

2010 Ethics Update

**Prepared by
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- I. Disciplinary Opinion Summaries (as of September 1, 2010)**
- II. Ethics Advisory Opinion Summaries (as of September 1, 2010)**
- III. 2009-2010 Annual Report of SC Lawyer Discipline**

I. Disciplinary Opinion Summaries (as of September 1, 2010)

Criminal Conduct

- (1) Matter of Sprouse. Lawyer was admitted in both North Carolina and South Carolina. The NC Bar disbarred her after she was convicted of eighteen counts of federal mail, wire, and/or bank fraud; conspiracy; and, money laundering. The Supreme Court of SC imposed reciprocal discipline. Disbarment. (Op.#26819, May 17, 2010)
- (2) Matter of Coker. Lawyer misappropriated \$275,000.00 from his trust account over a year and a half period. Lawyer restored the funds and reported himself. Definite Suspension for Three Years, plus LEAPP Ethics School and Trust Account School, by agreement. (Op.#26818, May 17, 2010)
- (3) Matter of Ervin. Lawyer was arrested for pointing and presenting a firearm in connection with a road rage incident. Lawyer completed PTI and the charges were expunged. Definite Suspension for Six Months, retroactive, plus two years of psychiatric counseling and costs. (Op.#2618, May 11, 2010)

Dishonesty

- (4) Matter of Boyd. Lawyer pocketed \$2000 in fees from two different clients that was supposed to go to his law firm. Lawyer resigned from the firm and paid the money back. Definite Suspension for Six Months, by agreement. (Op.#26847, August 9, 2010)
- (5) Matter of Fabri. During a deposition of Lawyer's expert witness in a domestic case, Lawyer wrote a note to the witness. In another domestic case, Lawyer issued subpoenas for medical records after the action was concluded. Admonition after hearing, plus costs. (August 20, 2010)

Neglect of Client Matters

- (6) Matter of Moody. Lawyer closed her law office and began teaching school without notice to her clients, the courts, or opposing counsel. She stopped collecting her mail and did not conclude her clients' legal matters. She was later suspended for nonpayment of dues and failure to comply with CLE requirements. She was sanctioned for neglect and abandonment of several client matters. In a PCR matter, Lawyer failed to properly advise her client of his right to appeal and failed to review the proposed order or provide a copy

of the final order to the client. In a Social Security matter, Lawyer failed to follow up on a request for a hearing and failed to respond to certified mail from her client. In a grandparent adoption matter, Lawyer did no work on the matter after being paid \$1100.00. In a name change matter, Lawyer was paid \$700.00, but took no action on behalf of the client. In a domestic matter, Lawyer failed to provide the client with her file. In a divorce matter in which Lawyer was paid \$475.00, she failed to pursue the matter and failed to respond to phone calls and letters from the client. In several of these matters, Lawyer failed to hold unearned fees in trust. In fact, Lawyer did not maintain a trust account. She converted fees to cash, which she held in the client files and used as needed. In addition, Lawyer failed to fully cooperate in the disciplinary investigation, including failing to respond to written inquiries, failing to appear for interviews, and failing to comply with subpoenas for documents. Definite Suspension for Two Years, retroactive, plus restitution, costs, monitoring by Lawyers Helping Lawyers, completion of Trust Account School and Ethics School, by agreement. (Op. #26809, April 26, 2010)

- (7) Matter of McGee. Lawyer failed to pay one hundred seventy-two title insurance premiums to a title company. In thirty-seven of those cases, Lawyer also failed to issue the title policies. Lawyer asserted that his failures resulted from computer problems and a lack of reconciliation of his accounts. The Court considered Lawyer's poor health and forty years of practice with no disciplinary history as mitigation. Indefinite Suspension, retroactive to the date of interim suspension, plus restitution, by agreement. (Op.#26804, April 12, 2010)
- (8) Matter of Brown. Lawyer mishandled a number of bankruptcy matters. He entered into an agreement with the Bankruptcy Court to refrain from filing new cases until he fixed the ones he had, establish and use a trust account, and seek treatment for alcohol abuse. Lawyer was held in contempt of court for failing to abide by this agreement. The opinion discusses five specific client matters that involved failure to competently and diligently pursue the representations, failure to adequately communicate with the clients, and failure to hold unearned fees in trust. The Court considered the Lawyer's well-documented substance abuse and efforts to seek treatment, his full cooperation in the disciplinary proceedings, and his expression of "significant regret and remorse" in mitigation. Definite Suspension of Six Months, not retroactive to the date of his interim suspension, plus two

years of treatment and abstinence monitoring by Lawyers Helping Lawyers and the Commission on Lawyer Conduct, restitution to clients and the Lawyers Fund, completion of LEAPP Trust Account School and Ethics School, and two years of trust account monitoring by the Commission on Lawyer Conduct, by agreement. (Op.# 26801, April 12, 2010)

