Allen Gibson, Jr.; Robert Fredrick Goings; Harry L. Goldberg; Thomas R. Gottshall; W. Andrew Gowder, Jr.; Elizabeth Van Doren Gray; Jack D. Griffeth; Sean Joseph Hinton; Cecil Kelly Jackson; Meliah Bowers Jefferson; Zandra L. Johnson; D. Michael Kelly; Catherine H. Kennedy; Francis B.B. Knowlton; Christopher R. Koon; Lanneau Wm. Lambert, Jr.; Adam Brooks Landy; LeRoy Free Laney; James Grant Long, III; Angus H. Macaulay; John Lucius McCants; J. Edwin McDonnell; John O. McDougall; Ian Douglas McVey; Joseph S. Mendelsohn; Kirby Rakes Mitchell; John Richard Moorman; Julie Jeffords Moose; John Hammond Muench; C. Tyson Nettles; Irish Ryan Neville; Stephanie Anne Nye; Cynthia Hall Ouzts; James Graham Padgett, III; Anne Louise Peterson ; Thomas Blaine Pleming; Ross Buchanan Plyler; Sheally Venus Poe; Andrew Troy Potter; Ashlin Blanchard Potterfield; William O. Pressley, Jr; Marie-Louise Ramsdale; Robert Douglas Robbins; Pamela Jane Roberts; John Edward Robinson; John Edward Roxon; Martha Kent Runey; Nancy Doherty Sadler; Stephen T. Savitz; Mary Elizabeth Sharp; Jane Opitz Shuler; Mary Amanda Harrelson Shuler; Lisa Lee Smith; Michael Benjamin Smith; Henry B. Smythe, Jr.; Carl L. Solomon; Christian Giresi Spradley; Wesley Alexander Stoddard; Hal M. Strange; Fred W. Suggs, Jr.; David L. Tedder; Carmen Harper Thomas; John Hagood Tighe; Thomas S. Tisdale, Jr.; Samuel Barton Tooker; Matthew N. Tyler; Robert E. Tyson, Jr.; Bradish J. Waring; J. Calhoun Watson; Robert M. Wilcox; Donald B. Wildman; William Marvin Wilson, III; William K. Witherspoon; David Whitten Wolf and Patrick Coleman Wooten.

Guests present were Keith Babcock, Andrew Cole, Margaret Day, Walter Dusky, Thomas Pendarvis and Sarah St. Onge.

Representing the Bar staff were: Cindy A. Coker, Jeremy Frazier, Leah G. Johnson, Charmy Medlin; Jason Stokes; Leigh G. Thomas and Robert S. Wells.

Chair Steedley Bogan called the meeting to order. A quorum was declared present.

Mr. Lambert moved to allow privileges of the floor to nonmembers. The motion was seconded, and it was approved.

Mr. Bogan stated that Agenda Item #14, Request to Support License Fee Increase for Pro Bono Administration, had been withdrawn. Ms. Clifford distributed a new item for the agenda. Mr. Bogan noted that the new item would become Agenda Item #14. Mr. Pressley moved to reinstate Agenda Item #14. The motion was seconded. The motion failed.

Mr. Koon made a motion to adopt the agenda as amended. The motion was seconded, and it was approved.

A motion was made to approve the Consent Agenda - approval of the minutes of the January 22, 2016, meeting; receipt of March Financial Statements and a request from the Military and Veterans' Law Section to amend bylaws. The motion was seconded, and it was approved.

Ms. Day recognized the 2016 Pro Bono Lawyers of the Year, Tina Cundari and Laura Evans.

Ms. Ramsdale recognized the 2016 Legal Services Lawyer of the Year, Susan Ingles.

Mr. Wooten recognized the 2016 Young Lawyer of the Year, Nichole Davis.

Mr. Dusky recognized the 2016 Law Related Education Lawyer of the Year, Garrett Johnson.

Next, President Ellefson recognized the graduates of the 2015-16 Leadership Academy: Brent Hamilton Arant, Marshall "Matt" Austin, Sheila Bias, Patrick Cleary, Cedric Cunningham, Emmanuel Ferguson, Garrett Johnson, Bess Lochocki, Julie L. Moore, George Morrison, Amanda Mueller, Lillian "Marshall" Newton, Sutania Radlein, Kerri Brown Rupert, Jasmine Smith, Brett Lamb Stevens, Danielle "Hope" Watson, Rebecca S. Williams, Nicole M. Wooten and Michael D. Wright.

Under report of the President, Ms. Ellefson noted the completion of year one of the strategic plan including the development of a new pro bono program, the design of a new Bar website and the increase in technology programs through the Bar's CLE Division. She reviewed a list of Bar members who had served in leadership roles in national associations and statewide and national awards received by Bar members, Bar

Divisions and Bar staff. She thanked the Bar staff and thanked Bar members for the opportunity to serve as President.

Ms. St. Onge presented a request from the Elder Law Committee to amend Article 5 of Title 62 to improve the process for appointment of guardians and conservators in South Carolina Probate Courts. Ms. Kennedy moved approval of the request. The motion was seconded, and it was approved.

Mr. Babcock and Mr. Pendarvis presented a request from the Professional Liability Committee to give Bar members the opportunity to voluntarily disclose malpractice insurance coverage via the Bar's website. Mr. Barroll moved approval of the request. The motion was seconded. Mr. Pressley opined that the insurance companies should be asked to provide the information. Mr. Pendarvis responded that the practice would make reporting mandatory and would be very time consuming. Ms. Ramsdale requested that the language to be used on the Bar website be amended as follows:

This Bar member has affirmed that he/she is in private practice and ~~has~~ had a current professional liability insurance policy as of January 1, 20XX.

Mr. Barroll accepted the amendment. The amended motion was approved.

As set by special order, the Assembly was convened. The Assembly was adjourned at the conclusion of its business.

Mr. Cole presented a request from the Practice and Procedure Committee to amend Rule 58, SCRCP, Entry of Judgment, Satisfaction or Cancellation of Judgment, to allow a judgment debtor to pay its debt through the Clerk of Court when the judgment creditor cannot be located. Mr. Cotter moved approval of the request. The motion was seconded, and it was approved.

Mr. Cole presented a request from the Practice and Procedure Committee to amend Rule 53(b), SCRCP, and Rule 71(a), SCRCP, to place foreclosures and partition actions under jurisdiction of the master-in-equity at the time of filing. Mr. Robinson moved approval of the request. The motion was seconded, and it was approved.

Ms. Moose presented a request to amend Rule 411(b) to shorten the term of members of the Lawyers' Fund for Client Protection Committee and moved approval. The motion was seconded, and it was approved.

Mr. Barroll presented a request to adopt a resolution on Court-centered regulation of legal services and moved approval. The motion was seconded. Mr. Elliott moved to strike Sections A and E. Mr. Barroll accepted Mr. Elliott's amendment to his motion. Mr. Suggs moved to table the motion and to refer the resolution to the Professional Responsibility Committee for review. The motion was seconded, and it was approved.

Ms. Clifford presented a request to adopt a policy to provide advance notice through E-Blast to the membership of House meetings and agendas, concurrent with distribution to the House, and posting of approved minutes. She moved approval. The motion was seconded. Discussion ensued on the duties of circuit delegates. The motion was approved.

Shawan Gillians was nominated for the SC Commission on CLE and Specialization.

The following members were elected to the Nominating Committee: Samuel R. Bass II and J. Edwin McDonnell, Judicial Region I, and Randall C. Stoney, III, Judicial Region IV.

Mr. Witherspoon presented Bar and CLE Division budgets for 2016-17 and moved approval. The motion was seconded, and it was approved.

Ms. Burnette moved a request from the Senior Lawyers Division to expand Rule 410(g) to allow inactive and retired members to perform pro bono service for state and local agencies and non-profit organizations, subject to approval of the proposed rule amended by the Board of Governors. The motion was seconded, and it was approved.

Mr. Witherspoon recognized outgoing Bar President Ellefson with a plaque and gift.

There being no further business, the meeting was adjourned.

TO: House of Delegates FM: Dawes Cooke, Treasurer

DT: January 2017 RE: Financial Reports

The financial reports through November follow. Page 1 is the balance sheet for general, grant and section funds. Page 9 has the balance sheet for the Lawyers' Fund for Client Protection. Page 10 is the CLE Division balance sheet.

As reflected on page 1, since July 1 the general, grant and section funds have decreased by a total of $1,272,893. The license fees are collected at the beginning of the calendar year and used throughout those twelve months while the Bar's fiscal year began on July 1. Hence, a deficit in net revenues is expected until January. Under accrual based accounting, license fees received for the 2017 license renewal will appear in the January statements.

Section funds decreased $16,858; see page 6. Monies held in grants and other funds increased $67,294; see page 8.

Through November the net effect on general operating funds was a decrease of $1,323,329, a figure found at the end of the third numerical column on page 2. (The decrease last year at the end of November was $1,240,165.) The fourth column on that same page indicates the expected loss was $1,425,900. Thus, the general operating funds are about $102,571 ahead of budget.

The deviations of $5,000 or more in year-to-date general revenues are:

Lawyer Referral Service Percentage Fees: Chiefly a settlement in one case.

SC Lawyer: More advertising sold in all three issues.

The deviations in general expenses of $5,000 or more are:

Salaries: Positions were unfilled at he beginning of the fiscal year.

FICA and Employee Benefits: Savings attributed to unfilled positions and some reduced monthly costs.

Delegate Expense: Reduced travel to two meetings.

Practice Management Assistance Program: Supplemental funding for LPM Tech Conference not used; national meetings not attended.

South Carolina Lawyer: Budget anticipated increased production costs which did not occur.

Page 11 reflects that the CLE Division's net loss was $88,647. (The decrease last year at the end of November was $53,010.) The budgeted loss was $81,500, resulting in an unfavorable position against budget of $7,147.

The deviations in CLE revenues of $5,000 or more are:

Seminar Income: Higher registrations for 11 seminars; lower for 18 seminars; 2 seminars cancelled.

Publication Income: Member and law student sales higher on existing titles.

The deviations in CLE expenses of $5,000 or more are:

Seminar Direct: Though savings achieved, disparate attendance resulted in slightly higher proportionate expenses against revenues.

Publication Direct: Though revenues exceeded budget, expense-to-revenue ratio was well below expectation.

Media Services Direct: Deferred purchases.

SOUTH CAROLINA BAR
BALANCE SHEET
For the Five Months Ending November 30, 2016

	YTD
CURRENT ASSETS	
CHECKING ACCOUNT	$123,217.91
MONEY MARKET	934,682.99
DISCIPLINE ASSESSMENT	5,563.99
INVESTMENTS	1,015,766.67
ACCOUNT RECEIVABLES	2,360.39
PREPAID EXPENSES	127,374.71
CONTRA ACCOUNTS DUE	5,465.25
TOTAL CURRENT ASSETS	**$2,214,431.91**
PLANT	
OFFICE EQUIPMENT	267,593.50
BUILDING & LAND	1,239,486.95
BUILDING # 2	6,115,290.69
DUE FROM CLE FIXED ASSETS	0.00
TOTAL PLANT FUND	**$7,622,371.14**
TOTAL ASSETS	**$9,836,803.05**
CURRENT LIABILITIES	
ACCOUNTS PAYABLE	135,063.98
PREPAID RENT	0.00
PERSONNEL PAYABLES	248,275.34
DUE:BF & COUNTY BAR	4,103.10
DEFERRED REVENUE	446,660.51
DEFERRED CONTRIBUTION TO USC	0.00
NOTES PAYABLE-CURRENT	1,319,370.75
RETAINAGE FOR NEW BUILDING	0.00
LEASE PAYABLE - CURRENT	0.00
SC SALES TAX REVENUE	0.00
TOTAL CURRENT LIABILITIES	**$2,153,473.68**
LONG TERM LIABILITIES	
NOTES PAYABLE-LONG TERM	0.00
LEASE PAYABLE - LONG TERM	0.00
TOTAL LONG TERM LIABILITIES	**$0.00**
TOTAL LIABILITIES	**$2,153,473.68**
BEGINNING OF YEAR GENERAL FUND BALANCE	8,157,481.03
BEGINNING OF YEAR LAWYER REFERRAL FUND	323,158.43
BEGINNING OF YEAR GRANT FUND BALANCE	186,944.04
BEGINNING OF YEAR SECTION FUND BALANCE	288,639.33
TOTAL BEGINNING OF YEAR FUND BALANCE	8,956,222.83
YTD REVENUE	651,807.24
YTD EXPENSES	1,924,700.70
NET CHANGE	(1,272,893.46)
FUND BALANCE	**$7,683,329.37**
TOTAL LIABILITIES AND FUND BALANCE	**$9,836,803.05**

