Ethical Issues in Criminal Law

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Rule 407, SCACR, Rules of Prof.Conduct, Rule 3.8

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Currentness

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Credits

[Adopted effective September 1, 1990. Amended effective May 8, 1996; October 1, 2005; December 1, 2005.]

<For annotated materials relating generally to Rule 407, see annotations contained in SC R A CT RULE 407 RPC Rule 8.5.>

Appellate Court Rule 407, Rules of Prof. Conduct, Rule 3.8, SC R A CT RULE 407 RPC Rule 3.8
Current with amendments received through August 1, 2017.

Rule 407, SCACR, Rules of Prof.Conduct, Rule 3.3

RULE 3.3. CANDOR TOWARD THE TRIBUNAL

Currentness

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply when the lawyer is representing a client before a tribunal as well as in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. These duties continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Credits

[Adopted effective September 1, 1990. Amended effective October 1, 2005.]

<For annotated materials relating generally to Rule 407, see annotations contained in SC R A CT RULE 407 RPC Rule 8.5.>

Appellate Court Rule 407, Rules of Prof. Conduct, Rule 3.3, SC R A CT RULE 407 RPC Rule 3.3
Current with amendments received through August 1, 2017.

Code of Laws of South Carolina 1976 Annotated
South Carolina Appellate Court Rules
IV. Rules Governing the Practice of Law
Rule 407. South Carolina Rules of Professional Conduct
Client-Lawyer Relationship

Rule 407, SCACR, Rules of Prof.Conduct, Rule 1.9

RULE 1.9. DUTIES TO FORMER CLIENTS

Currentness

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Credits

[Adopted effective September 1, 1990. Amended effective October 1, 2005.]

<For annotated materials relating generally to Rule 407, see annotations contained in SC R A CT RULE 407 RPC Rule 8.5.>

Appellate Court Rule 407, Rules of Prof. Conduct, Rule 1.9, SC R A CT RULE 407 RPC Rule 1.9
Current with amendments received through August 1, 2017.

Code of Laws of South Carolina 1976 Annotated
South Carolina Appellate Court Rules
IV. Rules Governing the Practice of Law
Rule 407. South Carolina Rules of Professional Conduct
Advocate

Rule 407, SCACR, Rules of Prof.Conduct, Rule 3.6

RULE 3.6. TRIAL PUBLICITY

Currentness

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Credits

[Adopted effective September 1, 1990. Amended effective May 8, 1996; October 1, 2005.]

<For annotated materials relating generally to Rule 407, see annotations contained in SC R A CT RULE 407 RPC Rule 8.5.>

Appellate Court Rule 407, Rules of Prof. Conduct, Rule 3.6, SC R A CT RULE 407 RPC Rule 3.6
Current with amendments received through August 1, 2017.

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Lawyers as Employers & Supervisors

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LAWYERS AS EMPLOYERS & SUPERVISORS
RCBA Annual Ethics CLE
October 27, 2017

Rules of Professional Conduct
1.6, 5.1, 5.2, 5.3, 5.4 and 5.5

Terms of Employment Notice
Per S.C. Code §41-10-10, *et seq.*

US Department of Labor Fact Sheets
Fair Labor Standards Act

US Department of Labor Field Operations Handbook
Information on Paralegals

Article on Seven FLSA Quirks

FLSA Record Retention Requirements

Employment Laws Applicable to Workplaces
Based on Number of Employees

Unpaid Internship Checklist

RULES OF PROFESSIONAL CONDUCT

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ceiling on the percentage
to offer clients an alterna
w also may apply to situati

ntingent fee, for example, government regulations
fees in certain tax matters.

of Payment

wyer may require advance payment of a fee, but is
return any unearned portion. A lawyer may accept
payment for services, such as an ownership
an enterprise, providing this does not involve
of a proprietary interest in the cause of action or
tter of the litigation contrary to Rule 1.8(i).
fee paid in property instead of money may be
the requirements of Rule 1.8(a) because such fees
the essential qualities of a business transaction
ient.

greement may not be made whose terms might
lawyer improperly to curtail services for the client
them in a way contrary to the client's interest.
e, a lawyer should not enter into an agreement
rvices are to be provided only up to a stated
n it is foreseeable that more extensive services
ill be required, unless the situation is adequately
to the client. Otherwise, the client might have to
further assistance in the midst of a proceeding or
. However, it is proper to define the extent of
ght of the client's ability to pay. A lawyer should
a fee arrangement based primarily on hourly
using wasteful procedures.

ited Contingent Fees

graph (d) prohibits a lawyer from charging a
ee in a domestic relations matter when payment is
pon the securing of a divorce or upon the amount
or support or property settlement to be obtained.
ion does not preclude a contract for a contingent
representation in connection with the recovery of
ent balances due under support, alimony or other
ders because such contracts do not implicate the
concerns.

of Fee

ision of fee is a single billing to a client covering
wo or more lawyers who are not in the same firm.
of fee facilitates association of more than one
matter in which neither alone could serve the
well, and most often is used when the fee is
nd the division is between a referring lawyer and
alist. Paragraph (e) permits the lawyers to divide
on the basis of the proportion of services they
each lawyer assumes responsibility for the repre-
a whole. In addition, the client must agree to the
including the share that each lawyer is to
the agreement must be confirmed in writing.
fee agreements must be in a writing signed by the
must otherwise comply with paragraph (c) of this
nt responsibility for the representation entails
nd ethical responsibility for the representation as if
were associated in a partnership. A lawyer who
nt responsibility should be available to both the
the other fee-sharing lawyer as needed throughout
entation and should remain knowledgeable about
s of the legal matter. A lawyer should only refer a
a lawyer whom the referring lawyer reasonably
competent to handle the matter. See Rule 1.1.
graph (e) does not prohibit or regulate division of
received in the future for work done when lawyers
ously associated in a law firm. Also, when a client
wo or more lawyers in succession on a matter and later refuses to consent to a discharged lawyer receiving an earned share of the legal fee, paragraph (e) should not be applied to prevent a lawyer who has received a fee from sharing that fee with the discharged lawyer to the extent that the discharged lawyer has earned the fee for work performed on the matter and is entitled to payment.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. See Rule 416, SCACR. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Payment of Fees in Advance of Providing Services

[10] A lawyer may treat a fee paid in advance of providing services as the property of the lawyer and deposit the fee in the lawyer's operating account, rather than hold the fee in trust, if the client agrees in a written fee agreement which complies with Paragraph (f)(1) through (5), and the fee is reasonable under the factors listed in Rule 1.5(a). The language describing such arrangements varies, and includes terms such as flat fee, fixed fee, earned on receipt, or nonrefundable retainer, but all such fees are subject to refund if the lawyer fails to perform the agreed-upon legal services.