- (9) Matter of Jacobsen. Lawyer entered into a consent order with the US Bankruptcy Trustee in which he agreed to withdraw from bankruptcy practice for one year, consult with Lawyers Helping Lawyers, complete 8 hours of ethics CLE and 25 hours of bankruptcy training, and complete an office review with the SC Bar Practice Management Assistance Program. At the time, Lawyer was facing contempt of the Bankruptcy Court for numerous ethical and procedural deficiencies. Lawyer failed to comply with the consent order, including continuing to accept new bankruptcy clients. When Lawyer's associate quit, Lawyer closed his office abruptly with more than 2000 bankruptcy matters pending. ODC received eight grievances from clients, one from Lawyer's former partner, and one from the Bankruptcy Court. Investigation revealed lack of required trust account records, commingling of client funds and law firm funds, and a \$15,000.00 shortage in the trust account. Disbarment, plus costs and restitution, by default. (Op.#26783, March 1, 2010)
- (10) Matter of C. Johnson. In a personal injury case, Lawyer failed to inform two clients of the potential conflict of their interests. Lawyer went forward on behalf of one of the clients with a lawsuit against the other contrary to specific instructions from her not to do so. He also missed the statute of limitations. In a real estate closing, Lawyer allowed his nonlawyer secretary/sister to engage in the practice of law, sign his name, then notarized that false signature. In thirteen unrelated real estate closings, Lawyer's documents contained "numerous financial discrepancies and inaccuracies," including falsely stating that a transaction was a refinance rather than a purchase; misrepresenting the amount of funds received by the borrower; incorrect statements of processing fees; and inaccurate sales prices. The Court rejected allegations that Lawyer assisted a mortgage broker in mortgage fraud. Although Lawyer created an atmosphere that allowed the broker to perpetrate his scheme by his "general slack and casual approach to real estate closings, the Court did not find clear and convincing evidence that he knowingly assisted the broker in

fraud. Definite Suspension of One Year, plus costs and completion of the Legal Ethics and Practice Program. (Op.#26774, February 16, 2010)

- (11) Matter of Thomson. In one matter, Lawyer failed to keep a client informed about the status of her case, then failed to deliver her file and refund her fees after she fired him. In a second matter, Lawyer failed to comply with a Resolution of Fee Disputes order to repay a client \$500.00. Lawyer failed to respond to disciplinary inquiries. Public Reprimand, plus restitution, by agreement. (Op.#26872, August 23, 2010)
- (12) Matter of Holcombe. Lawyer neglected several clients' cases. When Lawyer changed law firms, he did not notify all of his clients or make arrangements for the handling of the cases. While at his new law firm, Lawyer failed to hold unearned fees in trust, misappropriated fees that were intended for the law firm, and neglected his cases. When he left the new firm, he abandoned clients that he had been representing on the side. Definite Suspension for Two Years, plus LEAPP Ethics School and Trust Account School, by agreement. (Op.#26854, August 9, 2010)
- (13) Matter of Galmore. Lawyer neglected review of discovery in a court-appointed criminal case. Had Lawyer timely reviewed the discovery, he would have learned that another client was a potential witness in the case. Lawyer did not learn of the conflict until the grievance was filed. In response to the grievance, Lawyer stated that he would move to withdraw. He forgot to file the motion and forgot to respond to ODC inquiries about the status of the matter. In another matter, Lawyer failed to follow up on concerns regarding his client's mental health. He failed to obtain consent order, allowing his client to plead guilty without an evaluation. In two other matters, Lawyer failed to communicate with his clients about their criminal cases. Lawyer failed to adequately respond to disciplinary inquiries in these matters. Public Reprimand, plus costs, by agreement. (Op.# 26838, July 26, 2010)
- (14) Matter of Gay. Lawyer represented a husband and wife in defense of a civil lawsuit. The wife was unable to attend the arbitration. The clients thought that the wife's appearance before the arbitrator would be rescheduled. Instead, an award was issued and judgment was entered against the clients. The plaintiff then sought execution of the judgment. Lawyer was served with the judgment and the execution, but he did not inform the clients.

