



**South  
Carolina  
Bar**

**House of Delegates**



January 2022

Dear Member of the House:

The House of Delegates of the South Carolina Bar will convene on Thursday, January 20, 2022, in the Regency Ballroom at the Hyatt Regency Hotel, 220 N. Main Street, Greenville, South Carolina. Lunch will be ready at 11:00 p.m. and the business meeting will begin shortly thereafter. When you arrive, please be certain to sign in so that the minutes will reflect your attendance.

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

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

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

I look forward to our first House of Delegates meeting of 2022 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,

A handwritten signature in black ink that reads "Chris Koon".

Christopher R. Koon  
Chair



January 2022

Dear House of Delegates:

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

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

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.

I am looking forward to visiting 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.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mary E. Sharp".

Mary E. Sharp  
President

AGENDA  
SOUTH CAROLINA BAR HOUSE OF DELEGATES  
January 20, 2022 @ 11:00 a.m.

CALL TO ORDER  
SET THE AGENDA

Christopher R. Koon  
Chair

- |    |  |  |
|----|--|--|
| 1. | Approval of Consent Agenda<br>a. Approval of Minutes of Meeting Held on July 30, 2021<br>b. Receipt of November Financial Statements | Christopher R. Koon<br>Chair   |
| 2. | Presentation of Trial and Appellate Advocacy Section Award   | Bess J. DuRant<br>Section Council Member   |
| 3. | Report of the President  | Mary E. Sharp<br>President   |
| 4. | Report from South Carolina Bar Foundation, Inc.<br><br>Presentation on SC Supreme Court Historical Society                           | S. Venus Poe<br>Foundation President<br><br>Roy F. Laney<br>Society Membership Chair |
| 5. | Request from Practice and Procedure Committee to Amend Rule 26, SCRPC, in re Confidentiality in Discussions with Experts             | Guy J. Vitetta<br>Committee Chair  |
| 6. | Request from Resolution of Fee Disputes Board to Amend Rules   | Daniel L. Draisen<br>Executive Council Member  |
| 7. | Request from the Professional Responsibility Committee to Amend Rule 1.15(e)   | Barbara M. Seymour<br>Committee Member   |
| 8. | Request from Professional Responsibility Committee to Revise SC Rules of Professional Conduct in re Lawyer Advertising               | Melissa G. Mosier<br>Committee Member  |

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.



Minutes  
House of Delegates  
July 30, 2021

The House met this date at the Beaufort Inn. Participating were Shedricka Taccara Anderson; S. Maria Shiloh Averill; Margaret Elise Baker; Martin Rast Banks; Jacob Shuler Barker; J. Leeds Barroll, IV; Cherie T. Barton; Samuel Robert Bass, II; Elizabeth A. Battle; Mark S. Berglind; Susan B. Berkowitz; Joseph Pawel Bias; Matthew M. Billingsley; Maryann Elizabeth Blake; Clifford Lewis Bourke, Jr.; Kristine Jay Braswell-Amin; Melody Joy Edelman Breeden; Melody Jane Brown; Robert Lesley Brown; Derek Mitchell Bush; Beverly A. Carroll; George B. Cauthen; Aleksandra Boguslawa Chauhan; M. Dawes Cooke, Jr.; Lee Deer Cope; Leslie A. Cotter, Jr.; West Paul Cox; A. Sandy Cruickshanks, IV; Larry Cunningham; Elnora Jones Dean; Megan Catherine Hunt Dell; Robert Scott Dover; Martin S. Driggers, Jr.; Walter George Dusky; John D. Elliott; Scott A. Elliott; Frank L. Eppes; Ashley R. Forbes; Debra J. Gammons; Warren V. Ganjehsani; Shauna Lisa Gibson; Tiffany D. Gibson; Michael Frederick Gillen; William Eugene Grove; Doward Keith Karvel Harvin; Daryl G. Hawkins; Teckla S. Henderson; Amy L.B. Hill; Russell Thomas Infinger; James Matthew Johnson; Lindsay Anne Joyner; D. Michael Kelly; Catherine H. Kennedy; Christopher R. Koon; Lanneau Wm. Lambert, Jr.; Roy Free Laney; Tameaka A. Legette; Jonathan William Lounsberry; Garry Donald Malphrus; Karla Cecilia Martinez Lainez; John Lucius McCants; John O. McDougall; Joseph S. Mendelsohn; David B. Miller; Elizabeth Fulton Morrison; Adam Christopher Ness; Vincent Charles Northcutt; Alice F. Paylor; Ross Buchanan Plyler; Michelle Duncan Powers; Edward K. Pritchard, III; Frederick Elliott Quinn, IV; Frederick Elliott Quinn, IV; Robert Lawrence Reibold; John E. Rosen; Nancy Doherty Sadler; Carmelo Barone Sammataro; Stephen T. Savitz; Mary Elizabeth Sharp; Jane Opitz Shuler; N. Gruber Sires; Jasmine Denise Smith; Krystal Watson Smith; Christian Giresi Spradley; Fred W. Suggs, Jr.; Jeanmarie Tankersley; David L. Tedder; Stacy Elizabeth Thompson; John Hagood Tighe; Stephanie Millenbine van der Horst; Michael J. Virzi; Zachery Lee Weaver; Frances Ricci Land Welch; Richard Giles Whiting; Mitchell Willoughby; Nicole Nichols Workman and Michael Dennis Wright.

Guests present were Chief Justice Donald Beatty, Thomas Pendarvis, Kirsten Small, Nekki Shutt, Guy Vitetta, and Robert Wood.

Representing the Bar staff were Mary-Kathryn Craft, Nichole Davis, Jeremy Frazier, Betsy Goodale, Charmy Medlin, David M. Ross, Jason Stokes, Kimberly Snipes, and Kali Turner.

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

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

Mayor Stephen D. Murray, III, extended a welcome to the city of Beaufort.

Minutes, House of Delegates  
July 30, 2021  
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Chairperson Koon advised the House that Agenda Item 3, Request from the Pro Bono Board to Amend Rule 6.1 of the SC Rules of Professional Conduct, had been removed from the agenda. The amended agenda was adopted by acclamation.

Mr. McDougall moved to approve the Consent Agenda - approval of the minutes of the May 6, 2021, meeting. The motion was seconded, and it was approved

Mr. Ness recognized the 2020 Pro Bono Law Lawyers of the Year, Jeffrey Kuykendall, Brian Bevon, and Ian Watterson.

Next, Mr. McDougall presented a request from the Senior Lawyers Division to amend the Bar Bylaws and Constitution to add a second representative from the Division to the Board of Governors and moved approval. The motion was seconded, and it was approved.

Mr. Pendarvis presented a request from the Professional Responsibility Committee to establish an Attorney Dispute Resolution Program. The program would be similar to the Fee Dispute Program but would focus on disputes between attorneys. The proposal included an opt-out so that the parties could just mediate or mediate and arbitrate and the result provided a vehicle to appeal to the Circuit Court if necessary. A motion was made to adopt the proposal. It was noted that mediation was mandatory, but arbitration was not. Following discussion, the motion was approved.

Mr. Vitetta presented a request from the Practice and Procedure Committee to amend Rule 14(e) of the SC Family Court Rules to allow for acceptance of service. He stated that the rule currently only allowed for personal service of a Rule to Show Cause unless the Court ordered otherwise. The Committee's proposal included the ability of a party and/or their attorney to accept service of the same by combining the appropriate language from Rule 4(j), SCRCF, with the existing Rule 14(e). Mr. McDougall moved to approve the request. The motion was seconded, and it was approved.

Next, Mr. Vitetta presented a request from the Practice and Procedure Committee to amend Rule 4, SCRCF, to provide specific procedures for serving an individual in a foreign country. Mr. Lounsberry moved approval of the proposal. The motion was seconded, and it was approved.

Mr. Vitetta presented a request from the Practice and Procedure Committee to add notes to Rule 11, SCRCF, based on the decision in *Pee Dee Health Care v. Estate of Hugh S. Thompson*. The decision addressed the conflict between Rule 11, SCRCF, and the South Carolina Frivolous Civil Proceedings Sanctions Act regarding the time to file a request for sanctions. Mr. Lounsberry moved to adopt the proposal. The motion was seconded, and it was approved.

Next, Mr. Wood presented a request from the Unauthorized Practice of Law Committee to adopt a regulatory structure to address complaints regarding the unauthorized practice of law. He reviewed the Committee's history and efforts to address UPL noting that the focus shifted with the 2015 US Supreme Court decision in N.C. State Bd. of Dental Exam'rs v. FTC. The proposal suggested that the Supreme Court establish a Commission on the Unauthorized Practice of Law and authorize the Office of Disciplinary Counsel to review, investigate, and where appropriate, prosecute UPL complaints. The Commission on UPL would function similarly to the Commission on Lawyer Conduct and the Commission on Judicial Conduct, with the assistance of the Commission Counsel. A motion was made to approve the proposal. The motion was seconded. Discussion ensued on whether the Office of Disciplinary Counsel had been consulted, asking the Attorney General to deputize members of the UPL Committee to prosecute, how the case information would be compiled, the ultimate enforcement mechanism, and federal processes such as social security disability claims, that allow non-lawyers to serve as advisors. Following discussion, the motion was approved.

Ms. Shutt presented a request from the Civil Rights Task Force to establish a Civil Rights Section of the Bar. A motion was made to approve the request. The motion was seconded. Discussion ensued on Committees vs. Sections, whether there was overlap with existing Bar entities and whether the proposed section would meet the required 70 member minimum. Mr. Cauthen moved to amend the proposed bylaws by adding the following section:

***Article V, Section 5, Disability Defined as to this Article.*** *When used in this Article, the term "disability" shall refer to the inability of the officer to carry out assigned duties.*

The motion was seconded, and it was approved.

Mr. Ness moved that the House approve the formation of a Civil Rights Law Section effective upon proof of 70 signatures, with initial dues to be paid by January 1, 2022. The motion was seconded. The Chair reviewed the Bar Bylaws regarding the creation of a new Bar Section and ruled the motion inconsistent with the Bylaws. Following discussion, the main motion was approved.

Ms. Small presented a request from the Professional Responsibility Committee to amend Rule 8.4 of the SC Rules of Professional Conduct. The proposed amendments were designed to regulate conduct, define prohibitive conduct, include a standard to avoid accidental violation and make a distinction between conduct and speech. A motion was made to adopt the proposal. The motion was seconded. Discussion ensued on the 1<sup>st</sup> Amendment, whether the proposal was supported by the Office of Disciplinary Counsel, the definitions of discrimination and harassment, and support from the Diversity Committee. Mr. Malphrus moved to

Minutes, House of Delegates  
July 30, 2021  
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indefinitely postpone discussion on the proposed rule pending the receipt of an Opinion of the South Carolina Attorney General as to any legal issues that could arise. The motion was seconded. Following discussion, the motion failed.

Discussion resumed on the main motion. Following discussion, the main motion failed. John D. Elliott abstained from voting.

There being no further business, the meeting was adjourned.

Minutes  
South Carolina Bar Assembly  
July 30, 2021

President Sharp convened a meeting of the Assembly and declared a quorum was present. She invited agenda items.

President Sharp moved to approve the proposed Constitutional amendment. The motion was seconded and approved by more than two-thirds of the members voting.

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

TO: House of Delegates

FM: Russell T. Infinger, Treasurer

DT: January 2021

RE: Financial Reports

The fiscal year financial reports through November 30, 2021, are attached. Page 1 is the balance sheet for general, section, grant and other funds. Page 8 includes the balance sheet for the Lawyers' Fund for Client Protection. Page 10 is the CLE Division balance sheet.

The deviations of \$25,000 or more in year-to-date SC Bar revenues as compared to YTD budget are:

LRS PERCENTAGE FEE \$77K: Percentage fees higher than anticipated.

The deviations of \$25,000 or more in expenses as compared to YTD budget are:

EQUIPMENT MAINTENANCE & LICENSES \$27K: Budget spread evenly throughout year variance due to timing.

PROFESSIONAL FEES (\$30K): Consultant fees include costs for the prior year audit, costs for Rachel Shaw CPA consulting services, as well as some small legal consulting fees.

MEMBERSHIP SERVICE COMMITTEES (\$58K): The Board of Governors and House of Delegates meetings were held in July, having been pushed back due to COVID, therefore we will likely go over budget this year for meetings as the House of Delegates' January and Board of Governors' annual May meetings are back on as scheduled.

YOUNG LAWYERS DIVISION \$36K: Budget spread evenly throughout year variance due to timing.

REFERRAL SERV. MARKETING \$32K: Budget spread evenly throughout year variance due to timing.

LAW RELATED EDUCATION \$35K: Trainings have been canceled or moved virtual, and all LRE competitions for the full year have been moved to virtual. This underspend will continue through the rest of the fiscal year.

The deviations in CLE revenues of \$25,000 or more are:

SEMINARS \$32K: Seminar revenue budget spread evenly throughout year variance due to timing.

EACLE ACCESS \$179K: Higher than anticipated EACLE registrations.

The deviations in CLE expenses of \$25,000 or more are:

SALARIES \$61K: Unfilled positions.

SEMINARS (\$42K): Seminar expense budget spread evenly throughout year variance due to timing.