[11] When the lawyer has regularly represented a particular client, the written fee requirement in Paragraph (f) may be satisfied by a single agreement with the particular client that is applicable to multiple current or future matters or files, without the need for the lawyer and client to enter into a new written agreement for each individual matter.

RULE 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the

Files

client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(7) to comply with other law or a court order; or

(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

[Adopted effective September 1, 1990. Amended effective October 1, 2005; September 17, 2014.]

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(g) for the definition of informed consent. Confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

[5] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[6] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[7] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. The lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. Paragraph (b)(2) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[8] Paragraph (b)(3) does not limit the breadth of Paragraph (b)(1), but describes one specific example of a situation in which disclosure is permitted to prevent a criminal act by the client. Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(f), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. with respect to the law from the representation and Rule 1.13(c), which p an organization, to reve sentation in limited circu

[9] Paragraph (b)(4) lawyer does not learn of it has been consummate the option of preventin wrongful conduct, there suffered by the affected mitigated. In such si information relating to necessary to enable t mitigate reasonably cer their losses. Paragraph who has committed a c lawyer for representatio

[10] A lawyer's confid lawyer from securing lawyer's personal respo In most situations, dis advice will be impliedly a the representation. Eve authorized, paragraph (b of the importance of a l Professional Conduct.

[11] Where a legal c complicity of the lawy misconduct of the law client, the lawyer may reasonably believes nec same is true with respec representation of a form a civil, criminal, disciplin based on a wrong allege the client or on a wr example, a person clain lawyer and client actin respond arises when an made. Paragraph (b)(6) the commencement of a such complicity, so that responding directly to a assertion. The right to d proceeding has been com

[12] A lawyer entitled (b)(6) to prove the servic This aspect of the rul beneficiary of a fiduciary detriment of the fiduciary

Detection of Conflicts

[13] Paragraph (b)(8) firms may need to disclos detect and resolve conflic is considering an associa firms are considering a m purchase of a law prac Under these circumstanc ted to disclose limited in discussions regarding t Any such disclosure sho the identity of the person

criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[12] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

Detection of Conflicts of Interest

[13] Paragraph (b)(8) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [6]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(8) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(8) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(8). Paragraph (b)(8) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [6], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(7) permits the lawyer to make such disclosures as are necessary to comply with the law.

[16] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(7) permits the lawyer to comply with the court's order.

[17] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviato the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[18] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[19] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[20] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[21] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

[Adopted effective September 1, 1990. Amended effective October 1, 2005.]

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(g) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [27].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or

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rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

RULE 4.5. THREATENING CRIMINAL PROSECUTION

A lawyer shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.

[Adopted effective September 1, 1990. Amended effective October 1, 2005.]

Comment

This Rule is not included in the Model Rules of Professional Conduct. The language of this Rule is based upon DR 7 105 of the Code of Professional Responsibility.

LAW FIRMS AND ASSOCIATIONS

RULE 5.1. RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) Partners and lawyers with comparable managerial authority who reasonably believe that a lawyer in the law firm may be suffering from a significant impairment of that lawyer's cognitive function shall take action to address the concern with the lawyer and may seek assistance by reporting the circumstances of concern pursuant to Rule 428, SCACR.

[Adopted effective September 1, 1990. Amended effective October 1, 2005; Augnst 24, 2015; October 25, 2016.]

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(d). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular

circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2.(a).

[9] Paragraph (d) expresses a principle of responsibility to the clients of the law firm. Where partners or lawyers with comparable authority reasonably believe a lawyer is suffering from a significant cognitive impairment, they have a duty to protect the interests of clients and ensure that the representation does not harm clients or result in a violation of these rules. See Rule 1.16(a). One mechanism for addressing concerns before matters must be taken to the Commission on Lawyer Conduct is found in Rule 428, SCACR. See also Rule 8.3(c) regarding the obligation to report a violation of the Rules of Professional Conduct when there is knowledge a violation has been committed as opposed to a belief that the lawyer may be suffering from an impairment of the lawyer's cognitive function.

RULE 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

[Adopted effective September 1, 1990. Amended effective October 1, 2005.]

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise, a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[Adopted effective September 1, 1990. Amended effective October 1, 2005.]

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for

their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional conduct if engaged in by a lawyer.

RULE 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not 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.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate or trust of a lawyer may hold the stock or interest of the lawyer for a reasonable time during settlement or administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

[Adopted effective September 1, 1990. Amended effective October 1, 2005.]

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f)(lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

RULE 5.5. UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.
[Adopted effective September 1, 1990. Amended effective October 1, 2005; July 23, 2014; August 10, 2016.]

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[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) 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).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), the Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or

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other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require. For the purposes of this rule, a lawyer who is not admitted to practice in South Carolina who seeks to provide legal services pursuant to Rule 5.5(c)(3) in more than three matters in a 365–day period shall be presumed to be providing legal services on a regular, not temporary, basis. A lawyer providing legal services pursuant to paragraph (c)(3) must comply with the requirements of Rule 404, SCACR.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraph (c)(3) requires that the services arise out of or be reasonably related to the lawyer's preexisting representation of a client in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work for the client might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issue involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. Lawyers not otherwise authorized to practice law in this jurisdiction desiring to provide pro bono legal services on a temporary basis in this jurisdiction following a major disaster should consult Rule 426, SCACR (*Provision of Legal Services Following Determination of Major Disaster).*

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraphs (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

RULE 5.6. RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

[Adopted effective September 1, 1990. Amended effective October 1, 2005.]

