**SC Educational Conference on Workers' Compensation - Ethics Program**
**Barbara M. Seymour**
**Deputy Disciplinary Counsel**

**Part One - 2010-2011 Review of Developments in Ethics and Discipline**

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**Part Two – The Lawyer's Oath, Revisited**

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**Part Three – Lawyer Advertising Update**

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## I. Disciplinary Opinion Summaries (as of October 3, 2011)

### Criminal Conduct

(1) Matter of Patrick. Lawyer was convicted in Montana of two counts of assault with a weapon, one count of family member assault, one count of intimidation, and one count of tampering with witnesses. He was sentenced to two twenty-year sentences, two ten-year sentences, and one one-year sentence, all to run consecutively. Disbarred, by agreement. (Op.#26899, December 6, 2010)

(2) Matter of Sarratt II. According to a police report, Lawyer created a disturbance at a hospital where his father was a patient. He used profanity and threatened one of the nurses with bodily harm, claiming to be a "warrior." Lawyer was convicted by a jury for simple assault. He paid a fine. Lawyer was previously admonished and suspended for incidents involving failure to control his anger and criminal charges. Definite Suspension for Nine Months (retroactive) plus anger management, by agreement. (Op.#26907, January 7, 2011)

(3) Matter of Wild. Lawyer pled guilty to aggravated battery following his arrest for his involvement in a bar fight. Lawyer was sentenced to probation, community service, and $40,000.00 in restitution. Lawyer reported himself and voluntarily sought treatment for alcohol abuse and anger management. Definite Suspension for Ninety Days (not retroactive), by agreement. (Op. #26921, February 7, 2011)

(4) Matter of Givens. Lawyer was arrested for obtaining prescription drugs from two doctors without disclosure. She completed PTI. In an unrelated matter, Lawyer overbilled a client $10,566.00 by fabricating bills for roster meetings on a case that had been 40(j)'d. Definite Suspension for Nine Months (retroactive), plus costs, by agreement. (Op. #26922, February 7, 2011)

(5) Matter of E. Smith. Lawyer was convicted of four counts of embezzlement of public funds and one count of misconduct in office for misappropriating money while working as the county clerk of court. Disbarred (retroactive), by agreement. (Op. #26933, February 22, 2011)

(6) Matter of Long. Lawyer was charged with indecent exposure arising from four instances of exposing himself while standing behind the glass door of his office and of his home. Lawyer pled to two counts of exposure and was sentenced to thirty days or a fine. He paid the fine. Definite Suspension for Nine Months (retroactive), plus costs and one year of mental health counseling, by agreement. (Op. #26963, April 25, 2011)

(7) Matter of Walker. Lawyer pled guilty to solicitation of a felony after attempting to hire a hit man to kill another attorney using a post-dated check. In other news, Lawyer failed to reconcile his trust account and failed to maintain financial records required by Rule 417. As a result, Lawyer's paralegal misappropriated more than $200,000.00 with checks and electronic transfers to her credit card company, her husband's business, and herself. In addition, Lawyer guaranteed a bank loan for a client and paid the interest; contacted a client's spouse in a domestic matter and convincing him to fire his attorney and settle the case; failed to hold unearned fees in trust; and, neglected several client matters. Disbarred, retroactive, plus restitution and costs, by agreement. (Op.#27000, July 11, 2011)

### Dishonesty & False Witnessing

(8) Matter of Bodiford. Lawyer was hired to file a civil complaint. Lawyer lied to the client, stating that the matter was progressing when, in fact, he had not filed the complaint. Lawyer failed to adequately communicate with his client or diligently pursue the matter for nearly three years. Public Reprimand, by agreement. (Op.#26897, December 6, 2010)

(9) Matter of Woods. Lawyer submitted affidavits in a domestic matter that were not properly signed or notarized. In another case, Lawyer permitted a client to sign a verification of a

complaint that had not yet been drafted. In a third matter, Lawyer closed a loan for a NC law firm, but did not ensure that the deed was properly prepared or recorded. Public Reprimand, plus LEAPP Ethics School and Trust Account School, by agreement. Lawyer was also ordered to read the manual on SC Notary Publics and share it with his staff. (Op. #26900, December 6, 2010)

(10) Matter of Danielson. Lawyer settled a case for a client, but could not reach him to execute the documents. Lawyer forged the client's name to the check, release, and other documents, then he and his staff member signed as witness and notary. In another matter, Lawyer notarized a signature that he did not witness. In eight other matters, Lawyer failed to adequately communicate with clients and failed to diligently pursue matters. Lawyer also failed to respond to disciplinary inquiries and failed to appear in response to a disciplinary subpoena. Lawyer attributed his failings to severe depression. Definite Suspension for Two Years (not retroactive), plus restitution and Lawyers Helping Lawyers monitoring, by agreement. (Op. # 26923, February 7, 2011)

(11) Matter of Robinson. Lawyer submitted two witness affidavits in a federal civil rights case. The affidavits were not signed by the witnesses. Lawyer put the witnesses' names on the signature line, with the reference /s/, then notarized the affidavits. When confronted by the witnesses, Lawyer had new affidavits prepared. The revised affidavits weakened Lawyer's client's position in this litigation. Not only did Lawyer falsely notarize the affidavits and represent them as conformed copies, she also violated federal court rules, which require signed affidavits be filed, rather than copies. Public reprimand, plus costs, by agreement. (Op.#27002, July 11, 2011)

(12) Matter of Dahle. Lawyer overcharged fees on an estate matter by $30,000.00. In a second case, Lawyer failed to disclose the existence of material trust documents related to a probate matter. Although licensed in South Carolina, Lawyer lived and practiced law in Florida. By agreement, he was suspended by the Florida Bar. Our Supreme Court imposed reciprocal discipline. Definite suspension for one year. (Op.#27010, July 25, 2011)

(13) Matter of Cerato. Lawyer submitted seven affidavits in court that he had notarized without witnessing their execution. Lawyer had received written witness statements from his client. Lawyer contacted six of the witnesses by telephone and asked them to verify their statements. He then notarized the documents. Lawyer's conduct violated the notary public statute because he did not actually witness the execution of the documents. To further complicate matters, Lawyer did not verify the signature of one of the witnesses, but rather confirmed it with the witness's secretary. As it turned out, the witness had not actually been the one who signed the statement. Public reprimand, plus LEAPP Ethics School, review of the SC Notary Public Manual, and costs, by agreement. (Op.#27021, August 8, 2011)

(14) Matter of Brown. Lawyer conducted loan closings for a buyer and loan officer who were engaged in an ongoing scheme to defraud the banks in illegal flip transactions that included falsely representing that down payments were paid in connection with the purchases. Lawyer looked more closely at these transactions after reviewing disciplinary cases and attending a CLE that addressed similar circumstances. The buyer and loan officer discontinued using Lawyer to close their loans and, ultimately, went to federal prison for mortgage fraud. Public reprimand, by agreement. (Op.#27010, August 8, 2011)

(15) Matter of Poff. Lawyer represented a female client in a domestic matter. The client was unable to pay the bill, so Lawyer agreed to allow her to work in his law office in exchange for his legal services. The employment eventually became permanent and full-time. The

client was dependent on government assistance for health insurance. Full-time employment would disqualify her for those benefits and Lawyer was unable to afford private coverage for her. Lawyer split the client's salary between a W-2 and a 1099, which allowed her to misrepresent her employment status to Medicaid. The client used Lawyer's letterhead and signature on two occasions to provide false information related to her employment to the government. The client testified that this was done at Lawyer's suggestion and that Lawyer participated in the fraud. Lawyer denied this, but the Court resolved the credibility question against him because of his lack of candor in testimony regarding other issues at the hearing. At one point, the client found a sexually inappropriate email message Lawyer had sent to a friend about the client. She quit her job and threatened to file claims against him. Lawyer then reported the client to the federal authorities for Medicaid fraud. She was arrested and entered a pre-trial intervention program. She was awarded unemployment benefits for sexual harassment and Lawyer settled her malpractice lawsuit for $300,000.00. In addition, Lawyer was disciplined for using his trust account to pay bonuses to the client based on fees collected. Lawyer also disclosed details about the client's domestic matter to his email pen pal. Definite suspension for six months, plus LEAPP Ethics School and Trust Account School. (Op.#27028, August 22, 2011)

(16) Matter of Campbell. Lawyer closed on a refinance. He failed to obtain the signatures of the borrowers on a document. He scheduled an appointment for them to come in to sign. The clients appeared and waited for an hour, but Lawyer did not show up. The clients later discovered that someone signed their names to the document, which was notarized by Lawyer's paralegal/sister. Lawyer denied forging the document, but admitted that he was responsible for it. Lawyer was also cited for failing to cooperate in the disciplinary investigation. Definite suspension for one year, retroactive, plus costs, by agreement. (Op.#27045, September 26, 2011)

**Neglect of Client Matters**

(17) Matter of Boney. Lawyer was admitted in 2003. In 2006, she closed her law office and left the state. She was placed on interim suspension following several complaints of abandonment. Lawyer had not made sufficient arrangements for the handling of her cases. She did not turn over all of her files to the attorney appointed to protect her clients' interests. While the actual allegations of misconduct in the six grievances filed against her were not particularly egregious, Lawyer failed to cooperate in the disciplinary investigation. Ultimately, she defaulted in the formal proceedings and did not appear at the hearing. Disbarment, plus restitution. (Op.# 26893, November 15, 2010)

(18) Matter of Cheatham. Lawyer was disciplined for problems in four client matters. In the first case, Lawyer failed to properly serve opposing counsel with a proposed order. In the second matter, Lawyer received payment from a domestic client for the GAL. Lawyer's staff thought the payment was for earned fees and deposited it into the operating account. Lawyer was not diligent in responding to the client's inquiries about the status of her check. In the third case, Lawyer failed to follow up with opposing counsel about a proposed consent order, putting his client's interest in child custody at risk. Finally, Lawyer disbursed money from his trust account to a client before depositing her settlement proceeds. Public Reprimand, by agreement, plus costs and LEAPP Ethics School and Trust Account School. (Op.#26896, December 6, 2010)

(19) Matter of Kelley. Lawyer closed a loan in May 2008. The client informed him in October 2008 that title was still in the name of the seller. Lawyer claimed that the deed was originally returned as insufficient and that he made the necessary corrections and "placed

the documents in the courier bag" for re-filing. Apparently, the deed was never re-filed. Lawyer did not diligent pursue a solution for the client, who ultimately hired another attorney to correct the problem. Lawyer did not cooperate with the new attorney. Public Reprimand, by agreement. (Op.#26898, December 6, 2010)

(20) Matter of Glover. Lawyer operated the South Carolina office of a Georgia law firm. When the firm closed the office, Lawyer retained the clients. Lawyer subsequently abandoned her practice, failing to inform adjusters of her withdrawal from representation and failing to file lawsuits prior to the expiration of the statute of limitations. Lawyer failed to respond to ODC's inquiries in the multiple complaints filed against her. She did not answer the formal charges or appear at the hearing. Disbarment, plus costs and restitution, by default. (Op.#26908, January 7, 2011)

