

Ethics 2022 – A Year in Review

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I. Rule Changes & Proposals

Amended RLDE Rule 14(c)(1)

14(c)(1), RLDE, Rule 413, SCACR

A subpoena directed to a non-party shall be served on the non-party as provided in Rule 4(d) or (j) of the South Carolina Rules of Civil Procedure; provided a copy of the subpoena is not required to be served on the lawyer if issued pursuant to Rule 15(b)(1) of these rules.

- Identical change to Rule 14(c)(1), RJDE, Rule 502, SCACR

Petition (pending since 8/24/22) to amend Comment 4 to Rule 5.5

Rule 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

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Comment:

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[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b). On the other hand, a lawyer admitted in another jurisdiction does not establish a presence in this jurisdiction for the practice of law when the lawyer is physically located in this jurisdiction, temporarily or permanently, if the lawyer's work is limited to that which the lawyer is authorized to perform by the jurisdiction in which the lawyer is admitted and the lawyer does not hold out to the public that the lawyer has a professional presence in this jurisdiction.

**Petition (pending since 4/26/22)
to amend Rule 1.15(e)**

RULE 1.15: SAFEKEEPING PROPERTY

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

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

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

- (i) The notice must inform the third party that the lawyer may distribute the property to the client unless the third party files a legal action and provides the lawyer with written notice and a copy of the filed action within 90 calendar days of the date of service of the lawyer's notice. The lawyer's notice shall be served on the third party in the manner provided under Rules 4(c) and (d) of the South Carolina Rules of Civil Procedure.
- (ii) If the lawyer does not receive written notice of the filing of a legal action from the third party within the 90-day period, the lawyer may distribute the funds to the client after consulting with the client regarding the advantages and disadvantages of disbursement of the disputed property and obtaining the client's informed consent to the distribution, confirmed in writing.
- (iii) If the lawyer is notified in writing of a legal action filed within the 90-day period, the lawyer shall continue to hold the property in accordance with Subsection (e)(1) of this Rule unless and until the parties reach an agreement on distribution of the property or a court resolves the matter.
- (iv) Nothing in this rule is intended to alter a third party's substantive rights.

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

**Petition (pending since 4/28/20)
to amend Rules 7.1 – 7.5**

The petition asks for sweeping changes to the lawyer advertising and communication rules, consistent with recent changes to the ABA Model Rules and certain Ethics Advisory Opinions.

**PR Committee Proposal (HOD January Agenda)
to amend Rule 7.2**

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

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

...

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

Comment

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

**PR Committee Proposal (HOD May Agenda)
to amend Rule 5.4**

Rule 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not agree or contract to share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
- (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
- (3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provision of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (4) a lawyer or a law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; or
- (5) after legal fees are paid to a lawyer or law firm, a lawyer or law firm is permitted to share legal fees with a nonlawyer provided no agreement or contract to share a portion of the legal fees was made before the legal fees are paid to the lawyer or law firm.

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COMMENT

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[3] Paragraph (a)(5) recognizes the distinction between legal fees that have been paid to a lawyer or law firm and those that are unpaid. Once legal fees are paid to a lawyer or law firm the limitation on sharing legal fees with nonlawyers to protect the lawyer’s professional independence of judgment is no longer necessary.

II. Ethics Advisory Opinions

EAO 22-01

Prospective Client Rule – 1.18

Lawyer receives an email from Sender describing a dispute and asking whether Sender has “a legitimate claim.” Lawyer and Lawyer’s client are involved in the matter and adverse to Sender. Lawyer inquires whether she has a duty to keep the information in the email confidential.

The Committee concluded the lawyer does not because Sender is not a current client, former client, or under Rule 1.18 a “prospective client.” The Committee reasoned that the Sender “could not have had a reasonable expectation that Lawyer was likely to form an attorney-client relationship,” and therefore is not a “prospective client” under (a) entitled to confidentiality under (b).

EAO 22-02

The Forbidden Word: “expert” – 7.4

“Lawyer may not participate in any way in marketing via Expertise.com.”

EAO 22-03

Duty to Report Former Client’s Conduct – 1.6 & 1.9

Lawyer has no duty to report or otherwise act on information received after the representation terminated about a former client’s unlawful conduct that occurred during the representation (and did not involve the use of lawyer’s services in committing a crime). Rule 1.6 provides no exception and therefore Rule 1.9 prohibits disclosure of the newly-acquired information.

EAO 22-04

Stop-payment Costs – 1.5 & 1.15

When Lawyer is required to stop payment on a check to a third party and re-issue a new check, Lawyer may deduct the cost of stopping payment from the amount re-sent.