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

TERMS OF EMPLOYMENT NOTICE
SEE SC CODE §41-10-10 *et seq.*

Terms of Employment Notice

Date of hire: _____

Name of Employee | Social Security Number

Address

In compliance with §41-10-30 of the S.C. Code of Laws, 1976, as amended, you are hereby notified of the terms of employment:

☐ full-time ☐ part-time ☐ seasonal

1. Normal hours of work:

   (i.e., number or range of hours) per week, day, other, etc. _____

2. Rate of pay: Wages $_____; Salary $_____; Commissions_____%; Other_____

3. Payday is: Weekly_____ Bi-weekly _____Monthly_____Other_____

   Place of payment is _____

   Time of payment is _____

   Day of payment is _____

4. Deductions to be made from wages such as insurance deductions.

_____

Any changes in these terms shall be made in writing at least seven calendar days before they become effective.

Additional Terms

The following terms may be provided at the discretion of the employer in accordance with individual company policy.

5. Vacation policy is: _____

   _____

6. Paid holidays are: _____

   _____

7. Sick leave policy is: _____

   _____

8. Other: _____

   _____

_____
Employee signature

_____
Employer signature

Company: _____

Address: _____

_____

Telephone: _____

US DEPARTMENT OF LABOR FACT SHEETS
FAIR LABOR STANDARDS ACT

U.S. Wage and Hour Division
(Revised May 2014)

Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the Fair Labor Standards Act (FLSA).

Determining Whether an Employment Relationship Exists: Is a Worker an Employee or Independent Contractor?

In order for the FLSA's minimum wage and overtime provisions to apply to a worker, the worker must be an "employee" of the employer, meaning that an employment relationship must exist between the worker and the employer. The FLSA defines "employ" as including to "suffer or permit to work", representing the broadest definition of employment under the law because it covers work that the employer directs or allows to take place. Applying the FLSA's definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are employees. On the other hand, independent contractors are workers with economic independence who are in business for themselves.

A number of "economic realities" factors are helpful guides in resolving whether a worker is truly in business for himself or herself, or like most, is economically dependent on an employer who can require (or allow) employees to work *and* who can prevent employees from working. The Supreme Court has indicated that there is no single rule or test for determining whether an individual is an employee or independent contractor for purposes of the FLSA. The Court has held that the totality of the working relationship is determinative, meaning that all facts relevant to the relationship between the worker and the employer must be considered.

While the factors considered can vary, and while no one set of factors is exclusive, the following factors are generally considered when determining whether an employment relationship exists under the FLSA *(i.e.*, whether a worker is an employee, as opposed to an independent contractor):

1) The extent to which the work performed is an integral part of the employer's business. If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.

2) Whether the worker's managerial skills affect his or her opportunity for profit and loss. Managerial skill may be indicated by the hiring and supervision of workers or by investment in equipment. Analysis of this factor should focus on whether the worker exercises managerial skills and, if so, whether those skills affect that worker's opportunity for both profit and loss.

3) The relative investments in facilities and equipment by the worker *and* the employer. The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself. A worker's investment in tools and equipment to perform the work does not necessarily indicate independent contractor status, because such tools and equipment may simply be required to perform the work for the employer. If a worker's business investment compares favorably enough to the employer's that they appear to be sharing risk of loss, this factor indicates that the worker may be an independent contractor.

4) The worker's skill and initiative. Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.

5) The permanency of the worker's relationship with the employer. Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor. However, a worker's lack of a permanent relationship with the employer does not necessarily suggest independent contractor status because the impermanent relationship may be due to industry-specific factors, or the fact that an employer routinely uses staffing agencies.

6) The nature and degree of control by the employer. Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the employer (or anyone else, including the employer's clients). This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. For example, a worker's control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee's work at the remote worksite.

There are certain factors which are immaterial in determining the existence of an employment relationship. For example, the fact that the worker has signed an agreement stating that he or she is an independent contractor is not controlling because the reality of the working relationship – and not the label given to the relationship in an agreement – is determinative. Likewise, the fact that the worker has incorporated a business and/or is licensed by a State/local government agency has little bearing on determining the existence of an employment relationship. Additionally, the Supreme Court has held that employee status is not determined by the time or mode of pay.

Requirements Under the FLSA

When an employer-employee relationship exists, and the employee is engaged in work that is subject to the FLSA, the employee must be paid at least the Federal minimum wage of $7.25 per hour, effective July 24, 2009, and in most cases overtime at time and one-half his/her regular rate of pay for all hours worked in excess of 40 per week. The FLSA also has youth employment provisions which regulate the employment of minors under the age of eighteen, as well as recordkeeping requirements.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
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1-866-4-USWAGE
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Contact Us

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(Revised July 2008)

Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA)

This fact sheet provides a summary of the FLSA's recordkeeping regulations, 29 CFR Part 516.

Records To Be Kept By Employers

Highlights: The FLSA sets minimum wage, overtime pay, recordkeeping, and youth employment standards for employment subject to its provisions. Unless exempt, covered employees must be paid at least the minimum wage and not less than one and one-half times their regular rates of pay for overtime hours worked.

Posting: Employers must display an official poster outlining the provisions of the Act, available at no cost from local offices of the Wage and Hour Division and toll-free, by calling 1-866-4USWage (1-866-487-9243). This poster is also available electronically for downloading and printing at http://www.dol.gov/osbp/sbrefa/poster/main.htm.

What Records Are Required: Every covered employer must keep certain records for each non-exempt worker. The Act requires no particular form for the records, but does require that the records include certain identifying information about the employee and data about the hours worked and the wages earned. The law requires this information to be accurate. The following is a listing of the basic records that an employer must maintain:

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and day of week when employee's workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.
8. Basis on which employee's wages are paid (e.g., "$9 per hour", "$440 a week", "piecework")
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment.

How Long Should Records Be Retained: Each employer shall preserve for at least three years payroll records, collective bargaining agreements, sales and purchase records. Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages. These records must be open for inspection by the Division's representatives, who may ask the employer to make extensions, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.

What About Timekeeping: Employers may use any timekeeping method they choose. For example, they may use a time clock, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records. Any timekeeping plan is acceptable as long as it is complete and accurate.