(21) Matter of D. Smith. Lawyer practiced law in Georgia. A client paid $580.00 for an uncontested divorce. Lawyer did not file the action and had no communication with the client after accepting the fee. Lawyer did not respond to the client's complaint filed with the Georgia State Bar. Lawyer did not cooperate in that state's disciplinary investigation and was disbarred by the Supreme Court of Georgia. Lawyer did not contest the reciprocal discipline proceedings in South Carolina. Disbarment. (Op. #26934, February 22, 2011)

(22) Matter of Breen. Lawyer failed to promptly file bankruptcy petitions for several clients. He entered into a consent agreement with the bankruptcy trustee to return the clients' fees. In an unrelated matter, Lawyer agreed to look into a federal employee claim for a workers' compensation client. Lawyer neglected the matter and failed to communicate with the client for nearly a year. When he did contact her, he gave her incorrect information. Lawyer mismanaged his trust account, including failing to keep accurate records, failing to keep a complete accounting journal, and failing to reconcile his account. Lawyer relied on his memory to account for client balances, resulting in a shortfall of more than $12,000.00. In addition, Lawyer issued checks to cash and twice paid his phone bill from his trust account. Public Reprimand, plus law office management advising and monitoring by the Commission on Lawyer Conduct for two years, by agreement. (Op.#26942, March 21, 2011)

(23) Matter of M. Moore. Lawyer neglected three client matters. In one, a probate matter, Lawyer was paid a $25,000.00, which he did not hold in trust until earned. When the client hired another attorney, Lawyer did not comply with requests for an accounting of fees or refund of unearned fees paid. In a second, a land dispute, Lawyer delayed action in the case for more than a year and failed to communicate with his client, including not turning the file over to the client upon request. In the third matter, Lawyer was acting *pro se* in a case while on interim suspension. Lawyer issued and served a subpoena without the assistance of the clerk of court. Definite Suspension for Six Months, not retroactive, plus restitution, costs, and LEAPP Ethics School and Trust Account School, by agreement. (Op.#26944, March 21, 2011)

(24) Matter of Longtin. Respondent failed to pursue several cases pending in circuit court, even after orders from judges to file certain motions or otherwise proceed with the cases. With regard to a client with several pending collection matters, Lawyer failed to pursue the cases and failed to respond to the client's inquiries. Lawyer was the subject of a prior thirty-day suspension by the SC Supreme Court. The federal district court imposed a reciprocal suspension at the time. Although he was reinstated in state court, Lawyer never sought reinstatement in the federal court. Lawyer filed thirty-six cases in federal court in spite of his suspension there. In addition, Lawyer failed to pay a fellow bar member fees for contracted services in a client's criminal matter, in spite of twelve letters and numerous

phone calls requesting payment. Definite Suspension for Nine Months, plus costs, LEAPP Ethics School and Trust Account School, treatment monitoring, and restitution. (Op.#27009, July 18, 2011)

(25) Matter of Bagnell. Lawyer failed to take any action on behalf of a client in a civil matter. Lawyer did not communicate with the client and did not return the client file when asked. Lawyer abandoned his law practice and left the state. He did not respond to disciplinary inquiries and did not answer the formal charges. Lawyer failed to appear at the hearing and the oral arguments before the Supreme Court. Disbarred, by default. (Op.#27008, July 18, 2011)

(26) Matter of Bentley. Lawyer neglected several car wreck cases, failing to keep her clients informed and, ultimately, failing to notify them that she closed her law office for health reasons. Lawyer failed to maintain adequate financial records and failed to remove earned fees from her trust account. As a result, she was unable to identify $5,500.00 in trust at the time of her interim suspension. In addition, Lawyer failed to fully cooperate with the disciplinary investigation. Definite suspension for two years, retroactive, by agreement. (Op.#27019, August 8, 2011)

(27) Matter of Trundy. Lawyer was hired in 2005 to represent a client in a civil matter. Lawyer failed to adequately communicate with the client. Lawyer did not inform the client that the case was dismissed with leave to restore in 2007. When the client contacted Lawyer in 2008, he misrepresented the status of the case. Lawyer did not communicate with the client at all after that. Lawyer did not move to restore the case or take any other action on her behalf. Lawyer moved without informing the client of his new office address. Public reprimand, plus costs and LEAPP Ethics School, by agreement. (Op.#27040, September 12, 2011)

**Misappropriation and Other Trust Account Violations**

(28) Matter of Hardee-Thomas. Lawyer settled a personal injury claim for a client and withheld funds to pay medical liens. Lawyer failed to hold the funds in trust and did not pay the liens for more than a year. In another accident case, Lawyer received a settlement of $4,500.00 on the day she was placed on temporary suspension. After the deposit, the balance in the trust account was only $2,715.18. Lawyer was unable to account for the client's funds or the balance in her trust account. In two other matters, Lawyer failed to pay more than $5,000.00 to the clients' medical providers. Those funds were not in her trust account at the time she was suspended. In addition, Lawyer failed to maintain the records required by Rule 417; paid personal bills from her trust account; and, failed to accurately identify the purpose of checks paid to her firm from the trust account. Definite Suspension for Two Years (not retroactive), plus Trust Account School, completion of an audit, restitution, and costs. (Op. #26936, February 22, 2011)

(29) Matter of Stoddard. Lawyer failed to reconcile his trust account for more than three years. As a result of his inattention to the books, his paralegal was able to misappropriate $117,000.00 from his trust account by writing twenty-nine checks payable to herself over a nine month period. The paralegal was able to avoid overdrawing the trust account for several months by not sending legitimate checks out on behalf of clients. By the time Lawyer discovered the misappropriation, he had checks written on the account that were outstanding for more than four years. Lawyer admitted to a number of other trust account violations, including writing checks to cash, disbursing funds before deposit and collection, failing to issue settlement statements in contingency case, and failing to account for law firm funds held in trust to cover bank charges. Public Reprimand, plus LEAPP

Trust Account School and trust account monitoring by CLC for one year, by agreement. (Op. #26935, February 22, 2011)

(30) Matter of Halford. Lawyer bounced twenty-two checks on his trust account because of user error in transmitting deposits to the bank electronically. Four additional checks were presented on insufficient funds in Lawyer's trust account because of miscalculations in Lawyer's office of credit card transaction fees. Eleven more checks overdrew the trust account because Lawyer disbursed before collecting a check from a lender, who later stopped payment. Further, Lawyer failed to complete his monthly trust account reconciliations because he did not reconcile his client ledgers, many of which contained negative balances, which resulted from bookkeeping errors. Further, Lawyer failed to deposit unearned fees into his trust account. When he converted his system to ensure that unearned fees were deposited properly, he failed to account for the changes in his books, resulting in further negative ledger balances. Public Reprimand, by agreement. (Op. #26924, February 7, 2011)

(31) Matter of Mayer. Lawyer agreed to assist a client in defense of bad check charges. The client gave Lawyer power of attorney to cash her disability checks to pay the bad debts. Lawyer negotiated at least one of the disability checks and deposited it into her law partner's trust account. Lawyer did not pay the bad debts and did not represent the client in her case. At the time of the law partner's suspension, the funds were no longer in trust. In connection with two personal injury matters, Lawyer misappropriated more than $18,000.00 from her trust account. The Court considered in mitigation Lawyer's significant mental health issues, for which she is now seeking active treatment. Definite Suspension for Nine Months, not retroactive, plus restitution, costs, LEAPP Ethics School and Trust Account School, and LHL monitoring for two years, by agreement. (Op.#26943, March 21, 2011)

(32) Matter of Schelin. Lawyer accepted fees in ten bankruptcy cases, but did not file petitions for the clients. Lawyer did not respond to telephone calls or emails from the clients. She failed to hold the fees in trust until earned. In another matter, Lawyer misappropriated a $2,000.00 settlement check and failed to communicate with the client. In another case, Lawyer failed to respond to emails, faxes, phone calls, and text messages from a client. Lawyer attempted to change the fee structure during the representation, but refused the client's request to put it in writing. Lawyer also failed to hold the fees paid in trust until earned. In an employment matter, Lawyer allowed the time for file certain claims to expire. She offered to refund the client's retainer and pursue the remaining claims at no cost to the client. Lawyer took no further action and failed to refund the money, which had not been held in trust. Lawyer failed to cooperate in the disciplinary investigation. Disbarment, plus restitution, by agreement. (Op.#26945, March 21, 2011)

(33) Matter of Weems. Lawyer closed his real estate practice and moved out of state to pursue an LL.M. He left his trust accounts in the hands of nonlawyer owners of a title company to finalize policy issues and disburse funds in escrow. Lawyer failed to supervise the process and left a signature stamp with the nonlawyers. Lawyer had not reconciled his accounts and did not have an accounting of funds remaining in trust at the time of his departure. The nonlawyers issued over 1000 checks payable to Lawyer's firm marked "excess recording fees." The total amount was $21,500.00, which was simply the total balance of all the active client ledgers. The nonlawyers then used Lawyer's signature stamp to take the money out of the firm operating account with checks made payable to the title company. There was no documentation to show that Lawyer or the title company was entitled to these funds. Although there was in excess of $60,000.00 in outstanding checks

on one trust account, the nonlawyers moved all but $10,000.00 of the balance of the account into an account outside Lawyer's control. Lawyer lacks the financial resources to restore the funds and has pursued legal action against the title company. Definite Suspension for One Year, plus restitution and trust account monitoring by the Commission, by agreement. (Op.#26946, March 21, 2011)

(34) Matter of W. Griffin. Lawyer closed a loan in May, but failed to pay funds withheld for a homeowner's association assessment and state taxes. Lawyer was not aware of the missed payments because he did not properly supervise his paralegal and did not reconcile his trust accounts. In connection with another closing, the sellers filed a grievance because they did not receive their proceeds for more than a week. Lawyer made false statements to ODC regarding his involvement in the matter because he was "frightened." In a third closing, a refinancing transaction in June, Lawyer forwarded the closing documents to the lender with the understanding that the lender would disburse the funds and record the mortgage. By August, the payoffs had not been made and the documents had not been recorded. Lawyer was unaware of the situation because he did not supervise disbursement or recordation. In another case, one in which Lawyer represented a client in a civil action against an attorney, Lawyer wrote to the attorney suggesting that the attorney settle the case to avoid Lawyer's client filing a disciplinary complaint. Public Reprimand, by agreement. (Op.#26983, June 13, 2011)

(35) Matter of L. Moore. Lawyer's law license was suspended. Because he had bad credit and no income, he was unable to open a checking account. Lawyer began using an old trust account for personal transactions. When one such check bounced, it was reported to the Commission on Lawyer Conduct pursuant to Rule 1.15(h). In mitigation, the Court considered the fact that there were no client funds in the account put at risk. Definite Suspension for Ninety Days, retroactive, plus costs, by agreement. (Op.#27001, July 11, 2011)

(36) Matter of Pennington. Lawyer was suspended for two years. At the time of his suspension his trust account had insufficient funds to cover client obligations and unearned fees. Also, Lawyer signed as surety on a cash bond for a client in violation of Rule 604, SCACR. Lawyer did not cooperate in the disciplinary investigation and defaulted on the formal charges. Lawyer did appear at the hearing, but did not contest the allegations. Disbarred, plus restitution, costs, and LEAPP Ethics School and Trust Account School. (Op.#26999, July 11, 2011)

