

Rule 1.1 Causation and Damages

Marlowe v. SCDOT, 2025 S.C. LEXIS 43 (Mar. 26, 2025). In an inverse condemnation case in which construction of a new highway allegedly caused flooding of plaintiff's home, the plaintiff's expert testimony was insufficient to meet the "most probably" standard for causation; the expert's testimony that the construction of the highway was a "substantial contributor" or that there was "a possibility" that the construction caused flooding of the plaintiff's home was insufficient to prevent summary judgment for the defendant.

In *Carroll v. Isle of Palms Pest Control, Inc.*, ***SC Adv. Sh. 7.23.2025*** the Court discussed the scope of the "economic loss rule," which provides that tort recovery is not available when the only damage is to the product itself. The rule is designed to draw the boundary between contract and tort. In the opinion the Court noted that it had rejected the application of the economic loss rule "to allow tort recovery of purely commercial losses caused by professionals for breach of their professional duties imposed by law." Id. at ***.

Rule 1.6 Disclosure in Lawyer's Self-Defense

In *Formal Opinion #515* the ABA Committee advised that a lawyer who is the victim of a crime by a client or prospective client may disclose information relating to the representation (despite the duty of confidentiality in Rule 1.6) via an implicit exception, in order to seek investigation, prosecution, or redress of the crime.

Rule 1.13 Fairness to Non-Client Constituents Within an Entity Client

In *Formal Opinion #514* the ABA Ethics Committee examined a lawyer's obligations when advising an organization about conduct that may implicate individual constituents. The opinion emphasized the need to prevent misunderstandings by the organization's constituents as to the lawyer's role, referring to Model Rules 1.13(f), 4.1, 4.3.

Rule 1.16 Circumstances Justifying Discretionary Withdrawal

ABA *Formal Opinion #515* clarifies the meaning of "material adverse effect" under Model Rule 1.16(b)(1) for permissive withdrawal. The opinion specifies circumstances under which withdrawal is ethically permissible (e.g. when there is no significant harm to the client's matter or the attorney is able to mitigate any adverse effects of the withdrawal).

Rule 3.1 Non-Meritorious Assertions in Litigation

Hood v. United Servs. Auto Ass'n, 445 S.C. 1, 910 S.E.2d 767 (2025) is an important case on the liability and obligations of insurers in defending first party insurance claims. Hood was involved in a three-car accident and was a defendant in one action arising from the accident; USAA provided defense counsel to Hood in that case. The main issue in that case regarding Hood's liability was whether she had her headlights on when the accident occurred. Hood through her counsel presented direct and expert evidence that her headlights were on. Hood brought a separate action against the driver of another vehicle involved in the accident. The insurer for that driver tendered its full policy limits, and Hood's insurer, USAA, handled defense of Hood's UIM claim; the policy limit for that claim was \$1 million. Mediation did not produce a settlement, and the case went to trial with Hood recovering a judgment in excess of \$1 million. USAA paid its

full policy limit, but Hood brought suit against USAA for the excess judgment on a number of theories, including negligence and bad faith refusal to settle. The principal holding of the case was that an insured does not have a tort claim for negligence against its insurer; instead, the obligations of the insurer are based solely on the insurance contract. An insured does have a contractual claim for bad faith refusal to process or settle a claim as recognized by the South Carolina Supreme Court in *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933) (third party claims); *Nichols v. State Farm Mut. Auto. Ins.*, 279 S.C. 336, 306 S.E.2d 616 (1983) (first party claims). Evidence of negligence by the insurer is relevant to a bad faith claim, but does not create an independent tort claim. The court reasoned that an insurer does not have an independent duty to the insured other than the duty arising from the insurance contract, and recognition of a tort claim for negligence would be duplicative of the contract claim for bad faith refusal to settle.