The following is a sample timekeeping format employers may follow but are not required to do so:

DAY	DATE	IN	OUT	TOTAL HOURS
Sunday	6/3/07	--------	--------	--------
Monday	6/4/07	8:00am	12:02pm	
		1:00pm	5:03pm	8
Tuesday	6/5/07	7:57am	11:58am	
		1:00pm	5:00pm	8
Wednesday	6/6/07	8:02am	12:10pm	
		1:06pm	5:05pm	8
Thursday	6/7/07	--------	--------	--------
Friday	6/8/07	--------	--------	--------
Saturday	6/9/07	--------	--------	--------
Total Workweek Hours:				**24**

Employees on Fixed Schedules: Many employees work on a fixed schedule from which they seldom vary. The employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate that the worker did follow the schedule. When a worker is on a job for a longer or shorter period of time than the schedule shows, the employer must record the number of hours the worker actually worked, on an exception basis.

Where to Obtain Additional Information

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U.S. Department of Labor
Wage and Hour Division

Important information regarding recent overtime litigation in the U.S. District Court of Eastern District of Texas.

U.S. Wage and Hour Division
(Revised July 2008)

Fact Sheet #23: Overtime Pay Requirements of the FLSA

This fact sheet provides general information concerning the application of the overtime pay provisions of the FLSA.

Characteristics

An employer who requires or permits an employee to work overtime is generally required to pay the employee premium pay for such overtime work.

Requirements

Unless specifically exempted, employees covered by the Act must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay. There is no limit in the Act on the number of hours employees aged 16 and older may work in any workweek. The Act does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, as such.

The Act applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments excluded by the Act itself. Payments which are not part of the regular rate include pay for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. This is calculated by dividing the total pay for employment (except for the statutory exclusions noted above) in any workweek by the total number of hours actually worked.

Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. In addition, section 7(g)(2) of the FLSA allows, under specified conditions, the computation of overtime pay based on one and one-half times the hourly rate in effect when the overtime work is performed. The requirements for computing overtime pay pursuant to section 7(g)(2) are prescribed in 29 CFR 778.415 through 778.421.

Where non-cash payments are made to employees in the form of goods or facilities, the reasonable cost to the employer or fair value of such goods or facilities must be included in the regular rate.

Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, no part of a flat sum of $180 to employees who work overtime on Sunday will qualify as an overtime premium, even though the employees' straight-time rate is $12.00 an hour and the employees always work less than 10 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $13.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $78.00 must be included in determining the employees' regular rate.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 45 hour workweek for a weekly salary of $405. In this instance the regular rate is obtained by dividing the $405 straight-time salary by 45 hours, resulting in a regular rate of $9.00. The employee is then due additional overtime computed by multiplying the 5 overtime hours by one-half the regular rate of pay ($4.50 x 5 = $22.50).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for compensable overtime hours that are worked.

Where to Obtain Additional Information

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U.S. Department of Labor
Wage and Hour Division

Important information regarding recent overtime litigation in the U.S. District Court of Eastern District of Texas.

U.S. Wage and Hour Division
(Revised July 2008)

Fact Sheet #17B: Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for administrative, professional, computer and outside sales employees, and for more information on the salary basis requirement.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Management

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity

and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Department or Subdivision

The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

Customarily and Regularly

The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

Two or More

The phrase "two or more other employees" means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Particular Weight

Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee's recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

Exemption of Business Owners

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/contacts/state_of.htm.

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U.S. Department of Labor
Wage and Hour Division

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U.S. Wage and Hour Division
(Revised July 2008)

Fact Sheet #17C: Exemption for Administrative Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for executive, professional, computer and outside sales employees, and for more information on the salary basis requirement.

Administrative Exemption
To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Primary Duty
"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Directly Related to Management or General Business Operations
To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work "directly related to management or general business operations" includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

Employer's Customers
An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, employees acting as advisors or consultants to their employer's clients or customers — as tax experts or financial consultants, for example — may be exempt.

Discretion and Independent Judgment
In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

Matters of Significance
The term "matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

Educational Establishments and Administrative Functions
The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than $455 a week, or on a salary basis which is at least equal to the entrance salary for teachers in the same educational establishment, and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities. Having a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment includes, by its very nature, exercising discretion and independent judgment with respect to matters of significance.

Highly Compensated Employees
Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the

FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Where to Obtain Additional Information

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When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/whd/contacts/state_of.htm.

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Wage and Hour Division

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U.S. Wage and Hour Division
(Revised July 2008)

Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

The specific requirements for exemption as a bona fide professional employee are summarized below. There are two general types of exempt professional employees: learned professionals and creative professionals.

See other fact sheets in this series for more information on the exemptions for executive, administrative, computer and outside sales employees, and for more information on the salary basis requirement.

Learned Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Work Requiring Advanced Knowledge

"Work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Field of Science or Learning

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word "customarily" means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Creative Professional Exemption

To qualify for the **creative professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Invention, Imagination, Originality or Talent

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Recognized Field of Artistic or Creative Endeavor

This includes such fields as, for example, music, writing, acting and the graphic arts.

Teachers

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

Practice of Law or Medicine

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/whd/contacts/state_of.htm.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

Fact Sheet #73: Break Time for Nursing Mothers under the FLSA

This fact sheet provides general information on the break time requirement for nursing mothers in the Patient Protection and Affordable Care Act ("PPACA"), which took effect when the PPACA was signed into law on March 23, 2010 (P.L. 111-148). This law amended Section 7 of the Fair Labor Standards Act (FLSA).

General Requirements

Employers are required to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

The FLSA requirement of break time for nursing mothers to express breast milk does not preempt State laws that provide greater protections to employees (for example, providing compensated break time, providing break time for exempt employees, or providing break time beyond 1 year after the child's birth).

Time and Location of Breaks

Employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary.

A bathroom, even if private, is not a permissible location under the Act. The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother's use, it must be available when needed in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view, and free from any intrusion from co-workers and the public.

Coverage and Compensation

Only employees who are not exempt from section 7, which includes the FLSA's overtime pay requirements, are entitled to breaks to express milk. While employers are not required under the FLSA to provide breaks to nursing mothers who are exempt from the requirements of Section 7, they may be obligated to provide such breaks under State laws.

Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provision would impose an undue hardship. Whether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business. All employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply.

Employers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time. In addition, the FLSA's general requirement that the employee must be completely relieved from duty or else the time must be compensated as work time applies. *See* WHD Fact Sheet #22, Hours Worked under the FLSA.

FLSA Prohibitions on Retaliation

Section 15(a)(3) of the FLSA states that it is a violation for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

Employees are protected regardless of whether the complaint is made orally or in writing. Complaints made to the Wage and Hour Division are protected, and most courts have ruled that internal complaints to an employer are also protected.

Any employee who is "discharged or in any other manner discriminated against" because, for instance, he or she has filed a complaint or cooperated in an investigation, may file a retaliation complaint with the Wage and Hour Division or may file a private cause of action seeking appropriate remedies including, but not limited to, employment, reinstatement, lost wages and an additional equal amount as liquidated damages.

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov **and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).**

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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US DOL FIELD OPERATIONS HANDBOOK INFORMATION ON PARALEGALS

ARTICLE ON FLSA QUIRKS

FLSA RECORDKEEPING REQUIREMENTS

22i38 Paralegals.

(a) Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. *See* FOH 22i00.

29 CFR § 541.301(e)(7)
WHD Letter FLSA 2005-09NA
WHD Letter FLSA 2005-54NA

(b) **Paralegals with a specialized 4-year degree.**

The learned professional exemption may be available for paralegals who possess advanced specialized degrees in other fields and apply advanced knowledge in that professional field in the performance of their paralegal duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for the learned professional exemption. *See* FOH 22i00.

WHD Letter FLSA 2005-09NA

(c) **Paralegals – Administrative exemption.**

The work of paralegals and legal assistants will not generally meet the discretion and independent judgment test of the administrative exemption and thus an analysis of whether their work is related to management or general business operations is not necessary. Paralegals perform duties using particular skills and knowledge rather than exercising the level of discretion and independent judgment required by section 29 CFR § 541.202(a)(3). When paralegals research and prepare reports, it is generally the attorneys who exercise discretion and independent judgment because they receive and decide whether or how to act on the information in the reports.

Although paralegals may work independently and use their own judgment as to how to prioritize their work assignments, including how the projects will be executed and how much time to spend on each assignment, it is not sufficient that an employee makes decisions regarding relatively insignificant matters or that an employee makes limited decisions, within clearly "prescribed parameters." *See* Clark v. J.M. Benson Co., Inc., 789 F.2d 282, 287-88 (4th Cir. 1986) and Dalheim v. KDFW-TV, 706 F. Supp. 493, 509 (N.D. Tex. 1998), aff'd, 918 F.2d 1220 (5th Cir. 1990). Rather, there must be the exercise of discretion and independent judgment on matters of significance or consequence related to the management or general business operations of the employer or the employer's customers.

A typical paralegal does not formulate or implement management policies, utilize authority to waive or deviate from established policies, provide expert advice, or plan business objectives as required to be exempt under 29 CFR § 541.202(b). In addition, most jurisdictions have strict prohibitions against the unauthorized practice of law by laypersons. Under the American Bar Association's Code of Professional Responsibility, a delegation of legal tasks to a lay person is proper only if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete

professional responsibility for the work produced. The implication of such strictures is that paralegal employees would not have the amount of authority to exercise independent judgments with regard to legal matters necessary to bring them within the administrative exemption. *See* FOH 22i00.

WHD Opinion Letter FLSA 2006-27
WHD Letter FLSA 2005-54NA

(d) **Senior Legal Analysts.**

A Senior Legal Analyst who conducts research at the request of an attorney and prepares a report for an attorney's review is performing work involving the use of skills and procedures rather than exercising discretion and judgment. The attorney who receives the reports exercises discretion and judgment in determining how to use the report. *See* FOH 22i00.

WHD Opinion Letter FLSA 2006-27

22i39 **Physician assistants.**

Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption.

29 CFR § 541.301(e)(4)

22i40 **Police lieutenants and captains, fire battalion chiefs.**

29 CFR § 541.3(b) states that police officers, fire fighters or other first responder employees who perform work such as extinguishing fires, rescuing crime or accident victims, performing surveillance, pursuing or restraining suspects, interviewing witnesses, and other similar work are not exempt executive or administrative employees. However, the executive exemption may apply to police lieutenants, police captains and fire battalion chiefs so long as the duties they perform meet all of the requirements set out in 29 CFR § 541.100. *See* FOH 22i00.

WHD Letter FLSA 2005-40NA
WHD FLSA Opinion Letter May 19, 1988

22i41 **Purchasing agents.**

Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs. *See* FOH 22i00.

29 CFR § 541.203(f)
WHD Opinion Letter FLSA 2008-01

Seven FLSA Quirks – Unanticipated and Costly

On August 7, 2012, in Articles, News, by Morris Jennings

Would it concern you to know that you might have individual responsibility forcompliance failures of your company? If you or your entity were to be sued for back wages, how would you feel about a *six*-year statute of limitations? What if a minimum wage or overtime suit accuses you of being a racketeer? Certain types of compliance failures, or the results of them, can be completely unexpected. Let's examine these (and other) FLSA nuances.

1. You might believe that your relationship with another employer, such as a subcontractor, should not result in an obligation regarding *that* employer's practices with respect to wages or employment of minors. Similarly, you would not expect to be held responsible for FLSA practices of the entity by which you are employed. However, Joint employment concepts allow for multiple entities and/or individuals to be held simultaneously responsible for the same violations. Most back wage suits filed by DOL or by plaintiffs' attorneys cite, as defendants, individuals believed to have been "acting directly or indirectly in the interest of an employer in relation to an employee." The same is
true when the DOL assesses civil money penalties. When I was with the Wage and Hour Division, one of my investigations, of one establishment, resulted in civil money penalty assessment against three entities and four individuals. http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.1.1.2.50&idno=29 explains FLSA joint employment principles.