(37) Matter of Hoffman. In addition to neglecting two matters involving veteran's benefits, Lawyer failed to hold funds received on behalf of an estate in trust. Lawyer overdrew the client's ledger and, ultimately, deposited over $25,000 of personal funds into the trust account. Lawyer also failed to maintain the required financial records and converted client funds to cash. Definite suspension for two years, plus LEAPP Ethics School and Trust Account School, by agreement. (Op.#27022, August 8, 2011)

(38) Matter of Sarratt III. Lawyer placed unearned fees in his operating and personal accounts. When Lawyer was placed on interim suspension (see Matter of Sarratt II, above) and clients expected refunds, the balance in Lawyer's trust account was not sufficient to cover them. Public Reprimand, by agreement. (Op.#27039, September 12, 2011)

**Conflicts of Interest**

(39) Matter of Prendergast. Lawyer solicited a real estate investment of $65,000.00 from a client. Lawyer misrepresented to the client that Lawyer was investing $90,000.00 of his own funds. Lawyer also misrepresented the potential return the client could earn. The client lost all of his money. In addition, Lawyer failed to comply with the disclosure and

consent requirements of Rule 1.8(a). Finally, Lawyer failed to participate in the disciplinary investigation, failed to respond to notices and subpoenas, and failed to appear at the hearing or at the Supreme Court oral arguments. Disbarment, plus costs. (Op #26889, November 8, 2010)

**Incivility**

(40) Matter of White. Lawyer's client's landlord received a written demand for compliance with town zoning ordinances from the town manager. Lawyer wrote a letter to the landlord in response. In the letter, Lawyer referred to the town manager as brainless and soulless. He referred to other town officials as "pagans," and stated that they were "insane" and "pigheaded." Lawyer sent a copy of the letter to the town manager and to the town's attorney. Lawyer had a prior history of disparaging an opposing party and counsel in written correspondence. The Supreme Court rejected Lawyer's argument that the civility provisions of the Lawyers' Oath were unconstitutional. Definite Suspension for Ninety Days. (Op.# 26939, March 7, 2011)

(41) Matter of Anonymous. Lawyer represented the wife in a hotly contested domestic matter. In an email to the attorney for the husband, Lawyer stated that one of her "drug dealer clients" told her that opposing counsel's teenage daughter was detained by police for attempting to buy heroin from a "crack head." Lawyer implied that opposing counsel's accusations that Lawyer's client was a bad mother were improper given opposing counsel's own parenting issues. The Court again upheld the constitutionality of the civility provisions of the Lawyers' Oath. Letter of Caution. (Op.# 26964, April 25, 2011)

**Advertising**

(42) Matter of Wells. Lawyer was disciplined for multiple violations of the advertising provisions of the Rules of Professional Conduct. The Lawyer's website, firm brochure, and phone book ads were false and misleading in a number of ways, including exaggeration of the experience of Lawyer and his associates; overstatement of the firm's practice and reputation; false statements about the firm's practice areas, office locations, and prior results; and, misleading statements about foreign language ability. Lawyer was also cited for making comparative statements that could not be factually substantiated; failing to include the name of at least one lawyer responsible for ad content; making statements that characterized the quality of his firm's legal services; failing to disclose how expenses were to be paid in contingency cases; and, using the words 'expertise' and 'specialize' without certification. The Court noted Lawyer's cooperation and remorse. Public Reprimand, plus costs, $1000 fine, LEAPP Advertising School and Ethics School. (Op.# 26969, May 9, 2011)

## B. Annual Report

**ANNUAL REPORT OF LAWYER DISCIPLINE IN SOUTH CAROLINA**
**2010 - 2011**

| | | |
|---|---|---|
| COMPLAINTS PENDING & RECEIVED: | | |
| Complaints Pending June 30, 2010 | 937 | |
| Complaints Received July 1, 2010 - June 30, 2011 | 1442 | |
| Total Complaints Pending and Received | | 2379 |
| DISPOSITION OF COMPLAINTS: | | |
| Dismissed: | | |
| By Disciplinary Counsel after initial review | 184 | |
| By Disciplinary Counsel after investigation | 548 | |
| By Investigative Panel | 259 | |
| By Supreme Court | 3* | |
| Total Dismissed | 994 | |
| Not Dismissed: | | |
| Referred to Other Agency | 3 | |
| Closed But Not Dismissed | 9 | |
| Closed Due to Death of Lawyer | 1 | |
| Deferred Discipline Agreement | 6 | |
| Letter of Caution | 180 | |
| Admonition | 28 | |
| Public Reprimand | 30 | |
| Suspension | 36 | |
| Disbarment | 62 | |
| Contempt Order (UPL) | 0 | |
| Total Not Dismissed | 355 | |
| Total Complaints Concluded | | (1349) |
| Total complaints pending as of June 30, 2011 | | 1030 |

*The Supreme Court dismissed two contempt proceedings and one reciprocal discipline matter.

| Sources of Complaints | |
|---|---|
| Client or family/friend of client | 62.96% |
| Opposing party or family/friend | 13.83% |
| Bank (overdraft notice) | 5.70% |
| Another attorney | 4.24% |
| Third party payee (incl. court reporters) | 2.15% |
| Disciplinary counsel | 1.74% |
| Self-report | 1.11% |
| Ward or family/friend of ward | 1.04% |
| Judge | 1.04% |
| Family/friend of lawyer | <1.00% |
| Anonymous | <1.00% |
| Employee | <1.00% |
| Resolution of Fee Disputes Board | <1.00% |
| Other | 3.82% |

| Case Types | |
|---|---|
| Criminal | 39.96% |
| Domestic | 15.78% |
| Probate | 7.82% |
| Real estate | 4.81% |
| Post-conviction relief | 3.09% |
| Personal Injury | 3.09% |
| Debt collection/foreclosure | 2.15% |
| Workers' compensation | 1.87% |
| Employment/labor | 1.15% |
| Bankruptcy | <1.00% |
| Other civil matters | 17.50% |
| Miscellaneous case types | 2.37% |
| Trust account issues | 7.06% |
| Advertising & solicitation | 1.72% |
| Personal conduct | 4.52% |

**Practice Types**

| | | | |
|---|---|---|---|
| Solo practice | 38.87% | Other government | 2.72% |
| Law firm | 35.17% | Guardian *ad litem* | 1.19% |
| Public defender | 16.89% | Corporate counsel | <1.00% |
| Prosecutor | 4.26% | Mediator/arbitrator | <1.00% |

## COMMISSION ON LAWYER CONDUCT

COMMISSION PROCEEDINGS:

| | |
|---|---|
| Meetings of Investigative Panels | 12 |
| Formal Charges Filed | 9 |
| Disciplinary Hearings | 10 |
| Incapacity Proceedings | 3 |
| Meetings of Full Commission | 1 |

REQUESTS FOR DISMISSAL REVIEW:

| | |
|---|---|
| Requests for Review by Complainant | 58 |
| Dismissal Affirmed | 51 |
| Case Remanded for Further Investigation | 4 |
| Dismissal Review Pending | 3 |

ATTORNEYS TO PROTECT CLIENTS' INTERESTS:

| | |
|---|---|
| Serving as of July 1, 2010 | 30 |
| Appointed | +14 |
| Discharged | -17 |
| Serving as of June 30, 2011 | 27 |

LAWYERS BEING MONITORED:

| | |
|---|---|
| New Monitor Files Opened | 64 |
| Lawyers Currently Monitored | 87 |

## OFFICE OF DISCIPLINARY COUNSEL

ATTORNEYS TO ASSIST DISCIPLINARY COUNSEL:

| | |
|---|---|
| Complaints Assigned to Attorneys to Assist | 35 |
| Reports Filed by Attorneys to Assist | 52 |
| Outstanding Attorney to Assist Reports | 21 |

## SUPREME COURT

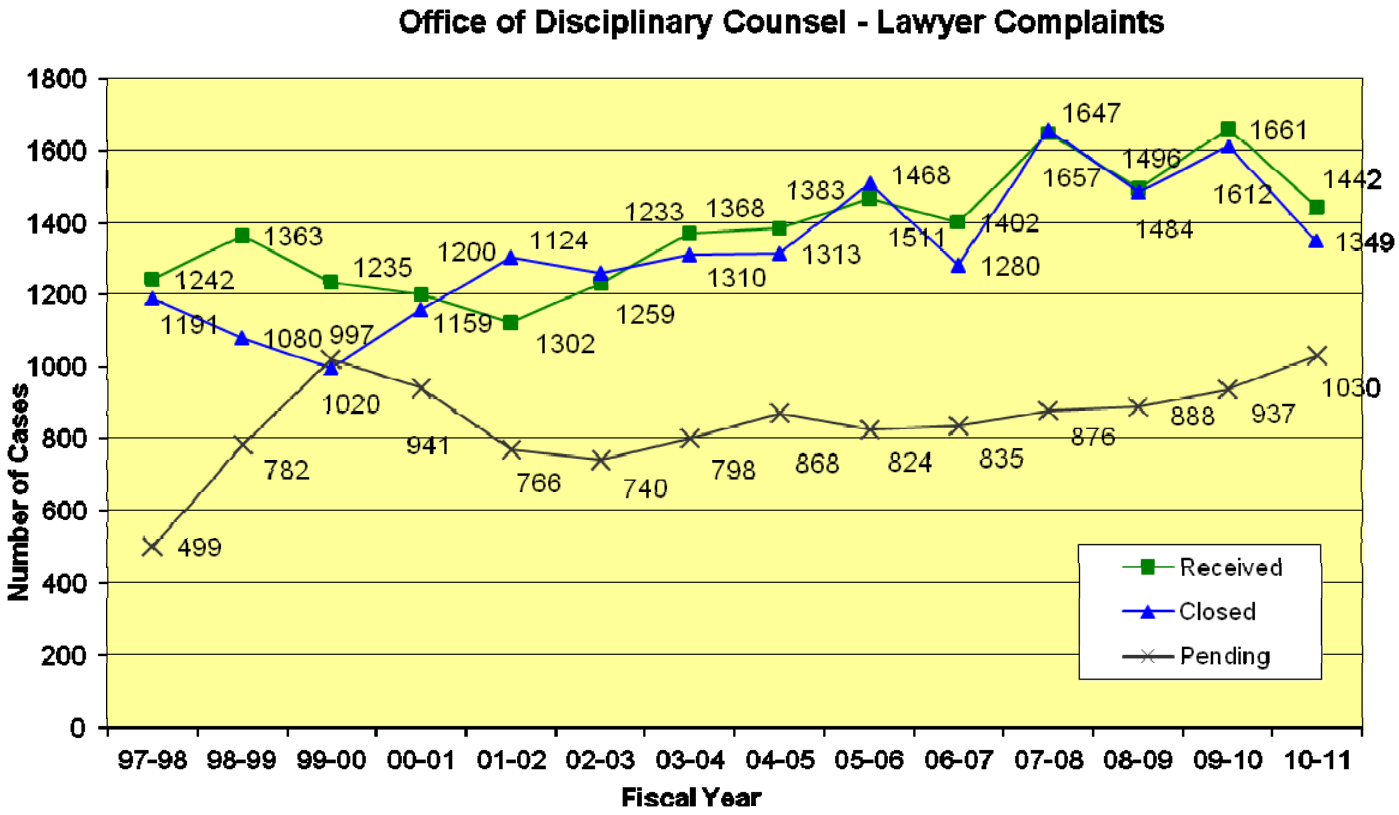
ORDERS*:

| | |
|---|---|
| Dismissal | 3 |
| Letter of Caution | 1 |
| Admonition | 12 |
| Public Reprimand | 11 |
| Definite Suspension | 13 |
| Disbarment | 11 |
| Transfer to Incapacity Inactive | 3 |
| Interim Suspension | 7 |
| Reinstatement | 8 |

*These figures represent the number of orders issued by the Supreme Court, not complaints. Some orders conclude multiple complaints.