SOUTH CAROLINA BAR  
BALANCE SHEET  
For the Five Months Ending Tuesday, November 30, 2021

	YTD
<b>CURRENT ASSETS</b>	
CHECKING ACCOUNT	\$2,645,775.07
MONEY MARKET	2,053,923.64
INVESTMENTS	1,722,640.86
ACCOUNT RECEIVABLES	9,754.00
PREPAID EXPENSES	234,409.00
CONTRA ACCOUNTS DUE	15,962.33
<b>TOTAL CURRENT ASSETS</b>	<b>\$6,682,464.90</b>
 <b>PLANT</b>	
OFFICE EQUIPMENT	210,992.88
BUILDING & LAND	598,618.06
BUILDING # 2	6,115,290.69
<b>TOTAL PLANT FUND</b>	<b>\$6,924,901.63</b>
 <b>TOTAL ASSETS</b>	 <b>\$13,607,366.53</b>
 <b>CURRENT LIABILITIES</b>	
ACCOUNTS PAYABLE	77,234.49
PREPAID RENT	125.00
PERSONNEL PAYABLES	233,823.82
DUE:BF & COUNTY BAR	213,510.00
DEFERRED REVENUE	1,070,401.07
OTHER LIABILITIES	252,245.00
NOTES PAYABLE-CURRENT	578,823.20
<b>TOTAL CURRENT LIABILITIES</b>	<b>\$2,426,162.58</b>
 <b>LONG TERM LIABILITIES</b>	
NOTES PAYABLE-LONG TERM	732,252.00
<b>TOTAL LONG TERM LIABILITIES</b>	<b>\$732,252.00</b>
 <b>TOTAL LIABILITIES</b>	 <b>\$3,158,414.58</b>
BEGINNING OF YEAR GENERAL FUND BALANCE	10,641,915.17
BEGINNING OF YEAR LAWYER REFERRAL FUND	382,722.79
BEGINNING OF YEAR GRANT FUND BALANCE	315,926.83
BEGINNING OF YEAR SECTION FUND BALANCE	371,027.97
TOTAL BEGINNING OF YEAR FUND BALANCE	11,711,592.76
 YTD REVENUE	602,945.40
YTD EXPENSES	1,865,586.21
NET CHANGE	(1,262,640.81)
 <b>FUND BALANCE</b>	 <b>\$10,448,951.95</b>
 <b>TOTAL LIABILITIES AND FUND BALANCE</b>	 <b>\$13,607,366.53</b>

SOUTH CAROLINA BAR  
Income Statement  
For the Five Months Ending Tuesday, November 30, 2021

	MONTHLY ACTUAL	MONTHLY BUDGET	YTD ACTUAL	YTD BUDGET	ANNUAL BUDGET
<b>REVENUE</b>					
LICENSE FEES	\$350.00	\$0.00	\$27,310.00	\$0.00	\$3,749,700.00
FEES TOWARDS BUILDING	0.00	0.00	0.00	0.00	493,800.00
INTEREST/INVESTMENT INCOME	(10,245.34)	1,600.00	3,162.22	8,000.00	20,000.00
LRS PERCENTAGE FEE	39,046.22	30,000.00	226,629.03	150,000.00	360,000.00
LRS SUBSCRIPTION FEE	6,771.30	5,500.00	38,052.33	28,000.00	50,000.00
MARKETING FEES	593.59	2,500.00	20,730.98	12,500.00	30,000.00
SC LAWYER	10,828.15	7,000.00	35,009.59	35,000.00	84,000.00
LAWYERS DESK BOOK	0.00	0.00	29,715.00	40,000.00	40,000.00
STAFF SUPPORT	0.00	4,750.00	0.00	23,750.00	57,000.00
RENTS RECEIVED	3,669.00	3,700.00	18,345.00	18,500.00	44,000.00
ADR CERTIFICATION	11,000.00	6,700.00	17,500.00	33,500.00	80,000.00
MISCELLANEOUS FEES	4,852.30	1,500.00	5,022.30	7,500.00	18,200.00
LAW STUDENT AFFILIATES	0.00	0.00	525.00	0.00	0.00
SALES TAX	0.00	300.00	0.00	1,500.00	3,400.00
<b>TOTAL REVENUES</b>	<b>\$66,865.22</b>	<b>\$63,550.00</b>	<b>\$422,001.45</b>	<b>\$358,250.00</b>	<b>\$5,030,100.00</b>
<b>EXPENSES</b>					
SALARIES	157,768.34	168,700.00	787,213.50	843,100.00	2,024,000.00
FICA & EMPLOYEE BENEFITS	33,589.47	31,800.00	193,927.17	211,100.00	590,000.00
BUILDINGS	9,735.33	13,500.00	66,981.50	67,500.00	162,000.00
DEPRECIATION	0.00	0.00	0.00	0.00	0.00
EQUIPMENT & SOFTWARE	4,165.07	1,700.00	7,120.41	8,100.00	20,000.00
EQUIP. MAINTENANCE & LICENSES	20,891.30	20,000.00	72,496.62	100,000.00	240,000.00
OFFICE SUPPLIES	3,165.05	2,000.00	6,269.77	10,000.00	24,300.00
POSTAGE	1,000.00	750.00	2,671.61	3,750.00	9,000.00
TELEPHONE	1,777.30	1,500.00	12,822.60	7,500.00	18,500.00
PROFESSIONAL FEES	10,482.71	6,800.00	63,999.30	34,000.00	82,000.00
BOND/INSURANCE	2,453.09	1,400.00	12,871.27	7,000.00	16,300.00
STAFF EXPENSE	1,306.12	2,400.00	4,846.95	12,000.00	28,700.00
DUES/SUBSCRIPTIONS/BOOKS	0.00	250.00	1,940.00	1,250.00	3,000.00
CASUAL LABOR/HIRING	0.00	200.00	0.00	1,000.00	2,000.00
DELEGATE EXPENSE	3,783.52	5,800.00	10,258.09	29,000.00	69,600.00
OFFICERS' EXPENSE	0.00	350.00	57.02	1,750.00	4,200.00
MEMBERSHIP SERV. COMMITTEES	2,914.71	7,600.00	79,585.68	21,200.00	174,300.00
PRACTICE MANAGEMENT ASST.	0.00	1,500.00	1,310.77	7,500.00	17,800.00
RISK MANAGEMENT	529.08	650.00	2,732.52	3,250.00	7,800.00
LAWYERS HELPING LAWYERS	3,978.53	6,400.00	17,548.36	31,650.00	76,450.00
MEMBERSHIP BENEFITS	0.00	9,500.00	31,458.16	47,500.00	113,800.00
YOUNG LAWYERS	10,943.75	16,200.00	45,041.07	81,000.00	194,700.00
SENIOR LAWYERS	1,110.95	4,500.00	20,517.32	22,500.00	54,000.00
GOVERNMENT RELATIONS	85.00	4,600.00	572.81	23,000.00	55,800.00
JUDICIAL EVALUATION	0.00	900.00	1,741.32	4,500.00	11,000.00
PRO BONO	4,699.10	3,500.00	13,147.33	17,500.00	42,200.00
ASK-A-LAWYER	1,343.00	2,500.00	3,620.67	12,500.00	29,700.00
CLIENT ASSISTANCE PROGRAM	0.00	100.00	0.00	500.00	1,000.00
ADR CERTIFICATION	129.91	700.00	248.97	3,500.00	8,500.00
REFERRAL SERV. MARKETING	14,977.21	10,400.00	20,051.39	52,000.00	125,000.00
LAW RELATED EDUCATION	2,887.33	13,400.00	2,879.89	37,400.00	302,600.00
PUBLIC RELATIONS	522.00	1,000.00	2,043.20	5,000.00	11,900.00
SC LAWYER	31,176.61	18,600.00	115,706.95	93,000.00	222,600.00
LAWYERS DESK BOOK	3,254.78	2,900.00	16,449.63	14,500.00	34,500.00
CONTRIBUTIONS	0.00	1,000.00	25,600.00	5,000.00	11,500.00
CREDIT CARD FEES	16,593.25	7,800.00	29,719.81	39,000.00	93,000.00
SHORT TERM PROJECTS	0.00	400.00	0.00	2,000.00	5,000.00
LAW STUDENT AFFILIATES	0.00	400.00	0.00	2,000.00	4,500.00
SALES TAX	0.00	300.00	2,329.66	1,500.00	3,400.00
BUILDING AND LAND DEBT	5,475.23	7,900.00	27,155.89	39,500.00	94,700.00
CONTINGENCY EXPENSES	0.00	0.00	0.00	0.00	0.00
<b>TOTAL EXPENSES</b>	<b>\$350,737.74</b>	<b>\$379,900.00</b>	<b>\$1,702,937.21</b>	<b>\$1,904,050.00</b>	<b>\$4,989,350.00</b>
<b>NET CHANGE</b>	<b>(\$283,872.52)</b>	<b>(\$316,350.00)</b>	<b>(\$1,280,935.76)</b>	<b>(\$1,545,800.00)</b>	<b>\$40,750.00</b>

**SOUTH CAROLINA BAR**  
**Government Relations**  
**Statement of Revenue and Expenses**  
For the Five Months Ending Tuesday, November 30, 2021

	<u>MONTHLY ACTUAL</u>	<u>MONTHLY BUDGET</u>	<u>YTD ACTUAL</u>	<u>YTD BUDGET</u>	<u>ANNUAL BUDGET</u>
<b>REVENUE</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>EXPENSES</b>					
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	85.00	0.00	572.81	0.00	0.00
<b>TOTAL EXPENSES</b>	<u><b>\$85.00</b></u>	<u><b>\$0.00</b></u>	<u><b>\$572.81</b></u>	<u><b>\$0.00</b></u>	<u><b>\$0.00</b></u>
<b>NET BALANCE</b>	<u><b>(\$85.00)</b></u>	<u><b>\$0.00</b></u>	<u><b>(\$572.81)</b></u>	<u><b>\$0.00</b></u>	<u><b>\$0.00</b></u>

**Lawyer Referral Service**  
**Statement of Revenue and Expenses**

<b>REVENUE</b>					
LRS PARTICIPATION FEES	\$39,046.22	\$0.00	\$226,629.03	\$0.00	\$0.00
LRS SUBSCRIPTION FEES	6,771.30	0.00	38,052.33	0.00	0.00
<b>TOTAL REVENUES</b>	<u><b>\$45,817.52</b></u>	<u><b>\$0.00</b></u>	<u><b>\$264,681.36</b></u>	<u><b>\$0.00</b></u>	<u><b>\$0.00</b></u>
<b>EXPENSES</b>					
SALARIES	8,447.49	0.00	42,237.45	0.00	0.00
FICA & EMPLOYEE BENEFITS	607.75	0.00	9,380.72	0.00	0.00
BUILDING	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
BOND / INSURANCE	0.00	0.00	0.00	0.00	0.00
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	14,977.21	0.00	20,051.39	0.00	0.00
GENERAL EXPENSES	0.00	0.00	0.00	0.00	0.00
<b>TOTAL EXPENSES</b>	<u><b>\$24,032.45</b></u>	<u><b>\$0.00</b></u>	<u><b>\$71,669.56</b></u>	<u><b>\$0.00</b></u>	<u><b>\$0.00</b></u>
<b>NET BALANCE</b>	<u><b>\$21,785.07</b></u>	<u><b>\$0.00</b></u>	<u><b>\$193,011.80</b></u>	<u><b>\$0.00</b></u>	<u><b>\$0.00</b></u>

SOUTH CAROLINA BAR  
SECTIONS FUND BALANCES  
For the Five Months Ending Tuesday, November 30, 2021

	<b>YTD</b>
CONSTRUCTION LAW SECTION	
BEGINNING FY FUND BALANCE	\$31,181.14
YTD REVENUE	2,078.25
YTD EXPENSES	3,053.36
FUND BALANCE	\$30,206.03
CONSUMER LAW SECTION	
BEGINNING FY FUND BALANCE	4,956.53
YTD REVENUE	720.00
YTD EXPENSES	0.00
FUND BALANCE	\$5,676.53
CORPORATE, BANKING & SECURITIES SECTION	
BEGINNING FY FUND BALANCE	30,558.58
YTD REVENUE	1,365.00
YTD EXPENSES	0.00
FUND BALANCE	\$31,923.58
CRIMINAL LAW SECTION	
BEGINNING FY FUND BALANCE	19,557.33
YTD REVENUE	1,380.00
YTD EXPENSES	0.00
FUND BALANCE	\$20,937.33
DISPUTE RESOLUTION SECTION	
BEGINNING FY FUND BALANCE	9,270.05
YTD REVENUE	30.00
YTD EXPENSES	0.00
FUND BALANCE	\$9,300.05
EMPLOYMENT AND LABOR LAW SECTION	
BEGINNING FY FUND BALANCE	8,317.65
YTD REVENUE	2,364.68
YTD EXPENSES	2,000.00
FUND BALANCE	\$8,682.33
ENVIRONMENTAL & NATURAL RESOURCES SECTION	
BEGINNING FY FUND BALANCE	14,314.81
YTD REVENUE	725.00
YTD EXPENSES	0.00
FUND BALANCE	\$15,039.81
FAMILY LAW SECTION	
BEGINNING FY FUND BALANCE	31,388.30
YTD REVENUE	4,919.02
YTD EXPENSES	5,000.00
FUND BALANCE	\$31,307.32
GOVERNMENT LAW SECTION	
BEGINNING FY FUND BALANCE	6,315.02
YTD REVENUE	1,350.00
YTD EXPENSES	750.00
FUND BALANCE	\$6,915.02
HEALTH CARE LAW SECTION	
BEGINNING FY FUND BALANCE	11,691.79
YTD REVENUE	1,360.00
YTD EXPENSES	0.00
FUND BALANCE	\$13,051.79

SOUTH CAROLINA BAR  
 SECTIONS FUND BALANCES  
 For the Five Months Ending Tuesday, November 30, 2021

	YTD
MILITARY LAW SECTION	
BEGINNING FY FUND BALANCE	1,353.65
YTD REVENUE	510.00
YTD EXPENSES	0.00
FUND BALANCE	\$1,863.65
PROBATE, ESTATE PLANNING AND TRUST	
BEGINNING FY FUND BALANCE	16,591.91
YTD REVENUE	3,135.00
YTD EXPENSES	0.00
FUND BALANCE	\$19,726.91
REAL ESTATE PRACTICE SECTION	
BEGINNING FY FUND BALANCE	43,347.78
YTD REVENUE	4,560.00
YTD EXPENSES	0.00
FUND BALANCE	\$47,907.78
SOLO AND SMALL FIRM PRACTITIONERS	
BEGINNING FY FUND BALANCE	45,856.19
YTD REVENUE	5,700.00
YTD EXPENSES	827.72
FUND BALANCE	\$50,728.47
TAX LAW SECTION	
BEGINNING FY FUND BALANCE	7,266.52
YTD REVENUE	1,200.00
YTD EXPENSES	0.00
FUND BALANCE	\$8,466.52
TORTS AND INSURANCE PRACTICE SECTION	
BEGINNING FY FUND BALANCE	57,616.98
YTD REVENUE	2,990.00
YTD EXPENSES	0.00
FUND BALANCE	\$60,606.98
TRIAL AND APPELLATE ADVOCACY SECTION	
BEGINNING FY FUND BALANCE	22,501.43
YTD REVENUE	2,890.00
YTD EXPENSES	0.00
FUND BALANCE	\$25,391.43
WORKERS' COMPENSATION SECTION	
BEGINNING FY FUND BALANCE	12,329.56
YTD REVENUE	3,140.00
YTD EXPENSES	1,500.00
FUND BALANCE	\$13,969.56
BEGINNING OF YEAR FUND BALANCE	374,415.22
YTD REVENUE	40,841.95
YTD EXPENSES	13,131.08
TOTAL NET ASSET CHANGE	27,710.87
ENDING FUND BALANCE	\$402,126.09

**GRANTS & OTHER  
FUND BALANCES**  
For the Five Months Ending Tuesday, November 30, 2021

	<b>YTD</b>
ASK-A-LAWYER 19/20	
BEGINNING OF YEAR FUND BALANCE	\$30,000.00
YTD REVENUE	0.00
YTD EXPENSES	0.00
FUND BALANCE	\$30,000.00
 ASK-A-LAWYER 20/21	
YTD REVENUE	12,500.00
YTD EXPENSES	0.00
FUND BALANCE	\$12,500.00
 LRE GRANT FUND 20/21	
YTD REVENUE	75,000.00
YTD EXPENSES	75,000.00
FUND BALANCE	\$0.00
 LRE SALES AND REGISTRATIONS	
BEGINNING OF YEAR FUND BALANCE	0.00
YTD REVENUE	0.00
YTD EXPENSES	0.00
FUND BALANCE	\$0.00
 PRO BONO OTHER	
BEGINNING OF YEAR FUND	192,417.86
YTD REVENUE	14,581.00
YTD EXPENSES	0.00
FUND BALANCE	\$206,998.86
 PB INDIGENT SERVICE FEE	
BEGINNING OF YEAR FUND	57,611.18
YTD REVENUE	34,306.00
YTD EXPENSES	56,005.62
FUND BALANCE	\$35,911.56
 DISCIPLINARY FUND	
BEGINNING OF YEAR FUND	8,825.00
YTD REVENUE	(8,825.00)
YTD EXPENSES	0.00
FUND BALANCE	\$0.00
 DISPUTED FEES	
BEGINNING OF YEAR FUND	0.11
YTD REVENUE	0.00
YTD EXPENSES	0.00
FUND BALANCE	\$0.11
 LAWYER REFERRAL SERVICE	
BEGINNING OF YEAR FUND	382,722.79
YTD REVENUE	0.00
YTD EXPENSES	0.00
FUND BALANCE	\$382,722.79