SOUTH CAROLINA BAR
INCOME STATEMENT
For the Five Months Ending November 30, 2016

	MONTHLY ACTUAL	MONTHLY BUDGET	YTD ACTUAL	YTD BUDGET	ANNUAL BUDGET
REVENUE					
LICENSE FEES	($120.00)	$0.00	$18,435.00	$15,500.00	$3,253,700.00
FEES TOWARDS BUILDING	0.00	0.00	2,295.00	2,000.00	455,300.00
INTEREST	528.03	400.00	4,169.32	1,600.00	6,300.00
LRS PERCENTAGE FEE	42,275.97	20,000.00	127,117.88	107,000.00	260,000.00
LRS SUBSCRIPTION FEE	4,450.00	4,000.00	64,750.00	64,700.00	65,000.00
MARKETING FEES	3,875.62	2,500.00	17,374.35	14,900.00	33,100.00
SC LAWYER	17,479.50	12,400.00	47,535.00	37,400.00	75,000.00
STAFF SUPPORT	0.00	0.00	0.00	0.00	50,800.00
RENTS RECEIVED	3,669.00	3,700.00	18,345.00	18,500.00	44,000.00
ADR CERTIFICATION	37,200.00	35,000.00	51,150.00	47,900.00	102,000.00
DUES COLLECTION FEES	1,589.90	500.00	1,589.90	500.00	14,100.00
MISCELLANEOUS	769.74	100.00	5,159.04	300.00	600.00
LAW STUDENT AFFILIATES	30.00	0.00	990.00	1,100.00	1,500.00
SALES TAX	0.00	0.00	23.55	0.00	200.00
TOTAL REVENUES	**$111,747.76**	**$78,600.00**	**$358,934.04**	**$311,400.00**	**$4,361,600.00**
EXPENSES					
SALARIES	141,118.96	141,500.00	684,650.90	701,200.00	1,695,300.00
FICA & EMPLOYEE BENEFITS	23,804.87	25,400.00	166,462.68	178,700.00	519,700.00
BUILDINGS	11,552.66	11,400.00	82,130.14	80,100.00	191,200.00
EQUIPMENT & SOFTWARE	103.73	0.00	13,043.84	13,100.00	26,400.00
EQUIP. MAINTENANCE & LICENSES	10,383.61	9,400.00	77,048.94	77,500.00	167,200.00
OFFICE SUPPLIES	1,251.30	1,500.00	10,054.88	11,400.00	35,100.00
POSTAGE	7,963.85	7,400.00	8,991.79	9,500.00	15,500.00
TELEPHONE	1,108.43	1,400.00	5,338.99	7,000.00	18,100.00
PROFESSIONAL FEES	0.00	0.00	5,000.00	5,300.00	9,200.00
BOND/INSURANCE	708.00	800.00	4,316.10	4,000.00	11,500.00
STAFF EXPENSE	3,363.43	2,500.00	12,018.42	14,200.00	32,500.00
DUES/SUBSCRIPTIONS/BOOKS	691.00	300.00	3,460.82	2,700.00	3,900.00
CASUAL LABOR/HIRING	440.00	500.00	1,023.70	1,000.00	2,400.00
DELEGATE EXPENSE	0.00	0.00	34,577.33	42,300.00	76,600.00
OFFICERS' EXPENSE	1,400.00	1,400.00	3,389.48	1,900.00	4,200.00
MEMBERSHIP SERV. COMMITTEES	4,054.31	3,200.00	12,647.45	9,100.00	110,600.00
PRACTICE MANAGEMENT ASST.	395.48	200.00	1,171.64	9,600.00	16,000.00
RISK MANAGEMENT	0.00	0.00	368.62	700.00	6,300.00
LAWYERS HELPING LAWYERS	4,213.00	3,200.00	17,345.17	21,000.00	48,400.00
MEMBERSHIP BENEFITS	7,323.00	6,500.00	33,323.00	32,500.00	90,000.00
YOUNG LAWYERS	12,842.85	15,900.00	52,794.06	57,200.00	194,300.00
SENIOR LAWYERS	0.00	400.00	10,575.80	11,400.00	38,800.00
GOVERNMENT RELATIONS	4,460.00	900.00	4,903.24	1,600.00	33,000.00
JUDICIAL EVALUATION	0.00	0.00	1,337.61	1,400.00	5,000.00
PUBLIC SERVICE COMMITTEE	1,234.69	300.00	4,919.83	7,400.00	28,000.00
PRO BONO	0.00	0.00	150.00	200.00	46,700.00
ASK-A-LAWYER	(3,453.38)	0.00	1,955.98	5,100.00	22,900.00
CLIENT ASSISTANCE PROGRAM	58.86	100.00	309.04	300.00	1,000.00
ADR CERTIFICATION	139.14	0.00	921.14	1,000.00	5,200.00
REFERRAL SERV. MARKETING	6,919.29	10,700.00	28,108.27	31,600.00	129,000.00
LAW RELATED EDUCATION	14,381.91	13,700.00	26,803.82	26,500.00	125,500.00
PUBLIC RELATIONS	3,550.07	3,500.00	8,314.22	7,800.00	22,200.00
SOUTH CAROLINA LAWYER	37,798.14	37,800.00	106,430.38	113,700.00	227,000.00
LAWYERS DESK BOOK	0.00	0.00	4,007.59	4,000.00	4,000.00
CONTRIBUTIONS	0.00	0.00	2,500.00	0.00	21,200.00
CREDIT CARD FEES	2,354.70	1,400.00	4,478.16	3,400.00	55,400.00
MISCELLANEOUS	200.95	200.00	4,250.94	1,000.00	2,800.00
SHORT TERM PROJECTS	0.00	0.00	500.00	0.00	5,000.00
LAW STUDENT AFFILIATES	268.20	0.00	6,271.78	5,300.00	8,500.00
SALES TAX	0.00	0.00	23.37	0.00	200.00
NEW BUILDING DEBT	26,400.00	26,400.00	132,000.00	132,000.00	316,800.00
WEB SITE REDESIGN	69,670.00	69,700.00	104,344.30	103,600.00	108,400.00
TOTAL EXPENSES	**$396,701.05**	**$397,600.00**	**$1,682,263.42**	**$1,737,300.00**	**$4,481,000.00**
NET CHANGE	**($284,953.29)**	**($319,000.00)**	**($1,323,329.38)**	**($1,425,900.00)**	**($119,400.00)**

SOUTH CAROLINA BAR
Government Relations
Statement of Revenue and Expenses
For the Five Months Ending November 30, 2016

	MONTHLY ACTUAL	MONTHLY BUDGET	YTD ACTUAL	YTD BUDGET	ANNUAL BUDGET
REVENUE					
	$0.00	$0.00	$0.00	$0.00	$0.00
EXPENSES					
SALARIES	0.00	0.00	0.00	0.00	0.00
FICA & EMPLOYEE BENEFITS	0.00	0.00	0.00	0.00	0.00
EQUIPMENT & FURNITURE	0.00	0.00	0.00	0.00	0.00
EQUIPMENT & MAINTENANCE	0.00	0.00	0.00	0.00	0.00
OFFICE SUPPLIES	0.00	0.00	0.00	0.00	0.00
POSTAGE	0.00	0.00	0.00	0.00	0.00
TELEPHONE	0.00	0.00	0.00	0.00	0.00
PROFESSIONAL FEES	0.00	0.00	0.00	0.00	0.00
STAFF EXPENSE	0.00	0.00	0.00	0.00	0.00
GOVERNMENT RELATIONS	4,460.00	900.00	4,903.24	1,600.00	33,000.00
TOTAL EXPENSES	**$4,460.00**	**$900.00**	**$4,903.24**	**$1,600.00**	**$33,000.00**
NET BALANCE	**($4,460.00)**	**($900.00)**	**($4,903.24)**	**($1,600.00)**	**($33,000.00)**

Lawyer Referral Service
Statement of Revenue and Expenses

REVENUE					
LRS PARTICIPATION FEES	$42,275.97	$20,000.00	$127,117.88	$107,000.00	$260,000.00
LRS SUBSCRIPTION FEES	4,450.00	4,000.00	64,750.00	64,700.00	65,000.00
TOTAL REVENUES	**$46,725.97**	**$24,000.00**	**$191,867.88**	**$171,700.00**	**$325,000.00**
EXPENSES					
SALARIES	7,080.25	7,100.00	35,401.25	35,500.00	85,000.00
FICA & EMPLOYEE BENEFITS	1,980.45	2,000.00	12,836.07	12,600.00	34,400.00
BUILDING	700.00	700.00	2,900.00	3,700.00	8,700.00
EQUIPMENT & FURNITURE	0.00	0.00	0.00	0.00	1,500.00
EQUIPMENT & MAINTENANCE	4,300.00	800.00	6,600.00	3,900.00	12,800.00
OFFICE SUPPLIES	0.00	0.00	0.00	0.00	1,500.00
POSTAGE	8.10	0.00	303.75	400.00	1,000.00
TELEPHONE	59.46	0.00	292.01	0.00	1,200.00
PROFESSIONAL FEES	0.00	0.00	300.00	300.00	300.00
STAFF EXPENSE	0.00	0.00	0.00	0.00	400.00
BOND / INSURANCE	0.00	0.00	0.00	0.00	600.00
DUES /SUBSCRIPTIONS	0.00	0.00	0.00	0.00	0.00
CASUAL LABOR	0.00	0.00	0.00	0.00	0.00
ADVERTISING	6,858.17	10,500.00	27,110.44	29,800.00	125,900.00
GENERAL EXPENSES	61.12	200.00	997.83	1,800.00	3,100.00
TOTAL EXPENSES	**$21,047.55**	**$21,300.00**	**$86,741.35**	**$88,000.00**	**$276,400.00**
NET BALANCE	**$25,678.42**	**$2,700.00**	**$105,126.53**	**$83,700.00**	**$48,600.00**

SOUTH CAROLINA BAR
Statement of Revenue and Expense
Young Lawyers Division
For the Five Months Ending November 30, 2016

	MONTHLY ACTUAL	MONTHLY BUDGET	YTD ACTUAL	YTD BUDGET	ANNUAL BUDGET
REVENUE					
	$0.00	$0.00	$0.00	$0.00	$0.00
EXPENSES					
ANNUAL CONVENTION	0.00	0.00	0.00	0.00	34,000.00
SERVICE TO THE PUBLIC	8,856.67	11,200.00	20,617.61	22,300.00	52,300.00
SERVICE TO THE BAR	2,315.82	4,200.00	8,221.76	10,000.00	37,000.00
STRATEGIC PLANNING	0.00	0.00	0.00	0.00	18,000.00
DELEGATE EXPENSE	0.00	0.00	16,154.29	17,800.00	33,000.00
ADMINISTRATIVE	1,670.36	500.00	2,548.57	1,400.00	3,500.00
PUBLICATIONS/SCYL	0.00	0.00	4,829.30	5,500.00	14,300.00
PROJECT COMPLETION	0.00	0.00	422.53	200.00	2,200.00
TOTAL EXPENSES	**$12,842.85**	**$15,900.00**	**$52,794.06**	**$57,200.00**	**$194,300.00**
NET BALANCE	**($12,842.85)**	**($15,900.00)**	**($52,794.06)**	**($57,200.00)**	**($194,300.00)**

SOUTH CAROLINA BAR
SECTIONS FUND BALANCES
For the Five Months Ending November 30, 2016

	YTD
CONSTRUCTION LAW SECTION	
BEGINNING FY FUND BALANCE	$15,583.96
YTD REVENUE	923.70
YTD EXPENSES	808.00
FUND BALANCE	$15,699.66
CONSUMER LAW SECTION	
BEGINNING FY FUND BALANCE	5,330.72
YTD REVENUE	360.00
YTD EXPENSES	41.71
FUND BALANCE	$5,649.01
CORPORATE, BANKING & SECURITIES SECTION	
BEGINNING FY FUND BALANCE	21,959.55
YTD REVENUE	690.00
YTD EXPENSES	0.00
FUND BALANCE	$22,649.55
CRIMINAL LAW SECTION	
BEGINNING FY FUND BALANCE	21,032.55
YTD REVENUE	930.00
YTD EXPENSES	78.70
FUND BALANCE	$21,883.85
DISPUTE RESOLUTION SECTION	
BEGINNING FY FUND BALANCE	11,251.14
YTD REVENUE	675.00
YTD EXPENSES	1,907.44
FUND BALANCE	$10,018.70
EMPLOYMENT AND LABOR LAW SECTION	
BEGINNING FY FUND BALANCE	4,046.19
YTD REVENUE	922.92
YTD EXPENSES	425.00
FUND BALANCE	$4,544.11
ENVIRONMENTAL & NATURAL RESOURCES SECTION	
BEGINNING FY FUND BALANCE	8,859.26
YTD REVENUE	425.00
YTD EXPENSES	0.00
FUND BALANCE	$9,284.26
FAMILY LAW SECTION	
BEGINNING FY FUND BALANCE	20,077.59
YTD REVENUE	2,245.78
YTD EXPENSES	6,759.79
FUND BALANCE	$15,563.58
GOVERNMENT LAW SECTION	
BEGINNING FY FUND BALANCE	6,012.94
YTD REVENUE	510.00
YTD EXPENSES	3,869.25
FUND BALANCE	$2,653.69
HEALTH CARE LAW SECTION	
BEGINNING FY FUND BALANCE	7,071.35
YTD REVENUE	3,410.75
YTD EXPENSES	4,416.72
FUND BALANCE	$6,065.38

SOUTH CAROLINA BAR
SECTIONS FUND BALANCES
For the Five Months Ending November 30, 2016

	YTD
MILITARY LAW SECTION	
BEGINNING FY FUND BALANCE	3,792.80
YTD REVENUE	345.00
YTD EXPENSES	191.27
FUND BALANCE	$3,946.53
PROBATE, ESTATE PLANNING AND TRUST	
BEGINNING FY FUND BALANCE	5,255.18
YTD REVENUE	1,740.00
YTD EXPENSES	0.00
FUND BALANCE	$6,995.18
REAL ESTATE PRACTICE SECTION	
BEGINNING FY FUND BALANCE	48,925.71
YTD REVENUE	2,175.00
YTD EXPENSES	6,524.45
FUND BALANCE	$44,576.26
SOLO AND SMALL FIRM PRACTITIONERS	
BEGINNING FY FUND BALANCE	20,666.44
YTD REVENUE	3,200.00
YTD EXPENSES	12,387.90
FUND BALANCE	$11,478.54
TAX LAW SECTION	
BEGINNING FY FUND BALANCE	9,176.07
YTD REVENUE	690.00
YTD EXPENSES	1,200.00
FUND BALANCE	$8,666.07
TORTS AND INSURANCE PRACTICE SECTION	
BEGINNING FY FUND BALANCE	47,997.25
YTD REVENUE	1,620.00
YTD EXPENSES	0.00
FUND BALANCE	$49,617.25
TRIAL AND APPELLATE ADVOCACY SECTION	
BEGINNING FY FUND BALANCE	26,605.78
YTD REVENUE	590.00
YTD EXPENSES	1,070.59
FUND BALANCE	$26,125.19
WORKERS' COMPENSATION SECTION	
BEGINNING FY FUND BALANCE	4,994.85
YTD REVENUE	1,470.00
YTD EXPENSES	100.00
FUND BALANCE	$6,364.85
BEGINNING OF YEAR FUND BALANCE	288,639.33
YTD REVENUE	22,923.15
YTD EXPENSES	39,780.82
ENDING FUND BALANCE	$271,781.66

GRANTS & OTHER
FUND BALANCES
For the Five Months Ending November 30, 2016

	YTD
ASK-A-LAWYER 16/17	
YTD REVENUE	$17,165.00
YTD EXPENSES	16,150.90
FUND BALANCE	$1,014.10
LRE GRANT FUND 16/17	
YTD REVENUE	96,165.00
YTD EXPENSES	87,606.09
FUND BALANCE	$8,558.91
LRE SALES	
BEGINNING OF YEAR FUND BALANCE	4,868.40
YTD REVENUE	20.00
YTD EXPENSES	0.00
FUND BALANCE	$4,888.40
JMLP (LRE) GRANT	
BEGINNING OF YEAR FUND BALANCE	26,272.70
YTD REVENUE	0.00
YTD EXPENSES	9,613.63
FUND BALANCE	$16,659.07
PRO BONO OTHER	
BEGINNING OF YEAR FUND	0.00
YTD REVENUE	0.00
YTD EXPENSES	0.00
FUND BALANCE	$0.00
SC ACCESS TO JUSTICE COMMISSION (IOLTA) 16/17	
YTD REVENUE	35,365.00
YTD EXPENSES	33,992.94
FUND BALANCE	$1,372.06
PB INDIGENT SERVICE FEE	
BEGINNING OF YEAR FUND	119,693.33
YTD REVENUE	19,885.00
YTD EXPENSES	46,626.39
FUND BALANCE	$92,951.94
DISCIPLINARY FUND 16/17	
BEGINNING OF YEAR FUND	713.99
YTD REVENUE	100,030.05
YTD EXPENSES	10.00
FUND BALANCE	$100,734.04
DISPUTED FEES	
BEGINNING OF YEAR FUND	21,346.11
YTD REVENUE	570.00
YTD EXPENSES	7,275.00
FUND BALANCE	$14,641.11
LAWYER REFERRAL SERVICE	
BEGINNING OF YEAR FUND	323,158.43
YTD REVENUE	0.00
YTD EXPENSES	0.00
FUND BALANCE	$323,158.43