2. Interns and trainees are often
treated as non-employees. In a business setting, this is usually *not* an accurate determination. See http://www.dol.gov/whd/regs/compliance/whdfs71.htm. When an employment relationship exists, failure to pay minimum wage and/or overtime compensation obviously results in a back wage liability. Likewise, allowing under-aged children to work – even when it is believed that they are "interns" – results in an assertion of child labor violations. Prior to retirement, I investigated a veterinary clinic and kennel. Minors, under fourteen years of age, worked on weekends – feeding and caring for the animals. These children were treated as "interns" or "volunteers." They received no compensation, and there was no record of their employment. Child labor, record keeping, and minimum wage violations were charged against the employers.

3. Record keeping provisions of the FLSA are explicit, but they are often ignored. There is no civil money penalty for failure to maintain proper records, but insufficient records often lead tomonetary or child labor violations. For example, failure to record time devoted to preparatory or concluding activities, checking emails and voice mail after scheduled hours, or compensable travel time, can result in a significant number of unrecorded (and uncompensated) hours worked. As I previously mentioned, certain workers might not even appear on the records. The lack of records is never a good thing, and perceived concealment will be treated as an indication of willfulness (increasing the civil money penalties). The penalties are even greater when child labor violations result from *minors* working "off the records." Required records: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.1.1.1.13&idno=29.

4. Exemption misclassification errors are familiar to most employers. However, the possibility that an inapplicable exemption might be claimed is not limited to "white collar" scenarios, and the result is not always limited to an overtime issue. *Child labor* violations can also occur because of exemption misclassification. Agricultural employment is generally exempt from overtime provisions, *and* employment of minors is less restrictive. However, the determination of agricultural status is sometimes difficult. An example of such a quandary is Christmas tree planting, maintenance, and harvesting. Christmas tree production is not "agricultural" for FLSA purposes unless the activities qualify under the complex explanations of "secondary agriculture." See §§ 780.105, 780.159 – 780.205, and 780.208 at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.1.1.2.41&idno=29#29:3.1.1.2.41.2.355.6. Not only are employees owed overtime pay (unless another exemption applies), but the ***non-agricultural child labor standards apply***. In a non-agricultural setting, a minor must be at least eighteen years of age to operate a power saw (including a chain saw). In a true agricultural operation, a minor may legally operate such a saw at sixteen years of age. Of interest to Christmas tree
growers in Maryland, North Carolina, South Carolina, Virginia, or West Virginia – the United States Court of Appeals for the Fourth Circuit ruled that the production of Christmas trees is "agricultural" for FLSA purposes. It is improbable that DOL will attempt to enforce its position within the Fourth Circuit, but you should consult with your attorney. The FLSA § 13(b)(28) ***overtime exemption*** applies to non-agricultural Christmas tree production and harvesting operations when eight or fewer employees are involved. See § 788.10 at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;sid=97db7fbc09311d3382f49aade5cfaa82;rgn=div5;view=text;node=29%3A.1.1.2.47;idno=29;cc=ecfr.

5. How the FLSA applies is sometimes dependent on other laws under which the employer has obligations. For example, if your state's minimum wage is higher than the FLSA minimum wage, and you have failed to comply with that higher wage rate, DOL will compute any FLSA overtime back wages at the state

minimum wage plus the half-time premium. Similarly, if you are subject to state "prevailing wage" laws, the wage determination wage rate will be treated as the regular rate (if you paid less than that rate) when computing overtime back wages. The same is true with regard to federal contract laws (Davis-Bacon Act, laws related to the DBA, and the Service Contract Act),
but the DOL Wage and Hour Division has *full* enforcement authority regarding those statutes and a related non-FLSA overtime law.

6. An even stranger quirk involving another law is the FLSA effect of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). That law requires farm labor contractors and joint employers to comply with the FLSA. MSPA has *no statute of limitations.* While this law ordinarily involves agriculture, it also applies to certain non-agricultural employment (e.g., forestry restoration and maintenance crews, employed by a labor contractor, are treated as "agricultural" for purposes of MSPA). In such a case, the FLSA overtime standards apply, but the FLSA statute of limitations does not apply to legal actions filed under MSPA. If a "farm labor" contractor fails to comply with the FLSA, litigation to recover back wages may be pursued by employees (plaintiffs) without regard to the FLSA three-year maximum statute of limitations. By alleging MSPA violations (i.e., that failure to comply with the FLSA equals failure to comply with MSPA), the plaintiffs may take advantage of the lack of a MSPA statute of limitations. I assisted the defense attorneys on one such case, in which the court allowed a *six year statute of limitations* (based on the state's applicable statute of limitations under contract law). I have no reason to believe that DOL would deviate from its customary two-year (three-year in the event of willfulness) litigation practices, but employers
who are subject to MSPA are very vulnerable to an extended statute of limitations when employee plaintiffs sue for FLSA back wages.

7. The FLSA provides, via the liquidated damages provision, that the back wage award may be doubled. An employer informed me that he owes FLSA back wages, but that the plaintiffs' attorney sought to recover *treble* damages by filing a civil suit under the Racketeer Influenced and Corrupt Organizations Act (RICO). This might have been a stretch, but the threat of a RICO suit is another potential aggravation and expense for employers.

The child labor provisions were referenced on several occasions. This topic was discussed in the June 2012 **BIZWatch.**

An FLSA compliant employer with no joint employment exposure is not likely to be affected by any of the described FLSA quirks. If there is doubt, "getting your house in order" is always advantageous (instead of waiting for DOL or a court to become involved). If there is a possibility of joint employment, it is to your benefit that such other employers take the initiative to ensure that there is not a continuing accrual of back wages. Whether you are seeking to enhance compliance within your own area of control, or assisting a joint employer in a compliance review, the http://www.bizkeys.com/ FLSA self-audit area will be very beneficial.