GRANTS & OTHER  
FUND BALANCES  
For the Five Months Ending Tuesday, November 30, 2021

	<b>YTD</b>
LGOA GRANT - PRO BONO	
BEGINNING OF YEAR FUND BALANCE	4,351.57
YTD REVENUE	0.00
YTD EXPENSES	552.72
FUND BALANCE	\$3,798.85
PARALEGAL CERTIFICATION	
BEGINNING OF YEAR FUND BALANCE	14,375.50
YTD REVENUE	5,550.00
YTD EXPENSES	0.00
FUND BALANCE	\$19,925.50
BANK OF AMERICA GRANT	
BEGINNING OF YEAR FUND BALANCE	2,934.28
YTD REVENUE	0.00
YTD EXPENSES	17,959.58
FUND BALANCE	(\$15,025.30)
LAWYERS HELPING LAWYERS	
BEGINNING OF YEAR FUND BALANCE	5,411.33
YTD REVENUE	0.00
YTD EXPENSES	0.00
FUND BALANCE	\$5,411.33
BEGINNING OF YEAR FUND BALANCE	698,649.62
YTD REVENUE	140,102.00
YTD EXPENSES	149,517.92
TOTAL CHANGE IN NET ASSETS	(9,415.92)
ENDING FUND BALANCE	\$689,233.70

LAWYERS' FUND  
STATEMENT OF REVENUE AND EXPENSES  
WITH BALANCE SHEET  
For the Five Months Ending Tuesday, November 30, 2021

	November	YTD
<b>REVENUES</b>		
CONTRIBUTIONS	\$2,801.67	\$24,336.12
INVESTMENT INCOME	56.07	242.64
<b>TOTAL REVENUES</b>	<b>\$2,857.74</b>	<b>\$24,578.76</b>
<b>EXPENSES</b>		
AWARDS	16,275.00	33,075.14
GENERAL EXPENSES	56.59	68.59
<b>TOTAL EXPENSES</b>	<b>\$16,331.59</b>	<b>\$33,143.73</b>
<b>NET CHANGE</b>	<b>(\$13,473.85)</b>	<b>(\$8,564.97)</b>

**BALANCE SHEET**

<b>ASSETS</b>	
LFCP CHECKING	71,079.20
LFCP MONEY MARKET INVESTMENTS	988,398.86
<b>TOTAL ASSETS</b>	<b>\$2,724,309.57</b>
<b>LIABILITIES</b>	
<b>FUND BALANCE</b>	
BEGINNING OF YEAR FUND BALANCE	2,732,874.54
YTD REVENUE	24,578.76
YTD EXPENSES	33,143.73
NET CHANGE	(8,564.97)
<b>FUND BALANCE</b>	<b>\$2,724,309.57</b>
<b>TOTAL LIABILITIES AND FUND BALANCE</b>	<b>\$2,724,309.57</b>

SOUTH CAROLINA BAR  
Statement of Revenue and Expense  
Young Lawyers Division  
For the Five Months Ending Tuesday, November 30, 2021

	<u>MONTHLY ACTUAL</u>	<u>MONTHLY BUDGET</u>	<u>YTD ACTUAL</u>	<u>YTD BUDGET</u>	<u>ANNUAL BUDGET</u>
<b>REVENUE</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>EXPENSES</b>					
ANNUAL CONVENTION	0.00	0.00	0.00	0.00	0.00
SERVICE TO THE PUBLIC	708.70	0.00	708.70	0.00	0.00
SERVICE TO THE BAR	0.00	0.00	0.00	0.00	0.00
STRATEGIC PLANNING	0.00	0.00	0.00	0.00	0.00
DELEGATE EXPENSE	0.00	0.00	0.00	0.00	0.00
ADMINISTRATIVE	10,235.05	0.00	44,332.37	0.00	0.00
PUBLICATIONS/SCYL	0.00	0.00	0.00	0.00	0.00
PROJECT COMPLETION	0.00	0.00	0.00	0.00	0.00
<b>TOTAL EXPENSES</b>	<u><b>\$10,943.75</b></u>	<u><b>\$0.00</b></u>	<u><b>\$45,041.07</b></u>	<u><b>\$0.00</b></u>	<u><b>\$0.00</b></u>
<b>NET BALANCE</b>	<u><b>(\$10,943.75)</b></u>	<u><b>\$0.00</b></u>	<u><b>(\$45,041.07)</b></u>	<u><b>\$0.00</b></u>	<u><b>\$0.00</b></u>

**SOUTH CAROLINA BAR CLE - DIVISION**  
**BALANCE SHEET**  
**For the Five Months Ending Tuesday, November 30, 2021**

**CURRENT ASSETS**

SCBT CHECKING	\$666,752.22
MONEY MARKET/INVESTMENTS	788,563.72
PETTY CASH	150.00
ACCOUNT RECEIVABLES	5,716.82
PRE-PAID EXPENSE	57,497.17
GENERAL INVENTORY	211,854.85
<b>TOTAL CURRENT ASSETS</b>	<b>\$1,730,534.78</b>

CAPITAL ASSETS	0.00
<b>TOTAL ASSETS</b>	<b>\$1,730,534.78</b>

**CURRENT LIABILITIES**

ACCOUNTS PAYABLE	43,839.02
DUE:COMPANY 1	12,146.24
REFUNDS PAYABLE	0.00
CLE VACATION PAYABLE	86,286.56
FACILITIES PAYABLE	0.00
SEMINAR DEFERRED REVENUE	351,680.85
CASH HOLDING ACCOUNT	0.00
CONVENTION CASH HOLDING	72,186.00
SALES TAX RECEIVED	0.00
<b>TOTAL CURRENT LIABILITIES</b>	<b>\$566,138.67</b>

BEGINNING OF YEAR FUND BALANCE	1,294,172.76
YTD REVENUE	725,050.90
YTD EXPENSE	854,827.55
<b>NET CHANGE</b>	<b>(129,776.65)</b>

FUND BALANCE	\$1,164,396.11
<b>TOTAL LIABILITIES AND FUND BALANCE</b>	<b>\$1,730,534.78</b>

**SOUTH CAROLINA BAR CLE - DIVISION**  
**INCOME STATEMENT**  
**For the Five Months Ending Tuesday, November 30, 2021**

	<u>MONTHLY ACTUAL</u>	<u>MONTHLY BUDGET</u>	<u>YTD ACTUAL</u>	<u>YTD BUDGET</u>	<u>ANNUAL BUDGET</u>
<b>REVENUE</b>					
SEMINAR INCOME	\$19,635.00	\$50,800.00	\$286,465.00	\$254,000.00	\$810,000.00
E-CLE ACCESS	71,657.50	25,300.00	242,648.04	64,100.00	1,000,000.00
PUBLICATION INCOME	36,969.45	32,500.00	179,565.60	162,500.00	390,000.00
SCJ ROYALTY INCOME	0.00	0.00	0.00	0.00	100,500.00
CONVENTION	0.00	0.00	0.00	0.00	344,600.00
INTEREST INCOME	13.92	200.00	79.61	1,000.00	2,400.00
BUILDING RENTAL	500.00	200.00	700.00	600.00	2,000.00
SHIPPING REVENUE	3,226.45	2,100.00	15,592.65	10,300.00	25,000.00
<b>TOTAL REVENUE</b>	<b>\$132,002.32</b>	<b>\$111,100.00</b>	<b>\$725,050.90</b>	<b>\$492,500.00</b>	<b>\$2,674,500.00</b>
<b>EXPENSE</b>					
CLE SALARIES	64,043.40	79,800.00	337,786.02	398,600.00	957,200.00
BENEFITS	15,968.65	19,350.00	109,478.54	126,400.00	350,800.00
BUILDING ACCOUNT	5,300.00	5,300.00	32,457.76	26,500.00	63,600.00
EQUIPMENT & FURNITURE	241.83	0.00	6,755.83	4,000.00	4,000.00
EQUIPMENT MAINTENANCE	7,124.72	6,100.00	27,262.54	30,500.00	74,000.00
OFFICE SUPPLY EXPENSE	276.50	600.00	2,018.35	3,000.00	6,800.00
POSTAGE EXPENSE	0.00	0.00	4.80	0.00	500.00
SHIPPING EXPENSE	5,343.59	2,100.00	17,202.50	10,300.00	25,000.00
TELEPHONE EXPENSE	587.24	900.00	2,739.34	4,500.00	10,800.00
STAFF EXPENSE	439.50	800.00	2,188.75	4,000.00	9,100.00
STAFF EDUCATION	0.00	300.00	0.00	1,400.00	3,500.00
CLE COMMITTEE EXPENSE	0.00	0.00	106.54	0.00	500.00
BOND & INSURANCE	559.29	1,000.00	2,796.45	5,000.00	12,000.00
PROFESSIONAL FEES	3,095.50	0.00	10,345.50	0.00	32,000.00
CASUAL LABOR	0.00	0.00	0.00	0.00	500.00
SEMINAR DIRECT	31,368.12	22,900.00	156,532.61	114,700.00	275,000.00
E-CLE ACCESS	8,403.97	9,300.00	41,379.85	46,500.00	111,600.00
PUBLICATION DIRECT	13,586.25	11,000.00	56,936.41	55,600.00	132,600.00
PUBLICATION ROYALTIES	0.00	0.00	7,575.00	0.00	93,600.00
CONVENTION	0.00	0.00	0.00	0.00	305,900.00
MEDIA SERVICES DIRECT	716.14	400.00	360.36	2,000.00	5,000.00
BANKCARD CHARGES	5,466.00	4,200.00	20,543.46	21,000.00	50,000.00
MARKETING	4,327.75	4,200.00	20,356.94	21,000.00	50,000.00
<b>TOTAL EXPENSE</b>	<b>\$166,848.45</b>	<b>\$168,250.00</b>	<b>\$854,827.55</b>	<b>\$875,000.00</b>	<b>\$2,574,000.00</b>
<b>NET CHANGE</b>	<b><u>(\$34,846.13)</u></b>	<b><u>(\$57,150.00)</u></b>	<b><u>(\$129,776.65)</u></b>	<b><u>(\$382,500.00)</u></b>	<b><u>\$100,500.00</u></b>





## Trial and Appellate Advocacy Section

### MEMORANDUM

TO: House of Delegates  
FROM: Amie L. Clifford  
Chair  
RE: 2021 Trial and Appellate Advocacy Section Award  
DATE: December 16, 2021

The Trial and Appellate Advocacy Section is pleased to announce that **Thornwell F. “Biff” Sowell** has been selected as the recipient of its **2021 Trial and Appellate Advocacy Section Award**. Council member Bess J. DuRant will join you at your January 20, 2022 meeting to present the Award to Mr. Sowell.

### **The Award**

The Trial and Appellate Advocacy Section of the South Carolina Bar bestows its award to a lawyer who has demonstrated outstanding commitment to trial and appellate advocacy in the legal profession. The award is presented during the South Carolina Bar’s annual convention.

The Award is open to individual lawyers who maintain a trial and/or appellate practice. No more than two (2) awardees are selected from time to time from those who have excelled in one or more of the following ways:

- Demonstrated substantial dedication to the furtherance of the art and techniques of trial and appellate advocacy in the State of South Carolina;
- Displayed outstanding and exemplary skill and conduct in his/her practice of trial and/or appellate advocacy; and/or
- Devoted substantial time and effort to the education and training of lawyers in the areas of trial and appellate advocacy.

### Past Award Recipients

2007: E. Warren Moise	2015: John S. Nichols
2009: Robert J. Thomas	2017: John I. Mauldin
2012: William W. “Billy” Wilkins	2018: Brett H. Bayne
2013: Robert E. Stepp	2019: Whitney B. Harrison
2014: Richard H. Willis	2020: Mark R. Farthing



# Report of the President

January 2022

Mary E. Sharp

## Communications

The Communications Division in partnership with other SC Bar divisions, sections and committees continues to highlight Bar member success stories and ways lawyers positively impact South Carolina across digital and print channels.

The team launched the **Saturday Shoutout** feature on Facebook in May 2021 to showcase member successes. Recent successful social media campaigns also highlighted veterans, videos about the impact of mediation and a month-long Palmetto Pro Bono campaign in October 2021.

The **South Carolina Lawyers Deskbook** 2021-22 edition was mailed in November to members who pre-ordered. Members had the option to order 2022-23 editions on their license fees. The number of orders received will determine if a print edition will be produced for 2022-23.

**SC Lawyer** magazine published on schedule throughout 2021. A Q&A feature called "The Closing Statement," that highlights Bar members' contributions to the profession and South Carolina continues and included an interview with Judge James Lockemy in January 2022. The Editorial Board is always looking for article contributions and is currently exploring improving the magazine's digital experience for readers.

In addition to news items and announcements, **eBlast** featured member spotlights including pro bono volunteers and mediators in October. The e-newsletter is distributed twice a week (Tuesdays and Thursdays) and features court summaries on Thursdays.

### Social media update since May 2021:

There were 107 new Twitter followers for a total of 5,655. The top-performing tweet in that timeframe was a Veterans Day tribute to member Anthony Livoti.

There were 287 new Facebook likes for a total of 5,065. The top post was about Adoption Day with Judge George McFaddin.

There were 53 new LinkedIn followers for a total of 1,564. The top post was about Michael Abro joining the Lawyers Helping Lawyers program.

The YLD Instagram account has 1,549 followers, an increase of 19.

The Communications Division led an effort to update the SC Bar's **main phone line** in summer and fall 2021 to improve customer service to members and the public. The revamped menu includes a Spanish option and voicemail. The Pro Bono Program in partnership with the University of South Carolina School of Law students assists these callers.

## Continuing Legal Education

By order dated March 31, 2021, the S.C. Supreme Court extended the waiver for in-person CLE through the 2022 MCLE compliance deadline of March 1, 2022. However, to make Bar-sponsored CLE more

accessible, the CLE Division began offering in-person, live webcast, and archived on-demand program options for almost all its seminars and workshops in July 2021.

Through the compliance period, the Division will have offered 52 live and live webcast seminars on a wide variety of topics including federal practice, family law, civil and family mediation certification, criminal law, real estate, estate planning and probate, equity, evidence, practice management, technology, substance abuse and mental health, torts and trial practice, construction, employment, and business law.

In addition, the Division has more than 700 archived on-demand programs covering more than 50 practice areas and ranging in duration from 30 minutes to six hours.