GRANTS & OTHER
FUND BALANCES
For the Five Months Ending November 30, 2016

	YTD
SC ACCESS TO JUSTICE - OTHER FUNDS	
BEGINNING YEAR FUND BALANCE	0.00
YTD REVENUE	0.00
YTD EXPENSES	0.00
FUND BALANCE	$0.00
LGOA GRANT - PRO BONO	
BEGINNING OF YEAR FUND BALANCE	12,901.24
YTD REVENUE	0.00
YTD EXPENSES	1,256.07
FUND BALANCE	$11,645.17
PARALEGAL CERTIFICATION	
BEGINNING OF YEAR FUND BALANCE	1,148.27
YTD REVENUE	750.00
YTD EXPENSES	125.44
FUND BALANCE	$1,772.83
BEGINNING OF YEAR FUND BALANCE	510,102.47
YTD REVENUE	269,950.05
YTD EXPENSES	202,656.46
ENDING FUND BALANCE	$577,396.06

LAWYERS' FUND
STATEMENT OF REVENUE AND EXPENSES
WITH BALANCE SHEET
For the Five Months Ending November 30, 2016

	November	YTD
REVENUES		
ANNUAL ASSESSMENTS	$0.00	$2,985.00
CONTRIBUTIONS	47,809.98	129,859.57
INTEREST	462.20	3,337.17
TOTAL REVENUES	**$48,272.18**	**$136,181.74**
EXPENSES		
AWARDS	3,956.00	115,713.86
GENERAL EXPENSES	0.00	75.00
RULE 413/33	804.45	7,929.98
TOTAL EXPENSES	**$4,760.45**	**$123,718.84**
NET CHANGE	**$43,511.73**	**$12,462.90**

BALANCE SHEET

ASSETS	
LFCP CHECKING	14,227.45
LFCP MONEY MARKET	622,010.58
INVESTMENTS	950,923.73
TOTAL ASSETS	**$1,587,161.76**
LIABILITIES	
DEFERRED REVENUE - BECK FUND	159,260.48
TOTAL LIABILITIES	**$159,260.48**
FUND BALANCE	
BEGINNING OF YEAR FUND BALANCE	1,415,438.38
YTD REVENUE	136,181.74
YTD EXPENSES	123,718.84
NET CHANGE	12,462.90
FUND BALANCE	**$1,427,901.28**
TOTAL LIABILITIES AND FUND BALANCE	**$1,587,161.76**

SOUTH CAROLINA BAR CLE - DIVISION
BALANCE SHEET
For the Five Months Ending Wednesday, November 30, 2016

CURRENT ASSETS	
SCBT CHECKING	$248,196.86
MONEY MARKET/INVESTMENTS	510,505.91
PETTY CASH	150.00
ACCOUNT RECEIVABLES	16,215.47
PRE-PAID EXPENSE	78,020.55
GENERAL INVENTORY	86,530.67
TOTAL CURRENT ASSETS	**$939,619.46**
CAPITAL ASSETS	0.00
TOTAL ASSETS	**$939,619.46**
CURRENT LIABILITIES	
ACCOUNTS PAYABLE	13,686.76
DUE:COMPANY 1	294.38
REFUNDS PAYABLE	0.00
CLE VACATION PAYABLE	94,582.25
FACILITIES PAYABLE	0.00
SEMINAR DEFERRED REVENUE	166,558.00
CASH HOLDING ACCOUNT	0.00
CONVENTION CASH HOLDING	80,516.70
SALES TAX RECEIVED	0.00
TOTAL CURRENT LIABILITIES	**$355,638.09**
BEGINNING OF YEAR FUND BALANCE	672,628.40
YTD REVENUE	773,860.11
YTD EXPENSE	862,507.14
NET CHANGE	**(88,647.03)**
FUND BALANCE	$583,981.37
TOTAL LIABILITIES AND FUND BALANCE	**$939,619.46**

SOUTH CAROLINA BAR CLE - DIVISION
INCOME STATEMENT
For the Five Months Ending Wednesday, November 30, 2016

	MONTHLY ACTUAL	MONTHLY BUDGET	YTD ACTUAL	YTD BUDGET	ANNUAL BUDGET
REVENUE					
SEMINAR INCOME	$79,605.00	$76,000.00	$516,287.70	$562,600.00	$1,330,000.00
E-CLE ACCESS	15,324.82	17,500.00	61,927.60	58,300.00	330,500.00
PUBLICATION INCOME	26,408.39	27,000.00	143,318.96	135,000.00	387,000.00
SCJ ROYALTY INCOME	0.00	0.00	40,182.51	42,500.00	85,000.00
CONVENTION	0.00	0.00	0.00	0.00	350,000.00
SPECIAL SEMINARS	0.00	0.00	0.00	0.00	0.00
MEDIA SERVICES/AV/HOM	0.00	0.00	25.00	0.00	3,000.00
INTEREST INCOME	55.76	0.00	284.26	0.00	500.00
BUILDING RENTAL	3,100.00	500.00	3,650.00	3,300.00	9,000.00
SHIPPING REVENUE	2,607.00	2,100.00	8,184.08	10,500.00	25,300.00
TOTAL REVENUE	**$127,100.97**	**$123,100.00**	**$773,860.11**	**$812,200.00**	**$2,520,300.00**
EXPENSE					
CLE SALARIES	73,915.77	70,400.00	355,211.19	352,000.00	852,600.00
BENEFITS	15,261.69	15,600.00	105,393.28	107,100.00	285,800.00
BUILDING ACCOUNT	5,300.00	5,300.00	26,500.00	26,500.00	64,000.00
EQUIPMENT & FURNITURE	125.00	0.00	1,789.10	2,000.00	16,600.00
EQUIPMENT MAINTENANCE	18,895.77	20,600.00	34,844.00	35,500.00	75,400.00
OFFICE SUPPLY EXPENSE	527.48	400.00	1,572.88	1,600.00	5,500.00
INTERNET DEVELOPMENT	396.82	700.00	1,462.81	3,500.00	9,300.00
POSTAGE EXPENSE	46.16	100.00	1,269.57	1,500.00	3,400.00
TELEPHONE EXPENSE	844.28	1,300.00	3,868.43	5,800.00	14,100.00
STAFF EXPENSE	477.76	800.00	3,750.71	3,100.00	9,100.00
STAFF EDUCATION	223.81	0.00	326.95	0.00	1,000.00
CLE COMMITTEE EXPENSE	0.00	0.00	247.23	0.00	500.00
BOND & INSURANCE	806.27	800.00	4,031.35	4,000.00	10,200.00
MEMBERSHIP/SUBSCRIPTIONS	0.00	0.00	0.00	0.00	0.00
PROFESSIONAL FEES	0.00	0.00	5,000.00	5,000.00	6,200.00
CASUAL LABOR	0.00	0.00	0.00	0.00	500.00
SEMINAR DIRECT	26,374.51	20,800.00	191,338.03	200,800.00	336,000.00
E-CLE ACCESS	7,964.90	8,500.00	39,666.53	42,500.00	102,500.00
PUBLICATION DIRECT	7,433.13	10,500.00	45,258.66	52,400.00	143,100.00
PUBLICATION ROYALTIES	0.00	0.00	0.00	0.00	120,000.00
CONVENTION	0.00	0.00	0.00	0.00	303,900.00
SPECIAL SEMINARS	0.00	0.00	0.00	0.00	0.00
MEDIA SERVICES DIRECT	294.06	1,400.00	621.19	7,200.00	17,500.00
BANKCARD CHARGES	3,093.48	3,200.00	15,158.01	17,000.00	56,000.00
MARKETING	12,736.25	12,700.00	25,197.22	26,200.00	120,000.00
TOTAL EXPENSE	**$174,717.14**	**$173,100.00**	**$862,507.14**	**$893,700.00**	**$2,553,200.00**
NET CHANGE	**($47,616.17)**	**($50,000.00)**	**($88,647.03)**	**($81,500.00)**	**($32,900.00)**

Memorandum

TO: House of Delegates

FR: Daniel Draisen, Chair
Resolution of Fee Dispute Board

RE: Proposed changes to Rule 20 and 21

DT: January 5, 2017

Recently a client in a fee dispute raised an issue concerning the confidentiality of information in the fee dispute process. At the annual meeting of the Fee Dispute Circuit Chairs, the issue was discussed and an ad hoc committee was tasked with drafting proposed changes to the fee dispute rules

Those proposed changes and the supporting rationale was submitted to the circuit chairs for a vote and were approved without objection.

The attached memo outlines the proposed changes and the rationale for them. The RFDB is asking the House to approve the changes so they may be submitted to the Court for adoption.

To: Daniel Draisen, Executive Chair, Resolution of Fee Disputes Board
From: Lex A. Rogerson, Chair, Region 2
Ariel Rosamond, Chair, First Judicial Circuit
Re: Proposed Amendments to Rule 416, SCACR
Date: October 5, 2016

At the annual meeting of circuit chairs on September 21, 2016, we were asked to prepare proposed rule changes to address the potential for compromise of confidentiality that were recently brought to light by a dispute in the First Circuit.

For as long as any of us can remember, Rule 21 has reflected the Supreme Court's mandate that fee dispute proceedings be confidential. All circuit chairs, we think it is fair to say, share the Court's judgment that they should remain so. However, recent developments illustrate that a party to litigation – even to litigation largely unrelated to a fee dispute – might employ discovery procedures to obtain information relating to the Board's proceedings. The consensus of the chairs was that the rules should be tightened to make fee dispute information not just confidential but qualifiedly privileged in the evidentiary sense and perforce exempt from discovery.

Our discussion of this problem led to the realization that the rules leave open a second avenue for breach of confidentiality. When a party appeals from a final Board decision to circuit court, most of the important information the confidentiality rule seeks to protect, including the dispute application, the Board decision, and the grounds for the circuit court appeal, becomes a matter of public record in the office of the clerk of court. *See* Rule 20(e) (requiring the Board to supply the circuit court with a record on appeal). This fact thoroughly undermines any confidentiality the proceedings previously had and suggests that the files of such appeal should accessible only to the extent necessary to facilitate a decision on the appeal itself.

We have considered language amending the rules to address these two issues and recommend that the Board propose to the House of Delegates the following amendments for consideration by the Supreme Court.

RULE 20. APPEALS

Paragraphs (a) through (c) – no change

Add new paragraph (d) as follows:

(d) Upon the filing of an appeal under this Rule, the Clerk of Court shall assign to the appeal a civil action number followed by a notation such as "X" indicating that court records relating to the appeal are confidential. The notice of appeal, the record on appeal, and all other pleadings, orders, or other documents of record relating to the appeal shall be open to inspection only by the parties, their attorneys, the circuit chair, and court personnel.

Renumber existing paragraphs (d) through (h) as (e) through (i), respectively.

RULE 21. PROCEDINGS CONFIDENTIAL AND PRIVILEGED

All proceedings shall be confidential ~~except that where~~ , and all communications, settlement offers, reports, decisions, or other documents generated in the course of a fee dispute proceeding shall be privileged and exempt from discovery in any other legal or administrative proceeding. This privilege shall not be subject to waiver except by the express agreement of all parties to a dispute proceeding. Where a party to a proceeding subsequently resorts to legal proceedings in a court of record to appeal or enforce the final decision of the Board, compliance with these Rules concerning appeal or enforcement does not constitute a violation of the confidentiality of the proceeding or result in a waiver of privilege.

MEMORANDUM

TO: House of Delegates
South Carolina Bar

From: Family Law Section Council

RE: Alimony reform

DATE: January 6, 2017

The Family Law Section presented revisions to various statutes governing the award of spousal support (alimony, separate maintenance, etc.) to the Board of Governors on December 15, 2016.

These proposed revisions resulted from many months of work by the leadership of the South Carolina Bar Family Law Section, the South Carolina President's Commission on Alimony, the American Academy of Matrimonial Lawyers, South Carolina Chapter, and the South Carolina Association for Justice, which have approved these proposals.

The following page summarizes the Board approved changes.

The Bar's Governmental Affairs staff is pursuing the proposed changes in the legislature.

Section 20-3-130:

Section 20-3-130 is the main alimony statute. The proposal for revision is as follows:

(a) Eliminates the absolute bar to alimony on the grounds of adultery (discussed more in detail below).

(b) Adds two (2) forms of short-term alimony, denominated "transitional alimony" and "fixed-term alimony". These two (2) forms of alimony were added to give the Family Court Judges more alternatives, particularly where long term alimony may not be appropriate.

(c) Defines the concept of "continued cohabitation" which under the original statute calls for termination of alimony upon the showing of ninety (90) days continuous cohabitation with a romantic partner. That statute is largely ineffective because the "continuous" part of the statute was impossible to prove and has been regularly avoided by the supported spouse, or the live-in, moving in and out of the same residence during the ninety (90) day period. This proposal allows more latitude while adding specific factors to be considered to be considered by the Family Court Judge.

(d) When providing for life insurance, which existed in the original statute, the Supreme Court added a requirement that "extraordinary circumstances" or words to that effect be shown in addition to what the Legislature had deemed appropriate in terms of factors. The proposed amendment removes "extraordinary circumstances" as a requirement for life insurance to secure support.

(e) The method of payment is addressed to include, checks, electronic transfer and wage withholding.

Section 20-3-150

The amendments to 20-3-150 track the new proposed factors to show "continued cohabitation".

Section 20-3-170

20-3-170 essentially deals with modification of spousal support. In addition to technical changes, the proposed revisions:

(a) Layout more specific factors to be considered by the Family Court in modifying, reducing, or eliminating spousal support; and

(b) Specifically address the factors to be considered when the supporting spouse retires.

2

S.C. BAR SENIOR LAWYERS DIVISION
STATEWIDE LAW DAY ESSAY CONTEST

MIRANDA: MORE THAN WORDS

The Senior Lawyers Division Statewide Law Day Essay Contest is open to all 9th, 10th, 11th and 12th grade students. All students, whether in public school, private school or homeschooled are welcomed and encouraged to participate.

Each student participant must write an essay of 1,000 words or less on this topic:

How does the Miranda warnings and the other constitutionally recognized procedural rights protect and promote the American aspiration of "justice" for all citizens?