COMPLAINTS:

| | |
|---|---|
| Complaints resolved | 147 |
| Pending as of June 30, 2011 | 78 |


Office of Disciplinary Counsel - Lawyer Complaints
Number of Cases
Fiscal Year
97-98
98-99
99-00
00-01
01-02
02-03
03-04
04-05
05-06
06-07
07-08
08-09
09-10
10-11
Received
Closed
Pending
1242
1363
1235
1200
1124
1233
1368
1383
1468
1511
1647
1657
1661
1496
1612
1442
1349
1191
1080
997
1020
1159
1302
1259
1310
1313
1280
1402
1484
782
941
766
740
798
868
824
835
876
888
937
1030
499

## C. Recent Rule Revisions and Proposals

**Advertising & Solicitation Filing Requirements.** On June 28, 2010, the Court adopted a proposal from the Commission on Lawyer Conduct to amend Rule 7.2 of the Rules of Professional Conduct to eliminate the filing requirement for lawyer advertisements. On August 22, 2011, the Court amended Rule 7.3 to eliminate the filing requirement for direct solicitations. The requirements related to records of dissemination remain intact.

**Testimonials.** On August 22, 2011, the Court revised Rule 7.1 to permit the use of testimonials in lawyer advertising in limited circumstances and with appropriate disclaimers.

**Content of Communications Regarding a Lawyer's Services.** Rule 7.1 was amended on August 22, 2011, to eliminate the ban on statements that describe or characterize the quality of a lawyer's services and "to provide that all advertisements shall be predominately informational such that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication."

**Solicitations.** On August 22, 2011, the Court adopted a number of changes to the rules regarding direct solicitation of clients to emphasize that the restrictions and limitations apply to electronic communications such as email.

**Self-Report of Criminal Arrests.** On June 28, 2010, the Court adopted a proposal from the Commission on Lawyer Conduct to amend Rule 8.3 of the Rules of Professional Conduct to require lawyers self-report arrests for serious crimes. Grammatical changes to the definition of the term 'serious crime' in Rule 1.0(n) were also made to clarify what circumstances give rise to the self-reporting and interim suspension requirements.

**Unclaimed and Unidentified Funds.** On June 28, 2010, the Court adopted an amendment to the Comment to Rule 1.15 to make it clear that unclaimed funds in a lawyer's trust account must be handled in accordance with the Uniform Unclaimed Property Act. The Court declined to adopt a proposal from the Commission on Lawyer Conduct to amend Rule 1.15 of the Rules of Professional Conduct to allow lawyers to pay unidentified funds to the Lawyers' Fund for Client Protection. It remains unclear how lawyers and law firms can ethically handle unidentified funds in trust.

**Trust Account Deposits and the Good Funds Rule.** On October 6, 2010, the Court adopted a proposal from the SC Bar Professional Responsibility Committee to amend Rule 1.15(f) of the Rules of Professional Conduct to make it clear that all funds must be deposited into the trust account before any disbursements can be made. Essentially, the Court did not change the substance of the rule, but rather restructured it for clarification. The Court did change the rule by adding two additional circumstances in which a lawyer can treat deposited funds as collected funds. The 'good funds' provision of the rule now includes insurance company checks that do not exceed $50,000.00 and any check that has not been returned or held by the bank for at least ten days. The Court also adopted a number of new comments to further explain the rule.

**Firm Dissolution.** The Court rejected a proposed firm dissolution rule submitted by the SC Bar Professional Responsibility Committee through the House of Delegates. The House has recently approved a new proposal that is currently pending at the Court. If adopted the rule will provide specific guidelines about responsibilities of lawyers leaving their law firms and firms that are dissolving or splitting up with regard to client files, client communication, and client funds.

**Financial Recordkeeping.** The Court adopted revisions to Rule 417 based, in part, on revisions to the ABA Model Rule for Financial Recordkeeping. The new version addresses issues related to electronic banking, nonlawyer signatories on trust accounts, and the extent to which lawyers are required to maintain images of canceled checks.

**Defining the Client File.** The Court rejected a proposed rule from the South Carolina Bar that would specifically define which portions of the client file are the property of the lawyer and what documents had to be delivered to the client upon termination of the representation or upon request of the client. The Court did note areas of concern and left open the opportunity for the Bar to resubmit a proposed rule.

## Part Two – The Lawyer's Oath, Revisited

### A. The Lawyer's Oath – Rule 402(k)(3), SCACR

I do solemnly swear (or affirm) that:

I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge those duties and will preserve, protect and defend the Constitution of this State and of the United States;

I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them;

To my clients, I pledge faithfulness, competence, diligence, good judgment and prompt communication;

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

I will not pursue or maintain any suit or proceeding which appears to me to be unjust nor maintain any defenses except those I believe to be honestly debatable under the law of the land, but this obligation shall not prevent me from defending a person charged with a crime;

I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law;

I will respect and preserve inviolate the confidences of my clients, and will accept no compensation in connection with a client's business except from the client or with the client's knowledge and approval;

I will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice;

**B. Matter of White**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of William Gary White, III, Respondent.

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Opinion No. 26939
Heard February 1, 2011 – Filed March 7, 2011

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**DEFINITE SUSPENSION**

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Lesley Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.
William Gary White, III, of Columbia, South Carolina, pro se Respondent.

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**PER CURIAM:** In this attorney disciplinary matter, the Commission on Lawyer Conduct ("Commission") investigated allegations of misconduct involving the Respondent, William Gary White, III, for his lack of civility and professionalism while handling a zoning dispute with the Town of Atlantic Beach ("Town"). The Office of Disciplinary Counsel ("ODC") filed formal charges against Respondent, and a Hearing Panel of the Commission recommended a definite suspension. We find Respondent has committed misconduct that warrants imposition of a definite suspension of ninety days and order Respondent to complete the Legal Ethics and Practice Program administered by the South Carolina Bar within six months of reinstatement.

## I. FACTS

In 2004, Respondent represented the Atlantic Beach Christian Methodist Episcopal Church[1] ("Church") in a legal action it filed against the Town regarding a zoning dispute. The Town Attorney was Charles Boykin. The parties settled the action in 2007. As part of the settlement, the Church's action was dismissed, the Town paid damages to the Church, and the Church promised future compliance with all of the Town's building, permitting, and zoning requirements.

On April 30, 2009, Kenneth McIver, the new Town Manager, sent a notice about the need for zoning compliance to the owners of the Church property, Vonetta M. Nimocks and Eboni A. McClary ("Church's Landlords"). In his notice, McIver stated that as part of the prior settlement, "the judge ordered that the Church must comply with the Town's Zoning Ordinances and that a request for compliance must come from you, the owner[s]." McIver copied the notice to the Church's pastor, who gave it to Respondent.

On May 6, 2009, Respondent sent a letter about McIver's notice to the Church's Landlords. Respondent sent copies of his letter to McIver and Boykin. The remarks made by Respondent in his May 6th letter are the subject of this disciplinary proceeding. The letter reads in full as follows:

You have been sent a letter by purported Town Manager Kenneth McIver. The letter is false. You notice McIver has no Order. He also has no brains and it is questionable if he has a soul. Christ was crucified some 2000 years ago. The church is His body on earth. The pagans at Atlantic Beach want to crucify His body here on earth yet again.

We will continue to defend you against the Town's insane [sic]. As they continue to have to pay for damages they pigheadedly cause the church. You will also be entitled to damages if you want to pursue them.

First graders know about freedom of religion. The pagans of Atlantic Beach think they are above God and the Federal law. They do not seem to be able to learn. People like them in S.C. tried to defy Federal law before with similar lack of success.

McIver delivered the letter to the Town Council, and three council members thereafter filed a disciplinary complaint against Respondent. ODC instituted formal charges against Respondent as a result of his conduct.

At the hearing on June 8, 2010, counsel for ODC stated: "ODC alleges that [Respondent's] statements questioning whether Mr. McIver has a soul, saying that he has no brain, calling the leadership of the Town pagans and insane and pigheaded violates his professional obligations, which include his obligation to provide competent representation to his clients; his obligation under Rule 4.4 to treat third parties in a way that doesn't embarrass them; Rule 8.4 to behave in a way that doesn't prejudice the administration of justice; and also [] the letter was not in conformity with his obligations under his oath of office, Rule 402(k)."[2] Counsel for ODC further alleged that Respondent had failed to cooperate with disciplinary authority by refusing to answer the allegations against him, threatening to sue the complainants for filing the grievance, and questioning ODC's authority.

The Hearing Panel found that Respondent was subject to discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR, for violating the following Rules of Professional Conduct (RPC) of Rule 407, SCACR: Rule 1.1 (competence), Rule 4.4 (respect for the rights of third persons), Rule 8.1 (knowing failure to respond to a lawful demand from a disciplinary authority), and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

The Hearing Panel further found Respondent is subject to discipline for violating the following provisions of the RLDE contained in Rule 413, SCACR: Rule 7(a)(3), RLDE (knowing failure to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5), RLDE (engaging in conduct tending to pollute the administration of justice, tending to bring the legal profession into disrepute, and demonstrating an unfitness to practice law); and Rule 7(a)(6), RLDE (violating the Lawyer's Oath taken upon the admission to practice law in South Carolina).

The Hearing Panel found three aggravating circumstances: Respondent's lack of remorse and unwillingness to acknowledge his wrongdoing, his extensive disciplinary history, and his "disregard and disrespect for these proceedings."

The Hearing Panel stated "Respondent offered no evidence in mitigation," but noted he did call his wife as a witness, who testified that she suffers from cancer. The Hearing Panel stated

Respondent offered no evidence that his wife's condition impacted his conduct in any way and, further, Respondent's wife was not diagnosed until after he sent the May 6, 2009 letter, so the Hearing Panel did "not consider Respondent's wife's medical condition as a mitigating factor."

The Hearing Panel recommended that Respondent be suspended from the practice of law. Three members of the Hearing Panel recommended a one-year suspension; one member recommended a two-year suspension. The Hearing Panel recommended that Respondent be required to pay a fine and the costs of these proceedings. It also recommended that Respondent be ordered to complete the Legal Ethics and Practice Program administered by the South Carolina Bar as a condition of reinstatement.

## II. LAW/ANALYSIS

Respondent has filed a brief opposing the Hearing Panel's recommended discipline, and ODC has filed a brief in support of the recommendations.

"The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court." In re Tullis, 375 S.C. 190, 191, 652 S.E.2d 395, 395 (2007). The Court "has the sole authority . . . to decide the appropriate sanction after a thorough review of the record." In re Thompson, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "The Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law." In re Hazzard, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008).