The Division has also continued its important partnerships with Bar sections, committees and divisions, as well as with organizations such as the South Carolina Administrative and Regulatory Law Association, the American Board of Trial Advocates, the American Academy of Trial Lawyers, the American Academy of Matrimonial Lawyers, the South Carolina Association of Criminal Defense Lawyers, the Federal Bar Association, the South Carolina State Guard, and the ABA Judicial Division to present significant CLE programming.

The CLE Big Ticket continues to gain momentum as more and more Bar members recognize the value of a one-year subscription with virtually unlimited access to the Bar's CLE programs at a price that is less than that for two full-day seminars.

The Division will continue to offer a wide variety of content featuring the best speakers and materials possible in live, live webcast, and on-demand options for maximum convenience to Bar members.

#### **CLE Publications**

The following titles were published from May-December 2021:

- *A Guide to Civil Practices and Procedures in Magistrate Court*
- *Elements of Civil Causes of Action, Sixth Edition*
- *Masters-in-Equity and Special Referees in SC, Fifth Edition*
- *Practicing before the US Court of Appeals for the Fourth Circuit: A Guide from Start to Finish*
- *SC Business Torts*
- *SC Drug Case Tool Kit, Third Edition*
- *SC Evidence Annotated, Sixteenth Edition*
- *SC Family Law Mediation: A Guide for Attorneys and Mediators*
- *The SC Guardian ad Litem's Toolkit, Second Edition*
- *The SC Law of Legal Malpractice, Second Edition*
- *SC Litigation Handbook, Second Edition*
- *SC Rules Annotated 2021*
- *Service of Process in SC, Fifth Edition*
- *Traumatic Brain Injury Litigation*
- *Trust Accounting for SC Lawyers: An Annotated Practice Manual*

Three active formatting and editing projects are underway, and the annual after-Thanksgiving sale ran from November 29 - December 10, 2021.

#### **Convention**

The 2022 SC Bar Convention in Greenville features:

- 26 seminars with 160+ speakers

- 30 Exhibitors; 25 Sponsors (corporate and law firm)
- A variety of events including the President's Welcome Reception at Old Cigar Warehouse, the Plenary Luncheon, MakeMade Jewelry, Judicial and Legislative Receptions, Stone Pin Bowling, TopGolf, and Wine Dinner with local pianist Emile Pandolfi.

The 2023 Convention will be held January 19-22, 2023, at Columbia Metropolitan Convention Center.

### **Government Affairs**

The Government Affairs Division continues to be active in State House matters, monitoring and advising on a variety of issues important to the legal community. It also serves as a resource for South Carolina's lawyer legislators. The South Carolina General Assembly adjourned sine die in May 2021 but continued to meet sporadically through December to address various COVID related measures, funding, and redistricting.

Bills were pre-filed in the House of Representatives on November 10 and November 17. No bills have been pre-filed in the Senate as of mid-December.

### **Lawyers Helping Lawyers**

Since July 2021, Lawyers Helping Lawyers staff (including Michael Abro, Beth Padgett, and Robert Turnbull):

- Served as moderators during the national 2021 Commission on Lawyers Assistance Programs Conference.
- Provided continuing legal education related to SA/MH to approximately 485 lawyers.
- Trained 21 lawyers and law students in Mental Health First Aid.
- Continue to provide columns on a quarterly basis for the SC Lawyer Magazine
- In-person office hours at both law schools were held during this fall semester and will continue in spring semester 2022.

In 2022, the Lawyers Helping Lawyers will:

- Lead an engagement group on the Charleston School of Law campus starting in January.
- Host additional Mental Health First Aid trainings.
- Host a three-seminar diversity CLE series with seminars in February, May, and September.
- Continue to provide continuing legal education related to SA/MH. Seminars are currently scheduled through September of 2022.
- Expand education and outreach services to previously underserved lawyers in previously underserved geographic areas.

### **Law Related Education Division**

The SC Bar's Law Related Education (LRE) is a service arm of the Bar that, since the mid-1980s, has provided teachers, school resource officers, juvenile justice personnel, and lawyers with resources,

materials and technical assistance to teach law and citizenship education. Director Cynthia H. Cothran along with Manager Donald Lanier and Coordinator Marian Kirk carry out the statewide programs and since last May have organized the following programs:

**In General:** The LRE Division analyzed the situation with schools participating in-person and virtually compared with what courthouses were permitting for competition purposes. As a result, virtual competitions were planned for the 2021-22 school year. In preparation for those competitions, the virtual rules, process, and case were developed. LRE also worked with the Zoom representative in acquiring the necessary Zoom accounts to meet the competition needs. In addition, the Mock Trial Coaches' Manual had sections updated and released in addition to updated Mock Trial trainings.

**Middle School Mock Trial:** The virtual regional competition was held November 12 and 13 with 14 teams competing. There were 81 attorney volunteers serving as attorney coaches and judges for the two-day virtual competition. The 2021 Regional Winner was J-E-T Middle School in Edgefield County with its second win in a row. The first runner-up was Dent Middle School in Richland County.

**High School Mock Trial:** Preparations are underway for three virtual regional competitions planned for February 25-26, 2022, with 49 teams competing. Twelve teams will be announced as advancing to the second virtual state competition planned for March 10-12, 2022. The National High School Mock Trial Board has not decided if the May 2022 competition will be in-person or virtual.

**We the People: The Citizen and the Constitution:** Ten teams competed in the virtual competition on December 9, 2021. The state high school winner was River Bluff High of Lexington, which will represent South Carolina at the National Finals in April 2022. Palmetto Academy of Success in Myrtle Beach won the middle school division. LRE is anticipating a decision to be made by the Center for Civic Education on the proposed format for the national We the People competition.

**Trainings:** The Division hosted webinar trainings for Mock Trial. A virtual We the People training was also conducted. Virtual School Resource Officer trainings were conducted at the SC Criminal Justice Academy's studio for virtual attendance.

**Other:** Mr. Lanier assisted with the Judicial Qualification Zoom process, format, and Zoom oversight on the days it took place.

## **Media Services and IT**

From June to December 2021, the Media Services team:

- Broadcast/Webcast and provided A/V support for over 20 CLEs including the Essentials series for new attorneys and two UofSC Law School programs (ABA Celebration and YLD Litigation Jungle).
- Worked with NC Bar on two joint CLEs in Charleston; Construction Law (Sept. 17) and NC/SC Employment & Labor Conference (Oct. 29-30). The Employment & Labor Conference was also streamed to NC attorneys.
- Provided A/V support for House of Delegates meeting in Beaufort.
- Shot/edited NextGen videos for Communications Division. Videos designed to engage/enlist new attorneys to consider joining committees and/or sections of the Bar.
- Shot/edited an updated phone messages for all departments of the SC Bar.
- Shot/edited short ads for upcoming/new SC Bar publications.
- Began testing Windows 11 for future company-wide implementation.

## **Membership Services**

- Membership Services staff processed 345 new admittees since June 1, 2021.

- The 2022 License Fee collection is in process.
- The annual meeting of Bar chairs was held in September 2021.
- Staff attended the 6<sup>th</sup> Circuit holiday party and made Bar photo IDs for attendees.
- Nominations are being collected for **odd circuit** and **out-of-state delegates** to the House of Delegates.
- The **Memory Hold the Door Committee** will honor 12 members at the January 2022 ceremony.
- Membership Services director serves as chair of the National Association of Bar Executives Scholarship Committee and as a member of the Membership Committee.
- **SC Board of Paralegal Certification** met several times and made a presentation to the Access to Justice Commission on expanded roles for paralegals. There are currently 76 SC Certified Paralegals.

### **Practice Management Assistance Program (PMAP)**

PMAP Director Courtney Troutman assisted lawyers with practice management related questions, including opening and closing a practice, succession planning and retirement, partnership dissolutions, choosing and using law office technology, internet fraud, insurance, trust accounting, internet marketing, and more.

The director:

- Assisted lawyers with Microsoft 365 and practice management questions via individual Zoom consultations. The director planned and moderated a CLE webinar on internet marketing.
- Authored articles and edited contributions to the Bar Bytes column for *South Carolina Lawyer* and was a contributor to the Attorney at Work web publication.
- Moderates the bar's 387-member Solo listserv and monitors and responds to bar or practice-related inquiries posted by bar members on the 2900-member My Legal BFF Facebook account.
- Is active in the ABA LP Division's Ethics and Professionalism committee.

The PMAP team continually updated its web page content and refreshed the look of numerous pages.

- Online forms were monitored and updated as needed.
- More than 126 free law office specific management or technology webinars were posted on the PMAP Webinars page between April and December 2021.

The PMAP assistant oversaw Bar Book Exchange donations of almost 15,000 used law books and assisted with numerous research projects for PMAP, drafted and shared regular tips for e-Blast and Twitter and managed the Lending Library.

The PMAP team took part in twice monthly virtual technology product demonstrations, tested law office software, trained in LEAP case management software, attended Practice Management Advisors of North America meetings, and attended a number of virtual CLEs.

**Member discounts** - PMAP continued oversight and management of the member benefits discounts program, including accounting, responding to current and new vendors, answering bar member's questions, reviewing new promotional materials, working with Communications staff, and assisting the Member Benefits Taskforce and the Bar director.

**Fastcase** – PMAP answered member questions, provided Fastcase tips through social media, posted Fastcase training webinars, worked with Communications staff to promote Fastcase to members, and coordinated with Fastcase on quality control and marketing.

## **Pro Bono Program**

### **COVID-19 Pro Bono Hotline**

Over 800 messages have been left on the COVID-19 Pro Bono Hotline since it went live in April 2020.

### **Palmetto Volunteer Lawyer Project**

The Palmetto Volunteer Lawyer Project continues to be available for Bar members to look at available pro bono cases online. Currently, the Pro Bono Program, Charleston Pro Bono Legal Services, Root & Rebound SC, South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA) and the Midlands Fatherhood Coalition are able to post cases on the site. By partnering with organizations around the state, the PVLP can bring attention to the organizations and their need for pro bono attorneys and to provide a wide selection of pro bono opportunities to Bar members.

The PVLP does not require registration, a username, or a password. Instead, available cases can be viewed by simply going to the Pro Bono Program page on the Bar website. In addition, available cases can be "embedded" on other websites. For instance, Greenville cases are currently embedded on the Greenville Bar website and Charleston Pro Bono Legal Services cases are embedded on their website. The Family Law Section and the Probate, Estate Planning and Trust Section will be entertaining requests by the Pro Bono Program to have available cases in those practice areas embedded on their section pages. This will increase opportunities for Bar members to view available cases.

Finally, all a volunteer must do is click the "Interested?" button on the case card, provide some basic information (name, email address, phone number, and Bar number) and click "Submit." The partner program that posted the case will receive an email and follow-up with additional information about the case so that the volunteer attorney can make a final decision whether to accept the case. **Clicking the "Interested?" button does NOT result in automatic assignment of the case.** An FAQ sheet is being prepared and will be distributed once the additional partners have completed the onboarding process.

### **Pro Bono Calls/Referrals**

In the last several months, the Pro Bono Program has seen a significant increase in the number of calls received. The average number has increased from 300 calls to 350 per month to its non-COVID lines. In 2021, South Carolina Bar members have accepted referral of approximately 50 pro bono cases.

### **South Carolina Supreme Court Honor Roll**

The SC Supreme Court published the 2020 Pro Bono Honor Roll with 298 names of SC Bar members.

### **Wills Clinics**

The Pro Bono Program continues to partner with the USC School of Law Pro Bono Program to provide wills and powers of attorney for indigent citizens around the state. We have been able to expand the reach of these clinics by using the new Palmetto Leader bus. Clinics have been held in Darlington, McColl, Ridgeland, and Kingstree. Not only has the bus allowed for further outreach to clients, but it has also allowed SC Bar members in these locations an opportunity to provide pro bono legal assistance.

### **South Carolina Free Legal Answers**

The SC Free Legal Answers website continues to see heavy traffic from South Carolinians seeking answers to civil legal questions. We have resumed having once a month Free Legal Answers Blitzes with the USC School of Law students and had one in partnership with the Charleston School of Law and Butler Snow in Charleston.

### **Family Court Summit**

Pro Bono Program Director Betsy Goodale continues to work with Hannah Honeycutt, Executive Director of the South Carolina Access to Justice Commission, Brett Lamb, Pro Bono Board Chair and family law practitioner, and Lauren Barnwell of the South Carolina Victim Assistance Network, to plan a Family Court Summit scheduled for March 18, 2022. This summit will address the issue of self-represented litigants in family court and how the Pro Bono Program and other organizations can provide assistance to the family court. The planning committee is working with the National Center for State Courts, the Institute for the Advancement of the American Legal System, and the Self Represented Litigant Network in choosing and scheduling speakers and topics. Chief Justice Beatty has designated a family court judge from each circuit to attend.

Family court clerks of court will also be invited, as well as representatives of organizations that represent clients in family court and some private family law practitioners.

### **Public Services**

The Bar offers a variety of free, public programs designed to connect volunteer attorneys with their communities. Cindy Coker leads this division, which in addition to the Pro Bono Program, includes clinics, the Law School for Non-Lawyers programs, the Client Assistance Program, the Resolution of Fee Disputes Board, the Lawyers' Fund for Client Protection Program, and the Lawyer Referral Service.

**Law School for Non-Lawyers** – Fall 2021 sessions were held in person at York Technical College and Tri-County Technical College. The sessions allow members of the public to interact with lawyers and learn about various topics such as the court system, family law, landlord tenant and others. The Division is in the process of scheduling the spring sessions.

A total of 58 **free, educational legal clinics** were held across the state from September through December 2021. Most of those returned to in-person presentations. Greer Relief/VISTA and the Chapin Memorial Library continued to offer the programming via a web-based platform. In-person sessions were held at the Conway Library, the Lake Wylie Library and various branches of the Lexington, Charleston, Pickens, and Spartanburg County library systems. The Division is currently scheduling sessions for the Spring 2022.

The **Resolution of Fee Disputes Board** processed 57 new claims since July 1. Of those, 41 were sent out for assignment and 16 were returned to the complainants. There are currently 58 claims pending.

Since July 1, the **Lawyers' Fund for Client Protection Program** received 18 new claims, resolved 21 and had 28 pending as of December 6, 2021.

The **Lawyer Referral Service** operators continue to operate remotely due to COVID concerns. From January 1, 2020, to December 6, 2020, the service made 18,519 referrals. From January 1, 2021, to December 6, 2021, the service made 21,185 referrals, with represents an increase of 2,666 referrals.

### **Risk Management and Mentoring**

Risk Management Director Nichole Davis oversees implementation of the Lawyer Mentoring Program, serves as a faculty member for ethics CLE programs, provides diversity training, administers the Ethics Hotline, and provides substantive and administrative support to the following committees: Ethics Advisory, Professional Responsibility, and Professional Liability.

### **Mentoring Program**

The SC Bar administers the mandatory Lawyer Mentoring Program, which includes recruiting new mentors, providing mentor training, and fostering mentor/mentee relationships. Bar members have continued to volunteer to serve as mentors throughout the pandemic.