3

Materials for this item will be distributed on site.

4

There are no written materials for this item.

5

Memorandum

To: House of Delegates

From: Kirsten Small, Chairperson, Professional Responsibility Committee

RE: Proposed Amendment to Rule 5.1(b), SCRPC and proposed addition of Comment [10] to Rule 5.1

At the request of Bar staff, the Professional Responsibility Committee initiated a discussion regarding Rule 34 of the SC Rules of Lawyer Disciplinary Enforcement. According to staff, there had been several instances where Bar members could not locate the rule regarding the hiring of a lawyer under discipline within the Rules of Professional Conduct. The rule is in the Rules for Lawyer Disciplinary Enforcement (RLDE). There is no cross-reference in the Rules of Professional Conduct.

The Committee proposes an addition to Rule 5.1(b) and an additional comment to the Rule that provide a cross-reference. The Committee is NOT proposing amendment or removal of any language in Rule 34, SCRLDE.

The proposed language is attached, as is the current version of Rule 5.1, SCRPC and Rule 34, SCRLDE.

Attachments

PROPOSAL
To add the underlined language to Rule 5.1(b), SCRPC and as Comment [10] to Rule 5.1, SCRPC:

Rule 5.1: RESPONSIBILITIES OF PARTNERS , MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer, including another lawyer suspended pursuant to Rule 34, SCRLDE, shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

...

[10] Under limited circumstances, a suspended lawyer may be employed by a lawyer, law firm, or any other entity providing legal services during the period of suspension. See Rule 34, RLDE. In such circumstances, the supervising lawyer shall be solely responsible for the supervision of the suspended lawyer. If the suspended lawyer violates the rules allowing for employment during suspension or any other rule while under the supervision of the supervising lawyer, the supervising lawyer shall be subject to discipline.

RULE 5.1: RESPONSIBILITIES OF PARTNERS,
MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) Partners and lawyers with comparable managerial authority who reasonably believe that a lawyer in the law firm may be suffering from a significant impairment of that lawyer's cognitive function shall take action to address the concern with the lawyer and may seek assistance by reporting the circumstances of concern pursuant to Rule 428, SCACR.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(e). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or

special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

[9] Paragraph (d) expresses a principle of responsibility to the clients of the law firm. Where partners or lawyers with comparable authority reasonably believe a lawyer is suffering from a significant cognitive impairment, they have a duty to protect the interests of clients and ensure that the representation does not harm clients or result in a violation of these rules. See Rule 1.16(a). One mechanism for addressing concerns before matters must be taken to the Commission on Lawyer Conduct is found in Rule 428, SCACR. See also Rule 8.3(c) regarding the obligation to report a violation of the Rules of Professional Conduct when there is knowledge a violation has been committed as opposed to a belief that the lawyer may be suffering from an impairment of the lawyer's cognitive function.

RULE 34
EMPLOYMENT OF LAWYERS WHO ARE DISBARRED, SUSPENDED, TRANSFERRED TO INCAPACITY INACTIVE STATUS, OR PERMANENTLY RESIGNED IN LIEU OF DISCIPLINE

(a) General Prohibition on Employment. Except as provided in paragraph (b), below, a lawyer who is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned in lieu of discipline shall not be employed directly or indirectly by a member of the South Carolina Bar as a paralegal, investigator, or in any other capacity connected with the practice of law, nor be employed directly or indirectly in the State of South Carolina as a paralegal, investigator, or in any capacity connected with the practice of law by a lawyer licensed in any other jurisdiction. Additionally, a lawyer who is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned in lieu of discipline shall not serve as an arbitrator, mediator, or third party neutral in any Alternative Dispute Resolution proceeding in this state nor shall any member of the South Carolina Bar directly or indirectly employ a lawyer who has been disbarred, suspended, transferred to incapacity inactive status, or permanently resigned in lieu of discipline as an arbitrator, mediator, or third party neutral in any Alternative Dispute Resolution proceeding. Any member of the South Carolina Bar who, with knowledge that the person is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned in lieu of discipline, employs such person in a manner prohibited by paragraph (a) of this rule shall be subject to discipline under these rules. A lawyer who is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned in lieu of discipline who violates paragraph (a) of this rule shall be deemed in contempt of the Supreme Court and may be punished accordingly.

(b) Employment of Lawyers Suspended for Less than Nine Months.

(1) A lawyer who has been suspended from the practice of law for a definite period of less than nine months may engage in the following activities during the period of his or her suspension:

(A) clerical legal research and writing, including document drafting, library or online database research, and searching titles, including obtaining information at the recording office; and

(B) non law-related office tasks, including but not limited to, building and grounds maintenance, personal errands for employees, computer and network maintenance, and marketing or design support.

(2) A lawyer who has been suspended from the practice of law for a definite period of less than nine months and is employed in any capacity connected with the practice of law pursuant to this rule is forbidden from engaging in the following activities:

(A) practicing law in any form;

(B) having contact or interaction in person, by telephone, by electronic means, or otherwise with clients, former clients, or potential clients of a lawyer, law firm, or any other entity engaged in the provision of legal services in any capacity;

(C) soliciting prospective clients in any form to engage the suspended lawyer in legal services at a future time when the suspended lawyer is reinstated to the practice of law;

(D) handling client funds or operating any trust or financial account belonging to a lawyer, law firm, or other entity;

(E) appearing as a lawyer before any court, judge, justice, board, commission, or other public body or authority;

(F) holding himself or herself out as a lawyer by any means; or

(G) continuing employment with the lawyer, law firm, or any other entity where the misconduct resulting in suspension occurred.

(3) If a suspended lawyer is employed in a law-related position during the period of suspension, the suspended lawyer must be adequately supervised.

(A) If a suspended lawyer is employed by another lawyer, law firm, or any other entity providing legal services during the period of suspension pursuant to paragraph (b)(1), the suspended lawyer must be supervised by a regular member of the South Carolina Bar who is in good standing (supervising lawyer). The suspended lawyer and supervising lawyer must submit a written plan to the Commission on Lawyer Conduct that outlines the scope of the suspended lawyer's employment, anticipated assignments on which the suspended lawyer will render assistance, and appropriate procedural safeguards in place to ensure a violation of this rule or further misconduct does not occur.

(B) The supervising lawyer shall be solely responsible for the supervision of the suspended lawyer. If the suspended lawyer violates this or any other rule while under the supervision of the supervising lawyer, the supervising lawyer shall be subject to discipline under these rules and may be punished accordingly.

(4) A suspended lawyer who violates paragraph (b) of this rule shall be subject to discipline under these rules, shall be deemed in contempt of the Supreme Court, and may be punished accordingly.

6

Memorandum
To: House of Delegates
From: Kirsten Small, Chairperson, Professional Responsibility Committee
Re: Proposed Amendment to SCRLDE, Rule 13

Attached please find a proposal to clarify language in Rule 13 of the SC Rules for Lawyer Disciplinary Enforcement. This item came to the committee's attention pursuant to a request made by two ethics defense lawyers. In part, a lawyer who requested review said the following:

> Rule 13 is currently allowing unscrupulous lawyers to use the grievance process as a sword in litigation by filing unfounded, uninvestigated, and sometimes even patently false allegations with complete disciplinary immunity. When lawyers do that, it is false, misleading, prejudicial to the administration of justice, and I don't think it's what the immunity rule is intended to allow. In fact, a portion of Rule 4.5 is incompatible with Rule 13, if bringing a disciplinary complaint solely to gain a civil advantage is misconduct but it's not prosecutable because it's subject to absolute immunity.

Subsequent to study and discussion, the Committee voted favorably on the attached proposal. After careful review of the rule, the Committee came to the conclusion that the Rule 13 presently does not provide immunity from discipline for a lawyer who commits misconduct in the filing of a grievance against another lawyer. Rule 13 provides absolute civil immunity. However, in practice the rule appears to be misread to provide protection to complaining lawyers, and the belief that it does so appears to be widespread among the bar. Therefore, the proposed additional language is intended to clarify the existing rule rather than to be a substantive change to the rule.

Attachments

The Professional Responsibility Committee proposes addition of the language underlined below to Rule 13, SC RLDE.

RULE 13
IMMUNITY FROM CIVIL SUITS

Communications to the Commission, Commission counsel, disciplinary counsel, or their staffs relating to misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant or witness. Members of the Commission, Commission counsel and staff, disciplinary counsel and staff, any receiver or attorney appointed to assist the receiver under Rule 31, and any supervising or monitoring attorney appointed under Rule 33 shall be absolutely immune from civil suit for all conduct in the course of their official duties. <u>This Rule does not protect a lawyer from discipline under these Rules for violating the Rules of Professional Conduct or other professional obligation in the course of filing a grievance against another lawyer.</u>

7

To: House of Delegates
From: Kirsten Small, Chairperson, Professional Responsibility Committee
Re: Request to Oppose ABA Proposed Amendments to Rule 8.4, SCRPC

The Professional Responsibility Committee requests that the House send the attached memorandum to the Court. The vote in the Committee was not unanimous.

In September, a courtesy copy of the letter attached at the end of the memorandum was sent to President Witherspoon. The letter from the American Bar Association requests that the Court adopt the language adopted by the ABA at its August meeting.

The language of Model Rule 8.4(g) adopted by the ABA is also attached.

The position of the Committee is that the language adopted by the ABA is overbroad and that South Carolina's Civility Oath and current Rule 8.4 with its comments are sufficient to address the issues identified by the proponents of the Model Rule.

Attachments

Memorandum

In Re: Proposed amendments to Rule 8.4(g) S.C. Rules of Professional Conduct

The ABA recently adopted amendments to Rule 8.4(g) of the Model Rules of Professional Conduct. By a letter dated September 29, 2016, John Gleason, Chair of the Center for Professional Responsibility Policy Implementation Committee, requested that Chief Justice Pleicones and the members of the SC Supreme Court consider adoption of those amendments. The letter is attached hereto.

The South Carolina Bar's Professional Responsibility Committee (Committee) has considered the amendments and, in addition to the links provided in the ABA's report, the Committee has considered the minority report and other comments provided prior to the ABA's adoption. The Committee requests that the SC Bar adopt a position opposing the adoption of proposed Rule 8.4(g) or, in the alternative, requests the Court hold a public comment period on the proposed rule and consider possible amendments. [1]

The Committee is aware that the amendments to the rule are offered in a spirit of seeking to eliminate discrimination. In response, South Carolina's own Professor Nathan Crystal and Keith R. Fisher wrote on behalf of the ABA's Business Law Section Ethics Committee that, "no matter how salutary the motivation, however, codifying this position into the Model Rules is fraught with

[1] In a letter dated December 20, 2016, South Carolina Bar President William Witherspoon suggested that a period of public comment should be scheduled on proposed rule 8.4(g) should the Supreme Court consider adopting its provisions.

difficulties." [2] Although this letter was originally written in response to and in opposition of an early version of the amendment, its sentiment remains applicable.[3]

The Proposed Rule is Unnecessary

Our Civility Oath, in conjunction with our current Rule 8.4 and its comments, is sufficient to address the issues identified by the proponents of the proposed rule. Addressing the relationships of an attorney in her practice of law, our civility oath requires attorneys to show "respect and courtesy" to the courts and personnel working within them, to act with "good judgment," among other traits, when interacting with clients, and to act with "fairness, integrity, and civility, not only in court, but also in all written and oral communications" when dealing with opposing counsel or parties.[4] Additionally, Rule 8.4 comment [3] provides that "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."[5]

When examining the civility oath, the South Carolina Supreme Court found that the oath protected "the administration of justice and the integrity of the lawyer- client relationship" and that "[t]here is no substantial amount of protected free speech penalized by the civility oath in light of

---

[2] Fisher, Keith R. and Crystal, Nathan M. Letter to Myles Link, Chair, ABA Standing Committee on Ethics and Professional Responsibility on Behalf of the of the Professional Responsibility Section of the ABA Business Law Section, March 10, 2016 (hereafter "BLS Ethic Comm. Ltr."). A copy of the letter may be found at: (http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_business_law_ethics_committee_comments.authcheckdam.pdf
The Committee, in a July 11, 2016 memorandum to the Business Law Section of the ABA, responded to proposed amendments to the then pending draft of Rule 8.4(g), reiterating many of the concerns expressed in the original memorandum. A copy of the July 11 memorandum is attached for reference and is referred to as "BLS Ethics Comm. Mem."

[3] In addition to the BLS Ethics Comm. Ltr., the ABA website at http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html has collected comments of various constituent groups or members regarding the proposed rule. In addition to the BLS Ethics Comm. Ltr. the following two documents on the website contain extended discussion of objections and concerns with the proposed rule that parallel those discussed below: (1) Joint Comments of 52 ABA Member Attorneys, lawyers; (2) The Christian Legal Society Comments, 3/10/2016. Many of the individual attorney comments simply adopt positions of these or other larger constituent groups.

[4] Rule 402, (k) (3), SCACR

[5] Rule 8.4, comment [3] RPC, Rule 407, SCACR

the oath's plainly legitimate sweep of supporting the administration of justice and the lawyer-client relationship. Thus, we find the civility oath is not unconstitutionally overbroad."[6] This same sentiment applies to current Rule 8.4 and its comments, which expressly tie discipline to conduct that reflects "adversely on fitness to practice law" (Comment 2, discussing why certain criminal activity may subject a lawyer to discipline), to actions that are "prejudicial to the administration of justice" (Comment 3, discussing when manifestations of invidious discrimination may lead to discipline), or to conduct that "suggest[s] an inability to fulfill the professional role of lawyers" (Comment 5, discussing abuses of public or private trust).

The Committee's position is that it would be an error to attempt to correct something that is working effectively. South Carolina's Rule 8.4 in connection with our civility oath is the most effective method of protecting the administration of justice without restricting unnecessarily the First Amendment rights of attorneys as discussed below.

The Proposed Rule is Unconstitutionally Vague[7]

The United State Supreme Court explicated the hazards of vague statutes by saying that they "force potential speakers to 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." [8] Vague statutes fall short of the requirement to "regulate in the area" of the First Amendment "only with narrow specificity"[9] and fail to give people fair notice of what is prohibited.

The proposed rule prohibits "harassment," a term which is open to a multitude of interpretations. "Harassment" in a courtroom in Pickens County may have an entirely different

[6] In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 337, 709 S.E.2d 633, 638 (2011).

[7] The issue of unconstitutional vagueness is addressed more fully in BLS Ethics Comm. Memo, pp. 7-12. It should be noted that one issue raised in the Memo – the omission of a scienter requirement, was addressed in the final, adopted version of the proposed rule.