A disciplinary violation must be proven by clear and convincing evidence. In re Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); see also Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

### A. Rule 4.4(a), Respect for Rights of Third Persons

Rule 4.4(a) of the RPC provides in relevant part: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." Rule 4.4(a), Rule 407, SCACR.

Respondent argues his letter served numerous purposes other than embarrassing others, such as serving as a "warning" that he would sue the Town "a fourth time," protecting his and his client's religious beliefs, and protecting the integrity of the courts. We agree with ODC and the Hearing Panel that it is clear Respondent's "substantial purpose" in making the remarks and copying the letter to the Town Manager and the Town Attorney was to intimidate and embarrass those he perceived as being contrary to his client's legal position.

Respondent argues the rule contains its own "safe harbor" that protects "uncivil" remarks when they serve other purposes. However, the fact that the letter could have served other purposes does not prevent his conduct from being in violation of Rule 4.4(a). See, e.g., In re Norfleet, 358 S.C. 39, 595 S.E.2d 243 (2004) (finding an attorney who became angry and spoke in a threatening manner to a school principal who refused to turn over a student's file had violated Rule 4.4; the attorney was attempting to obtain the file for the otherwise legitimate purpose of using it in litigation).

Moreover, an attorney may not, as a means of gaining a strategic advantage, engage in degrading and insulting conduct that departs from the standards of civility and professionalism required of all attorneys. See In re Golden, 329 S.C. 335, 341, 496 S.E.2d 619, 622 (1998) (determining the attorney's conduct in questioning a witness by using sarcasm, unnecessary combativeness, threatening words, and intimidation served no legitimate purpose other than to embarrass, delay, or burden another person and, even if the witness was being uncooperative, it would not justify the attorney's insulting conduct, which was found to have "completely departed from the standards of our profession" as well as "basic notions of decency and civility").

It is clear from the record in this matter that Respondent sent the letter as a calculated tactic to intimidate and insult his opponents. Although Respondent maintains he used many of the words at the request of his client, the Church, Respondent cannot discharge his responsibility for his use of disparaging name-calling and epithets by simply stating he was asked to behave in this unprofessional manner by his client.

Respondent has also justified his conduct by arguing that he has a duty to provide zealous representation. We agree that an attorney has an obligation to provide zealous representation to a client. However, an attorney also has a corresponding obligation to opposing parties, the public, his profession, the courts, and others to behave in a civilized and professional manner in discharging his obligations to his client. Legal disputes are often emotional and heated, and it is precisely for this reason that attorneys must maintain a professional demeanor while providing the necessary legal expertise to help resolve, not escalate, such disputes. Insulting and intimidating tactics serve only to undermine the administration of justice and respect for the rule of law, which ultimately does not serve the goals of the client or aid the resolution of disputes.

**B. Constitutional Arguments**

To the extent Respondent argues the contents of his letter are protected by the United States Constitution by the First Amendment provisions for freedom of speech and freedom of religion, we conclude these rights do not prevent disciplinary action for an attorney's misconduct that is violative of the professional standards set by the courts.

"In the United States, the courts have historically regulated admission to the practice of law before them and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1066 (1991).

"'Membership in the bar is a privilege burdened with conditions,' to use the oft-repeated statement of Cardozo, J., in In re Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917), quoted in Theard v. United States, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342 (1957)." Id. "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." Id. at 1071. Limitations on the free speech rights of attorneys are also recognized as to extrajudicial statements. See id. at 1075-77.

"States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of

professions." Florida Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995) (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (alteration in original)).

"Although a lawyer does not surrender her freedom of expression upon admission to the bar, once admitted, a lawyer must temper her criticisms in accordance with professional standards of conduct." Burton v. Statewide Grievance Committee, 830 A.2d 1205, 1211 (Conn. Super. Ct. 2002) (citing United States Dist. Court for the E. Dist. of Washington v. Sandlin, 12 F.3d 861, 866 (9th Cir. 1993)). "[T]here is a balancing of an attorney's right of free speech and the state's interest in preserving the integrity of the judicial system." Id. (citation omitted).

The Hearing Panel's determination that Respondent's conduct is not protected by the First Amendment is supported by clear and convincing evidence. Respondent could have zealously protected his client's rights by means other than using derogatory and demeaning comments. The legal profession is one of advocacy; however, Respondent's role as an advocate would have been better served by zealously arguing his client's legal position, not making personal attacks. His statement that the RPC are always trumped by the First Amendment is not a correct statement of the law, and we hold the Hearing Panel properly found his actions amounted to sanctionable misconduct.

### C. Rule 8.1, Failure to Cooperate

As to the Hearing Panel's finding that he violated the RPC by failing to cooperate with lawful demands from a disciplinary authority, Respondent argues "[t]here is nothing in the record indicating any lack of cooperation, simply that the Respondent was adamant about his client's rights and that they were being violated."

Respondent filed answers when requested, essentially justifying his conduct as being protected by the First Amendment, and he did file a witness list and an exhibit list and respond to all other inquiries from ODC and participate in the hearing in this matter. Thus, although we find Respondent clearly committed misconduct in other respects, we decline to find that he violated Rule 8.1 by failing to cooperate.

### D. Mitigation

As to Respondent's arguments regarding the failure of the Hearing Panel to find his wife's health was a factor in mitigation, we find the record clearly supports the Hearing Panel's finding. Although his wife's diagnosis is certainly unfortunate, the evidence indicates Respondent's letter of May 6, 2009 predates her diagnosis. Moreover, even if she had been diagnosed sooner, Respondent failed to elicit any testimony on point as to how this affected his state of mind or affected his ability to conform his conduct to the rules concerning professional conduct.

## III. CONCLUSION

After considering the record in this matter, we conclude Respondent has committed misconduct in the respects identified by the Hearing Panel, except for the allegation regarding the failure to cooperate. We further find the Hearing Panel's suggestion of a definite suspension is appropriate under the circumstances.

Based on Respondent's blatant incivility and lack of decorum in this instance and the aggravating factors found by the Hearing Panel, including his disciplinary history, we impose a definite suspension of ninety days. We further order Respondent to complete the Legal Ethics and Practice Program administered by the South Carolina Bar within six months of reinstatement.[3] Respondent's conduct in this matter reflects poorly on himself as a member of the legal profession and reflects negatively upon the profession as a whole. He represented to this Court at oral argument that in the future he will conduct himself in accordance with the RPC and treat all persons in a civil, dignified, and professional manner as is expected of all members of the South Carolina Bar. We expect nothing less.

**DEFINITE SUSPENSION.**

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

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[1] It also appears in the record as the Christian Methodist Episcopal Mission Church.

[2] Rule 402(k)(3), SCACR provides every applicant for admission to practice law in this state must take and subscribe to the "Lawyer's Oath," by which the applicant pledges to act with "fairness, integrity, and civility, not only in court, but also in all written and oral communications." Id.

[3] We decline the recommendation of the Hearing Panel to impose a fine or costs.

### C. Matter of Anonymous

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of Anonymous Member of the South Carolina Bar, Respondent.

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Opinion No. 26964
Heard September 22, 2010 – Filed April 25, 2011

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**LETTER OF CAUTION**

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Disciplinary Counsel Lesley M. Coggiola and Deputy Disciplinary Counsel Barbara M. Seymour, both of Columbia, for Office of Disciplinary Counsel.
David Dusty Rhoades, of Charleston, and Cynthia Barrier Patterson, of Columbia, for Respondent.

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**PER CURIAM**: In this attorney discipline matter, the Hearing Panel (the Panel) determined Respondent was subject to discipline for violating Rule 7(a)(5), RLDE, Rule 413, SCACR, and Rule 8.4(e), RPC, Rule 407, SCACR, both of which provide that a lawyer may be disciplined for engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute, and Rule 7(a)(6), RLDE, Rule 413, SCACR, which provides it is a ground for discipline for an attorney to violate the attorney's oath of office. A majority of the Panel concluded Respondent's action warranted an admonition and would require Respondent to pay the costs of this proceeding, while one member of the Panel recommended Respondent receive a Letter of Caution with a finding of minor misconduct. We find that Respondent did violate the rules outlined above, but we disagree with the majority of the Panel's recommendation. We find Respondent's acknowledgement of misconduct and remorse to be sincere and effective in the mitigation of our sanction. Accordingly, we issue a private Letter of Caution with a finding of minor misconduct to Respondent.

Additionally, for the benefit of the bar, we take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication. We are concerned with the increasing complaints of incivility in the bar. We believe United States Supreme Court Justice Sandra Day O'Connor's words elucidate a lawyer's duty: "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L.Q. 5, 8 (1998).

**FACTS**

The formal charges in this matter arose out of a disciplinary complaint regarding an e-mail message Respondent sent to opposing counsel (Attorney Doe) in a pending domestic matter. Respondent represented the mother and Attorney Doe represented the father in an emotional and heated domestic dispute. It was within this context that Respondent sent Attorney Doe the following e-mail (the "Drug Dealer" e-mail):

I have a client who is a drug dealer on . . . Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near . . . Street. Think about it. Am I right?

Attorney Doe's spouse, also an attorney, filed the complaint in this matter after Attorney Doe disclosed the "Drug Dealer" e-mail to him. At the hearing, Respondent admitted that Attorney Doe's daughter had no connection to the domestic action.

At the hearing, Respondent asserted that the e-mail was in response to daily obnoxious, condescending, and harassing e-mails, faxes, and hand-delivered letters from Attorney Doe. These communications allegedly commented on the fact that Respondent is not a parent and therefore could not advise Respondent's client appropriately.[1] In support of this contention, Respondent submitted five e-mail exchanges between Respondent and Attorney Doe, four of which were dated after the "Drug Dealer" e-mail. In further support of Respondent's assertions, Respondent claimed to possess ten banker's boxes full of e-mails and other documents that constituted daily bullying from Attorney Doe; however, these documents were not produced. Due to a lack of evidence supporting Respondent's assertions, the Panel found Respondent's testimony to be entirely lacking in credibility. Ultimately, the Panel found Respondent was subject to discipline for sending the "Drug Dealer" e-mail to Attorney Doe.

## STANDARD OF REVIEW

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000) (citations omitted). "Although this Court is not bound by the findings of the Panel and Committee, these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of the witnesses." *In re Marshall*, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998) (citation omitted). "However, this Court may make its own findings of fact and conclusions of law." *Id.* (citation omitted).

## LAW

### I. Conduct Prejudicial to the Administration of Justice

"It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Rule 8.4(e), RPC, Rule 407, SCACR. Additionally, a lawyer is subject to discipline for "engag[ing] in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute . . . ." Rule 7(a)(5), RLDE, Rule 413, SCACR. This Court has stated that a lawyer "must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the Court. When a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial

system, and, as well, disserves his client." *In re Goude*, 296 S.C. 510, 512, 374 S.E.2d 496, 497 (1988).

We agree with the Panel that Respondent's e-mail was conduct tending to bring the legal profession into disrepute and was prejudicial to the administration of justice. By sending the "Drug Dealer" e-mail to Attorney Doe, Respondent was doing a disservice to Respondent's client. An e-mail such as the one sent by Respondent can only inflame the passions of everyone involved, make litigation more intense, and undermine a lawyer's ability to objectively represent his or her client. This kind of personal attack against a family member of opposing counsel with no connection to the litigation brings into question the integrity of the judicial system and prejudices the administration of justice.