### **Ethics Hotline**

Nichole Davis is available to answer members' ethics questions, provide analysis of the Rules of Professional Conduct as applied to certain facts, and make recommendations regarding risk management, while leaving final decisions to the inquiring Bar member. All conversations are confidential and protected by Rule 8.3(f) of the S.C. Rules of Professional Conduct. Members can call (803) 576-3820 or send an email to [ndavis@scbar.org](mailto:ndavis@scbar.org).

Recent **presentations** include:

- *Protecting Yourself While Advocating for Your Client* - 2021 Lawyers Fund CLE
- *Ethical Considerations and Best Practices for Attorneys in Education Law* – 2021 SC Council of School Attorneys
- *Ethical Best Practices in Labor & Employment Law* – 2021 NC/SC Labor and Employment Law Conference
- *Back to Basics: An Ethics Overview* – 2021 SC Black Lawyers Association Conference
- *Implicit Bias in the Legal Profession* – 2021 SCWCEA Conference
- *Implicit Bias and Leadership* – 2021 Leadership South Carolina

## **Committees, Divisions and Sections**

The **Alternative Dispute Commission** proposed changes to Rules 2, 3, 5, 9 and 20 and Mediator Standards of Conduct IV. Two members of the Commission, Carol Sanders, and Pamela Deal, retired. New members Almond Barron and Holly Wall were appointed to those seats.

The **Dispute Resolution Section** offered one CLE program via webcast as a member benefit. Its plans include working with the CLE Division to offer more CLE programming in the on-demand format. The Section Council also proposed an amendment to SCRPC 43(k) which has been filed with the South Carolina Supreme Court.

The **Family Law Section Council** has been involved in discussions about the use of technology in hearings going forward. They recently invited several family court judges and Justice Kittredge to their meeting to discuss these issues.

The **Diversity Committee** reviewed and distributed the results of the member survey and will be meeting with other stakeholders in the profession. The Committee hosted a pre-law advisor training attended by representatives from 25 colleges across the state and established a Diversity Law Clerk program that will begin in the summer of 2022.

The **Ethics Advisory Committee** has issued two Ethics Advisory Opinions (EAO 21-01 and EAO 21-02) and is currently working on other opinions.

The **Intellectual Property and Innovation Committee** met January, February, March, April, June, August, September, and October with guest speakers from the business and legal communities. Two members of the IPI committee joined the Technology committee focus group on proposed ethics rule changes.

The **Judicial Independence and Impartiality Committee** was established by the Board of Governors. Beverly Carroll of Rock Hill serves as chair. Its purpose is to promote the importance of an independent judiciary by: responding to unjust criticism when rules of conduct prevent individual judges from making

public statements; addressing inaccuracies and misinformation reporting criticism of judges and courts, serving as a resource for unbiased information concerning judicial activities and court process; and educating the public on the role of judges and lawyers in our democracy.

The committee wrote a commentary that was published in *The Post and Courier* in late October 2021. Going forward, the committee will meet regularly and plans to post responses on its website and share with Bar members via eBlast, as it did in October.

**The Judicial Qualifications Committee** conducted a robust screening cycle from July to September. The Committee employed a computerized form designed by Donald Lanier to conduct surveys that was very well received by our members. It conducted interviews with all the incumbent judges and judicial candidates via the Zoom platform.

The **Professional Responsibility Committee** prepared several proposals to be presented to the SC Bar House of Delegates.

The **Solo and Small Firm section** grew to almost 900 members with over one-third participating in the PMAP moderated Section listserv. Section council met in April, July, and December 2021. The Section sponsored two free CLE webinars for its members, planned by the PMAP director. Section Council chose Michael J. Polk as the recipient of the 2020 Solo & Small Firm Lawyer of the Year award and in December was slated to consider 2021 nominees.

The **Senior Lawyers Division** hosted the Nifty Fifty event, a fall retreat and is coordinating a 2022 trip to Scotland.

The **Technology Committee** met in April, July, and October 2021. The committee formed a focus group which met in September to study proposed ethics rule changes regarding internet marketing.

The **Young Lawyers Division** held several summer law clerk receptions in Myrtle Beach, Charleston, and Columbia as well as new member receptions in Columbia, Rock Hill, Lancaster, and Charleston.

The Division held a networking event with the South Carolina Bankers Association, a professional development event with State Representative Seth Rose and a disaster relief CLE. It hosted a summer backpack drive, a Voices Against Violence necessities drive and a Families Forever toy drive. Members participated in a Pro Bono lunch and learn and the Steppin' Up to Health Challenge.



**Materials for this item will be sent separately.**



SCRCP Rule 26, like most of the original SCRCP, was patterned on the Federal Rules of Civil Procedure, and specifically FRCP 26. As time has gone on the federal rules have been amended, and it was left to this committee to seek to adapt the SCRCP to meet more “modern” times when it was appropriate and consistent with state law.

All of us who deal with experts often send them via email or regular mail articles we’ve located on our own, or ideas that we think of during the day, knowing that a spontaneous unscheduled phone call will likely go unanswered or interrupt other workflow. We all also know that scheduling a call at a mutually convenient time is a tedious task and it can take a week or longer before the schedules coincide with a mutually convenient time. Having such communications be discoverable impedes effective communication between a party’s attorney and an expert witness.

The proposed amendments to SCRCP Rule 26 still will not require expert witnesses to provide a written report or impose any additional requirements on them. The proposed amendments instead protect communications, except the three narrow classes of communications, between a party’s attorney and any witness designated as an expert.

Specifically, the proposed amendments to SCRCP Rule 26(b)(4) attempt to make the state rule similar to the recent changes to the parallel FRCP 26(b)(4)(C) governing the discovery of communications between a party’s attorney and expert witnesses.

The Federal Rule subpart (ii)—in excepting certain communications from protection—reads as follows: “(ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed.” Fed. R. Civ. P. 26(b)(4)(C)(ii). The language in our proposal requires the expert to have both considered and relied upon facts or data for the communication setting forth those facts and data to be unprotected and produced.

The new subdivision (D) to be added would now read as follows:

(D) Trial-Preparation Protection for Communications Between a Party’s Attorney and Expert Witnesses. Rule 26(b)(3) and Rule 26(b)(4)(A) protect communications between the party’s attorney and any witness designated as an expert, regardless of the form of the communications, including draft reports, except to the extent that the communications:

- (i) relate to compensation for the expert’s study or testimony;
- (ii) identify facts or data that the party’s attorney provided, and that the expert considered **and relied upon** in forming the opinions to be expressed; or,
- (iii) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.

## Rule 26, SCRPC

This document reflects changes received through October 1, 2021

*SC - South Carolina State & Federal Court Rules > SOUTH CAROLINA RULES OF CIVIL PROCEDURE > V. DEPOSITIONS AND DISCOVERY*

### **RULE 26 GENERAL PROVISIONS GOVERNING DISCOVERY**

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#### **(a) Discovery Methods.**

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions. The frequency or intent of use of discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this Rule.

#### **(b) Scope of Discovery.**

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

##### **(1) In General.**

—Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the

## Rule 26, SCRPC

information sought appears reasonably calculated to lead to the discovery of admissible evidence.

**(2) Insurance Agreements.**

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

**(3) Trial Preparation: Materials.**

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

**(4)****(A) Trial Preparation: Experts.**

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by any discovery method subject to subdivisions (b)(4)(B) and (C) of this rule, concerning fees and expenses, and subdivision (b)(4)(D).

**(B)** A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specially employed.

**(C)** Upon the request of the party seeking discovery, unless the court determines otherwise for good cause shown, or the parties agree otherwise, a party retaining an expert who is subject to

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deposition shall produce such expert in this state for the purpose of taking his deposition, and the party seeking discovery shall pay the expert a reasonable fee for time and expenses spent in travel and in responding to discovery and upon motion the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rule 26(b)(3) and Rule 26(b)(4)(A) protect communications between the party's attorney and any witness designated as an expert, regardless of the form of the communications, including draft reports, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided, and that the expert considered and relied upon in forming the opinions to be expressed; or,

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

**(5) Claims of Privilege or Protection of Trial Preparation Materials- .**

**(A) Information Withheld**

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

**(B) Information Produced.** If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The producing party must preserve the information until the claim is resolved.

**(A)** A party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the

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requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery, including allocation of expenses associated with discovery of the electronically stored information.

**(B)** On motion or on its own motion, the court shall limit the frequency or extent of discovery otherwise allowed by these rules if the court determines that:

- (i)** the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii)** the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii)** the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

**(c) Protective Orders**

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

—If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

**(d) Sequence and Timing of Discovery**

. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a

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party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

**(e) Supplementation of Responses**

. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except that requests for discovery under Rules 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, shall be promptly transmitted to the other party.

In addition, a party is under a duty seasonably to supplement his response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

**(f) Discovery Conference**

. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorneys for any party if the motion includes:

- (1) A statement of the issues as they then appear;
- (2) A proposed plan and schedule of discovery;
- (3) Any limitations proposed to be placed on discovery;
- (4) Any other proposed orders with respect to discovery;
- (5) A statement of any issues relating to discovery of electronically stored information, including the form or forms in which it should be produced;
- (6) A statement of any issues relating to claims of privilege or of protection as trial preparation material, including -- if the parties agree on a procedure to assert such claims after production -- whether the parties wish to have the court include their agreement in an order; and
- (7) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the

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proper management of discovery in the action. An order may be altered or amended whenever justice so requires. Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial hearing authorized by Rule 16.

**(g) Signing of Discovery Requests, Responses, and Objections**

. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification in accordance with Rule 11.

**(1) Filing, Service and Custody**

. Except as provided in Rule 30(h), the party requesting discovery shall serve the request on other counsel or parties, but not file the notice or materials or matters discovered. The requesting party shall retain the originals and shall file the originals with the clerk of court when the same are to be used at a hearing or at trial.

**(2) Destruction**

. One year after the final termination of an action in which discovery other than depositions has been taken, the party taking the other discovery or the clerk of court, as the case may be, may destroy or otherwise dispose of the original discovery requests and responses.

Annotations

## Commentary

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**COMMENT****Note:**

This is the language of Federal Rule 26(a) as amended August 1, 1983. The second part was added to address the problem of duplicative, redundant, and excessive discovery by encouraging judges to identify instances of needless discovery and to limit the uses of the various discovery devices accordingly. This rule changes State procedure by permitting discovery by deposition upon written questions and also mental and physical examinations.

**Note:**

This is the language of Federal Rule 26(b). It is substantially equivalent to the language of Circuit Court Rule 87B with minor editorial changes. In particular it has the same scope of discovery--"relevant to the subject matter."

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**Note:**

This is the language of the Federal Rule 26(b)(2) and authorizes discovery of insurance agreements by any discovery method. Circuit Court Rule 90(e) presently authorizes an interrogatory to discover the names and addresses of all insurance companies which have liability insurance relating to the claim and the numbers and amounts of the policies. Thus, this language does not produce any significant change in existing State practice.

**Note:**

This is the language of Federal Rule 26(b)(3). There is no equivalent Circuit Court Rule on this subject although there is existing common law providing similar protection. This provision is added to clarify and standardize the law on the issue.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

**Note:**

This is a continuation of paragraph (b)(3), of the Federal Rule and provides for the discovery of statements by parties and witnesses. This is comparable to Circuit Court Rule 90(e)(1) which provides for the discovery of the existence of statements taken from witnesses.

**Note:**

Rule 26(b)(4) is based upon the comparable Federal Rule. The language is changed to permit discovery of an expert expected to testify at trial by any means and without any special showing of need. There is also a requirement that the party is not required to disclose an expert casually or informally consulted or one consulted but not specially employed. This is similar to the result reached under the federal rules and its Advisory Notes to 26(b)(4)(B). 26(b)(4)(C) is changed to require a party producing an expert for deposition to do so in this state. The discovering party is specifically made responsible for reasonable fees and expenses incurred in traveling to this state, as well as the time spent in responding to the discovery.

**Note to 1986 Admendment:**

This amendment to Rule 26(b)(4)(C) replaces the "manifest injustice" standard with that of "good cause shown" to conform to similar references to the standard for controlling discovery practice in other Rules.

## Rule 26, SCRPC

**Note to 1996 Amendment:**

Rule 26 is amended to add paragraph (b)(5) requiring a party to notify the other parties that it is withholding information otherwise discoverable on grounds of privilege or work product. The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. The rule does not specify 7/12/2021 <https://www.sccourts.org/courtReg/printSection.cfm> <https://www.sccourts.org/courtReg/printSection.cfm> 4/33 the detail required which will depend upon the facts of each case. The rule applies to material otherwise discoverable, and does not require disclosure of information that is privileged. A motion challenging the claim of privilege or work product normally is decided by the court after an in camera inspection of the materials. Non-parties have a similar obligation when responding to a subpoena under Rule 45(d)(2), SCRPC, and there is similar language in the comparable federal rules.

**Note to 2011 Amendment:**

The amendments to Rules 16, 26, 33, 34, 37 and 45 of the South Carolina Rules of Civil Procedure concerning electronic discovery are substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure. The rules concerning electronic discovery are intended to provide a practical, efficient and cost-effective method to assure reasonable discovery. Pursuit of electronic discovery must relate to the claims and defenses asserted in the pleadings and should serve as a means for facilitating a just and cost-effective resolution of disputes.

**(6) Electronically Stored Information.****Note to 2011 Amendment:**

The amendments to Rules 16, 26, 33, 34, 37 and 45 of the South Carolina Rules of Civil Procedure concerning electronic discovery are substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure. The rules concerning electronic discovery are intended to provide a practical, efficient and cost-effective method to assure reasonable discovery. Pursuit of electronic discovery must relate to the claims and defenses asserted in the pleadings and should serve as a means for facilitating a just and cost-effective resolution of disputes.

**Note:**

This is the language of Federal Rule 26(c). Exactly the same language was recently adopted as Circuit Court Rule 96.

**Note:**

This is the language of Federal Rule 26(d). There is no equivalent in the Circuit Court Rules. The purpose of the paragraph is to prevent the idea of "priority" in the taking of discovery, resulting in delay. The court however retains power to set the order of discovery if necessary.

**Note:**

## Rule 26, SCRPC

This Rule 26(e) is the language of Federal Rule 26(e). A like duty to supplement the special interrogatories permitted under present Circuit Court Rule 90 is imposed by that rule and is substantially the same as the Federal Rule. In these discovery Rules the Federal language is adopted for all discovery except Rule 33(b) standard interrogatories. The Circuit Court Rule 90 provision is retained as to answers to those special interrogatories because the interrogatories are limited in number, the continuing duty to update them is not burdensome, and it preserves the existing State practice.

**Note to 1996 Amendment:**

Rule 26(e) is amended to make applicable the language of Rule 33(b) on the duty to supplement the standard interrogatories to discovery requests under Rule 31 Depositions Upon Written Questions, Rule 33 Interrogatories to Parties, Rule 34 Production of Documents and Tangible Things, and Rule 36 Request for Admission. Discovery requests under these rules are deemed to be continuing and the responding party must update the answers promptly when new information comes to the attention of the party, a representative of the party or counsel. This duty to supplement does not apply to discovery under Rule 30 Depositions Upon Oral Examination. However, there is an additional duty to provide supplemental information on expert witnesses and witnesses with knowledge of the facts of the case regardless of the form of the discovery request. The obligation to supplement prior discovery responses includes the duty to amend or supplement answers which are found to be incorrect or misleading so former subparagraph (e)(2) has been deleted, as has former subparagraph (e)(3) which is now redundant.