[8] Baggett v. Bullitt, 377 U.S. 360, 372, 84 S.Ct. 1316 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 78 S. Ct. 1332, 1460 (1958))

[9] National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433, 83 S.Ct.328, 405 (1963).

meaning than "harassment" in Colleton County, depending on the court, the judge and the parties. Thus, the proposed rule would likely be arbitrary in its application.

The vagueness of this proposed amendment raises due process concerns. The United States Supreme Court has held that disciplinary procedures are quasi-criminal and certain due process requirements apply, including fair notice of the charges.[10] The Court has also held that "[a] disciplinary rule that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process law."[11] As in the "harassment" example above, attorneys must guess the exact definition. Although some may argue that there are examples of harassment in the proposed comments to the proposed amendment, those examples do not define harassment and are limited in their scope.

The Proposed Rule is Unconstitutionally Overbroad

While attorneys, like all American citizens, are entitled to the protection of the First Amendment, we are held to professional standards of behavior that place limitations on our speech. "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."[12] However, these restrictions must balance "the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest…"[13]

The proposed model rule seeks to prohibit "harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law,"[14] thereby making 8.4(g) overbroad and diluting the main justification of restricting attorney speech. Our current

[10] In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968).

[11] Connally v. General Construction Co., 269 U.S.385, 391, 46 S.Ct 126, 127 (1926).

[12] In re Sawyer, 360 U.S. 622, 646-47, 79 S.Ct. 1376, 1388 (1959).

[13] Gentile v. State Bar of Nevada, 501 U.S. 1030, 1073, 111 S.Ct.2720, 2744 (1991).

[14] Model Rules of Prof'l Conduct R. 8.4 (g) (2016)

phrase in comment [3] to Rule 8.4 uses the language, "[i]n the course of representing a client…" and requires that the manifestation of a bias or prejudice be "…prejudicial to the administration of justice."

Ostensibly, every word uttered by a lawyer, whether work-related or personal, may be considered "related to the practice of law." If every action an attorney makes is related to the practice of law, how does an attorney attend a rally that opposes or questions same-sex marriage or participate in a protest with a poster stating "He's not my president"? Another attorney, a client, or a potential client, may cite a violation of the proposed amendment based on these actions. At the end of the day, lawyers are also humans and have their own personal beliefs and causes outside of the profession. The proposed rule, unlike the current Civility Oath and Rule 8.4 and its comments, does not clearly contain its application to instances involving "the administration of justice and the integrity of the lawyer- client relationship" [15] as noted by the South Carolina Supreme Court in addressing the specific application of the Civility Oath.

Indiana amended its Rule 8.4 to largely model the proposed Rule 8.4(g), but using the phrase "in a professional capacity," rather than "related to the practice of law" in the black letter rule. An Indiana attorney inquired of the Indiana Legal Ethics Committee if he, as a member of a nonprofit organization that admits only men of a certain religion, could serve on the governing board of the organization and be one of its officers without being subject to discipline under the Indiana rule. *See* Ind. Bar State Legal Ethics Comm. Op. No. 2015-01, p. 1 (a copy of the opinion is attached for reference). After summarizing various Indiana court opinions applying that state's version of Rule 8.4(g) and stating that mere membership in such an organization would not likely trigger discipline under the Indiana rule, the committee expressly noted the vagueness of the statute and the restraint upon the attorney's participation in the face of imprecise guidance:

[15] In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 337, 709 S.E.2d 633, 638 (2011).

> So, a lawyer should be mindful of the particular practices of such an organization if the lawyer intends to personally participate in activities that advance any of its discriminatory requirements, policies or beliefs. The lawyer should proceed with particular caution if the lawyer's status as a lawyer is connected to his or her participation in the organization's activities. Accepting a leadership role in such an organization or using one's status as a lawyer in support of the organization creates more ethical risk than mere membership. But in either case, the nature of the organization and the lawyer's role in the organization are critical to the outcome of any ethical analysis. In light of the delicate balance between constitutional rights and the necessity of fairness in the administration of justice, it is the Committee's hope that the Indiana Supreme Court may offer further clarification on the scope of "professional capacity" by way of an official Comment to Rule 8.4(g).

Ind. Bar Legal Ethics Comm. Op. 2015-01, p. 5.[16]

The proposed rule's "related to the practice of law" provision implements an even more indefinite measure of sanctionable conduct. If adopted, Rule 8.4(g) may prevent attorneys from speaking freely on myriad current events and social topics in order to avoid perceived harassment or discrimination. If a law punishes a substantial amount of protected speech in relation to a statute's legitimate purpose, then is it overbroad and unconstitutional. "[T]he party challenging a statute simply must demonstrate that the statute could cause someone else- anyone else- to refrain from constitutionally protected expression."[17]

The Proposed Rule Codifies Unconstitutional Content Discrimination

Proposed rule 8.4(g) would punish those who speak out against particular social and political issues. At the same time, the proposed Rule offers no disincentive for those who speak in favor of these issues. [18] When looking at content discrimination, the United States Supreme Court held that "Viewpoint discrimination is thus an egregious form of content discrimination. The government

[16] In the disciplinary proceeding *In the Matter of Joseph Barker*, 993 N.E.2d 1138 (Ind. 2013) the court suspended the attorney pursuant to Rule 8.4(g) for referring to the opposing party as an "illegal alien" in a communication to opposing counsel regarding the possible filing of a contempt motion for obstructing visitation of the child in the course of a custody dispute, thus suggesting that a lawyer may be suspended under the terms of the rule for using disfavored words or expressions. The court also cited Ind. R. of Prof. Cond. 4.4 regarding conduct causing embarrassment to opposing parties in imposing a 30 day suspension on the lawyer.

[17] In re Amir X.S., 371 S.C. 380, 384, 639 S.E.2d 144, 146 (2006).

[18] Model Rules of Prof'l Conduct R. 8.4 (g) , comment (4) (2016).

must abstain from regulating such speech when the specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction." [19]

The adoption of this rule would not only codify content discrimination but also create a chilling effect on attorney speech. An attorney could be accused of committing professional misconduct for simply disagreeing with the prevailing cultural zeitgeist. As attorneys, the free exchange of ideas and opinions should be encouraged, and the Court should not seek to stifle and punish those who hold ideas contrary to our own.

The Proposed Rule Would Restrict A Lawyer's Autonomy

If the proposed amendments are adopted, attorneys will be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases. Under the proposed Rule, attorneys will be affirmatively precluded from declining certain clients or cases. They will, in other words, be forced to take cases or clients they might have otherwise declined.[20]

It should be noted that ABA claims that Rule 8.4(g) does not limit the ability of a lawyer to accept, decline, or withdraw from representation so long as the attorney is acting in accordance with Rule ABA Model Rule 1.16.[21] However, Rule 1.16 does not permit an attorney to decline representation based upon personal morality or ethics. Zealous representation could be impaired if a lawyer may not decline representation of a client who falls outside of the lawyer's field of morality and ethics, and the impairment of zealous representation creates an inherent conflict, putting the lawyer in violation of 1.7.

The Rule Could Be Used as a Weapon

[19] Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995).

[20] See the discussion of this issue in the Comments of 52 ABA Members found at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16.authcheckdam.pdf

[21] This issue is discussed more fully in BLS Ethics Comm. Memo, pp. 8-10.

This addition to the rule is based on the perception of the "receiver" of the conduct. The receiver can always allege this violation of the rules. It is not hard to believe that clients who are upset with their representation will seek recourse by claiming they were subjected to harassment. Additionally, one could imagine an unscrupulous attorney using this rule to gain some type of advantage over opposing counsel without overtly violating Rule 4.5. Rule 8.4 was created to shield individuals from activity prejudicial to the administration of the law. But the ABA's amendment has transformed it into a club that can be swung at an attorney any time a conflict arises.

Conclusion

This proposed rule violates the very spirit—in addition to the text— of the First Amendment's guarantees and transgresses the most fundamental principles that American lawyers have adhered to since 1788 regarding a lawyer's right to express and live out his own belief system, as well as the right to full and zealous legal representation on behalf of any client, including (and indeed, especially) those whose views diverge from political correctness or modern social orthodoxy. "For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."[22]

[22] National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 445, 83 S.Ct.328, 344 (1963)

Defending Liberty Pursuing Justice

Center for Professional Responsibility
Policy Implementation Committee
321 N. Clark Street
Chicago, IL 60610
Phone: (312) 988-5298
Fax: (312) 988-5491
John.Holtaway@americanbar.org

September 29, 2016

Honorable Costa M. Pleicones
Chief Justice
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Recent Amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct

Dear Chief Justice Pleicones:

We take this occasion to report to you the recent amendment of Rule 8.4 of the ABA Model Rules of Professional Conduct with the hope that your Court will undertake a review of the changes and consider integrating them into your state's rules of professional conduct. These revisions and additions were the culmination of two years of work by the ABA Standing Committee on Ethics and Professional Responsibility ("Ethics Committee"). http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html

Amended Model Rule 8.4 contains new paragraph (g) that establishes a black letter rule prohibiting harassment and discrimination in the practice of law. It also contains three new Comments related to paragraph (g).

New paragraph (g) to Model Rule 8.4 is a reasonable, limited, and necessary addition to the Model Rules of Professional Conduct. It makes it clear that it is professional misconduct to engage in conduct that a lawyer knows or reasonably should know constitutes harassment or discrimination while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers. Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating and managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Amended Model Rule 8.4 (g) does not prohibit speech, thought, association, or religious practice. The rule does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with current rules of professional conduct.

Twenty-five jurisdictions have adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules. To properly address this issue, the ABA adopted an anti-discrimination and anti-harassment provision in the black letter of the Model Rules. Studies on the perception of the public about the justice system and

lawyers support the need for the amendment to Model Rule 8.4.

Adopted Revised Resolution 109 and its accompanying Report can be found at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf

The Center for Professional Responsibility Policy Implementation Committee has created a Power Point Presentation to assist courts, rules committees, the legal profession, and the public to understand the amendments to Model Rule 8.4. https://www.dropbox.com/s/6seu8x1i0m411l6/Model%20Rules%208_4%20Presentation_Final.wmv?dl=0

We can provide you with electronic copies of Revised Resolution 109 with Report and discussion points if you or the Chair of your state review committee contact John Holtaway, Policy Implementation Counsel, john.holtaway@americanbar.org, (312) 988-5298. We have sent copies of this letter to your State Bar Association President, State Bar Association Executive Director, State Bar Admissions Director, and Chief Disciplinary Counsel, and ABA State Delegate.

The Center for Professional Responsibility Policy Implementation Committee is available to assist states with the review process. Members of the Committee, including members of the Ethics Committee, are available to meet in person or telephonically with review committees.

The work product of the Ethics Committee reflects the ABA's continued leadership in professional responsibility law. The ABA looks forward to assisting you on this important project.

Respectfully,

John S. Gleason, Chair
Center for Professional Responsibility Policy Implementation Committee

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

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

(e) 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;

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

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

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. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. 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. A pattern of repeated offenses,

even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] 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.

[7] 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

8

TO: SC BAR, HOUSE OF DELEGATES
FROM: SC BAR ELDER LAW COMMITTEE [ELC]
DATE: DECEMBER 30, 2016
SUBJECT: PROPOSED LEGISLATION IN RESPONSE TO FABIAN V. LINDSAY

In October 2014, the South Carolina Supreme Court decided the case of *Fabian v. Lindsay*, 765 S.E.2d 132 (2014).[1] This landmark decision abolished South Carolina's long-standing strict privity rule. The strict privity rule required a plaintiff to prove the existence of an attorney-client relationship in order to pursue a malpractice action against an estate planning attorney (i.e., any attorney that prepares a will or trust for a client). The strict privity rule benefitted the client by safeguarding the attorney's duty of loyalty to the client, as opposed to non-clients such as potential beneficiaries named or omitted from the will or trust. As a result of the ruling in *Fabian*, a non-client beneficiary plaintiff may now pursue a malpractice action against an estate planning attorney who prepares a will, trust, or other estate document for a client.

[1] Please refer to the attached Memorandum, which contains a more thorough explanation and legal analysis in support of the position expressed herein.

This holding has serious ramifications that undermine and frustrate the attorney-client relationship. Among these ramifications are the following:

- Interfering with and frustrating the attorney's long-recognized duty of strict loyalty to the client by instead requiring the attorney to anticipate potential conflicts between the client's current desires and the future desires of an unknown class of third parties;

- Placing the attorney in a position of unlimited liability to an unknown class of third-party beneficiaries with no readily ascertainable statute of limitations nor guarantee of malpractice insurance coverage;

- Interfering with the client's control over the client's legal representation because of the attorney's newly developed, yet undefined, duties to potential non-client beneficiaries; and

- Encouraging malpractice lawsuits by disappointed beneficiaries that may cast doubt on the testator's intentions.

Notably absent from the *Fabian* Court's opinion is a discussion regarding the above ramifications, as

well as other implications, for the estate planning attorney and how they can be expected to adequately and properly represent their clients while trying to juggle the competing and conflicting interests of third-party beneficiaries. Instead, the *Fabian* Court simply concluded that the strict privity rule was unjustifiable because it immunized estate planning attorneys from liability by not providing an avenue of recourse for a beneficiary. With all due respect to our Court, this reasoning is flawed. The *Fabian* Court overlooked the fact that prior to *Fabian*, non-client beneficiaries were not without legal remedy to correct a defect in a will or trust.[2] If *Fabian* is legislatively overruled, as we believe it should be, the existing legal remedies will still be available to the appropriate parties.

---

[2]The Probate Code allows for private agreements to resolve controversies among beneficiaries § 62-3-912; reformation of a Will to conform to testator's intention § 62-2-601; reformation of a trust §62-7-415; and compromise of a controversy §62-3-1101. Additionally, there are a few exceptions to the strict privity requirement, such as attorney fraud, criminal acts, and other independent attorney action that harms a non-client and for which the attorney can be directly liable. the disappointed beneficiary has standing to bring a reformation claim and the personal representative also has standing to bring claims on behalf of the testator to effectuate his/her intentions.

We respectfully request the House of Delegates to review and approve proposed legislation that will legislatively overrule Fabian v. Lindsay and reinstate our State's long-standing law of strict privity *(Aggressive Approach)*. Reinstating the strict privity rule is essential to preserve and protect attorney-client relationships in South Carolina. In the alternative, we request the House of Delegates to review and approve proposed legislation that would define the requirements for a non-client malpractice lawsuit against a lawyer who prepares a Will, trust, or other estate document (*Moderate Approach*).

Our goal is to proceed wisely and fairly in response to *Fabian* so that our Bar members are not forced to guess or speculate about their duties and obligations to clients and non-clients and so our clients continue to enjoy the protection and benefits afforded by our South Carolina Rules of Professional Conduct and other relevant legal and ethical considerations.