They learned of it when they received notice from the sheriff. When the clients asked Lawyer about it, he said that he was not informed of the judgment. Public Reprimand, plus costs, by agreement. (Op.#26839, July 26, 2010)

- (15) Matter of Kellett. Lawyer was administratively suspended for noncompliance with CLE requirements, but he did not inform his clients. Twenty disciplinary complaints were subsequently filed against Lawyer for neglecting legal matters. In several instances, Lawyer obtained settlements for clients and misappropriated some or all of the funds. Lawyer commingled funds and failed to keep the financial records or reconcile his trust account as required by Rule 417. Lawyer failed to respond to ODC's inquiries and was placed on interim suspension. Disbarment, plus restitution, costs, monitoring by Lawyers Helping Lawyers, and LEAPP Ethics School and Trust Account School, by agreement. (Op.# 26837, July 26, 2010)

Misappropriation and Other Trust Account Violations

- (16) Matter of Roy. Lawyer closed his own home mortgage refinance and used his trust account for the transaction. A dispute arose with his first lender over the amount of the payoff. Lawyer held the payoff funds in his trust account for a year, making the monthly payments. Lawyer did not inform his new lender that the original mortgage was not paid off, placing the new lender in a secondary position. In addition, Lawyer did not inform the title insurance company of the dispute over the payoff. Most significantly, as a result of accrued interest, Lawyer paid out \$28,000.00 more in payments to the first lender than was on deposit for that purpose. The investigation revealed that Lawyer was not in compliance with Rule 417 recordkeeping and reconciliation requirements, resulting in shortages in the account. Public Reprimand, plus costs. (Op.#26815, May 3, 2010)
- (17) Matter of Ham. Lawyer neglected a probate matter and misappropriated funds from the estate. Lawyer also failed to perfect service in litigation for a business client and lost the client file. Lawyer failed to maintain required trust account records and failed to cooperate in the disciplinary investigation. Indefinite Suspension, retroactive to the date of interim suspension, plus restitution, by agreement. (Op. #26800, April 12, 2010)
- (18) Matter of Witcraft. Lawyer entered into a contingency fee arrangement with a client without a written fee agreement in violation of Rule 1.5(c). Lawyer settled the matter for

\$21,000.00. Lawyer took \$2,000.00 in fees and then converted the rest for personal expenses. Lawyer was placed on interim suspension pending resolution of the disciplinary investigation. After his interim suspension, he engaged in the unauthorized practice of law by submitting an order to the judge in a Family Court matter. Definite Suspension for Two Years, retroactive, plus restitution and costs, by agreement. (Op.# 26801, April 12, 2010)

- (19) Matter of David. Lawyer failed to maintain required trust account records and failed to reconcile his two trust accounts. As a result, he did not discover that over one million dollars in deposits were made into the wrong account. In a three-month period, over sixty checks were issued on one trust account on insufficient funds. In addition, Lawyer failed to discover that a nonlawyer employee moved about \$320,000 from one of the trust accounts to the firm's operating account over a two-year period. Lawyer admitted that the firm was not entitled to these funds. Lawyer hired an accountant to conduct a complete audit of the two accounts (one of which was approximately 20 years old). Lawyer restored the funds to the accounts. Public Reprimand, plus costs and LEAPP Ethics School and Trust Account School, by agreement. (Op.#26778, March 1, 2010)
- (20) Matter of Ginn. In March 2007, Lawyer issued a check for \$8,134.91 to a third party on behalf of a client. The third party did not present the check until January 2009. At the time of presentment, there were insufficient funds in the account to cover the check. Lawyer's bank reported the overdraft to the Commission on Lawyer Conduct. Funds were short because Lawyer was using the account to process his own funds and failed to keep up with how much was going in and how much was coming out. He used approximately \$18,000.00 more than he deposited. Lawyer was not keeping the records required by Rule 417 and was not reconciling his account. In an unrelated matter, Lawyer failed to take any action on behalf of a PCR client for a year and a half. Lawyer's initial failure to cooperate in the disciplinary investigation resulted in his interim suspension. Lawyer attributed his conduct to severe depression. Definite Suspension for Nine Months, retroactive, plus LEAPP Ethics School and Trust Account School, monitoring by Lawyers Helping Lawyers for two years, and trust account monitoring by the Commission for two years, by agreement. (Op.#26848, August 8, 2010)