**Note:**

This is the language of Federal Rule 26(f). Its purpose is to prevent discovery abuse by encouraging the court to intervene when abuse occurs, or when an attorney has failed to obtain the cooperation of opposing counsel and should have the assistance of the court. Routine matters should be resolved by Rule 26(c) Motions for protective orders or Rule 37 Motions to compel. The discovery conference is discretionary with the court, and may be combined with a pretrial hearing.

**Note to 2011 Amendment:**

The amendments to Rules 16, 26, 33, 34, 37 and 45 of the South Carolina Rules of Civil Procedure concerning electronic discovery are substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure. The rules concerning electronic discovery are intended to provide a practical, efficient and cost-effective method to assure reasonable discovery. Pursuit of electronic discovery must relate to the claims and defenses asserted in the pleadings and should serve as a means for facilitating a just and cost-effective resolution of disputes.

**Note:**

This language is drawn from the first three sentences of Federal Rule 26(g) and has been slightly modified to incorporate reference to Rule 11. The more strict standard of the Federal Rules contained in Rules 11, 16 and 26 has not been adopted.

## Rule 26, SCRPC

**Note:**

This paragraph conforms to Circuit Court Rule 97 and provides that, except for videotaped depositions under Rule 30(h), the requesting party retains the original discovery request and response until it is needed for a motion or trial, then it is filed with the court.

**Note to 2022 Amendment**

The amendment to add Rule 26(b)(4)(D) is intended to make the rule similar to the 2010 changes to the FRCP 26 which give more protection to communications between lawyers and the expert witnesses retained to testify. While the amendment will still not require a testifying expert to produce a report, it will allow a freer exchange of information with an expert in the process of developing her thoughts and opinions and allow the consideration of the mental impressions of a lawyer without having to disclose those. Thus, the additional language in subdivision (ii) that the expert "... considered **and relied upon** the information in forming the opinions to be expressed" to make it clear that it is data and facts the expert relies upon that must be disclosed.

South Carolina Court Rules

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End of Document



## Memorandum

TO: House of Delegates  
From: Resolution of Fee Disputes Board  
RE: Proposed Rule Changes  
Date: December 15, 2021

The Executive Committee and Circuit Chairs of the Resolution of Fee Disputes Board met in September 2021. During the course of the annual meeting, there was considerable discussion and review of the current Fee Dispute Rules.

After discussion, the Board recommended two changes to the current Fee Dispute Rules: 1) With regard to Rule 4, the addition of quasi-judicial immunity language for the Board Executive Chair, Executive Committee Members, Regional Chairs, Circuit Court Chairs, Hearing Panel Members, and Assigned Members acting for or on behalf of the Board similar to that granted to mediators; and 2) With regard to Rule 14, the elimination of the language allowing for the appointment of a lawyer to represent a claimant at a panel hearing. The proposed changes are attached.

The requested change to Rule 4 is as the result of increased incidences of individuals filing appeals and/or separate lawsuits in regard to fee disputes wherein they name the Circuit Chair and/or the Assigned Member as parties to the litigation. If the threat to Members of the Board of being sued as a result of their volunteer service on the Board, to the Bar, and to the citizens of South Carolina, by handling fee disputes is not eliminated, Circuit Chairs will have an increasingly difficult time and may eventually be unable to recruit Members of the Bar to serve on the Board thereby making the Board unable to carry out its duties and function. As it stands, the Bar has been required to intervene in these instances, to retain counsel, and to file motions on behalf of the Fee Disputes Board Members seeking their dismissal from the actions thereby imposing on the judiciary to protect Board Members. The proposed amended language would, by Rule change, protect Members of the Board while acting in the course and scope of their duties for the Resolution of Fee Disputes Board, and provide clear guidance to the Courts in the event of future appeals or lawsuits filed that name the Assigned Member and/or the Circuit Chair. It would also serve to promote and to protect the ability of Circuit Chairs to recruit well-qualified Members of the Bar to serve on the Fee Disputes Board without the fear of retribution or retaliation from an attorney or client dissatisfied with the findings of the Board.

Pursuant to the Court-Annexed ADR Rules, Rule 7(g): **Immunity**. The mediator shall have immunity from liability to the same extent afforded judicial officers of this state. The Board proposes that similar language and protections be provided to Members of the Resolution of Fee Disputes Board who are acting within the course and scope of the duties with the Board.

The requested change to Rule 14 is based on the fact that the Board does not have available a pool of attorneys from which to appoint lawyers to represent Fee Dispute claimants. The Board does not have the authority to require that the County Clerks appoint an attorney from its "civil" or "criminal" list to represent a claimant that requests representation. Furthermore, as the Fee Dispute Resolution process is civil in nature, civil litigants are not under most circumstances entitled to court-appointed legal representation. The Rule places an undue burden on the Board and one that it really has no means to fulfill.

## Proposed changes to Resolution of Fee Dispute Rules

RULE 4. DUTIES The Board is authorized to receive, inquire into, take proofs, and make findings and final determination of disputes between attorneys and clients. It shall be the duty of the Board to encourage the amicable resolution of fee disputes falling within its jurisdiction. Each member shall continue to serve until completion of ongoing work on the Board. Members of the Board shall have the immunity from liability to the same extent afforded judicial officers of this state.

RULE 14. APPOINTMENT OF HEARING PANEL When appropriate, a hearing panel of three (3) members shall be appointed by the circuit chair from the circuit panel in the judicial circuit where the principal place of practice of the attorney is located. A hearing panel should be appointed within ten (10) days of the date a written request for a hearing panel is filed with the circuit chair. The procedure for appointing hearing panel members shall be established by the Executive Council. One (1) member of the hearing panel shall be designated by the circuit chair as chair of the hearing panel. Upon appointment of the hearing panel, the parties to the proceeding shall be notified in writing by the circuit chair of the appointment of the hearing panel, giving the names and addresses of the members, including the identity of the chair, and further informing the parties involved that the hearing panel will resolve the dispute. Each party may proceed without counsel or be represented by counsel of the party's choosing and at the party's own expense. ~~The Board is not required by law to appoint an attorney to represent a party; however, upon request of a party, a member of the Board may be appointed to represent the party before the hearing panel if, in the discretion of the circuit chair, good cause is shown. Good cause may include but is not limited to (1) the income level of the party, (2) the educational level of the party, or (3) interests of parity and justice.~~



## **Professional Responsibility Committee's proposed amendment to Rule 1.15(e)**

The Professional Responsibility Committee has *unanimously* passed a Proposed Amendment to Rule 1.15(e) of the Rules of Professional Conduct to balance competing interests in timely disbursement of client funds while providing for a similarly timely method to address third party claims to client funds. The purpose of this proposed amendment is to provide an optional method for a lawyer to resolve competing claims between a client and a third party and avoid holding funds in trust indefinitely.

Under the current rule, in order for a lawyer to disregard a third party's claim to funds or property held in trust, the lawyer must conclude that the third party's claim is "frivolous." The Committee proposes eliminating this subjective standard and instead provide that disbursement to the client of disputed property is prohibited when an equitable or matured claim is timely presented under new subsection (e), or when disbursement of disputed funds is otherwise mandated by law, such as to statutory lienholders.

The Professional Responsibility Committee's unanimous proposal gives a lawyer the option to serve a written notice upon the third party claimant that the lawyer will distribute the property to the client unless the third party initiates legal action and provides the lawyer with written notice of such action within 90 calendar days. If the third party does not provide timely written notice of such legal action and assuming disbursement is not otherwise prohibited by law or court order, the lawyer may disburse the property to the client within the Rules of Professional Conduct. A similar rule has been in effect in Arizona since 2014.

As stated in proposed new subsection (e)(2)(iv), nothing in the Committee's proposal alters the substantive rights of the third party asserting a claim to funds or property. This amendment is not aimed at limiting third party claimants' rights to protection of legitimate interests under Rule 1.15. The process set forth in the proposed rule provides an option for a lawyer to set a time limit for a third party to perfect its claim to the funds or property if distribution is not otherwise agreed upon or ordered by a Court.

**Conclusion.** This proposed amendment serves the public by allowing clients to have timely access to funds or other property in cases where third party claims have been raised but not actively pursued, which is delaying a resolution of the dispute and preventing disbursement.

## **Proposed amendment to Rule 1.15(e), RPC, Rule 407, SCACR**

(e)(1) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute. Disputed property shall be kept separate until one of the following occurs:

- (i) the parties reach an agreement on the distribution of the property;
- (ii) a court order resolves the competing claims; or
- (iii) distribution is allowed under Subsection (e)(2) of this Rule.

(e)(2) Where competing claims to property in the possession of a lawyer are between a client and a third party and disbursement to the client is not otherwise prohibited by law or court order, the lawyer may provide written notice to the third party of the lawyer's intent to distribute the property to the client, as follows:

(i) The notice must inform the third party that the lawyer may distribute the property to the client unless the third party files a legal action and provides the lawyer with written notice and a copy of the filed action within 90 calendar days of the date of service of the lawyer's notice. The lawyer's notice shall be served on the third party in the manner provided under Rules 4(c) and (d) of the South Carolina Rules of Civil Procedure

(ii) If the lawyer does not receive written notice of the filing of a legal action from the third party within the 90-day period, the lawyer may distribute the funds to the client after consulting with the client regarding the advantages and disadvantages of disbursement of the disputed property and obtaining the client's informed consent to the distribution, confirmed in writing.

(iii) If the lawyer is notified in writing of a legal action filed within the 90-day period, the lawyer shall continue to hold the property in accordance with Subsection (e)(1) of this Rule unless and until the parties reach an agreement on distribution of the property or a court resolves the matter.

(iv) Nothing in this rule is intended to alter a third party's substantive rights.

Comment [4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim ~~is not frivolous~~ has become a matured legal or equitable claim under applicable law and unless distribution is otherwise allowed under this rule, the lawyer must refuse to surrender the property to the client until the claims are resolved. Except with regard to the procedures set out in Subsection (e)(2) of this Rule, a A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, ~~but,~~ Alternatively, when a lawyer reasonably believes there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.



**PROFESSIONAL RESPONSIBILITY COMMITTEE'S PROPOSAL  
TO REVISE THE RULES OF PROFESSIONAL CONDUCT  
RELATED TO LAWYER ADVERTISING AND SOLICITATION**

**PART 1: INTRODUCTION**

The world of advertising has changed greatly for lawyers in recent years. Massive growth and focus on internet advertising has led to the importance of search engine optimization and pay-per-click advertising. With the increase in popularity of the smartphone, upwards of 80% of searches for attorneys and law firms take place via the internet. However, internet advertising is far more complicated than the average member of the public realizes, and there are some questionable behind-the-scenes tactics that lawyers can take to promote themselves or their law firms.

It is important to familiarize oneself with key terminology with regard to internet advertising:

- **Internet search engine** is a software system that searches the Internet for web sites related to a word or phrase entered by the user, in this case, the user is referred to as a potential client.
- **Search engine optimization (“SEO”)** Search Engine Optimization, or SEO, is the process of increasing the quality and quantity of high-ranking, organic (natural, not paid) visibility as a result of an Internet search.
- **Keyword** is a word or phrase used in a website to make it more easily found when searching the Internet. If a law firm wants to promote its estate planning services, then they may, for example, use the term “estate planning” in the text of the site and other web advertising.
- **Ads / AdWords** is an internet marketing technique where advertiser pays money for “keywords.” When a potential client enters an Internet search that includes words in common with the advertiser's selected keywords, the search results may or may not include the advertiser's ad amongst the list of other nonadvertising or unpaid website search results. The advertiser pays the search engine if the potential client clicks on the advertiser's ad from amongst the search results.<sup>1</sup>
- **Metadata** is “data about data.” This data is typically “hidden” from someone searching the web but does impact the display of search results. For example, a law firm may have a picture of an estate planning document on its website. The image could have hidden metadata phrases attached to it, like “estate planning law firm in Greenville, SC.”

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<sup>1</sup> The explanation provided by the Court in *In Re Naert*, 777 S.E. 2d 823 (2015), is helpful and paraphrased here.

- **Pay-per-click (“PPC”)** advertising allows businesses to purchase words and phrases so that an internet search containing those words and phrases has a higher chance of returning the purchaser’s website as a top result. In other words, if Law Firm A purchases “estate planner” as a search term, Law Firm A is more likely to be the top result of an internet search than Law Firm B who also practices estate planning, but does not pay money to the web browser. Pay-per-click advertising became immensely popular for law firms in the past five years with the shift from traditional advertising methods to the web.
- **Google Map Pack** For purposes of illustration a sample search is produced in these materials. As shown, Google displays three highlighted Google-Maps-based businesses within the page of search results. “PPC” ads can be purchased to display within these results.

Beyond pay-per-click advertising, competitive keyword advertising is when a law firm (or its agent) purchases the name of a competitor so that the purchaser’s website is a top result when the competitor is searched. It is not common knowledge to the general public that companies, like law offices, can purchase search terms and phrases to gain an advantage. It is certainly not general knowledge that searching the name of a specific law firm or lawyer might yield a result with absolutely no affiliation. That said, the Professional Responsibility Committee recommends additions to South Carolina Model Rule 7.1. The proposed additions to Rule 7.1 would only prohibit the purchase of a competitor’s name in pay-per-click advertising to protect the public, clients, and the administration of justice from misleading advertising. The rule would not limit purchasing other general words or phrases.

The South Carolina Ethics Advisory Committee originally moved towards the prohibition of competitive keyword advertising but ultimately advised that “a lawyer may use internet competitive keyword advertising that includes the names of competing lawyers and law firms.” and goes on to state that “[t]he lawyer should be mindful of all additional advertising rules.” This Committee believes that, in some circumstances, competitive keyword advertising does not comport with Rule 7.1 and that the Rule should be amended to include a prohibition on the use of a competitive keyword advertising meeting certain criteria.

The proposed Rule change prohibits the use of a competitor or unaffiliated attorney’s name in law firm advertising to redirect a member of the public from the unaffiliated attorney’s firm to a different law firm. This is in harmony with the Ethics Advisory Committee’s observation that creating an internet link indicating it belonged to one firm but led the public to another firm was deceitful conduct. This Committee’s proposed rule change goes beyond misdirection in a search to prohibiting the manipulation of search terms. The proposed Rule change, therefore, also prohibits the creation of a link that appears to lead to Firm A but actually

leads to Firm B. It is the Committee's collective opinion that manipulating search terms in this way should be prohibited.

The overarching goal of Rule 7.1 is to prohibit false, deceptive and misleading advertising by lawyers, and in that spirit, the rule already recognizes it is not only the *message* but also the *method* of advertising that can be misleading.<sup>2</sup> To come current with modern technology, the Professional Responsibility Committee has crafted and agreed upon the a Rule change so that members of the bar have clear guidance on the permissible and prohibited conduct in the area of internet advertising.