Submitted on behalf the ELC/*Fabian*
Legislative Subcommittee

By: Kathryn Cook DeAngelo, Esq., Chair
Kathryn Cook DeAngelo Law Firm, Ltd.
P.O. Box 15667
Surfside Beach, SC 29587-5667
843-238-8422; kcdeangelo@aol.com

MEMORANDUM – FABIAN V. LINDSAY

LEGAL MALPRACTICE CLAIMS BY NON-CLIENT

Submitted by

Elder Law Committee

Fabian Legislative Subcommittee

Kathryn Cook DeAngelo, Esq., Chair

TO: House of Delegates, South Carolina Bar
FROM: Elder Law Committee [ELC]
DATE: December 15, 2016
RE: Review and Request for Support of Proposed Legislation

REQUEST: The ELC is requesting that the House of Delegates review this matter and lend their support to proposed legislation (Aggressive approach) to legislatively overrule the holding in the case of *Fabian v. Lindsay* (non-client legal malpractice claims against estate planning attorneys) or, in the alternative, lend its support to proposed legislation (Moderate approach) to define and govern such claims.

The holding in *Fabian*, which abolishes strict privity and allows non-clients to sue the estate planning lawyer (any lawyer who prepares a Will, Trust, or other estate planning document), has serious ramifications that we believe undermine and frustrate the long-recognized attorney-client relationship. Among these ramifications are the following:

- Placing the attorney in a conflict situation of having to weigh the client's interest against the attorney's fear of liability to third parties and prevent the

attorney from zealously representing his or her client's best interest;

- Interfering with and frustrating the attorney's long-recognized duty and loyalty strictly to the client by requiring the attorney to layer on defensive mechanisms and procedures to protect or defend himself against the potential risk of claims by an unknown class of third parties and thus creating a conflict for the attorney;

- Interfering with the client's control over his or her contract for legal services because of the attorney's preoccupation with assessing potential risk and potential liability to an unknown class of third parties; and

- Causing legal malpractice lawsuits by disappointed beneficiaries that would cast doubt on the testator's intentions long after the testator is deceased and unavailable to speak for himself or herself.

This foregoing issues and concerns are referred to and discussed more in depth later on in this memorandum.

OVERVIEW AND BACKGROUND:

In October 2014, our Supreme Court decided the case of *Fabian v. Lindsay,* 765 S.E.2d 132 (2014). http://www.judicial.state.sc.us/opinions/HTMLFiles/SC/27460.pdf, which abolished South Carolina's long-standing law that required an attorney-client relationship (strict privity) in order for a plaintiff to sue an estate planning lawyer for legal malpractice. *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996); *Ellis v. Davidson*, 358 S.C. 509, 523, 595 S.E.2d 817, 824 (Ct. App. 2004); *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct. App. 2002). The prior law recognized that "[b]efore a claim for malpractice may be asserted, there must exist an attorney-client relationship."[1] *Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996); *see also Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) ("[A]n attorney is immune from liability to third persons arising from the performance of his professional activities

[1]A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. *Rydde*, 381 S.C. 643, 675 S.E.2d 431 (2009). Isn't this somewhat similar to any tort claim that requires duty (first and foremost), breach, causation, and damages?

as an attorney on behalf of and with the knowledge of his client." (quoting *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986)).

The plaintiff in *Fabian* was the niece of a grantor (person who creates or establishes the trust) of a trust. After the plaintiff's uncle died, the plaintiff niece claimed she was disinherited and received nothing from her uncle's trust because of an ambiguity/drafting error made by the lawyer who prepared her uncle's trust. In *Fabian*, the Court reviewed the three theories adopted by the majority of states that allow a non-client to sue a lawyer for malpractice.

1. The first theory, balancing of factors test, was first articulated in the 1958 California case of *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) involving a notary public who prepared a will, which holding was later extended to attorneys in the case of *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961) allowing recovery by a non-client both in tort and as a third-party beneficiary to a contract. This first theory was adopted by the *Fabian* Court.

2. The second theory, the Florida-Iowa rule, allows a third-party beneficiary to seek recovery for improper drafting but limits the plaintiff to proof of the testator's intent as expressed in the testamentary instrument and rejects all extrinsic evidence. This approach was rejected by the *Fabian* Court.

3. The third approach, third-party beneficiary of contract theory, was also adopted by the *Fabian* Court. This third approach was primarily premised on the South Carolina case of *Windsor Green Owners Ass'n. v. Allied Signal, Inc.*, 605 S.E.2d 750 (Ct. App. 2004), wherein the Court stated "if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create direct, rather than an incidental or consequential, benefit to such third person." *Id.* at 752.

The *Fabian* Court's reliance on *Windsor Green* seems misplaced since that case did not deal with a lawsuit against a lawyer or lawyer malpractice. Instead, *Windsor Green* dealt with a plaintiff/homeowners' association that sued the owner of a condo unit whose tenant caused a fire. Plaintiff Windsor Green claimed it was a third-party beneficiary of the rental agreement between the condo unit owner and the tenant. The Court in *Windsor Green* also recognized that "[g]enerally, one not in privity of contract with another, cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable by the plaintiff." *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (citation omitted).

In adopting the third-party beneficiary approach in *Windsor*, the *Fabian* Court also relied on the *Lucas* case (first approach) where the California Court stated, "Obviously the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will, and therefore it seems improper to hold . . . that the testator intended only 'remotely' to benefit those persons." *Lucas,* at 688. In the final analysis, the *Fabian* Court adopted causes of action both in tort (*Lucas*) and in contract by a third-party beneficiary (*Windsor Green* and *Lucas*), perhaps a "hybrid approach," and held that a non-client as third-party beneficiary can sue the attorney who prepares a will, trust, or other estate document for a client.

The *Fabian* Court went on to explain its reasoning for abolishing privity and allowing a non-client to sue an estate planning attorney by stating the following:

> Joining the majority of states that have recognized causes of action is the just result. This does not impose an undue burden on estate planning attorneys *as it merely puts them in the same position as <u>most other legal professionals</u> by making them responsible for their professional negligence to the same extent as <u>attorneys practicing in other areas</u>. [emphasis added]*

Fabian at 140-141.

The questions raised by the italicized portion of the Court's reasoning are: Who are "most other legal professionals"? It seems the Court means attorneys because they narrow their statement to attorneys in the latter part of their opinion. Another question relates to the Court's reference to "attorneys practicing in other areas." What other areas? Divorce, personal injury, bankruptcy, real estate, patent, probate, business/commercial, tax and so forth. Has our state pre-Fabian recognized and allowed a non-client to sue a lawyer for malpractice in other areas of practice, such as marital/domestic, tax, real estate, personal injury, employment/labor?

For instance, has South Carolina always recognized that a non-client can sue a divorce lawyer for not getting the best equitable distribution deal or best child custody deal for their client? Or that a non-client can sue a personal injury lawyer for not getting the best outcome for a client in a car wreck case? Or that a non-client can sue a personal injury lawyer for recommending or having a client accept a structured settlement that later backfired and caused loss to the client's spouse and/or children?

Since strict privity was required pre-*Fabian*, a non-client could not pursue a malpractice claim against the lawyer. [2]

Instructive on this question is the case of *Canty Hanger LLP v. Byrd*, 467 S.W.3d 477 (Texas Supreme Ct. 2015) http://docs.texasappellate.com/scotx/op/13-0861/2015-06-26.lehrmann.pdf, which dealt with a divorce attorney's immunity from legal malpractice to non-clients. In *Canty Hanger*, the ex-husband sued his ex-wife's divorce lawyers (Canty Hanger) for legal malpractice premised on fraud and other grounds. The trial court granted the ex-wife's lawyers' Canty Hanger summary

---

[2]There are a few exceptions to the strict privity requirement, such as attorney fraud, criminal acts, and other independent attorney action that harms a non-client and for which the attorney can be directly liable. Such an exception is illustrated by the South Carolina case of *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995), which involved a non-client's lawsuit against an opposing party's attorney. The Court held that "an attorney may be held liable for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client." The Court in *Stiles* noted that a number of jurisdictions recognize that an attorney may be held liable where he acts in bad faith or for his own personal motivations. *See generally Annotation* 97 ALR 3rd 688 (attorney's liability for abuse of process). This case is easily distinguishable from *Fabian* (no bad faith, bad acts, or personal motivation by lawyer).

judgment premised on attorney immunity (lawyer representing a client owes a duty only to client and not to a non-client), which was reversed by the court of appeals. The Texas Supreme Court reversed the court of appeals' decision and upheld the trial court's grant of summary judgment to the ex-wife's divorce lawyers Canty Hanger premising its holding on attorney-immunity, which is essentially premised on strict privity wherein the lawyer's duty is to the client and the lawyer is not liable to a third party non-client.

While the *Fabian* Court outlined its reason for abandoning the well-recognized law in South Carolina of strict privity and adopting the new law that allows non-clients to sue an estate planning attorney, the Court's decision left many unanswered questions and also left the door open to potential unintended consequences and confusing issues for all attorneys who prepare Wills, Trusts, and other estate documents (statute of limitations, burden of proof, class of plaintiffs, attorney-client privilege/confidentiality, what types of "estate planning documents" are subject to malpractice claims, attorney conflicts, extension to other areas of law, not just estate planning, and others).

For instance, the requirement of a lawyer-client relationship (contractual relationship between the lawyer and client) is the cornerstone of and harmonizes with our Rules of Professional Conduct, such as rules pertaining to attorney-client privilege, confidentiality, conflicts, loyalty,

zealous representation, and the many other ethical obligations owed by the lawyer to his client. The *Fabian* holding also conflicts with and frustrates S.C. Code 62-1-109, which was wisely enacted by our legislature and provides:

> **SECTION 62-1-109.** Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.
>
> Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. *This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created*. [emphasis added]
>
> HISTORY: 1994 Act No. 449, Section 2; 2013 Act No. 100, Section 1, eff January 1, 2014

Only a few years ago, our Supreme Court expressed its reasoning and rationale for strict privity/immunity in the *Rydde* case wherein the Court recognized that imposing a duty on an attorney to a prospective beneficiary "*would*

wreak havoc on the attorney's ethical duty of undivided loyalty to the client and force an impermissible wedge in the attorney-client relationship." [emphasis added] *Rydde*, 675 S.E.2d 431, 435 (2009)(the *Rydde* case dealt with a malpractice claim against a lawyer for failing to timely prepare a Will prior to the client's death). We believe the holding in *Fabian* wreaks such havoc on the attorney's ethical duties and attorney-client relationship.

The settled and substantial policies favoring strict privity or the attorney-client relationship as a prerequisite for a plaintiff's legal malpractice claim were recently summarized in the Colorado Supreme Court opinion, *Baker v. Wood, Ris & Hames* (Colo. Jan. 19, 2016). In *Baker*, the Colorado Supreme Court was asked to "decide whether dissatisfied beneficiaries of a testator's estate have standing to bring legal malpractice or contract claims against the attorney who drafted the testator's estate planning documents." The *Baker* Court declined to abandon the strict privity rule and recognized the long-standing principles that favor the strict privity rule, i.e., attorney's duty of loyalty to and effective advocacy for the client; attorney's preoccupation or concern with potential negligence claims by third parties could dilute quality of work or increase client costs for attorney to protect themselves; expanding attorney liability to non-clients could result in adversarial relationships between attorney and third parties and further conflicts for the attorney; confidentiality; fiduciary duties.

After reviewing and analyzing the law surrounding this subject, the ELC *Fabian* subcommittee expressed the following ethical and policy concerns and reasons for upholding the prior law of strict privity (disallowing non-client lawsuit for legal malpractice) in South Carolina, some of which were identified by the Court in the *Baker* case:[3]

1. Limiting an attorney's liability to his or her clients protects the attorney's duty of loyalty to and effective advocacy for the client. While the testator is alive, the lawyer owes him or her a duty of complete and undivided loyalty. The strict privity rule protects an attorney's obligation to direct his or her full attention to the needs of the client. An attorney's preoccupation or concern with potential negligence claims by third parties might result in a diminution in the quality of the legal services received by the client as the attorney might weigh the client's interests against the attorney's fear of liability to a third party. Such a result, in turn, would tend to undermine the purpose of the attorney-client relationship, which requires that an attorney zealously represent and act in his or her client's best interest.

[3]Note: Some language below was taken directly from *Baker* but is included without quotation or citation to other supporting cases referenced in *Baker*. Please see the full *Baker* opinion for further details. https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2013/13SC554.pdf

2. Expanding attorney liability to non-clients could result in adversarial relationships between an attorney and third parties and thus give rise to conflicting duties on the part of the attorney. There is a conflict of interest when a beneficiary sues the testator's attorney for negligence because the alleged deficiencies may well have existed pursuant to instructions issued by the testator after receiving the advice of counsel. The attorney's ability to render advice would be severely compromised if the advice could be second-guessed in the future by disappointed beneficiaries. Moreover, allowing a non-client beneficiary to maintain a cause of action against an attorney for professional malpractice may require the attorney to reveal confidences the testator would never want revealed. For example, envision a scenario in which the testator tells a relative that he or she will inherit a certain part of the testator's estate, but, in reality, the testator does not intend to leave that part to this relative because the testator secretly believes that the relative is a greedy person.

If the disappointed relative has standing at the testator's death to sue the attorney for malpractice then the attorney may be forced to reveal confidences that the testator never would have wanted to be revealed. Another example, the testator confides in their attorney why they are leaving unequal shares to their children, and the details of "why" are embarrassing or scandalous, i.e., the child receiving

less because the child is a pedophile, is in jail, stole from the client, did something that the client considered "immoral." In these latter circumstances, the testator does not want these details revealed publicly or even to have the child know how his/her parent feels about the child.

3. <u>The impact of an expansion of attorney liability to third parties could be expanded to an unlimited and unforeseeable number of people/potential plaintiffs</u>. In *Fabian* our Supreme Court limited standing to those third parties identified specifically or as part of a class, i.e., my children, my grandchildren, my wife's grandchildren. This class designation could easily become ambiguous and confused, such as stepchildren, cousins, nieces, nephews, first cousins, second cousins, best friends. Although the Court may have carefully considered this class designation a means of "narrowing" potential non-client plaintiffs, it could further create more confusion and an expansion of attorney liability to allow claims by non-clients. This deters attorneys from undertaking certain legal matters, thus compromising the interests of potential clients by making it more difficult for them to obtain legal services. For instance, if a client wants the lawyer to prepare a Will and leave a small percentage to their 25 "cousins," the lawyer may begin to tremble thinking of the potential risk and exposure to liability from these and a host of other "omitted" cousins or cousins whose names are similar or the same. Yikes!!

The attorney's preoccupation with potential liability to a wide "class" of non-parties might result in a diminution in the quality of legal services provided because the attorney would need to weigh the client's interests against his or her liability and appetite for risk. As a result, the testator could potentially lose control of his or her contract for legal services.