EAO 22-05

Representing a Forger in Probate Court – 1.everything, 3.everything, etc.

Theoretically, you can, but there’s almost nothing you could do to advance the forger’s interests, so it would be pointless.

EAO 22-06

Ghostwriting Pleadings – 1.2

Ghostwriting is A-okay. Pleadings do not need to disclose that they were ghost-written by a lawyer.

ABA Formal Opinion 503 (Nov. 2022)

Reply-all – 4.2

Lawyers who copy their clients on an email to other counsel in the matter are presumed to have impliedly consented for Rule 4.2 purposes to counsel’s “reply all” to the communication. Thus, unless that result is intended, lawyers should not copy their clients on electronic communications to such counsel; instead, lawyers should separately forward these communications to their clients. The presumption of implied consent is overcome if the sending lawyer communicates in advance to the receiving lawyer that they do not consent to a reply-all.

III. Bar Admissions

In re Anonymous Applicant for Admission to the South Carolina Bar

June 29, 2022

Petition for Admission Granted subject to 1-year delay

Applicant lied on his law school application about prior criminal charges and school discipline:

1. After admission, Applicant disclosed a charge of being a minor in possession of alcohol, claiming he had forgotten it happened.
2. A year later in law school, he disclosed an additional criminal charge of hindering police. However, Applicant gave a different explanation of the circumstances to the law school than appeared in the police reports from the incident. His later explanation to the Committee on Character and Fitness more closely resembled the police report.
3. Later still in law school, Applicant disclosed a prior charge of careless driving.
4. Just prior to his Character and Fitness hearing, Applicant disclosed that he was disciplined by his undergraduate university for participating in a fraternity prank that involved stealing bicycles.

After learning he passed the bar exam, Applicant edited his LinkedIn profile to state that he was an “associate attorney” at the firm that hired him as a law clerk pending his admission to the bar.

The court repeatedly acknowledged that the infractions were relatively minor and did not suggest unfitness to practice law, but the willful failure to disclose them warranted delayed admission:

In recent years, this Court has been presented with a growing number of bar applicants who omit from their law school applications information that is plainly required to be disclosed. Despite warnings in law school of the consequences of nondisclosure, too many applicants never amend, or never fully amend, their law school applications to include all relevant matters. Predictably, the issue of nondisclosure often resurfaces at the time an applicant submits a petition for admission to practice law. Often, the undisclosed conduct itself would not necessarily have disqualified an applicant from admission to law school, but false and misleading nondisclosures most certainly impact this Court's evaluation of an applicant's character and fitness to practice law. When applicants are confronted about incidents they failed to disclose on their law school applications, this Court and the Committee receive a familiar refrain of unpersuasive excuses.⁷ Although this Court imposes repercussions for these nondisclosures in individual cases, bar admissions matters are nonpublic, and this Court's decisions in those matters are not published. Accordingly, too many potential applicants continue to interpret application instructions and early warnings in law school of the consequences of nondisclosure as empty threats.

⁷ These excuses range from "I forgot," to "I couldn't find any records," to "I thought I didn't have to disclose it because it was sealed/expunged," to inappropriately expansive interpretations of "minor parking or traffic violations."

IV. Discipline Cases

In re Harley
February 9, 2022
Public Reprimand by agreement

Several clients fired Lawyer and, unsatisfied with the partial retainer refunds, requested accountings of their retainers and Lawyers' fees. Lawyer failed to comply with each of these requests. Lawyer also failed to cooperate with ODC's investigation of this and two other matters. The opinion also cites Rule 1.3 for Lawyer's failure to act with diligence and promptness in providing an expert affidavit to a "client."

In re Lindler
March 2, 2022
Reciprocal Disbarment by agreement

Lawyer was disbarred in North Carolina for failing to pay income tax for 7 years, failing to remit employment taxes for 13 years.

In re Wilson
April 13, 2022
Public Reprimand by agreement

Lawyer was charged with first-degree CDV, pled no contest to third-degree simple assault, and was sentenced to 30 days in jail, suspended upon payment of a \$500 fine.

In re Guyton
April 13, 2022
Public Reprimand and Fine by agreement

Lawyer laundered his personal contributions to political campaigns in excess of statutory limits through dummy LLCs, for which he was sanctioned \$33,000 by the State Ethics Commission.

In re DuPree
April 13, 2022
Nine-month Suspension by agreement

Lawyer was arrested for third-degree assault and battery, completed PTI and the arrest record was expunged. Lawyer self-reported the arrest, spent 45 days in in-patient alcohol treatment and was continuing outpatient treatment, Alcoholics Anonymous, and the Lawyers Helping Lawyers program.