Leave a Reply

Name (required)

Mail (will not be published) (required)

Website

Submit Comment

The FLSA requires that employers retain certain employment records for specific periods of time.[8]

Fair Labor Standards Act (FLSA) Record Retention Requirements

Type of Records	Duration of Record-Keeping
Payroll records for each employee, including the employee's full name, employee identification number (if applicable), home address including zip code, date of birth (if under the age of 19), sex, occupation, work schedule (including the time of day and day of week on which the employee's workweek begins), regular hourly rate of pay (including the basis of wage calculation and the amount and nature of payments excluded from the regular rate of pay), total hours worked each day and week, total daily or weekly earnings, total overtime compensation, basis of overtime computation, total additions to or deductions from wages, total wages for each pay period, and the date of payment and the pay period covered by the payment.	Three years from last date of entry.
Individual employment contracts, collective bargaining agreements, plans, trusts, certificates, and required notices.	Three years from last effective date.
Sales and purchase records, including a record or total dollar volume of sales or business, and total volume of goods purchased or received during a weekly, monthly, or quarterly basis, in such form as maintained by the employer in the ordinary course of business.	Three years.
Supplementary basic records including employment and earnings records, such as basic time and earning cards or sheets showing daily starting and stopping time of employees or the amount of work accomplished by individual employees on a daily, weekly, or pay period basis when such amounts determine in whole or in part the wages of the employee, and wage rate schedules or tables.	Two years from the date of last entry.
Order, shipping, and billing records.	Two years from the last date of entry.

[8] *See* 29 C.F.R. § 516.2 - 516.6

Records of additions to and deductions from each individual employee's wages; all employee purchase orders or wage assignments; other records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs are related to additions or deductions from wages paid.	Two years.

EMPLOYMENT LAWS APPLICABLE TO WORKPLACES BASED ON NUMBER OF EMPLOYEES

LAWS APPLICABLE TO PRIVATE WORKPLACES BASED ON THE NUMBER OF EMPLOYEES[1]

Number of Employees triggering application	FEDERAL OR SOUTH CAROLINA STATUTE
1.	I. **The Civil Rights Act of 1866**, 42 U.S.C. § 1981 - protects against racial discrimination in making and enforcing contracts II. **The Fair Labor Standards Act (FLSA)**, 29 U.S.C. § 201, *et seq.* - entitles employee to a minimum wage at an hourly rate of $7.25 - entitles "non-exempt" employees to overtime compensation for each hour worked in excess of 40 hours in a work-week III. **The National Labor Relations Act (NLRA)**, 29 U.S.C. § 151, *et seq.* - protects employees' right to unionize; to discuss working conditions without fear of retaliation IV. **The South Carolina statute protecting smokers against discrimination,** S.C. Code Ann. § 41-1-85 - protects against employment action on the basis of outside-the-workplace use of tobacco products V. **The Patient Protection and Affordable Care Act (PPACA or ACA)**, 124 Stat. 119–124 - requires employers to provide employees with a notice of availability of coverage through the healthcare exchanges VI. **The South Carolina Payment of Wages Act,** S.C. Code Ann. § 41-10-10, *et seq.* (except 41-10-30) Imposes on employers an obligation to - pay timely all wages that are due - provide specific written notice of any deductions from wages Prohibits agreements waiving rights under the statute
2.	I. **The Equal Pay Act**, 29 U.S.C. § 201, *et seq.* - protects against gender discrimination in compensation
4.	I. **The South Carolina Workers' Compensation Law**, S.C. Code Ann. § 42-1-10, *et seq.* - provides for compensation for injuries suffered by accident arising out of and in the course of employment

[1] This chart contains brief descriptions of complex statutes that may be subject to amendment, regulatory interpretation and court rulings. Please consult legal counsel for specific information. August 31, 2015.

5.	I. **The South Carolina Payment of Wages Act**, S.C. Code Ann. § 41-10-30 - imposes on the employer an obligation: • to maintain certain records for three years • to provide specific terms of employment in writing to every employee
10.	I. **The Occupational Safety and Health Act (OSHA)**, 29 U.S.C. § 651 - protects employees' right to safe and healthful working conditions
15.	I. **Title VII of the Civil Rights Act of 1964**, 42 U.S.C. § 2000e, *et seq.* and the **SC Human Affair Law,** S.C. Code Ann. §1-13-10, *et. seq.* - protects employees against discrimination based on race, color, religion, sex, and national origin - discrimination based on pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII - employment action based on gender stereotypes (sexual orientation and gender identity) may constitute discrimination based on sex II. **The Genetic Information Nondiscrimination Act of 2008 (GINA)**, P.L. 110-233 - protects employees against discrimination based on genetic information III. **The Americans with Disabilities Act (ADA)**, 42 U.S.C. § 12111, *et seq.* - protects employees against discrimination based on disability • requires employers to provide reasonable accommodation of employees' disabilities, defined as physical or mental impairment that substantially limits a major life activity, if such an accommodation can be provided without undue hardship
20.	I. **The Age Discrimination in Employment Act (ADEA)**, 29 U.S.C. § 201, *et seq.* - protects employees who are 40 years old and older against adverse employment actions based on age
50.	I. **The Family and Medical Leave Act (FMLA)**, 29 U.S.C. § 2601, *et seq.* - entitles employees to up to 12 weeks of unpaid leave to accommodate serious health conditions or serious health conditions of employees' family members II. **The Patient Protection and Affordable Care Act (PPACA or ACA)**, 124 Stat. 119–124 - requires employers to offer health coverage that is affordable and provides minimum value
100.	I. **The Worker Adjustment and Retraining Notification Act (WARN Act)**, 29 U.S.C. § 2101 - requires employers to give 60 days' notice of impending mass layoff or plant closing

UNPAID INTERNSHIPS

Checklist for Unpaid Internship Programs

Internship programs can provide advantages for both employers and interns, but many internships risk running afoul of state and federal laws. Employers can end up on the hook for significant amounts in unpaid wages, employment taxes, and penalties. To avoid these unintended consequences, make sure your program:

- Is similar to training that would be provided in an educational environment.
- Predominantly benefits the interns.
- Provides interns with skills they can use in multiple employment settings rather than only in the employer's operation.
- Ensures interns do not perform the routine work of the business on a regular and recurring basis.
- Does not result in the displacement of regular employees.
- Does not merely augment the existing workforce during specific time periods.
- Puts interns under the close supervision of existing staff.
- Provides no immediate advantage to the employer from the interns' activities.
- Impedes the employer's operations on occasion.
- Runs for a fixed length of time, established before the internships begin.
- Does not entitle interns to employment after their internships conclude.
- Makes clear to interns that they are not entitled to wages for their time during the internships.