## **PART 2: PROPOSED REVISIONS TO RULE 7.1 Communications Concerning a Lawyer's Services**

Rule 7.1 governs all communications regarding the services of a lawyer or law firm. The existing Rule 7.1 strives to protect the public by prohibiting misleading, false or deceptive advertising by lawyers.

Over time, the ABA Model Rules and (to a greater extent) the South Carolina Rules have been revised with the addition of subsections and commentary that provide specific prohibitions. ABA Model Rule 7.1 simply states "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." The South Carolina Rule 7.1 states essentially the same rule, but also provides more extensive clarification on what lawyers must do or refrain from doing in order to comport with the Rule.

This Committee carefully considered Rule 7.1 and feels overwhelmingly that, in order to protect the general public, clients, potential clients, and the administration of justice, the Rule 7.1 should be amended to include a specific prohibition on purchasing an unaffiliated attorney's name to use in keyword advertising.

### **Proposal to Add Subsection (f) to Rule 7.1 "Communications Concerning A Lawyer's Services"**

Rule 7.1 currently provides lawyers with guidance concerning limitations on a lawyer's ability to advertise its services to the public. A general prohibition on 'misleading' advertising is helpful, but with advances in technology and advertising capabilities, this Committee recommends the addition of subsection (f), which reads:

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<sup>2</sup> For example, Rule 7.1 already requires testimonials to be identified as such, and further requires disclosure as to paid endorsements.

(f) contains a statement or implication that another lawyer or law firm is part of, is associated with, or affiliated with the lawyer when that is not the case, including contact or other information presented in a way that has the effect of misleading a person searching for information regarding a particular lawyer or law firm, to unknowingly contact a different lawyer or law firm.

Additionally, this Committee recommends the addition of comment [5], which reads:

[5] A lawyer may not state or imply an association or affiliation with another lawyer or law firm if the statement or implication is untrue or misleading. It is impermissible for a lawyer to include the name of a non-affiliated or non-associated lawyer or law firm in an internet advertisement or sponsored link that is displayed when the non-affiliated lawyer or law firm's name is used as a search term when the advertisement does not clearly indicate that the non-affiliated lawyer or law firm is not a part of the advertising lawyer's firm. A lawyer's use or purchase of the name or trade name of another lawyer or law firm as an internet search term that results in the display of the lawyer's advertisement without a disclaimer that the advertisement is for the lawyer and not the other lawyer or law firm would also violate Rule 7.1(f). Additionally, an advertisement that is displayed in internet search results must include the name and address of the lawyer responsible for the advertisement and the principal geographic location of the lawyer who will handle matters advertised for, as required by Rule 7.2(d) and (h).

### **PART 3: TRADEMARK AND CONSTITUTIONAL CONSIDERATIONS**

As to trademark law:

One of the many considerations for using another attorney's name is that law firms with trademarked names are safe from competitive keyword advertising because their names cannot legally be purchased. However, trademarking a name can be costly, time consuming, and potentially limiting as an attorney. Additionally, this Committee believes that an attorney should not have to buy their name to be protected from a competitor implying the existence of a professional relationship or association.

A 9<sup>th</sup> Circuit case held that use of key words was not a violation of the Trademark Act, actually serves to emphasize the distinction between trademark cases and legal ethics cases. In *Network Automation Inc. v. Advanced Systems Concepts Inc.*, 638 F.3d 1137 (9<sup>th</sup> Cir. 2011) the Court pointed out that under trademark law, “the *sine qua non* of trademark infringement is consumer confusion ... not mere diversion.” 638 F.3d at 1148. This is distinct from lawyer ethics rules, because our ethical rules prohibit a lawyer from using indirect means to accomplish what cannot be accomplished directly. The question is whether the conduct is deceptive or misleading, not whether there is prejudice in the end.

In *Lexmark International, Inc. v. Static Control Components Inc*, 572 U.S. 118 (2014), the United States Supreme Court further demonstrated the difficulty of bringing a false or misleading advertising claim under the trademark statute. In *Lexmark*, the Court stated that the Lanham Act (the trademark statute) authorizes suit only for commercial injuries for which proximate cause is shown. This again provides a distinction from ethical rules for lawyers, as there is no proximate cause requirement for a rule violation – the spirit of the rules is to prevent the harm and preserve the esteem of the profession – totally different goals than those seeking to right a wrong through trademark law.

#### **As to the US Constitution:**

In *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the U.S. Supreme Court held that the government may freely regulate commercial speech that concerns unlawful activity or is misleading. A state has the right to prohibit, without limitation, misleading advertising by lawyers and such prohibition does not violate the First Amendment.

In *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the U.S. Supreme Court held that lawyer advertising is commercial speech, and as such, is accorded only a limited measure of First Amendment protection. If the ad is not misleading there is intermediate scrutiny. Therefore, restrictions on non-misleading commercial speech are permissible if the government asserts a substantial interest in support of its regulation, establishes that the restriction directly and materially advances that interest, and demonstrates that the regulation is narrowly drawn. The Court noted:

“Commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.”

The Court then noted that the solicitation in that case was not misleading, and so therefore the three-pronged test discussed above would then come into effect. The point is that the above cases clearly demonstrate that if conduct is misleading or deceptive, the state may restrict it without violating the First Amendment. This Committee has discussed and considered both trademark and Constitutional law and considers this proposed Rule change to serve an important purpose to the public in its search for legal representation when the need arises.

#### **PART 4: OTHER STATE’S APPROACHES**

Washington D.C. North Carolina, and New York have all banned competitive keyword advertising.

In North Carolina, the North Carolina State Bar disciplined a lawyer for using competitive keyword advertising, clearly stating that his “intentional inclusion of other attorneys’ names and law firms in [his] keyword advertising campaign [was] dishonest and therefore [violated] Rule 8.4(c).” *In re David J. Turlington, III*, No. 13G0121, N.C. Grievance Cmte., Wake County (Nov. 18, 2013). North Carolina’s Rule 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. North Carolina Ethics Opinion 2010-14 and the New York Rule of Professional Conduct 7.1(g), go even further to ban “meta tags or other hidden computer codes.” These meta tags take the names of competitors and bury them in the coding of a website to indicate that the competitor’s name is a part of the website when in fact, it is not. It makes sense to prohibit conduct that, if not embedded in hidden data, would violate advertising rules.

Notably, while the New Jersey Advisory Committee leads off with permitting competitive key word advertising in the beginning, it later limits that permission by stating:

“A lawyer may not, however, consistent with the rules governing attorney ethics, insert, or pay the internet search engine company to insert, a hyperlink on the name or website URL of a competitor lawyer that will divert the user from the searched-for website to the lawyer’s own law firm website.”

Thus, it seems the New Jersey Advisory Committee would endorse this Committee’s proposed rule change as one necessary to prohibit misdirection of a potential client.

Like New Jersey, Florida also permits competitive keyword advertising, but a proposed rule change nearly identical to that proposed by this Committee limits how it is done.

Texas and Wisconsin allow competitive keyword advertising, claiming that the purchase of an unaffiliated attorney’s name alone does not constitute lawyer “communication” with potential clients and the general public. This Committee believes that the legal profession and legal advertising is different from buying a product – and that a consumer who searched for “Volvo” but sees “Subaru” will instantly know that is not what they looked for – but a potential client in need of legal help may not know that when they searched for “Lawyer A” they were misdirected to “Lawyer B’s” website, who has no affiliation with Lawyer A.

## **PART 5: CONCLUSION**

The only recurring argument that seems to bear any real significance is that the act of purchasing another attorney’s name does not constitute communication and therefore does not warrant a change in the Rules. However, the purchase of an unaffiliated lawyer’s name by a firm

for the purpose of attracting unsuspecting members of the public by leading them to believe (through internet search results) that that unaffiliated attorney has any relation to the purchasing firm is inherently misleading and should be prohibited.

To expect the general public to understand the intricacies of how an internet search yields results and how those results can be manipulated through paid advertising is unrealistic and does a disservice to potential clients and the legal field as a whole. For these reasons, this Committee believes that the proposed Rule change helps maintain the integrity of the profession and set clear standards for lawyers to follow when crafting their advertising strategy.

# Example of Competitive Keyword Advertising Search:

Dewey, Cheatum & Howe desires to redirect potential clients to them who are search for the Smith and Jones estate planning law firm. Here is how they do it:

1. Domain Name Poaching - Dewey creates a website [www.smithandjonesfirm.com](http://www.smithandjonesfirm.com) and either redirects the domain to their website, or creates a website that appears to be Smith and Jones Law Firm, but directs their calls, forms, and chats to the Dewey law firm.
2. URL Poaching – Dewey creates a page on their website for estate planning that uses the smithandjoneslawfirm name or some variation. Something like [www.deweycheatumandhowe\smithandjoneslawfirm](http://www.deweycheatumandhowe\smithandjoneslawfirm).
3. Name Poaching with Keywords – Dewey uses the Smith and Jones Law Firm name, address, phone numbers, attorney names, and other S&J specific information as keywords within their website.
4. Name Poaching with Metadata – Dewey uses the Smith and Jones Law Firm name, address, phone numbers, attorney names, and other S&J specific information as hidden metadata, such as descriptions of photos, within their website.
5. Name Poaching with PPC Advertising Campaigns – Dewey bids on (purchases) the Smith and Jones Law Firm name, address, phone numbers, attorney names, and other S&J specific information.

# Google Search Results Example:

The image shows a Google search results page for the query "estate planning attorneys in greenville sc". The search bar at the top contains the text "estate planning attorneys in greenville sc". Below the search bar, there are two advertisements from "www.thedoddlawfirm.com/estate-planning" with the phone number (864) 253-7647. The ads include the text "Estate Planning Attorneys Greenville - The Dodd Law Firm" and "Call Us Today To Discuss Estate Planning Strategies That Best Meet Your Needs. Free Consultation. Flexible Fee Agreements. Years of Experience." A red arrow labeled "PPC Ads" points to these advertisements.

Below the ads is a map showing the location of "Wayne Patterson Attorney at Law" in Greenville, SC. Below the map is a "Map Pack" listing three law firms: "Keegan Law Firm, LLC", "B. Faith Martzin, PC | Attorney at Law", and "Wayne Patterson Attorney at Law". Each listing includes a star rating, address, phone number, and links for "WEBSITE" and "DIRECTIONS". A red arrow labeled "Map Pack" points to this section.

Below the Map Pack are organic search results. The first organic result is from "attorneys.superlawyers.com" titled "Best Greenville, SC Estate Planning & Probate Attorneys ...". The second organic result is from "lawyers.findlaw.com" titled "Top Greenville Estate Planning Lawyers - South Carolina". A red arrow labeled "Organic Results" points to these search results.

## MEMORANDUM

**TO:** South Carolina Bar House of Delegates  
**FROM:** SC Bar Technology Committee  
**DATE:** January 6, 2021  
**RE:** Response and Comments to Petition to Amend Rule 7.1 SCRPC

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### Summary

The Technology Committee focus group identified at least three primary issues of concern with the proposed amendment: (1) It attempts to solve a “problem” that is not at all clear is something “caused” by lawyers as opposed to the way Google search works; (2) It attempts to use a Rule (7.1) that cannot by its plain language be employed for this purpose; and (3) It leaves out crucial language (the Florida safe harbor) that would eliminate confusion and arguably tie the proposed rule change back to “communication” and Rule 7.1.

### Introduction

One of the purposes of the Technology Committee is to advise other Bar groups on technology matters. Because it relates directly to use of the internet by lawyers, the Tech Committee formed a focus group to review the Professional Responsibility Committee's Proposal to Revise the Rules of Professional Conduct Related to Lawyer Advertising and Solicitation. The focus group conducted research on keyword purchasing and spoke to several national law firm internet marketing experts about Google ads and keyword purchasing in general. The group also reviewed all source materials cited in the Professional Responsibility Committee's Petition and includes a detailed Response as part of this Memorandum.

### Technology is Ever-Changing

Rules designed specifically to address the internet must be carefully crafted due to the highly changeable nature of technology and the practices of technology companies. A rule must be written so that it is easily understandable to lawyers, yet neither so broad nor so narrow that it may have unforeseen consequences if technology changes.

### Internet Marketing

The opinion of the marketing experts contacted was that keyword purchasing by law firms is not a common occurrence and search results are more strongly determined by the variable algorithms of various search engines. Careful consideration should be given to whether this specific amendment is needed and how any amendment is crafted so that it isn't confusing to lawyers or impracticable. Both the focus group and the experts were concerned that the language of the proposed amendment could be read to require that a search *result* must "include the name and

address of the lawyer responsible for the advertisement and the principal geographic location of the lawyer who will handle matters advertised for...." Search results displayed by search engines *are totally within the control of search engine companies*. A lawyer is not able to change this.

The experts noted that Google definitions and ad practices have changed even since the Professional Responsibility Committee drafted its Petition. For example, not all ads are pay per click. Local Services Ads are charged per lead (the advertiser pays the search engine for placement in the ads sections of the search results). The Petition's definition of Google Map Pack states that "'PPC' ads can be purchased to display within these results." This is incorrect; one cannot directly pay for just this section. It is a feature one can add on in Google Ads but it doesn't guarantee that one will appear there. These items are pointed out as examples of how quickly the internet changes and how easy it is to be mistaken about how Google operates. One additional observation of the experts was that Google (and other companies) frequently change product names, which leads to more confusion.

#### Other States' Law

The focus group turned to the Petition itself to see if the opinions cited support the need for an amendment to Rule 7.1. Detailed comments of the focus group are submitted with this Memorandum. A number of discrepancies are noted in the Response to the Petition. For example, the Petition states that Washington D.C., North Carolina, and New York "banned" competitive keyword ads. It would be helpful to include all citations in the Petition, as it does not appear that Washington D.C. or New York have banned keyword ads. The focus group did not feel that, in all cases, the Petition fully and accurately describes the approaches to competitive keyword advertising taken in other jurisdictions.

#### The Florida Bar Proposed Rule 4-7.13 Deceptive and Inherently Misleading Advertisements

The Professional Responsibility committee based its proposed amendments on a similar proposal pending before the Florida Supreme Court since October, 2020. The South Carolina proposal differs in one significant respect from Florida in that it is more stringent and difficult for lawyers to control. If the majority of the House of Delegates is in favor of the proposed amendment to Rule 7.1, the Technology Committee proposes including the "safe harbor" language from Florida's Proposed Rule in Comment 5:

[5] A lawyer may not state or imply an association or affiliation with another lawyer or law firm if the statement or implication is untrue or misleading. It is impermissible for a lawyer to include the name of a non-affiliated or non-associated lawyer or law firm in an internet advertisement or sponsored link that is displayed when the non-affiliated lawyer or law firm's name is used as a search term when the advertisement does not clearly indicate that the non-affiliated lawyer or law firm is not a part of the advertising lawyer's firm. A lawyer's use or purchase of the name or trade name of another lawyer or law firm as an internet search term that results in the display of the lawyer's advertisement without a disclaimer that the advertisement is for the lawyer and not the other lawyer or law firm would also violate Rule 7.1(f). Additionally, an advertisement that is displayed in internet search results must include the name and address of the lawyer responsible for the advertisement and the principal geographic location of the lawyer who will handle

matters advertised for, as required by Rule 7.2(d) and (h). Another example of impermissible conduct is use of another lawyer or law firm name as an Internet search term that triggers the display of an advertisement that does not clearly indicate that the advertisement is for a lawyer or law firm that is not the lawyer or law firm used as the search term. The triggered advertisement would not be misleading if the first text displayed is the name of the advertising lawyer or law firm and, if the displayed law firm name is a trade name that does not contain the name of a current or deceased partner, the name of the lawyer responsible for the advertisement is also displayed as the first text.