4. Extending attorney liability to non-client beneficiaries risks suits by disappointed beneficiaries that would cast doubt on the testator's intentions long after the testator is deceased and unavailable to speak for himself or herself. Allowing disappointed beneficiaries to question a deceased testator's intention would contradict the policy underlying South Carolina's dead man's statute, S.C. Code § 19-11-20. That statute "essentially . . . prohibits any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest." *Hanahan v. Simpson*, 485 S.E.2d 903 (S.C. 1987). How good are memories years later? Or do people remember what they want to remember and forget what is painful? Will it boil down to "he said/she said" because the testator can no longer speak and explain his or her intentions?

The *Fabian* Court went on to state in its decision that the non-client beneficiary's right to sue the estate lawyer

for malpractice extends to an existing Will or "estate planning document":[4]

> In sum, today we affirmatively recognize causes of action both in tort and in contract by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. The focus of a will or estate document is, inherently, on third-party beneficiaries. *Fabian* at 141.

This term used by the *Fabian* Court (estate planning document) is mentioned several times in the case but is not defined or explained and opens up a pandora's box or grab bag of confusion and ambiguity. For instance, what is an estate planning document that a lawyer (estate lawyer, tax lawyer, real estate lawyer, marital/domestic lawyer, or other lawyer) could prepare and have a non-client third-party sue them for legal malpractice? Could it mean or might it be construed to mean any of the following is an "estate planning document"?

- Advance medical directive (Health Care Power, Living Will)
- Durable Power of Attorney [DPA][5]

[4]The plaintiff in *Fabian* sued the lawyer because of a drafting error in her uncle's trust that was prepared by her uncle's lawyer. So although the *Fabian* case involved legal malpractice involving a trust, the Court extended its holding to an existing Will and estate planning document.

- Documents, including letters, prepared in connection with
  - ❖ Personal Injury or Worker's Comp settlement terms, a structured settlement
  - ❖ Personal Injury – Medicare Set-Aside or Special Needs Trust
  - ❖ Divorce/separation agreements that include change of beneficiary forms, QDROs, Deed transfers
  - ❖ Medicaid planning
  - ❖ VA planning
  - ❖ Medicare
- Change of beneficiary forms for life insurance, banks, brokerage, and other financial institutions
- Forms associated with Social Security, SSI, SSDI
- Documents prepared in a divorce or personal injury action that impact on a client's estate (life insurance beneficiaries, IRAs/401Ks, QDROs, settlement proceeds, receipt of monies that

---

[5] The South Carolina Uniform Power of Attorney Act, S.C. Code 62-8-101 *et seq*., which became effective January 1, 2017, is a complex law that will govern DPAs. Lawyers who "dabble" in drafting DPAs must become familiar with this new law or risk even more exposure to potential liability for legal malpractice claims, including *Fabian* claims by third parties.

could impact eligibility for SSI/Medicaid and other government entitlements)
- Documents prepared by a real estate lawyer, such as deeds and mortgages, that have a significant impact on a client's estate (such as changing a tenant in common deed to a joint right of survivorship deed, a life estate deed, gift deeds)
- And what else?

The following are among the important ethical and practical policy considerations for retaining strict privity (pre-*Fabian*) for a malpractice claim:

- Conflicts – actual and potential – With a looming *Fabian* claim, the client's lawyer has to establish defensive practice measures to protect himself/her from future claims by unknown third party plaintiffs. So to whom does the client's lawyer owe his undivided loyalty? His client? The beneficiaries in the client's will, trust, or other estate document? How far will it go and how far in the distant future can the lawyer be sued by a third-party beneficiary?
- Attorney-Client Privilege
- Confidentiality
- Defending against potential third-party claims years into the future
  - ❖ Retention of client files – how long? All your life?

- ❖ Malpractice premiums or the lack of coverage
- ❖ Fees – Increased time and expertise to
- ❖ Study, evaluate, develop, and implement protective mechanisms and policies into attorney-client relationship
- ❖ Prepare protective letters and memoranda to document and confirm advice
- ❖ All the above resulting in an increase in fees for the time, expertise to pro-actively manage such potential risk

Another concern is non-client lawyer malpractice claims being extended to attorney drafting and legal advice in other practice areas:

- Pro bono – Ex. SC Appleseed
- SC Legal Services
- SC Bar Will Clinics
- Divorce – Children? Creditors?
- Personal injury – third-party liens, client's family who may be injured or experience loss caused by settlement terms or jury verdicts
- Guardian/Conservator – Ward's children/family/other third persons suffering damage
- Personal Representative - heirs/beneficiaries/creditors
- Trustee – beneficiaries' creditors and other ancillary

- Attorney-in-Fact or Agent – any third party(ies) who suffer damage as a result of DPA drafting, agent use of the DPA, or attorney advice[6]
- Foreclosure actions
- Real estate/bank loans
- Divorce – opposing party/spouse suing the other spouse's lawyer (see the Texas case *Hange*r referred to above)
- Personal injury – disgruntled spouse/children of client, opposing party claiming some duty by opposing lawyer

If a non-client third party beneficiary is unable to sue the attorney for legal malpractice, is s/he left without a remedy? No. As noted in *Baker*, the disappointed beneficiary has standing to bring a reformation claim and the personal representative also has standing to bring claims on behalf of the testator to effectuate his/her intentions.[7]

To address the many concerns, questions, and confusion created by *Fabian*, the Elder Law Committee

---

[7] Also, the Probate Code allows for private agreements to resolve controversies among beneficiaries § 62-3-912; reformation of a Will to conform to testator's intention § 62-2-601; reformation of a trust §62-7-415; and compromise of a controversy §62-3-1101.

[ELC] formed a legislative subcommittee in the fall of 2015 chaired by lawyer Kathryn Cook DeAngelo[8] to review the *Fabian* opinion and its implications. The subcommittee found that the original rationale supporting strict privity remains essential to the estate planning lawyer and the legal practice and deserved reconsideration. In response to *Fabian*, the subcommittee presented two (2) legislative proposals to the ELC. The first legislative proposal is referred to as the "Aggressive" approach and the other legislative approach is referred to as the "Moderate" approach (see attached drafts of the proposed legislative approaches). Both approaches are briefly explained as follows:

1. AGGRESSIVE APPROACH: The aggressive approach legislatively overrules *Fabian* and reinstates the strict privity requirement for a malpractice claim against a lawyer in South Carolina. In other words, the old law strict privity is reinstated. The Elder Law Committee favors pursuing the aggressive approach if there is support for this approach from other groups, including the Probate, Estate Planning, and Trust [PET] Section of the Bar, other sections, and of course the S.C. Bar House of Delegates.

2. MODERATE APPROACH: The moderate approach adopts the main holding in *Fabian* that abolishes strict

[8]Other members who served and worked on the *Fabian* subcommittee are: Chad Groover, Lauren Karp, Melody Breeden, Katherine Gettys, and John Jolley.

privity but strives to outline and identify the requirements for a third-party plaintiff to bring such a malpractice action. The moderate approach also slightly narrows the expansive holding in *Fabian* so that there is more structure and a better-defined cause of action the third party may pursue against the lawyer who prepares Wills, Trusts, and other estate planning documents. If the legal community and sections of the Bar are not in favor of the Aggressive approach, then this Moderate approach is a compromise or happy medium that we hope will be acceptable. Of course, the draft is subject to further review, edits, and revisions as deemed necessary or desirable.

CONCLUSION

In closing, the following should be remembered:

> [T]he legal profession can gracefully take no other position . . . than that its members should practice their profession with the highest degree of competence, diligence and care and should be answerable to anyone for whom they have legitimately undertaken to render their services in that manner . . . **. On the other hand, they cannot be expected, for ordinary fees, to undertake a liability to an indeterminate number of possible plaintiffs**. See John J. Meehan, *Careless Lawyers and Careworn Third Parties*, 28 *Brook L. Review 99* (1961). Coupled with this liability to an unknown

> group of third parties is the fear that attorney's liability could be expanded to include liability to a vague notion of "**the public at large.**" William W. Voorhees, Jr., *Attorney Malpractice: The Expanding Scope of Liability,18 Seton Hall L. Rev. 630 (1988).* [emphasis added]

On behalf of the ELC, the undersigned respectfully requests that the proposed legislation referred to hereinabove in response to *Fabian* be reviewed and that the Aggressive approach, if thought to be fair, viable, and acceptable, be adopted for the ELC to pursue through the legislative channels of our Bar with the support of our Sections and other interested persons. In the alternative, we request that the Moderate approach be adopted.

We welcome questions, comments, concerns, and guidance on these approaches and the best way to proceed in response to *Fabian* so that our Bar members are not forced to guess or speculate about their duties and obligations to clients and non-clients and so our clients are properly and fairly protected pursuant to and consistent with our South Carolina Rules of Professional Conduct and other relevant ethical considerations.

If requested, the undersigned and other members of ELC Fabian Legislative Subcommittee will be glad to attend meetings or meet via phone to review and discuss this matter further.

Submitted on behalf the ELC/*Fabian* Legislative Subcommittee by

Kathryn Cook DeAngelo, Esq., Chair
Kathryn Cook DeAngelo Law Firm, Ltd.
P.O. Box 15667
Surfside Beach, SC 29587-5667
843-238-8422; kcdeangelo@aol.com

AGGRESSIVE
FABIAN – OVERRULE:

62-1-XXX. Duties and obligations of lawyer during lifetime of client and after death of client for whom a will or trust is prepared.

Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer engaged to prepare a will or trust or both and the client for whom such will or trust or both are prepared shall not impose upon the lawyer any duties or obligations to any other persons, except the client, during the lifetime of such client or after the death of such client. This section is intended to govern the attorney-client relationship between lawyers engaged to prepare a will or trust or both for a client and the client for whom such a will or trust or both is prepared, including such relationships previously in existence, now in existence, or hereafter created.

REPORTER'S COMMENTS

This section was enacted and intended to clarify to whom a lawyer engaged to prepare a will or trust or both owes a duty: Unless expressly provided otherwise in a written employment agreement, the lawyer owes a duty only to the client for whom a will or trust or both are prepared and not to any other person. During the lifetime of such client and after the death of such client, such lawyer owes no duty to any other person, except the client. This section expressly rejects and overrules the holding set forth in the case of *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (S.C. 2014)(an intended beneficiary of a will or trust can sue the drafting attorney for legal malpractice). This section applies to attorney-client relationships existing before and after the enactment of this section.

MODERATE-FABIAN
PROCEDURE FOR THIRD-PARTY MALPRACTICE CLAIMS AGAINST ESTATE PLANNING ATTORNEYS (WILLS & TRUSTS):

SECTION 62-??????: Action for legal malpractice against a lawyer after death of client for whom a will or trust is prepared.

(A) As used herein, "claimant" means a person who brings an action for damages as described herein after the death of a client for whom a will or trust or both was prepared by a lawyer. A claimant is specifically limited to any person who is named in such will or trust or otherwise identified in such will or trust by their status (e.g., my children, my grandchildren, my wife's children).

(B) As used herein, "lawyer" means (i) an individual lawyer, together with his or her employees who are lawyers, (ii) a professional partnership of lawyers, together with its employees, partners, and members who are lawyers, (iii) a professional service corporation of lawyers, together with its employees, officers, and shareholders who are lawyers; and (iv) a person who is a non-lawyer and employed by a lawyer as described in (i), (ii), or (iii) of this section (B).

(C) As used herein, "client" means a person who enters into or has an attorney-client relationship with a lawyer to prepare a will or trust or both.

(D) When injury is caused by an act or omission of a lawyer who rendered professional services by preparing a will or a trust or both for a client, a claimant may, after such client's death, bring an action for damages against such lawyer based on tort or on contract as a third-party beneficiary of such will or trust or both. Any such action must be commenced by the claimant within one (1) year after the date of the client's death.

(E) If the claimant brings a claim sounding in both tort and contract, the claimant must elect a recovery under one of the foregoing theories, and the claimant is barred from bringing any other theories or types of action, except an action in tort or contract.

(F) If the claimant entitled to bring such action is under the age of majority at the time the cause of action accrues, the period of limitations shall not begin to run until majority is attained. After reaching the age of majority, any such claimant may commence an action for damages against such lawyer based on tort or on contract as a third-party beneficiary of such will or trust or both. Any such action must be commenced by such claimant within one (1) year after majority is attained by such claimant, and such action shall be controlled and governed by the requirements and terms set forth in this Section.

(G) The claimant must prove his claim by clear and convincing evidence, and the court may grant relief only if it is satisfied by clear and convincing evidence that the claimant is entitled to relief under either a tort or contract theory. Extrinsic evidence shall not be admissible to prove the client's intent.

(H) This section provides the only causes of action that a claimant may bring against a lawyer after the death of the lawyer's client arising out of an act or omission in the performance of professional services provided to a client by such lawyer in connection with a will or trust or both. This statute of limitations set forth herein is the only statute of limitations applicable to any such claimant's action. Accordingly, no other statute of limitations, including but not limited to S.C. Code Section 15-3-530 or elsewhere in this Code, shall apply to or govern any such action brought by a claimant.

(I) This Section applies to all legal malpractice actions as set described herein accruing on or after its effective date.

Comment: The case of *Fabian v. Lindsay*, 765 S.E.2d 132 (2014) abolished strict privity and adopted an approach for a non-client to bring a legal malpractice claim against a lawyer who prepared a will or trust for a client. This statute overrules the case of *Fabian v. Lindsay* and establishes the only procedure for actions for damages and malpractice against a lawyer after the death of a client for whom a lawyer prepared a will or a trust or both.

9

TO: House of Delegates

FROM: Julie J. Moose, 12th Judicial Circuit Representative

DATE: December 19, 2016

RE: Proposed Amendment to Rule 410, SCACR

South Carolina Bar members who serve as Federal Administrative Law Judges outside of South Carolina are currently not eligible for Administrative Law Judge status. The following proposed amendment would make them eligible.

Rule 410, SCACR

(h)(1)(F) Administrative Law Judge or Workers' Compensation Commission Member. This class shall include any member who is a judge on the South Carolina Administrative Law Court, is a federal administrative law judge ~~whose duties are primarily performed within the State of South Carolina~~ or is a South Carolina Workers' Compensation Commissioner.

10

TO: House of Delegates FM: Bev Carroll

DT: January 2017

RE: Constitution and Bylaws Amendments

Attached are proposed amendments to the Constitution and Bylaws.

The changes to Constitution Sec. 9.4 and Bylaws Sec. 2.1 and 8.5 are proposed to clarify that electronic balloting may be used.

The changes to Bylaws Sec. 1.1 and 1.4 are proposed for two reasons.

The Court expanded and retitled the Administrative Law Judge member category in Rule 410, SCACR, so the text recognizing the Workers' Compensation Commission (lawyer) members is added where needed.