While the case contains a number of other points of interest to plaintiffs' and insurance defense counsel, three stand out. All of these relate to claims for bad faith refusal to settle. First, the USAA did not violate the duty of good faith by failing to offer in mediation the amount of its policy reserve for this claim. When an insurance company takes over defense of a UIM claim, it is acting in its own interest and does not have duties to the insured beyond acting in good faith. In fact, South Carolina statutory law recognizes this right. S.C. Code Ann. § 38-77-160 (2015). In UIM cases counsel retained by the UIM carrier represents the insurer and not the insured. The court agreed with decisions in other jurisdictions that the amount of the policy reserve is not an admission or recognition by the insurer of the value of the claim. Second, USAA did not violate the duty of good faith when its counsel in mediation of the UIM case represented that counsel was offering his full settlement of \$200,000, when in fact he had settlement authority of \$250,000. The court stated that the duty of good faith did not require an insurer to offer the full extent of its settlement authority. It should also be noted that counsel for a party does not act unethically in misrepresenting settlement authority because such a representation under conventions of negotiation is not treated as a statement of material fact. See SCRPC 4.1 and cmt. 3. Third, USAA did not violate the duty of good faith by arguing in the UIM litigation that Hood's lights were off when counsel hired by USAA to defend Hood in the action against Hood had argued and offered evidence that her lights were on. The court concluded that USAA's conduct was proper. USAA did not take inconsistent positions because it was not a party to the original tort action, and counsel hired by USAA to represent Hood had a duty to zealously argue the defense favorable to her. USAA was a party to the UIM case and had the right to raise defenses to protect its interest. The court pointed out that substantial evidence supported the defense that Hood was at fault because her lights were off, and she even conceded in that action that her lights were off and did not call her expert witness to support an argument that her lights were off.

Rule 3.4 Knowing Disobedience to Rules of Tribunal

Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC, 445 S.C. 19, 911 S.E.2d 406 (2025), holds that striking of pleadings is a proper sanction for discovery abuse. The court was clear in holding that a party is not subject to sanctions for discovery abuse because the party moves to quash subpoenas or requests a protective order. However, in that case the appellants "engaged in a deliberate pattern of discovery abuse," including missing discovery deadlines, failing to comply with motions to compel, and dishonoring representations to cooperate in discovery. Moreover, appellants' willful noncompliance was a tactic designed to delay and

supported the extreme sanction of dismissal of pleadings. In addition, the failure to appeal prior discovery orders by refusal to comply with the order and obtain a contempt sanction constitutes a waiver of the right to appeal and makes those orders the law of the case. For discussion of the requirements for sanctions under SCRCP 11 see *Bauknight v. Pope*, 445 S.C. 408, 914 S.E.2d 848 (2025) (holding that Rule 11 is clear that sanctions may be imposed on a party as well as its counsel).

Welch v. Advance Auto. Parts, Inc., 2025 S.C. LEXIS 64 (May 21, 2025) is an appeal of discovery orders in a South Carolina asbestos case. The trial court struck defendant's answer and placed it in default for failure to comply with court-ordered discovery. The case is significant in two respects. First, defendant refused to produce a 30(b)(6) (organization) witness. The court's decision discusses the purpose and importance of the rule including the obligation of the organization to prepare the witness to testify on the designated subject matter. Second, defendant claimed that it could not legally comply with the court's discovery orders because they violated a Quebec "blocking statute." The South Carolina Supreme Court, relying on decisions from the U.S. Supreme Court, held that such statutes did not deprive US courts from ordering and enforcing discovery.

Rule 3.4 Improper Trial Tactics

Washington v. State, 445 S.C. 233, 911 S.E.2d 536 (Ct. App. 2025) was a case of first degree criminal assault. There was no physical evidence of the assault, which turned on the credibility of the minor defendant. In closing argument the prosecutor vouched for the victim's credibility: "I submit to you [Victim] was wholly credible. That she's only capable of telling the truth." On appeal the State argued that the trial court's curative instruction was sufficient to overcome this deficiency but the Court of Appeals disagreed. The case is significant because it provides guidance on when a curative instruction is sufficient to overcome a trial error. The Court of Appeals emphasized the following factors: (1) the vouching comments were extensive rather than fleeting; (2) the statements were made during summation rather than when the witness testified; and (3) defense counsel did not object to the vouching comments. The court distinguished the Supreme Court's previous decision in *State v. Reyes*, 432 S.C. 394, 853 S.E.2d 334 (2020) where the curative instruction was sufficient.

Rule 5.5 Practice of Law by Nonlawyers

U.S. Bank Nat'l Ass'n v. Mack-Marion, 445 S.C. 103, 912 S.E.2d 236 (2025) expanded the jurisdiction of lower courts to consider claims of unauthorized practice of law. In 2001 Frances Mack-Marion refinanced her property taking out a new mortgage; the refinancing occurred without attorney supervision. In 2011 the South Carolina Supreme Court ruled that mortgage lenders are not entitled to equitable remedies to enforce their mortgages that closed without attorney supervision. *Matrix Financial Services Corporation v. Frazer*, 394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011). In 2020 U.S. Bank National Association ("U.S. Bank"), the successor in interest to Mack-Marion's loan, started foreclosure proceedings against her. In response Mack-Marion asserted several counterclaims, including a declaratory judgment that U.S. Bank was barred from the equitable remedy of mortgage foreclosure under *Matrix*. The bank filed motions to dismiss the counterclaims contending that (1) the master-in-equity, to whom the case had been assigned, did not have subject matter jurisdiction over claims for the unauthorized practice of law, which could only be brought before the South Carolina Supreme Court, and (2) the