### Conclusion

The Technology Committee believes that the proposed amendment to Rule 7.1 could create issues for lawyers now and in the future due to the ever-changing nature of technology and rapid changes in internet companies' practices. If it is the consensus of the House of Delegates that an amendment to Rule 7.1 is necessary, the Technology Committee asks that the proposed amendment follow the language proposed by The Florida Bar Rule 4-7.13.

**Response by the Technology Committee to the Professional Responsibility Committee's  
Proposal to Revise the Rules of Professional Conduct Related to Lawyer Advertising and  
Solicitation**

Summary

The Technology Committee is not sure the Proposal (hereinafter referred to as "the Petition") fully and accurately describes the approaches to competitive keyword advertising taken in other jurisdictions, in particular the use of Rule 8.4 in contrast to Rule 7.1. Additionally, the Petition conflates "misdirection in search" (already prohibited in South Carolina based on Rule 8.4) and "manipulation of search terms" (what the Proposed Rule seeks to prohibit pursuant to Rule 7.1). As a result, the Petition does not address the rationale of those states (including South Carolina) that have allowed competitive keyword advertising, or the reasons why Rule 8.4 might be employed to prohibit this practice but Rule 7.1 might not. The Technology Committee suggests that existing Rule 8.4 is sufficient to prohibit "misdirection in search," and also avoids the problematic use of Rule 7.1 to address "manipulation of search terms." However, if the Committee intends to propose a rule change like Florida's Proposed Rule, the Committee should consider including the safe harbor contained in Florida's Proposed Rule.

Discussion of Law Cited in the Petition

**I. Two Jurisdictions Have Opined that Competitive Keyword Advertising Violates Rule 8.4(c)<sup>1</sup>**

Addressing the approaches taken with respect to this issue in other states, the Petition says

Washington D.C. North Carolina, and New York have all banned competitive keyword advertising.

It is not clear this statement is correct. The North Carolina State Bar and the Ohio Board of Professional Conduct<sup>2</sup> have opined that competitive keyword advertising violates the existing and applicable rules of professional responsibility in those jurisdictions:

- The North Carolina State Bar issued a Formal Ethics Opinion (2010-14) opining that "it is a violation of Rule 8.4(c) for a lawyer to select another lawyer's name to be used in his own keyword advertising."<sup>3</sup>
- The Ohio Board of Professional Conduct opined that a "[t]he purchase and use of a competitor lawyer's or law firm's name as a keyword for advertising is an act that is designed to deceive an Internet user and thus contrary to Prof.Cond.8.4(c)."<sup>4</sup>

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<sup>1</sup> Rule 8.4(d) in South Carolina.

<sup>2</sup> Subsequent to the creation of the Petition.

<sup>3</sup> North Carolina State Bar, 2010 Formal Ethics Opinion 14, adopted April 27, 2012, available at <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-14/>

<sup>4</sup> Ohio Board of Professional Conduct, Opinion 2021-04, issued June 11, 2021, available at <https://ohioadvop.org/wp-content/uploads/2021/06/Adv.-Op.-2021-04-FInal.pdf>

However, it would appear that *Washington, DC and New York have not banned competitive keyword advertising.*

## **II. No Jurisdiction Has Amended Rule 7.1 to Prohibit Competitive Keyword Advertising, and Several Jurisdictions Have Pointed Out that Competitive Keyword Advertising Does Not Involve a “Communication”**

Several jurisdictions have considered this issue, and as noted in Ethics Advisory Opinion 20-01, Texas, Wisconsin, New Jersey (and South Carolina) have all determined that competitive keyword advertising is not prohibited by the Rules of Professional Conduct. The Petition recognizes that Texas and Wisconsin are two jurisdictions that allow competitive keyword advertising:

Texas and Wisconsin allow competitive keyword advertising, claiming that the purchase of an unaffiliated attorney’s name alone does not constitute lawyer “communication” with potential clients and the general public. This Committee believes that the legal profession and legal advertising is different from buying a product – and that a consumer who searched for “Volvo” but sees “Subaru” will instantly know that is not what they looked for – but a potential client in need of legal help may not know that when they searched for “Lawyer A” they were misdirected to “Lawyer B’s” website, who has no affiliation with Lawyer A.

The Petition does not mention that the New Jersey Advisory Committee concluded that the purchase of competitive keyword advertising does not violate that state’s rules of professional responsibility.<sup>5</sup> Additionally, the New Jersey Advisory Committee also determined that the purchase of competitive keyword advertising does not involve a “communication” subject to Rule 7.1. As set out in Ethics Advisory Opinion 20-01:

In New Jersey, the inquirer asked whether the purchase of a competitor’s name as a keyword would violate Rule 7.1. That Advisory Committee decided that the purchase does not violate the Rule, because the Rule applies to lawyers’ communications and, “the keyword purchase of a competitor lawyer’s name is not, in itself, a ‘communication.’”

Significantly, the Ohio Board of Professional Conduct also underscored why Rule 7.1 (Prof.Cond.R 7.1 in Ohio) does not accommodate a rule change purporting to address competitive keyword advertising:

Prof.Cond.R. 7.1 prohibits a lawyer from making a false, misleading, or nonverifiable communication about the lawyer or the lawyer’s services. The rule governs all lawyer communications, including advertisements permitted by Prof.Cond.R. 7.2. The simple act of purchasing a keyword, including another

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<sup>5</sup> New Jersey Advisory Committee on Professional Ethics, ACPE Opinion 735, issued June 25, 2019, available at <https://www.njcourts.gov/notices/2019/n190806c.pdf>

lawyer's name, does not communicate anything *about* the purchasing lawyer or his or her services. The purchase and use of a keyword in advertising does not result in the dissemination of any information about the lawyer or by the lawyer that is not already publicly available. Thus, so long as the information on the purchasing lawyer's own website is not false, misleading, or nonverifiable, the communication complies with Prof.Cond.R. 7.1.

The Petition does not address the rationale of the Texas, Wisconsin, New Jersey, Ohio, or South Carolina opinions, but instead concludes without analysis that "legal profession and legal advertising are different from purchasing a product . . . ."

### **III. The Proposed Rule is Imprecise with Its Use of Terms- "misdirection in search" and "manipulation of search terms"**

The Petition conflates certain terms, creating confusion and a lack of clarity. More importantly, the authority cited by the Petition as supporting the Proposed Rule in fact does just the opposite. The "misdirection in a search" prohibited by Ethics Advisory Opinion 20-01 pursuant to Rule 8.4(d) (and which the Technology Committee agrees is misleading) is not the same thing as what the Petition concludes is the "manipulation of search terms" (competitive keyword advertising). The Petition recognizes initially that "misdirection in a search" and "manipulation of search terms" are two distinct practices:

*This Committee's proposed rule change goes beyond misdirection in a search to prohibiting the manipulation of search terms.*

Throughout the Petition, however, the term "misdirection in a search" is used interchangeably with "competitive keyword advertising." For example, the Petition cites approvingly the previously discussed opinion of the New Jersey Advisory Committee:

*Notably, while the New Jersey Advisory Committee leads off with permitting competitive key word advertising in the beginning, **it later limits that permission** by stating:*

*"A lawyer may not, however, consistent with the rules governing attorney ethics, insert, or pay the internet search engine company to insert, a hyperlink on the name or website URL of a competitor lawyer that will divert the user from the searched-for website to the lawyer's own law firm website."*

*Thus, it seems the New Jersey Advisory Committee would endorse this Committee's proposed rule change as one necessary **to prohibit misdirection of a potential client.***

(Emphasis supplied).

However, the New Jersey Advisory Committee's prohibition on the "misdirection of a potential client" did not "limit" any "permission" to conduct *competitive keyword advertising* (pursuant to Rule 8.4 or Rule 7.1). In fact, as described above, the New Jersey Advisory Committee 1) explicitly concluded that the purchase of competitive keyword advertising does not violate that

state's rules of professional responsibility; and 2) rejected the use of Rule 7.1 to prohibit competitive keyword advertising.

Second, as described above, South Carolina's existing Rule 8.4(d) (via Ethics Advisory Opinion 20-01) *already* prohibits "misdirection of a potential client" by "insert[ing], or pay[ing] the internet search engine company to insert, a hyperlink on the name or website URL of a competitor lawyer that will divert the user from the searched-for website to the lawyer's own law firm website."

As a result, the New Jersey Advisory Committee would *not* "endorse this Committee's proposed rule change [to Rule 7.1 and prohibiting competitive keyword advertising] as one necessary to prohibit misdirection of a potential client," because the New Jersey Advisory Committee specifically rejected doing so and opined that competitive keyword search does not violate the Rules.

Similarly, the Petition conflates the use of "meta tags" (and a prohibition on the use of *certain* meta tags) with competitive key word advertising. As set out below, these are different practices, and should be evaluated as such. More importantly, one jurisdiction's limited prohibition on meta tags does not support a prohibition on competitive keyword advertising in another jurisdiction.

The Petition states:

**misrepresentation. North Carolina Ethics Opinion 2010-14 and the New York Rule of Professional Conduct 7.1(g), go even further to ban "meta tags or other hidden computer codes." These meta tags take the names of competitors and bury them in the coding of a website to indicate that the competitor's name is a part of the website when in fact, it is not. It makes sense to prohibit conduct that, if not embedded in hidden data, would violate advertising rules.**

North Carolina Ethics Opinion 2010-14 does not address "meta tags or other hidden computer codes."

New York Rule 7.1(g) states: "A lawyer or law firm shall not utilize meta-tags or other hidden computer codes that, if displayed, would violate these Rules." Comment 14 to New York Rule 7.1 explains:

Meta-tags are hidden computer software codes that direct certain Internet search engines to the web site of a lawyer or law firm. For example, if a lawyer places the meta-tag "NY personal injury specialist" on the lawyer's web site, then a person who enters the search term "personal injury specialist" into a search engine will be directed to that lawyer's web page. That particular meta-tag is prohibited because Rule 7.4(a) generally prohibits the use of the word "specialist." However, a lawyer may use an advertisement employing meta-tags or other hidden computer codes that, if displayed, would not violate a Rule. NY ST RPC Rule 7.1 (McKinney).

New York Rule 7.1(g) does not address competitive keyword advertising. Moreover, New York Rule 7.1(g) is not a blanket prohibition on the use of meta tags, but a prohibition on meta-tags

*that would violate the Rules if displayed.* New York Rule 7.1(g) does not provide support for the Proposed Rule.

Finally, meta tags are obsolete in many instances. As the Ninth Circuit observed: “Modern search engines such as Google no longer use metatags. Instead they rely on their own algorithms to find websites.” *Network Automation Inc. v. Advanced Systems Concepts Inc.*, 638 F.3d 1137 at n.3 (9<sup>th</sup> Cir. 2011).

#### **IV. Florida’s Proposed Rule Does Limit Competitive Keyword Advertising, But Contains a “Safe Harbor” Not Found in the Proposed Rule**

A proposal to amend Florida Rule 4-7.13 (Florida’s Proposed Rule) to add *some* of the language in the Proposed Rule has been submitted to the Florida Supreme Court, but has not yet been approved:

<http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseTypeSelected=All&CaseYear=2020&CaseNumber=1467>

Florida’s Proposed Rule would limit competitive keyword advertising, and some of its language is functionally identical to that in the Proposed Rule. However, Florida’s Proposed Rule contains a crucial “safe harbor” missing from the Proposed Rule:

##### *Implication of Association or Affiliation with Another Lawyer or Law Firm*

This rule prohibits any statement or implication that a lawyer or law firm is affiliated or associated with the advertising lawyer or law firm when that is not the case. Lawyers may not state or imply another lawyer is part of the advertising firm if the statement or implication is untrue. For example, when a lawyer leaves a law firm, the firm must remove the lawyer’s name from the firm’s letterhead, website, advertisements, and other communications about the law firm. An example of impermissible advertising would be including the name of a lawyer or law firm that is not part of the advertising law firm in an Internet advertisement or sponsored link that is displayed when the non-affiliated lawyer or law firm’s name is used as a search term when the advertisement does not clearly indicate that the non-affiliated lawyer or law firm is not part of the advertising law firm. Another example of impermissible conduct is use of another lawyer or law firm name as an Internet search term that triggers the display of an advertisement that does not clearly indicate that the advertisement is for a lawyer or law firm that is not the lawyer or law firm used as the search term. *The triggered advertisement would not be misleading if the first text displayed is the name of the advertising lawyer or law firm and, if the displayed law firm name is a trade name that does not contain the name of a current or deceased partner, the name of the lawyer responsible for the advertisement is also displayed as the first text.*

(Emphasis added).

In other words, an advertisement that results from a competitive keyword search does not violate Florida’s Proposed Rule if the advertisement displays the advertising lawyer/firm as “the first

text.” The inclusion of that information in that position removes any potential “statement or implication” that any other lawyer or firm is “part of, is associated with, or affiliated with the advertising law firm . . . .”

Friendly Amendment Proposed by the Technology Committee

The PR Committee should consider including the safe harbor language from Florida’s Proposed Rule if the Proposed Rule goes forward. Comment 5 would read as follows:

[5] A lawyer may not state or imply an association or affiliation with another lawyer or law firm if the statement or implication is untrue or misleading. It is impermissible for a lawyer to include the name of a non-affiliated or non-associated lawyer or law firm in an internet advertisement or sponsored link that is displayed when the non-affiliated lawyer or law firm’s name is used as a search term when the advertisement does not clearly indicate that the non-affiliated lawyer or law firm is not a part of the advertising lawyer’s firm. A lawyer’s use or purchase of the name or trade name of another lawyer or law firm as an internet search term that results in the display of the lawyer’s advertisement without a disclaimer that the advertisement is for the lawyer and not the other lawyer or law firm would also violate Rule 7.1(f). Additionally, an advertisement that is displayed in internet search results must include the name and address of the lawyer responsible for the advertisement and the principal geographic location of the lawyer who will handle matters advertised for, as required by Rule 7.2(d) and (h). Another example of impermissible conduct is use of another lawyer or law firm name as an Internet search term that triggers the display of an advertisement that does not clearly indicate that the advertisement is for a lawyer or law firm that is not the lawyer or law firm used as the search term. The triggered advertisement would not be misleading if the first text displayed is the name of the advertising lawyer or law firm and, if the displayed law firm name is a trade name that does not contain the name of a current or deceased partner, the name of the lawyer responsible for the advertisement is also displayed as the first text.

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