The other changes reflect Rule 430, SCACR, which added Military Spouse Attorney members. Included in those changes is the establishment of the privileges for such members

Attachment

CONSTITUTION

Section 9.4 Election of Officers, Governors and State Bar Delegates.

. . .

(b) If more than one person is nominated for any such office or position, ballots containing the names of all nominees for each contested position shall be ~~mailed~~ distributed to all members who are eligible to vote at the same time as ballots for contested Circuit Delegate elections are distributed. The nominee who receives the greatest number of votes for each office or position shall be declared elected. In the event of a tie vote, the House of Delegates shall determine which of those tied nominees shall serve.

BYLAWS

Article I. Membership

Section 1.1 Classes of Membership. Membership classes of the South Carolina Bar are defined by Rule 410(h), SCACR: Regular, Inactive, Judicial, Judicial Staff, Military, Administrative Law Judge or Workers' Compensation Commission, Retired ~~Members~~, Limited Member - Rule 405, Limited Member - Rule 414, Limited Member - Rule 415, ~~and~~ Limited Member - Rule 427 and Military Spouse Attorney - Rule 430. Membership status is determined as of January 1 each year. A member may change class as set forth in Rule 410, SCACR.

. . .

Section 1.4 Privileges of Members.

(a) Regular members, judicial staff members and limited license members admitted under Rule 405 and Rule 414, while in good standing as defined in Rule 410(i), SCACR, shall be eligible—

(1) to vote in the election of or serve as a member of the Board of Governors or as a circuit delegate in the House of Delegates;

(2) to vote on any matter before the Assembly or on any matter which is the subject of a referendum directed to the membership; and

(3) to serve as voting members of committees, boards, task forces, commissions, divisions and sections.

(b) Judicial members, military members, ~~and~~ administrative law judge or workers' compensation commission members and military spouse attorney members, while in good standing as defined in Rule 410(i), SCACR, are entitled—

(1) to attend meetings of the Assembly and to participate without vote in its deliberations;

(2) to serve as nonvoting members of committees, boards, task forces, commissions, divisions and sections; and

(3) to receive all notices and publications of the Bar except notices relating to elections and matters upon which only regular members may act.

(c) Inactive members, limited license members admitted under Rule 415 and Rule 427 and retired members, while in good standing as defined in Rule 410(i), SCACR, shall have the same privileges as do judicial members except that they shall not be entitled to receive any notices or publications except the South Carolina Lawyer unless they shall request the Secretary in writing that they be sent the other notices to which judicial members are entitled.

. . .

Section 2.1 Nomination and Election of Circuit Delegates.

. . .

If the number of nominees exceeds the number of delegates to be elected from a circuit, the Board of Governors shall on or before the fifteenth day of February prepare ballots bearing the names of the nominees and shall cause a ballot to be ~~mailed~~ distributed to each regular member, judicial staff member, limited member - Rule 405 and limited member - Rule 414 member residing in such circuit. In order to be effective, each ballot shall be duly marked and returned to the Board of Governors not later than the fifteenth day of March. On that date the balloting for the election of circuit delegates shall be closed and the Board of Governors shall proceed to count the ballots and determine, announce, and publish the results of such election.

. . .

Section 8.5 Secretary. The Secretary shall—

. . .

(d) receive, certify, and publish the results of ~~mail~~ ballots;

. . .

11

TO: Members, House of Delegates FM: Board of Governors

DT: January 2017

RE: Nominations for Commission on Continuing Legal Education and Specialization

Rule 408(b)(1), SCACR, requires the House of Delegates to present to the Supreme Court up to two nominees for every vacancy on the Commission on Continuing Legal Education and Specialization. The terms of two commissioners expire on June 30, 2017.

Debbie Whittle Durbin of Columbia and J. René Josey of Florence have each served one term. The Commission recommends that they each serve an additional term. Both are willing to serve.

Karen M. Tyner of Spartanburg has resigned from the Commission. Her term is set to expire on June 30, 2018. Her replacement must be from Judicial Region 1 (Circuits 7, 10, 13, 16). The Board of Governors received from the Commission the following names to be placed in nomination.

Lucas J. Asper	Greenville
Ellen S. Cheek	Spartanburg

Nominations for any of the seats may be made from the floor.

The Commission members are:

Hon. Donald W. Beatty	Spartanburg	
Debbie Whittle Durban	Columbia	Region 2
W. Steven Johnson	Columbia	Region 2
Zandra L. Johnson	Greenville	Region 1
J. René Josey	Florence	Region 3
Robert A. Kerr, Jr.	Charleston	Region 4
Hon. Alex Kinlaw, Jr.	Greenville	
Rebecca Laffitte	Columbia	Region 2
James D. Myrick	Charleston	Region 4
Hon. William H. Seals, Jr.	Marion	
Stuart W. Snow, Sr.	Florence	Region 3
Vacancy		Region 1

The Supreme Court of South Carolina

COMMISSION ON CONTINUING LEGAL EDUCATION AND SPECIALIZATION

MEMORANDUM

TO: William K. Witherspoon, President, South Carolina Bar
Robert S. Wells, Executive Director, South Carolina Bar

FROM: Mary A. Germack, Executive Director

DATE: January 5, 2017

RE: Nominations for Commission Vacancies

CC: James D. Myrick, Chair

I. Reappointments to Commission Seats

The terms of Commission members Debbie Whittle Durban of Columbia (Judicial Region II) and J. René Josey of Florence (Judicial Region III) will expire on July 1, 2017. Ms. Durban and Mr. Josey have served one (1) term on the Commission on CLE and Specialization (Commission) and pursuant to Rule 408(b)(1), SCACR, they are eligible for reappointment by the Supreme Court for a second three-year term.

The Commission seeks to have Ms. Durban and Mr. Josey reappointed for a second term, to expire July 1, 2020. The Commission contacted Ms. Durban and Mr. Josey, and they have agreed to serve another term if reappointed by the Supreme Court. Both Commissioners are outstanding Bar members who have provided excellent service to the Commission during their first terms; therefore, the Commission requests that the South Carolina Bar forward these re-nominations to its House of Delegates (House) for consideration at its upcoming meeting scheduled on January 19, 2017. Mr. Wells has previously advised the Commission that eligible Commissioners, who are willing to serve second terms, will go forward to the House without additional nominees.

II. Commission Vacancy: Judicial Region I

Karen M. Tyner of Spartanburg was appointed on July 1, 2015 to her second term as a member of the Commission from Judicial Region I. Ms. Tyner has informed the Commission that she is leaving the practice of law to pursue a new career in church ministry. Consequently, a vacancy exists on the Commission for a member from Judicial Region I.

950 Taylor Street, Suite 120, PO Box 2138, Columbia, SC 29202
Phone: (803) 799-5578; e-mail: commcle@bellsouth.net; website: www.commcle.org

Regarding nominations for the attorney positions on the Commission, Rule 408(b)(1), SCACR, provides that the South Carolina Bar's House of Delegates shall present to the Supreme Court up to two (2) nominees for each vacancy on the Commission. While the Court expects that the House will actively determine the nominees, it has been the Commission's practice to respectfully submit to the South Carolina Bar the names of attorney nominees who it feels would be outstanding members of the Commission.

To fill the vacancy created by Ms. Tyner's resignation, and to serve the remainder of her unexpired term until June 30, 2018, the Commission nominates Lucas J. Asper and Ellen S. Cheek.

A. Lucas J. Asper

Mr. Asper was admitted to practice in the South Carolina Bar in 2008 and is a shareholder in the Greenville office of Ogletree Deakins Nash Smoak & Stewart, P.C. Mr. Asper's primary practice areas are employment and health care law. Mr. Asper received his B.A. degree in Sociology, *cum laude*, from the University of South Carolina, in 2004, and his J.D. degree, *cum laude*, from the University of South Carolina School of Law in 2008, where he was Associate Editor-in-Chief of the *South Carolina Law Review* and a member of the Order of Wig and Robe. While at USC Law School, Mr. Asper was awarded the Victor A. Michalewitz Award for Excellence in Legal Writing and the Robert McCormick Figg, Jr. Trial Advocacy Award. Mr. Asper was also the recipient of the USC Law School Alumni Association's Compleat Lawyer Award as a third year law student. Mr. Asper serves on the Corporate Counsel Committee of the Litigation Section of the American Bar Association, and is the Committee's former Publications and Communications Editor. He has been active in the Greenville community, serving on the boards of the United Way of the Piedmont, Piedmont Care, Inc., and the Greenville Society for Human Resource Management. Mr. Asper has consented to his name being placed in nomination and has agreed to serve faithfully if appointed by the Supreme Court

B. Ellen S. Cheek

Ms. Cheek has been a member of the South Carolina Bar since 2001. She is a Phi Beta Kappa graduate of the University of North Carolina, having received a B.A. degree, *with distinction*, in English, in 1991. She received her J.D. degree, *with distinction*, from Emory University School of Law in 1995, where she was awarded the Research, Writing, and Advocacy Teaching Scholarship, and was a member and coach of the Moot Court Society Special Teams. Ms. Cheek was admitted to the Georgia Bar in 1995 and practiced law in Atlanta and Decatur, Georgia for six years, litigating general tort, contract and land use cases and representing local school systems, before moving back to her hometown of Spartanburg to become senior corporate counsel for Advance America, Inc. in 2001. She joined the Wilkes Law Firm in March 2003, where her practice focus is on business litigation and professional liability defense. She works regularly with clients in the defense of professional liability and aviation claims, in contract drafting and negotiation, and in the field of construction litigation. Ms. Cheek also litigates business disputes, including claims for contract breach, intellectual property infringement, and unfair trade practices. She is a member of the Construction Law Section of the South Carolina Bar, the South Carolina Defense Trial Attorneys Association, and the Defense Research Institute.

Ms. Cheek teaches adult Sunday School at Trinity United Methodist Church and serves on the board of TOTAL Ministries. Ms. Cheek has consented to her name being placed in nomination and has agreed to serve faithfully if appointed by the Supreme Court.

The Commission strongly submits that both Mr. Asper and Ms. Cheek are excellent candidates for the upcoming vacancy in Judicial Region I. Their professional accomplishments are outstanding. Both candidates would be valuable assets to the Commission.

III. Summary

The Commission thanks the South Carolina Bar for the opportunity to submit nominations to the House of Delegates for the upcoming two reappointments and the attorney seat vacancy on the Commission. The Commission submits that it has provided an excellent slate of diverse and accomplished attorneys who would provide exceptional service to the Supreme Court. Attached for the House of Delegates' review are the candidates' resumes. If the Bar has questions, or would like to discuss this matter further, please do not hesitate to contact us.

The Commission's recommendations for reappointments for current attorney seats in Judicial Regions II and III are as follows:

Debbie Whittle Durban (Judicial Region II) and J. René Josey (Judicial Region III)

The Commission's recommendations for the nominations for the new attorney seat in Judicial Region I are as follows:

Lucas J. Asper and Ellen S. Cheek

Attachments

Lucas J. Asper

Ogletree Deakins
Nash Smoak & Stewart, P.C.

The Ogletree Building
300 North Main Street
Greenville, South Carolina 29601
Phone: 864-240-5697
E-mail: lucas.asper@ogletreedeakins.com

Lucas Asper is a shareholder in Ogletree Deakins' Greenville, South Carolina office. Mr. Asper represents management in all aspects of labor and employment law, including:

- federal and state litigation involving discrimination, harassment, retaliation, wrongful discharge, protective covenants, and breach of employment agreements
- preventive employment and labor law advice, including addressing matters under Title VII of theCivil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (FLSA), and the National Labor Relations Act (NLRA) employee relations
- drafting, reviewing, and advising on employment-related policies, procedures, agreements, handbooks, and manuals
- training on positive employee relations, union avoidance, and other aspects of labor and employment law

Lucas is a native of Omaha, Nebraska, and has lived in South Carolina since 1990. He graduated with honors from the University of South Carolina in 2004, where he majored in Sociology. In 2008, he graduated with honors from the University of South Carolina School of Law, where he served as Associate Editor-in-Chief of the *South Carolina Law Review* and was a member of the Order of Wig and Robe. Upon graduating from law school, Lucas was one of three students awarded the Compleat Lawyer Award by the University of South Carolina School of Law Alumni Association. Prior to law school, Lucas served as a project manager for a lumber supply company/building components manufacturer in Columbia, South Carolina, where Lucas managed numerous multi-family and single family construction projects.

Education
J.D., *cum laude*, University of South Carolina School of Law, 2008
B.A., *cum laude*, Sociology, University of South Carolina, 2004

Honors and Awards
Compleat Lawyer Award
Robert McCormick Figg, Jr. Trial Advocacy Award
Victor A. Michalewitz Award for Excellence in Legal Writing

Admissions
South Carolina
U.S. District Court, District of South Carolina
U.S. Court of Appeals, Fourth Circuit

Ellen S. Cheek

Wilkes Law Firm, P. A.

127 Dunbar Street, Suite 200
Spartanburg, South Carolina 29306
Phone: 864-591-1113
Fax: 864-591-1767
E-mail: echeek@wilkeslaw.com

Ellen Cheek has been helping businesses and individuals protect their interests and navigate the legal process for over 20 years. Ellen combines her experience in litigating complex cases with a practical ability to advise her clients in a manner that allows them meet their particular goals effectively and efficiently. She works regularly with clients in the defense of professional liability and aviation claims, in contract drafting and negotiation, and in the field of construction litigation. Ellen also litigates business disputes, including claims for contract breach, intellectual property infringement, and unfair trade practices. Ellen maintains her license to practice law in both Georgia and South Carolina, and represents clients in state and federal courts in those jurisdictions. She is a member of the Construction Law Section of the South Carolina Bar, the South Carolina Defense Trial Attorneys Association, and the Defense Research Institute.

Before joining Wilkes Law Firm, Ellen practiced law in Atlanta for six years, litigating general tort, contract and land use cases and representing local school systems. In 2001, she returned to her hometown of Spartanburg to serve as associate counsel to a locally-based corporation, in which position she primarily focused on contracts and labor and employment matters. Ms. Cheek resumed private practice in 2003.

Ellen lives in Spartanburg with her husband and two children. She teaches adult Sunday School at Trinity United Methodist Church and serves on the board of TOTAL Ministries.

Education
Emory University School of Law, Doctor of Law, with distinction, 1995
University of North Carolina at Chapel Hill, B.A., English, with distinction, 1991

Admissions
South Carolina, 2001
Georgia, 1995
U.S. Court of Appeals, Fourth Circuit
U.S. Court of Appeals, Eleventh Circuit
U.S. District Court, District of South Carolina
U.S. District Court, Northern District of Georgia

Memberships
South Carolina Bar
State Bar of Georgia
South Carolina Defense Trial Attorneys Association
Defense Research Institute
Spartanburg County Bar Association