**II. Violation of the Lawyer's Oath**

Respondent contends that the civility clause contained within the lawyer's oath is unconstitutionally vague and overbroad. We disagree.

Respondent took the lawyer's oath which includes the following clause, "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications . . . ." Rule 402(k), SCACR. The United States Supreme Court has noted that lawyers are not entitled to the same First Amendment protections as laypeople. *See In re Snyder*, 472 U.S. 634, 644–45, 105 S. Ct. 2874, 2881 (1985). Moreover, attorneys' "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *In re Sawyer*, 360 U.S. 622, 646–47, 79 S. Ct. 1376, 1388 (1959) (Stewart, J., concurring). "Even outside the courtroom, . . . lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071, 111 S. Ct. 2720, 2743 (1991).

*A. Vague*

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001) (citation omitted).

In *Grievance Administrator v. Fieger*, 719 N.W.2d 123 (Mich. 2006), *cert. denied*, 549 U.S. 1205, 127 S. Ct. 1257 (2007), an attorney challenged the constitutionality of Michigan's "civility" and "courtesy" rules for lawyers. That court held, "Such a challenge cannot be successfully advanced here because there is no question that even the most casual reading of these rules would put a person clearly on notice that the kind of language used by Mr. Fieger would violate MRPC 3.5(c) and MRPC 6.5(a)." *Fieger*, 719 N.W.2d at 139. In this case, there is no question that even a casual reading of the attorney's oath would put a person on notice that the type of language used in Respondent's "Drug Dealer" e-mail violates the civility clause. Casting aspersions on an opposing counsel's offspring and questioning the manner in which an opposing attorney was rearing his or her own children does not even near the margins of the civility clause. While no one argued it in this case, it could be argued that the language used by

Respondent in the "Drug Dealer" e-mail constituted fighting words. Moreover, a person of common intelligence does not have to guess at the meaning of the civility oath. We hold, as the court held in *Fieger*, that the civility oath is not unconstitutionally vague.

*B. Overbroad*

"The First Amendment overbreadth doctrine is an exception to the usual rules regarding the standards for facial challenges." *In re Amir X.S.*, 371 S.C. 380, 384, 639 S.E.2d 144, 146 (2006). Under the overbreadth doctrine, "the party challenging a statute simply must demonstrate that the statute could cause someone else—anyone else—to refrain from constitutionally protected expression." *Id.* (citation omitted). The overbreadth doctrine has "been implemented out of concern that the threat of enforcement of an overly broad law may deter or 'chill' constitutionally protected speech—especially when the overly broad law imposes criminal sanctions." *Id.* at 384-85, 639 S.E.2d at 146 (citation omitted). The overbreadth doctrine:

> . . . permits a court to wholly invalidate a statute only when the terms are so broad that they punish a substantial amount of protected free speech in relation to the statute's otherwise plainly legitimate sweep—until and unless a limiting construction or partial invalidation narrows it so as to remove the threat or deterrence to constitutionally protected expression.

*Id.* at 385, 639 S.E.2d at 146–47 (citation omitted).

A court analyzing whether a disciplinary rule violates the First Amendment must balance "the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073, 111 S. Ct. 2720, 2744 (1991). "In those instances where a lawyer's unbridled speech amounts to misconduct which threatens a significant state interest, a state may restrict the lawyer's exercise of personal rights guaranteed by the Constitutions." *In re Johnson*, 729 P.2d 1175, 1178 (Kan. 1986) (*citing N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340–41 (1963)). "A layman may, perhaps, pursue his theories of free speech . . . until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics." *In re Woodward*, 300 S.W.2d 385, 393–94 (Mo. 1957).

The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which Respondent attacked Attorney Doe. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client. There is no substantial amount of protected free speech penalized by the civility oath in light of the oath's plainly legitimate sweep of supporting the administration of justice and the lawyer-client relationship. Thus, we find the civility oath is not unconstitutionally overbroad.

**CONCLUSION**

We find Respondent violated Rule 7(a)(5), RLDE, Rule 413, SCACR, and Rule 8.4(e), RPC, Rule 407, SCACR, both of which provide that a lawyer may be disciplined for engaging in

conduct tending to pollute the administration of justice or bring the legal profession into disrepute, and Rule 7(a)(6), RLDE, Rule 413, SCACR, which provides it is a ground for discipline for an attorney to violate the attorney's oath of office. Because we find Respondent's acknowledgement of misconduct and remorse to be sincere, we issue a private Letter of Caution with a finding of minor misconduct to Respondent. We publish this Letter of Caution in the *In re Anonymous* format so as to provide guidance to the bar. We caution the bar that henceforth, this type of conduct could result in a public sanction.

**TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. JUSTICE PLEICONES has filed a separate opinion.**

**JUSTICE PLEICONES**: As I would impose no sanction or other requirement in connection with this matter, I respectfully decline to join in the opinion.

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[1] A complaint filed by Respondent against Attorney Doe was concluded in a confidential manner.

**Part Three – Lawyer Advertising Update**

**A. Matter of Wells**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of Michael Hensley Wells, Respondent.

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Opinion No. 26969
Heard April 7, 2011 – Filed May 9, 2011

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**PUBLIC REPRIMAND**

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Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.
Kevin Mitchell Barth, of Florence, for Respondent.

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**PER CURIAM:** In this attorney disciplinary matter, the Commission on Lawyer Conduct ("Commission") investigated allegations of misconduct involving Michael Hensley Wells's ("Respondent's") use of a website, brochures, and telephone book advertisements to promote his law firm's services. The Office of Disciplinary Counsel ("ODC") filed Formal Charges against Respondent. A Hearing Panel of the Commission ("Hearing Panel") issued its Panel Report, finding Respondent had committed misconduct. A majority of the Panel recommended that this Court issue a Public Reprimand.[1] The Panel also recommended that this Court order Respondent to pay costs, pay a fine, and complete the Ethics School and the Advertising School of the Legal Ethics and Practice Program.

Neither Respondent nor the ODC has filed a brief taking exception to the Panel Report. We accept the Panel's recommendation. Accordingly, we issue a Public Reprimand and order Respondent to pay the costs of the disciplinary proceedings, pay a fine in the amount of $1,000, and complete the Ethics School and the Advertising School of the Legal Ethics and Practice Program administered by the South Carolina Bar.

**I. Factual/Procedural History**

Respondent, who was admitted to the South Carolina Bar on April 24, 2001, owns and operates a law firm doing business under the name Coastal Law, L.L.C. This matter arises from the marketing practices used by Respondent's law firm as of January 2009. At that time, Respondent employed two associates, both of whom were admitted to practice in 2007. The law firm's marketing consisted primarily of a website, telephone book advertisements, and a firm brochure distributed at various public locations that included a mall kiosk.

Following a full investigation, the ODC filed Formal Charges against Respondent on February 25, 2010, alleging seven matters of misconduct involving his law firm's advertising practices. In his Answer, Respondent conceded certain allegations, but asserted that he did not intend to violate the Rules of Professional Conduct.

On July 15, 2010, the Panel held a hearing on the Formal Charges. At the hearing, Respondent testified regarding the allegations of misconduct. Although he acknowledged the improper statements in his advertising material, he claimed it was an "honest mistake" and that he had not intended to be deceptive. He further explained that he had failed to oversee the creation of the advertisements. He also emphasized that he had corrected and revised the advertising materials after being apprised of the Rule violations. He maintained that he now reviews all of the firm's advertisements before they are disseminated. In addition, Respondent offered evidence of his good character.

On December 22, 2010, the Hearing Panel issued a report that was filed with the Commission the next day. In its report, the Panel found the following facts[2] regarding the allegations of misconduct:

**Allegation A**

In his advertising materials, Respondent included false and misleading statements regarding: his experience and his associates' experience; the firm's areas of practice and past case results; the assignment of cases among the attorneys in the firm; the firm's reputation; the firm's office locations; and the foreign language ability of the firm's employees.

In terms of his experience, Respondent included a statement on his website and in his firm brochure that he had "worked in the legal environment for over twenty years." Although Respondent had worked as a clerk for a law firm while in college and law school, he had only actually practiced law for about seven years when these materials were disseminated.

Respondent also overstated the experience of his associates on his website. At the time the website was published, the firm's two associates had been admitted for less than one year, yet the website referred to the firm's "numerous trained and experienced attorneys." The website also included phrases describing the firm's attorneys as "thoroughly familiar with the local court system", "highly skilled", possessing "wide-ranging knowledge", and having a "deep personal knowledge of the courts, judges, and other courthouse personnel."

Regarding the firm's areas of practice and the types of cases handled by the attorneys, Respondent's website included a statement that "our attorneys handle all types of legal matters in state and federal court in South Carolina" when, in fact, that was not the case. The website also stated that the firm represents clients "in every level of the South Carolina state court system", which was not true.

Respondent's website also stated that "[e]ach attorney with Coastal Law Firm focuses his or her practice exclusively on one area of the law [thus] each attorney is deeply familiar with the law and procedural issues related to their clients' cases." However, Respondent listed at least twenty-seven distinct practice areas on his website even though only three attorneys (including himself) were employed with the firm.

Respondent's website further stated that the firm had served clients in constitutional law, civil rights, ethics and professional responsibility, and toxic torts. No lawyer in the firm had actually handled any matters in those areas; however, they were willing to accept such cases.

Additionally, Respondent's website contained a page entitled "Consumer Protection and Products Liability Lawyer." The page claimed that the firm has "a history of winning [products liability] cases" and that it employs "defective products liability lawyers" who "understand how to deal with both corporations and insurance companies and have a history of winning cases for our clients." On another page on the website, Respondent stated that "At Coastal Law, our . . . product recall lawyers understand what is required in filing a medical injuries claim for manufacturer negligence in producing a hazardous drug or product leading to a dangerous product recall. We can aggressively pursue your legal rights against negligent corporations that may have introduced a product that damaged your health." Neither Respondent nor any lawyer in his law firm had ever handled a products liability matter.

In terms of the firm's office locations, some of Respondent's telephone book advertisements stated that the firm had offices in Georgia and Florida. At the time, Respondent had a referral arrangement with firms located in those states and had plans to merge his firm with another South Carolina lawyer, who had offices in Georgia and Florida. Respondent's firm, however, never actually operated offices in those states.

With respect to the foreign language ability of the firm's employees, Respondent's advertising materials included the phrase "We Speak Spanish" written in Spanish. None of the lawyers in the firm spoke Spanish. Only part of the time when these advertisements were published did the firm employ a staff member who spoke Spanish. The inclusion of "We Speak Spanish" in Respondent's advertising, particularly at times when no one in the office spoke Spanish, was misleading as it implied that the firm employed Spanish- speaking attorneys.

As to the firm's reputation, Respondent's website included a number of statements that could not be factually substantiated such as the firm "developed a reputation over the years for outstanding results" and the firm is "recognized as an established, experienced, and reputable local Myrtle Beach law firm." Although Respondent admitted at the hearing that the inclusion of this language was a "mistake" as his law firm had not been identified as a leading law firm or received special recognition, he claimed it was never his "intention to deceive."