mortgage was recorded before the effective date of the *Matrix* decision. The master-in-equity granted the motion to dismiss. Mack-Marion appealed, and the Supreme Court granted her motion to have the case certified to it. U.S. Bank's subject matter jurisdiction argued rested on previous decisions of the South Carolina Supreme Court and the Court of Appeals which seemed to indicate that unauthorized practice claims could only be brought in the original jurisdiction of the Supreme Court. In *Mack-Marion* the court clarified how lower courts should handle civil claims involving the unauthorized practice of law. **First**, the Court reaffirmed its prior rulings that South Carolina does not recognize a cause of action for the unauthorized practice of law. To have a valid claim involving the unauthorized practice of law a "party must show something more than the unauthorized practice of law to have a valid claim." Second, the court overruled prior case law to the extent that it found that lower courts did not have subject matter jurisdiction over claims that were "intertwined" with the unauthorized practice of law. Under the Court's decision in *Mack-Marion*, lower courts would have subject matter jurisdiction over such claims if the South Carolina Supreme Court had found that the conduct in question was the unauthorized practice of law. That was the situation in *Mack-Marion* because the Supreme Court had already found in *Matrix* that mortgage lenders engaged in the unauthorized practice of law by closing loans without attorney supervision. **Third**, while the master-in-equity had subject matter jurisdiction over Mack-Marion's counterclaims, the court nonetheless affirmed the dismissal of those counterclaims because the mortgage was recorded before the court's decision in *Matrix*. Mack-Marion asked the court to rule that *Matrix* should be applied retroactively but the court did not "see a sound reason to do so." **Fourth**, the court clarified that it would only exercise subject matter jurisdiction to determine whether conduct constituted the unauthorized practice of law when the conduct raised a novel question. See Nathan M. Crystal, *South Carolina Doesn't Recognize a Cause of Action for UPL, Right? - Not So Fast*, 36 S. Carolina Lawyer 16 (March 2025).

Rule 7.1 False, Deceptive, and Misleading communications

Advertising by Out-of-State Lawyers

Creating Unjustified Expectations

Comparison with Other Lawyers

Rule 7.2 Identification of a Responsible Lawyer

In re Matter of Hostilo, 2025 S.C. LEXIS 44 (Apr. 9, 2025). Respondent, a lawyer admitted to practice in Georgia but not in South Carolina, engaged in advertising in South Carolina and was therefore subject to the South Carolina Rules of Professional Conduct under Supreme Court Rule 418. Respondent also employed South Carolina admitted attorneys who provide legal services in South Carolina. The Supreme Court accepted respondent's conditional admission and administered a public reprimand for numerous violations of the advertising rules in the firm's website, YouTube video, and billboard. The case reads like a checklist of advertisements a firm should not make. Careful reading of the opinion by any lawyer who engages in advertising is worthwhile. The following violations, however, are particularly worth noting:

- Misrepresentation about length of practice in South Carolina and other jurisdictions;
- Statements about results obtained in cases without the required disclaimers;
- Comparison of services rendered by respondent's firm with services rendered by other lawyers without the required disclaimers;
- Testimonials and endorsements without the proper disclaimers;

- Violation of the requirement that advertising be “predominantly informational,” particularly by visual emphasis of money;
- Failure to review advertisement for compliance with the Rules of Professional Conduct.

Rule 8.4 Discrimination in the Practice of Law

ABA *Formal Opinion* #517 addresses discriminatory use of peremptory challenges in jury selection under Rule 8.4(g), including in contexts involving AI-assisted jury selection. The opinion examines when such challenges may violate the Model Rules. South Carolina has not adopted Model Rule 8.4(g).

Overview of the South Carolina Disciplinary System

Investigations

In *Anonymous Mediator/Attorney Petitioner v. South Carolina Office of Disciplinary Counsel*, *** SC Adv. Sh. 7.30.2025*** the Court ruled that South Carolina ADR Rule 8(a), dealing with confidentiality of ADR proceedings is not absolute, and an attorney mediatory was required to respond to Disciplinary Counsel’s request for a description of the behavior of an attorney participant in a mediation. The Court concluded that the request did not relate to the substance of the mediation and was therefore not protected by the confidentiality rule. Note also that the ADR Rules have a specific exception for information disclosed during a mediation that is “offered to report, prove, or disprove professional misconduct occurred during the mediation.”