Ethics 2023 – Year in Review

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Hilton Head Island Bar Super CLE

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I. Rule Changes & Proposals

Amended
RULE 1.15: SAFEKEEPING PROPERTY

(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 paragraph (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 civil 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 civil action from the third party within the 90-day period, the lawyer may distribute the property 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 civil action filed within the 90-day period, the lawyer shall continue to hold the property in accordance with paragraph (e)(1) of this Rule unless and until the parties reach an agreement on distribution of the property or a court resolves the matter.

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

Comment:

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim ~~is not frivolous under applicable law~~ 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 paragraph (e)(2) of this Rule, [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.

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

Comment:

[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.

Proposal to amend Rule 7.1:
COMMUNICATIONS CONCERNING A 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.

- Rejected by the House of Delegates in January 2023 in favor of an outright ban on using another lawyer's name without that lawyer's consent. The PR Committee is still working on the language of a proposed ban and an accompanying comment.

II. Ethics Advisory Opinions

EAO 23-01
Charging client for fact testimony – 1.5

Lawyer wanted to include in a retainer agreement a provision providing that Lawyer is to be paid their hourly rate for time spent responding to discovery or testifying as a fact witness in the event such testimony is required after the lawyer's legal work is concluded.

Charging a reasonable amount for the lawyer's time performing non-legal services that may be compelled by and ancillary to the legal representation is not inherently unreasonable. Therefore, as long as the lawyer's hourly rate complies with the reasonableness requirement of Rule 1.5(a), this kind of charge is not categorically unethical, provided the client agrees to it when the lawyer's services are first engaged.

EAO 23-02
Out-of-state associate working on SC cases – 5.1 & 5.5

Lawyer inquired about what work an out-of-state associate in Lawyer's firm may perform on in-state cases and what, if any involvement or supervision is required of Lawyer (licensed in SC) to prevent the associate from engaging in the unauthorized practice of law.

Part 1(a) addresses in-state court appearances. Rule 404 governs and subsection (i) requires the associated in-state lawyer to "at all times be prepared to go forward with the case, sign all papers subsequently filed, and attend all subsequent proceedings in the matter." Rule 404(f) also prohibits pro hac vice admission to any lawyer who "is regularly engaged in the practice of law or in substantial business or professional activities in South Carolina." Because this language is more

restrictive than the Rule 5.5(b) prohibition on a "systematic and continuous presence," Rule 404 would prohibit pro hac vice admission if the associate "regularly" enters South Carolina to work on in-state cases even though that same regular, continual entry would not preclude Rule 5.5(c)(1) authorization to perform legal services in South Carolina that do not involve pro hac vice appearances.

Part 1(b) addresses out-of-court work on in-state matters. Rule 5.5(c)(1) allows Associate to practice law in South Carolina "in association" with Lawyer as long as Lawyer "actively participates in the matter." The Comments note that the associated in-state lawyer takes responsibility for the out-of-state lawyer's work. The Committee opined that active participation and taking responsibility mean something more than the Rule 404(i) requirement of being "prepared to go forward at any time" and essentially requires that an out-of-state lawyer be treated like a paralegal. That requires supervision by the in-state lawyer, which means instruction, review, and (when necessary) correction of Associate's work by Lawyer.

Lawyer specifically asked whether he or she must be physically present whenever associate is performing legal work. The Committee referred Lawyer to the Supreme Court for that question, noting that a lawyer's physical presence is required during some non-lawyer interactions with clients when those interactions inherently involve legal advice, as in a residential real estate closing or when a paralegal offers to answer a client's legal questions.

Part 2 addresses out-of-state (or cross-border) work on South Carolina cases. The Committee referred the inquirer to the Supreme Court for this answer as well, noting that the precise contours of providing legal services "in" a particular jurisdiction are the subject of much debate and are not defined simply by the physical location of the lawyer. The Committee reasoned that the recent amendment to the Comments to Rule 5.5 essentially acknowledges that a lawyer's "presence" for Rule 5.5(b) purposes is where the predominant effect of the work occurs and where the clients or forum are located. That amendment allows an out-of-state lawyer to work remotely from a South Carolina home office as long as they don't advertise in South Carolina or take in-state cases. That same reasoning, applied when the lawyer and the client switch sides of the state line, would support the inverse conclusion: that a lawyer physically located in another state is practicing law in South Carolina when they work for South Carolina clients on South Carolina matters, particularly if their firm advertises here.

EAO 23-03

Digital radio text advertising – 7.2(d)

Lawyer wants to buy ad space in the Radio Data System ("RDS") that displays text ads on car radio screens. RDS ads allow limited characters, often not enough to satisfy the Rule 7.2(d) requirements of including an individual lawyer's name and office address. Comment 10 provides exception to that requirement for promotional materials and "signage" that contains only the firm name and "ordinary contact information" but no slogan, tagline, or other "substantive advertising or soliciting" language.

Comment 10 notes that a “talking phone number” may be substantive and therefore trigger the full name and address requirement of 7.2(d). Lawyer also asks (1) whether a talking phone number that merely includes Lawyer’s name (e.g., 1-800-LYR-LISA) would trigger the additional language requirement; and (2) whether including the word “call” before the phone number is substantive advertising or soliciting language” that triggers the requirement.

The committee opined that (1) RDS ads can be “signage” within the meaning of Comment 10; (2) the lawyer’s name in a talking phone number is not substantive advertising that takes the ad outside the exception to 7.2(d); and (3) the word “call” is also not the kind of advertising “substance” discussed elsewhere in the comments and therefore is not outside the exception; and (4) identifying practice areas is substantive a would trigger the full name and address requirement of 7.2(d).

EAO 23-04

Revising a will adverse to former joint client – 1.9

A lawyer is not prohibited from revising Husband’s estate planning documents to remove Wife as the primary beneficiary, despite that 10 years earlier the lawyer represented both Husband and Wife in jointly drafting their existing wills, trusts, and POAs.

The Committee opined that executing Husband’s current estate planning objectives is not “materially adverse” to the prior representation of Wife and is not “substantially related.” Comment 3 to Rule 1.9 states, “Matters are ‘substantially related’ … if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.” Husband’s present estate planning is not the same transaction or dispute as prior estate planning, and Lawyer would have no confidential factual information from the prior work that could be used against Wife and was not already shared with husband.

The Committee noted that both it and the South Carolina Supreme Court had reached a similar conclusion in the real estate context. *See In re Anonymous*, 286 S.C. 163, 378 S.E.2d 821 (1989) (representing Buyer and Lender in a real state transaction does not preclude later representing Lender in foreclosure against Buyer); EAO 10-03 (2010) (representing Buyer in real estate transaction does not preclude later representing HOA against Buyer).

III. Discipline Cases

https://abovethelaw.com/2022/11/lawyer-faces-ethics-complaint-for-pooping-in-pringles-can-flinging-it-into-victims-advocacy-center-parking-lot/