**Allegation B**

In his advertising materials, Respondent improperly compared his law firm's services to other law firms in ways that could not be factually substantiated with statements such as "best attorney available", "most effective legal services", and "best services possible." Respondent acknowledged that it was inappropriate to make these comparisons to other lawyers.

**Allegation C**

Although Respondent filed his telephone book advertisements with the Commission on Lawyer Conduct in compliance with Rule 7.2(b), he admitted that he did not do so with his website or firm brochure.

**Allegation D**

Respondent admitted that some of his telephone book advertisements listed only the law firm name and not the name of a lawyer that was responsible for the content of the advertisements.

## Allegation E

Respondent admitted in his Answer that his firm brochure characterized the quality of his firm's legal services for criminal defense clients as "tough criminal defense representation." He also admitted that his website characterized his firm's attorneys as: "highly skilled at obtaining bonds for their clients"; "dedicated attorneys who provide excellent legal advice"; "maintaining a high degree of professionalism" in real estate matters; and "intelligent", "competent", and "full service."

## Allegation F

Respondent admitted that his telephone book advertising and website included statements regarding contingent fee arrangements, including the following statements: "no fee until you receive money"; "no fees up front to handle your personal injury or wrongful death case"; and "your cost is nothing unless we win." Respondent, however, failed to disclose whether the client would be liable for any expenses in addition to the fee or whether the percentage of the contingency fee would be computed before deducting the expenses.

## Allegation G

Respondent's website referred to the firm's "expertise" in personal injury matters and the firm's "expert nursing home litigation advisors." The website and firm brochures also stated that the firm "specializes in several areas of law." Respondent, however, admitted that no one in his firm was a certified specialist in any area of law.

## Hearing Panel's Findings of Misconduct

The Hearing Panel found that by his conduct, Respondent was subject to sanctions for violating the following South Carolina Rules of Professional Conduct (RPC) of Rule 407, SCACR: Rule 7.1(a) (communications concerning a lawyer's services that contain "a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading"); Rule 7.1(b) (communications concerning a lawyer's services that are "likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law"); Rule 7.1(c) (communications concerning a lawyer's services that compare "the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated"); Rule 7.2(b) ("A lawyer is responsible for the content of any advertisement or solicitation placed or disseminated by the lawyer and has a duty to review the advertisement or solicitation prior to its dissemination to reasonably ensure its compliance with the Rules of Professional Conduct"; failure to file advertisements with the Commission on Lawyer Conduct)[3]; Rule 7.2(d) ("Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer responsible for its content."); Rule 7.2(f) ("A lawyer shall not make statements in advertisements or written communications which are merely self-laudatory or which describe or characterize the quality of the lawyer's services; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients."); Rule 7.2(g) ("Every advertisement that contains information about the lawyer's fee shall disclose whether the client will be liable for any expenses in addition to the fee and, if the fee will be a percentage of the recovery, whether the

percentage will be computed before deducting the expenses."); and Rule 7.4(b)[4] (use of the words "expert" and "specialist" in advertisements is prohibited where a lawyer is not a certified specialist).

**Aggravating and Mitigating Circumstances**

The Hearing Panel took into consideration the following mitigating circumstances: (1) Respondent's character evidence; (2) the absence of any prior disciplinary history; (3) Respondent's acknowledgement of wrongdoing; and (4) Respondent's remorse and willingness to take remedial action. In aggravation, the Panel took into consideration the seriousness of Respondent's misconduct, in particular the dishonest nature of the conduct, and the fact that these charges represented a pattern of multiple offenses.

**Hearing Panel's Recommended Sanction**

Two members of the Hearing Panel recommend the sanction of a Public Reprimand. The remaining member of the Hearing Panel recommended the sanction of an Admonition. Additionally, all members of the Hearing Panel recommended that Respondent be ordered to pay the costs of the proceedings, be fined an appropriate amount, and be required to complete the Ethics School and the Advertising School of the Legal Ethics and Practice Program within a period of six months from the date of this Court's order.

## II. Discussion

This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record. In re Welch, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003). "The Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law." In re Hazzard, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008).

"A disciplinary violation must be proven by clear and convincing evidence." In re Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); see also Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

The parties, by not filing briefs, have accepted the findings of fact, conclusions of law, and recommendations of the Hearing Panel. Thus, this Court must determine whether the recommended sanction is appropriate.

We agree with the Panel's recommended sanction of a Public Reprimand as it is consistent with this Court's decisions regarding similar professional misconduct. See In re Schmidt, 374 S.C. 167, 648 S.E.2d 584 (2007) (holding that Public Reprimand was the appropriate sanction where attorney: published newspaper advertisements that failed to disclose the location, by city or town, where he principally practiced law; used advertisements containing the word "specialist", when in fact he was not a certified specialist; sent solicitation letters that failed to disclose where he principally practiced law, included the words "expert" and "expertise", were not filed with the Commission, and did not disclose a list of persons to whom the letters were sent; and sent a client letter containing statements that were not verified); In re Mitchell, 364 S.C. 606, 614 S.E.2d 634 (2005) (finding Public Reprimand was the appropriate sanction where attorney, who

had previously received a letter of caution, continued to use letterhead that contained misleading information regarding his solo practice); In re Pavilack, 327 S.C. 6, 488 S.E.2d 309 (1997) (concluding Public Reprimand was the appropriate sanction where attorney aired two misleading advertisements); cf. In re Anonymous Member of the South Carolina Bar, 386 S.C. 133, 687 S.E.2d 41 (2009) (issuing a letter of caution with a finding of minor misconduct where attorney's use of the words "expert" and "specialist" on his firm's website violated Rule 7.4(b) of the Rules of Professional Conduct); In re Creson, 338 S.C. 157, 526 S.E.2d 231 (2000) (finding a Public Reprimand was warranted for attorney who failed to remove from his South Carolina letterhead a misleading statement indicating that he was admitted to practice in Georgia but had been suspended from the practice of law in that state).

Here, Respondent was clearly cooperative and remorseful as evidenced by his testimony before the Hearing Panel and this Court. Respondent also has no prior disciplinary history and has revised his advertising materials in accordance with the suggestions made by the ODC. Moreover, according to Respondent, the advertising materials were corrected almost immediately after he received the ethics complaint in January 2009.

In terms of the website, Respondent testified that the website was "actually up" for only three to four months as it became operational at the end of 2008 and was taken down shortly after he received the ethics complaint in January 2009. Respondent also testified that he "pulled all the brochures and business cards" from the mall kiosk that had been set up for the firm's advertisements.

Finally, Respondent stated that he now uses a "checklist" compiled by the ODC to help attorneys with their advertisements. He further explained that he has "scaled" back on the statements in his advertisements as to the firm's areas of practice and the potential case results.

In addition to the above-outlined sanction, we also order Respondent to pay a fine of $1,000 and the costs of the disciplinary proceedings.[5] See In re Thompson, 343 S.C. 1, 13, 539 S.E.2d 396, 402 (2000) ("The assessment of costs is in the discretion of the Court."); Rule 27(e)(3), RLDE, of Rule 413, SCACR ("The Supreme Court may assess costs against the respondent if it finds the respondent has committed misconduct."); Rule 7(b)(6), RLDE, of Rule 413, SCACR (stating sanctions for misconduct may include the "assessment of the costs of the proceedings, including the cost of hearings, investigations, prosecution, service of process and court reporter services"); Rule 7(b)(7), RLDE, of Rule 413, SCACR (providing that sanctions for misconduct may include assessment of a fine).

Moreover, given the extent of Respondent's improper advertisements, we order Respondent to complete the Ethics School and the Advertising School of the Legal Ethics and Practice Program.

## III. Conclusion

Based on the foregoing, we conclude that Respondent has committed misconduct in the respects identified by the Hearing Panel. We further find the Hearing Panel's recommended sanctions are warranted under the circumstances. Accordingly, we issue a Public Reprimand and further order Respondent to pay the costs of the disciplinary proceedings, pay a fine in the amount of $1,000,

and complete the Ethics School and the Advertising School of the Legal Ethics and Practice Program administered by the South Carolina Bar within six months of the date of this order.

**PUBLIC REPRIMAND.**

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

[1] One member of the Panel recommended an Admonition.

[2] Neither party filed briefs with this Court. Consequently, the parties are deemed to have accepted the Panel's findings of fact, conclusions of law, and recommendations. See Rule 27(a), RLDE, of Rule 413, SCACR ("The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.").

[3] Respondent's advertisements were subject to filing pursuant to Rule 7.2(b), which was amended effective October 1, 2005. As of June 28, 2010, the rule has been amended to eliminate this filing requirement.

[4] Although the Panel Report references Rule 7.4(c), we believe Rule 7.4(b) is the proper rule as Rule 7.4(c) addresses advertisements regarding patent and trademark attorneys.

[5] The Commission claims it has incurred $1,005.24 in these proceedings.

**B. Revised Rules (August 22, 2011)**

The Supreme Court of South Carolina
RE: Amendments to the South Carolina Rules of Professional Conduct,
Rule 407 of the South Carolina Appellate Court Rules (SCACR)

ORDER

The South Carolina Bar's Commission on Lawyer Advertising has proposed a comprehensive set of amendments to the South Carolina Rules of Professional Conduct. While we appreciate the time and effort given to this project by the Commission, and its dedication to protecting the public and maintaining the integrity of the legal profession, in light of recent court decisions and our desire to retain some consistency with the pre-2002 or current version of the Model Rules of Professional Conduct as well as the rules of other states, we decline to adopt a majority of the changes proposed by the Commission. However, some of the proposed amendments are necessary and beneficial for purposes of compliance with recent court decisions and for consistency, as previously mentioned. Accordingly, pursuant to Article V, §4 of the South Carolina Constitution, we hereby amend Rules 7.1, 7.2 and 7.3 of the South Carolina Rules of Professional Conduct, Rule 407, SCACR, as follows:

- The term "unfair" is deleted from Rule 7.1;

- The ban on testimonials is deleted from Rule 7.1(d) and replaced with language allowing testimonials under certain conditions;

- Comments [1] and [3] to Rule 7.1 are amended to address the change in the ban on testimonials;

- Rule 7.2(a) is amended to provide that all advertisements shall be predominately informational such that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication. A new Comment [4] has been added to address the amendment to Rule 7.2(a). The remaining Comments have been renumbered;

- Rule 7.2(c)(2), and new Comment [8] to Rule 7.2, are amended to require that the legal service plan or not-for-profit lawyer referral service not be acting in violation of any Rules of Professional Conduct;

- Rule 7.2(f) is deleted and sections (g), (h), and (i) of the rule are re-designated as sections (f), (g), and (h);

- New Comment [6] to Rule 7.2 is amended to state that it is the responsibility of the lawyer who disseminates or causes the dissemination of the advertisement to review it for compliance with the South Carolina Rules of Professional Conduct.