- (21) Matter of Crews. Lawyer used his power of attorney for two clients to convey property to himself, his companies, and his office manager; used his clients' property for his own benefit, misappropriated funds from his trust account; and failed to maintain records of financial transactions with and on behalf of clients. Total misappropriation of funds and property exceeded \$1.3 million. Disbarment, plus restitution and costs. (Op.# 26870, August 16, 2010)
- (22) Matter of Crummey. Lawyer misappropriated funds received from clients to pay their mortgage, resulting in foreclosure. Lawyer used the money for payroll, meals, parking tickets, and other personal expenses. In a second matter, Lawyer failed to communicate with a client and misappropriated the client's settlement. In a third matter, Lawyer neglected a client's civil case, including missing court appearances, failing to communicate with the client, and failing to comply with discovery requests. In two other matters, Lawyer converted funds entrusted to her as a fiduciary. In another matter, lawyer failed to pay a court reporter for deposition transcripts. Lawyer did not cooperate with ODC in the investigation of these matters. Disbarment, plus restitution and costs, by agreement. (Op.# 26840, July 26, 2010)

Unauthorized Practice of Law

- (23) Matter of Foti. Lawyer was suspended from the practice of law for failing to comply with mandatory CLE requirements. For a period of two weeks during his suspension, Lawyer conducted at least twenty-two real estate closings. Lawyer had two prior CLE suspensions. Public Reprimand, plus costs, by agreement. (Op.#26790, March 22, 2010)
- (24) Matter of Schoer. Lawyer sent a nonlawyer assistant to close on a refinance loan for a client. Lawyer made an error in the deed that resulted in conveyance of the property to the client's former husband. Lawyer notarized the deed before it was signed, then signed as the second witness, although he was not present when it was executed. Lawyer routinely sent nonlawyer assistants to borrowers' homes to conduct real estate closings outside his presence. In cases in which the borrowers did not provide their own witnesses, Lawyer would later sign the mortgages as the second witness, even though he was not present at the closings. Lawyer also performed real estate closings for two out-of-state companies, where his role was limited to the execution of the documents. The remaining steps in the

conveyance process, including title abstraction, recordation, and disbursement, were not performed or supervised by a South Carolina lawyer. Definite Suspension for Two Years, retroactive, by agreement. (Op.#26824, June 1, 2010)

II. Ethics Advisory Opinion Summaries (as of September 1, 2010)

Collaborative Law (EAO #10-01)

Facts: A licensed South Carolina attorney wishes to practice collaborative law. In a collaborative law setting, the parties and their lawyers gather in the same room with the goal of collectively resolving a dispute without litigation. Before collaborating, the parties are informed in writing that each attorney's scope of representation is limited to the collaborative process and the clients sign a consent. Additionally, all parties agree that if the collaborative effort fails and litigation ensues, no attorney representing a party in the collaborative process shall represent any party in any other proceeding.

Questions: (1) Is it permissible for an attorney to limit the scope of his representation to the collaborative law process? (2) Is a non-consentable conflict of interest created when an attorney represents a client in the collaborative process because the attorney's representation can be terminated by a third party adversary?

Summary: An attorney may limit the scope of representation to the collaborative law process, provided the attorney proceeds pursuant to the other Rules of Professional Conduct. While a potential conflict of interest may be created in the collaborative process, it is one to which the client may consent.

Accounts to Pay Recording Fees (EAO #10-02)

Facts: The Clerk of Court/Register of Deeds is beginning a system of e-recording for many documents involved in real estate transactions. Under the proposed procedure, the closing lawyer will scan the document to be recorded and email the document to the Clerk of Court/Register of Deeds Office. The Clerk or Register will add the date, time, Book and Page stamps to the document and email the document back to the closing lawyer. The closing lawyer will then print the emailed document, and this emailed version will become the original recorded document. At the same time the document is received by the Clerk of Court/Register of Deeds Office, that office will debit an account of the transmitter for the recording and transfer fees. Since funds received in a real estate transaction pass through a lawyer's trust account, there is an objection to allowing the Clerk or Register to access the trust account for purposes of withdrawing funds for recording and transfer fees. Instead, the lawyer wants to establish an account separate from the trust account so that once a transaction is completed, the funds collected for recording and transfer fees will be deposited into that separate account. When the documents from that transaction are recorded, the Clerk or Register will then debit that separate account for the appropriate fees. If the money is not in that account, the Clerk or Register will reject the documents.

Questions: (1) Would the account described be considered a trust account regulated under S.C. RPC 1.15 and SCACR 417? (2) Can a lawyer share control of an account with a non-lawyer?

Summary: An account that contains funds of a client or third party is a trust account subject to the provisions of SC RPC 1.15 and SCACR 417. As long as an account does not contain legal fees which could not be shared with a non-lawyer under SC RPC 5.4 or client funds which are subject to the safe-keeping requirements of SC RPC 1.15 and Financial Recordkeeping requirements of SC ACR 417, a lawyer may share control of an account with a non-lawyer. Under the fact scenario presented, if the shared recording account contains funds of the lawyer's clients, it would necessarily be a trust account and would be subject to all the recordkeeping requirements outlined above. The funds transferred from the lawyer's trust account to the "recording" account remain client funds until they are paid to the Clerk or Register. The only way to avoid this conclusion would be if the recording account contained the lawyer's own funds which were being advanced for the recording of the documents. Then the contents of the account would not be client funds or legal fees at all, but the lawyer's own funds. The lawyer would then be reimbursed for these advanced costs by a disbursement from the client trust account once recording had been accomplished.

Conflicts of Interest – Real Estate (EAO #10-03)

Facts: Several years ago, an attorney conducted a transaction which pertained to a bond for title/contract for sale for two parties. This transaction does not transfer legal ownership in the subject real property, only an equitable interest in the property at the time of the transaction, and legal ownership does not transfer to prospective purchasers until the legal title owner of that property is paid in full by said prospective purchasers. Another attorney with the same law firm, who practices at another location than the previous attorney, may be retained by the Homeowners Association to address a violation of the recorded covenants and restrictions on the subject real property. This would include sending letters to the prospective purchasers on behalf of the Homeowners Association regarding such violations, and potentially filing a lawsuit on behalf of Homeowners Association against both prospective purchaser and title owner.

Question: Is it a conflict of interest under the rules of ethics, particularly under Rule 1.9, for Attorney/law firm to represent the Homeowners Association in this matter?

Summary: No. Without more, the mere conduct of a residential closing is not substantially related, for purposes of Rule 1.9, to an HOA's later efforts to enforce covenants or restrictions against the buyer.

**COMMISSION ON LAWYER CONDUCT
ANNUAL REPORT
For the period July 1, 2009 through June 30, 2010**

COMPLAINTS*

COMPLAINTS PENDING AND RECEIVED

Complaints Pending as of July 1, 2009	888
Complaints Received July 1, 2009 through June 30, 2010	<u>1661</u> (+11%)

TOTAL Complaints Pending and Received2549

DISPOSITION OF COMPLAINTS

Dismissed by Disciplinary Counsel after Initial Review	248
Dismissed by Disciplinary Counsel for Lack of Evidence	723
Dismissed by Investigative Panel	242
Dismissed by Supreme Court	<u>1</u>
Total Dismissed.....	<u>1214</u>

Closed But Not Dismissed	11
Referred to Other Agency	5
Letter of Caution without Finding of Misconduct	135
Letter of Caution with Finding of Minor Misconduct	96
Deferred Discipline Agreement	15
Admonition	58
Public Reprimand	3
Suspension	39
Indefinite Suspension	6
Disbarment	21
Closed Due to Death of Lawyer	9
Contempt Order (UPL)	<u>0</u>
Total Not Dismissed	<u>398</u>

LESS TOTAL complaints concluded this fiscal year..... (1612) (+9%)

TOTAL complaints pending as of June 30, 2009.....937

*These figures refer to individual complaints, not individual lawyers.

COMMISSION ACTIVITIES

Meetings of investigative panels this fiscal year	12
Meetings of hearing panels this fiscal year	15 (+36%)
Meetings of full Commission this fiscal year	1
Advertising filings	1064 (+13%)
NSF Reports filed	116 (- 20%)
ATTORNEYS TO PROTECT CLIENTS' INTERESTS	
Serving as of July 1, 2009	31
Appointed	25(+56%)
Discharged	<u>(26)</u>
Serving as of June 30, 2010	<u>30</u>

OFFICE OF DISCIPLINARY COUNSEL

PLEADINGS FILED	
Formal Charges filed (Complaints)	83(+84%)
ATTORNEYS TO ASSIST DISCIPLINARY COUNSEL	
Complaints assigned to Attorneys to Assist	103
Reports filed by Attorneys to Assist	115
Outstanding Attorney to Assist Reports	34
SUPREME COURT	
Complaints concluded by Opinions	82
Complaints pending at the Court	60

SUPREME COURT ORDERS AND OPINIONS**

Dismissals	1	Letter of Caution	3
Admonition	8	Public Reprimand	3
Definite Suspension	14	Indef. Suspension	3
Disbarment	3	Reinstatement	11
Incapacity Inactive	2	Interim Suspension	20

**This data reflects the number of opinions and orders issued rather than the number of complaints involved. Some orders and opinions involve more than one complaint.

Commission on Lawyer Conduct Caseload Trends