- The requirement that solicitations be filed with the Commission on Lawyer Conduct, together with a $50 filing fee, is deleted from Rule 7.3(c) and electronic solicitations are added to the types of solicitations for which lawyers must maintain a file;

- Rule 7.3(d)(1) is amended to require that email solicitations be labeled as advertising material in the subject line and at the beginning and end of the message in capital letters and prominent type;

- Rule 7.3(d)(2)(A) is amended by adding directories and the advice of others as alternative methods for obtaining information about other lawyers;

- Rule 7.3(d)(2) and (d)(3) is amended to apply to "solicitations" and "communications," instead of being limited to "written or recorded solicitations"; and

- Rule 7.3(i) is amended to require a lawyer who reasonably believes a lawyer other than the lawyer whose name or signature appears on the communication will likely be the lawyer who primarily handles the case or matter, or that the case or matter will be referred to another lawyer or law firm, to notify a potential client.

These amendments shall be effective immediately. The rules, as amended, are available at www.sccourts.org/courtReg.

IT IS SO ORDERED.

s/Jean H. Toal C.J.
s/Costa M. Pleicones J.
s/Donald W. Beatty J.
s/John W. Kittredge J.
s/Kaye G. Hearn J.

Columbia, South Carolina
August 22, 2011

## RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make false, misleading, or deceptive, ~~or unfair~~ communications about the lawyer or the lawyer's services. A communication violates this rule if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

(d) contains a testimonial about, or endorsement of, the lawyer

(1) without identifying the fact that it is a testimonial or endorsement;

(2) for which payment has been made, without disclosing that fact;

(3) which is not made by an actual client, without identifying that fact;

and

(4) which does not clearly and conspicuously state that any result the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate similar results can be obtained for other clients.

(e) contains a nickname, moniker, or trade name that implies an ability to obtain results in a matter.

**Comment**

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. ~~The prohibition in paragraph (b) of statements that may create "unjustified expectations" and the prohibition in paragraph (d) of testimonials would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.~~

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a

whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

For instance, the prohibition in paragraph (b) on statements likely to create "unjustified expectations" may preclude, and the limitations in paragraph (d) on testimonials and endorsements does preclude, advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, unless they state clearly and conspicuously that any result the lawyer or law firm may have achieved on behalf of clients in other matters does not necessarily indicate similar results can be obtained for other clients. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

[4] Paragraph (e) precludes the use of nicknames, such as the "Heavy Hitter" or "The Strong Arm," that suggest the lawyer or law firm has an ability to obtain favorable results for a client in any matter. A significant possibility exists that such nicknames will be used to mislead the public as to the results that can be obtained or create an unsubstantiated comparison with the services provided by other lawyers. See also Rule 8.4(f)(prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law).

**RULE 7.2: ADVERTISING**

(a) Subject to the requirements of this Rule and Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media. All advertisements shall be predominately informational such that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication.

(b) A lawyer is responsible for the content of any advertisement or solicitation placed or disseminated by the lawyer and has a duty to review the advertisement or solicitation prior to its dissemination to reasonably ensure its compliance with the Rules of Professional Conduct. The lawyer shall keep a copy or recording of every advertisement or communication for two (2) years after its last dissemination along with a record of when and where it was disseminated.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service, which is itself not acting in violation of any Rule of Professional Conduct; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer responsible for its content.

(e) No lawyer shall, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm unless the advertisement discloses the name and address of the nonadvertising lawyer, the relationship between the advertising lawyer and the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

~~(f) A lawyer shall not make statements in advertisements or written communications which are merely self laudatory or which describe or characterize the quality of the lawyer's services; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients.~~

(~~g~~f) Every advertisement that contains information about the lawyer's fee shall disclose whether the client will be liable for any expenses in addition to the fee and, if the fee will be a percentage of the recovery, whether the percentage will be computed before deducting the expenses.

(~~h~~g) A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or fee range for at least ninety (90) days following dissemination of the advertisement, unless the advertisement specifies a shorter period; provided that a fee advertised in a publication which is issued not more than annually, shall be honored for one (1) year following publication.

(~~i~~h) All advertisements shall disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside a city or town, the county in which the office is located must be disclosed. A lawyer referral service shall disclose the geographic area in which the lawyer practices when a referral is made.

**Comment**

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule, but see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real time electronic exchange that is not initiated by the prospective client.

[4] Regardless of medium, a lawyer's advertisement should provide only useful, factual information presented in an objective and understandable fashion so as to facilitate a prospective client's ability to make an informed choice about legal representation. A lawyer should strive to communicate such information without the use of techniques intended solely to gain attention and which demonstrate a clear and intentional lack of relevance to the selection of counsel, as such techniques hinder rather than facilitate intelligent selection of counsel. A lawyer's advertisement should reflect the serious purpose of legal services and our judicial system. The state has a significant interest in protecting against a public loss of confidence in the legal system, including its participants, and in protecting specifically against harm to the jury system that might be caused by lawyer advertising. The effectiveness of the legal system depends upon the public's trust that the legal system will operate with fairness and justice. Public trust is likely to be diminished if the public believes that some participants are able to obtain results through inappropriate methods. Public confidence also is likely to be diminished if the public perceives that the personality of their advocate, rather than the legal merit of their claim, is a key factor in determining the outcome of their matter. It is necessary to ensure that lawyer advertisements do not have these detrimental impacts. This rule is intended to preserve the public's access to information relevant to the selection of counsel, while limiting those advertising methods that are most likely to have a harmful impact on public confidence in the legal system and which are of little or no benefit to the potential client.

[~~4~~5] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

**Record of Advertising**

[~~5~~6] Paragraph (b) imposes upon the lawyer who disseminates an advertisement or causes its dissemination the responsibility for reviewing each advertisement prior to dissemination to

ensure its compliance with the Rules of Professional Conduct. It also requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.

**Paying Others to Recommend a Lawyer**

[~~6~~7] Lawyers are not permitted to pay others for channeling professional work. Paragraph (c)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the cost of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public relations personnel, business development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[~~7~~8] A lawyer may pay the usual charges of a legal service plan or a not for profit lawyer referral service, which is itself not acting in violation of the Rules of Professional Conduct. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service. The "usual charges" may include a portion of legal fees collected by a lawyer from clients referred by the service when that portion of fees is collected to support the expenses projected for the referral service.

[~~8~~9] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. See also Rule 7.3(b).

**RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

(a) A lawyer shall not by in person, live telephone or real time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by direct written, recorded or electronic communication or by in person, telephone, telegraph, facsimile or realtime electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, harassment, fraud, overreaching, intimidation or undue influence;

(3) the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person unless the accident or disaster occurred more than thirty (30) days prior to the solicitation;

(4) the solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person solicited is represented by a lawyer in the matter; or

(5) the lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(c) ~~Every written or recorded communication subject to this Rule, except those directed only to other lawyers, family members, close personal friends, or persons with whom the sender has a prior or existing professional relationship, shall be filed with the Commission on Lawyer Conduct within ten (10) days after any written communication is sent or any recorded communication is made together with a fee of $50.00. If a written communication is sent or a recorded communication is made generally to persons similarly situated, a representative copy may be filed with a listing of those persons to whom the communication was sent.~~ Any lawyer who uses written, ~~or~~ recorded, or electronic solicitation shall maintain a file for two years showing the following:

(1) the basis by which the lawyer knows the person solicited needs legal services; and

(2) the factual basis for any statements made in the written, or recorded, or electronic communication.

(d) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family, close personal or prior professional relationship, shall conform to Rules 7.1 and 7.2 and, in addition, must conform to the following provisions:

(1) The words "ADVERTISING MATERIAL," printed in capital letters and in prominent type, shall appear on the front of the outside envelope and on the front of each page of the material. Every such recorded or electronic communication shall clearly state both at the beginning and at the end that the communication is an advertisement. If the solicitation is made by computer, including, but not limited to, electronic mail, the words "ADVERTISING MATERIAL," printed

in capital letters and in prominent type, shall appear in any subject line of the message and at the beginning and end of the communication.

(2) Each ~~written or recorded~~ solicitation must include the following statements:

(A) "You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting directories, seeking the advice of others, or ~~the Yellow Pages or by~~ calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer" and

(B) "The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary."

Where the solicitation is written, the above statements must be in a type no smaller than that used in the body of the communication.

(3) Each ~~written or recorded~~ solicitation must include the following statement: "ANY COMPLAINTS ABOUT THIS COMMUNICATION ~~LETTER (OR RECORDING)~~ OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION ON LAWYER CONDUCT, 1015 SUMTER STREET, SUITE 305, COLUMBIA, SOUTH CAROLINA 29201 – TELEPHONE NUMBER 803-734-2037." Where the solicitation is written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.

(e) Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted or certified delivery.

(f) Written communications mailed to prospective clients shall not be made to resemble legal pleadings or other legal documents.

(g) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.

(h) A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self mailing brochure or pamphlet, the nature of the client's legal problem.

(i) If a lawyer reasonably believes ~~knows~~ that a lawyer other than the lawyer whose name or signature appears on the communication will likely be the lawyer who primarily handles ~~actually handle~~ the case or matter, or that the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter shall include a statement so advising the potential client.

(j) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan. A lawyer may participate with a prepaid or group legal service plan only if the plan is established in compliance with all statutory and regulatory requirements imposed upon such plans under South Carolina law. Lawyers who participate in a legal service plan must make reasonable efforts to assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b).

**Comment**

[1] There is a potential for abuse inherent in direct in person or, live telephone or real time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[2] The use of general advertising and written recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in person live telephone or real time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false, misleading, deceptive, or unfair communications, in violation of Rule 7.1. The contents of direct in person live telephone or real time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third party scrutiny. Consequently, they are much more likely to approach, and occasionally cross, the dividing line between accurate representations and those that are false and misleading.

[3] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(d) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[4] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false, misleading, deceptive or unfair within the meaning of Rule 7.1; which involves coercion, duress, harassment, fraud, overreaching, intimidating or undue influence within the meaning of Rule 7.3(b)(2); which involves contact with a prospective client

who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1); which involves contact with a person the lawyer reasonably should know is represented by another lawyer in the matter; or which involves contact with a prospective client the lawyer reasonably should know is physically, emotionally or mentally incapable of exercising reasonable judgment in choosing a lawyer under Rule 7.3(b)(5) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[5] The public views direct solicitation in the immediate wake of an accident as an intrusion on the personal privacy and tranquility of citizens. The 30-day restriction in paragraph (b)(3) is meant to forestall the outrage and irritation with the legal profession engendered by crass commercial intrusion by attorneys upon a citizen’s personal grief in a time of trauma. The rule is limited to a brief period, and lawyer advertising permitted under Rule 7.2 offers alternative means of conveying necessary information about the need for legal services and the qualifications of available lawyers and law firms to those who may be in need of legal services without subjecting the prospective client to direct persuasion that may overwhelm the client’s judgment.

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(d) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Requiring communications to be marked as advertisements sent only by regular U.S. mail and prohibiting communications from resembling legal documents is designed to allow the recipient to choose whether or not to read the solicitation without fear or legal repercussions. In addition, the lawyer or law firm should reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of this information source will help the recipient understand the extent of knowledge the lawyer or law firm has regarding the recipient’s particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient’s matter if the lawyer does not.

[9] Paragraph (j) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services

through the plan. The organization referred to in paragraph (j) must not be owned by or directed, whether as manager or otherwise, by any lawyer or law firm that participates in the plan. For example, paragraph (j) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services.