2017 Year in Review: An Update on Ethics Advisory Opinions

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Cecil Duff Nolan, Jr., Respondent.

Appellate Case No. 2016-002497

Opinion No. 27704
Submitted January 12, 2017 – Filed February 15, 2017

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Cecil Duff Nolan, Jr., of Stuttgart, Arkansas, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent is licensed to practice law in Arkansas. At all times relevant to these matters, respondent was providing or offering to provide legal services in South Carolina. Therefore, respondent is a lawyer as defined in Rule 2(q), RLDE, and is subject to the disciplinary authority of this Court and the Commission on Lawyer

Conduct pursuant to Rule 8.5(a) of the South Carolina Rules of Professional Conduct, Rule 407, SCACR.

Respondent represented intellectual property holders from Georgia. In 2009, respondent brought an infringement action on behalf of the property holders (the plaintiffs) alleging the defendant was selling a product in violation of the plaintiffs' rights. The lawsuit was originally filed in federal court in Georgia, but was removed to South Carolina because the defendant is a South Carolina business and the alleged violation occurred in South Carolina.

In the course of preparing for the litigation, respondent's private investigators travelled to locations in South Carolina to pose as customers in an effort to obtain evidence to prove that the defendant was violating the intellectual property rights of the plaintiffs. During the investigation, respondent's investigators made false statements to the defendant's employees and used tactics designed to prod the employees into making statements about the product. Respondent's investigators tape-recorded these conversations without notice to the employees.

Respondent was unaware that secret tape-recording, pretexting, and dissembling were in violation of the South Carolina Rules of Professional Conduct.[1] He acknowledges that it was incumbent upon him to research the law in South Carolina before sending his investigators to this state.

Respondent admits that the conduct of the investigators in secretly tape-recording the conversations with the defendant's employees, posing as the defendant's customers, and coercing and manipulating the defendant's employees violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 4.4(a) (in representing client, lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden third person, or use methods of obtaining evidence that violate the legal rights of third person); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). Respondent further admits that he is responsible for the conduct of his investigators and, therefore, he

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[1] *See In the Matter of an Anonymous Member of the Bar*, 304 S.C 342, 404 S.E.2d 513 (1991); *In the Matter of Warner*, 286 S.C. 459, 335 S.E.2d 90 (1985); and *In the Matter of an Anonymous Member of the Bar*, 283 S.C. 369, 322 S.E.2d 667 (1984).

violated the following additional provisions of the Rules of Professional Conduct: Rule 5.3(c) (lawyer shall be responsible for conduct of person that would be violation of Rules of Professional Conduct if engaged in by lawyer if lawyer orders or, with knowledge of specific conduct, ratifies conduct involved) and Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another).

Respondent admits that by his conduct he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it is ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur.

418 S.C. 384
Supreme Court of South Carolina.

In the MATTER OF Margaret D. FABRI, Respondent.

Appellate Case No. 2016-000917
|
Opinion No. 27683
|
Heard September 21, 2016
|
Filed November 16, 2016

Synopsis

Background: Attorney disciplinary proceedings were instituted, and hearing panel for Commission on Lawyer Conduct recommended discipline.

Holdings: The Supreme Court held that:

[1] attorney engaged in misconduct by issuing two subpoenas commanding production of documents at hearing without providing notice to opposing counsel, as required under civil procedure rules, and

[2] public reprimand was appropriate sanction for attorney's misconduct.

Attorney publicly reprimanded.

West Headnotes (5)

[1] **Attorney and Client**
Jurisdiction of Courts

Attorney and Client
Discretion

The Supreme Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record.

Cases that cite this headnote

[2] **Attorney and Client**
Review

The Supreme Court is not bound by the hearing panel's recommendation and may make its own findings of fact and conclusions of law at an attorney disciplinary proceeding. S.C. App. Ct. R. 413; S.C. Lawyer Disciplinary Enforcement, Rule 27(e)(2).

Cases that cite this headnote

[3] **Attorney and Client**
Weight and sufficiency

An attorney disciplinary violation must be proven by clear and convincing evidence. S.C. App. Ct. R. 413; S.C. Lawyer Disciplinary Enforcement, Rule 8.

Cases that cite this headnote

[4] **Attorney and Client**
Deception of court or obstruction of administration of justice

Attorney, by issuing two subpoenas commanding production of documents at hearing without providing notice to opposing counsel, as required under civil procedure rules, violated professional conduct rules governing conduct prejudicial to the administration of justice, prohibiting violation of professional conduct rules or other rules regarding professional conduct, prohibiting engagement in conduct tending to pollute administration of justice, governing making of false statements to third person, and prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. S.C. R. Civ. P. 45(b)(1); S.C. App. Ct. R. 407, 413; S.C. R. Prof. Conduct 4.1(a), 8.4(d), 8.4(e); S.C. Lawyer Disciplinary Enforcement, Rules 7(a)(1), 7(a)(5).

Cases that cite this headnote

[5] **Attorney and Client**
Public Reprimand;Public Censure; Public Admonition

Public reprimand was appropriate sanction for attorney who engaged in misconduct by issuing two subpoenas without providing notice to opposing counsel as required by civil procedure rules; attorney had previously been sanctioned for misconduct in two instances that involved improperly subpoenaing an out-of-state party and issuing a subpoena in a case that was not pending. S.C. R. Civ. P. 45(b)(1); S.C. App. Ct. R. 407, 413; S.C. R. Prof. Conduct 4.1(a), 8.4(d), 8.4(e); S.C. Lawyer Disciplinary Enforcement, Rules 7(a)(1), 7(a)(5).

Cases that cite this headnote

Attorneys and Law Firms

**307 Disciplinary Counsel Lesley M. Coggiola and Senior Assistant Disciplinary Counsel Charlie Tex Davis, Jr., both of Columbia, for Office of Disciplinary Counsel.

David Dusty Rhoades, of Charleston, for Respondent.

Opinion

PER CURIAM:

*386 In this attorney disciplinary matter, the Office of Disciplinary Counsel ("ODC") filed formal charges against Margaret Fabri ("Respondent"), alleging Respondent committed misconduct by issuing two subpoenas without providing notice to opposing counsel as required under Rule 45(b)(1) of the South Carolina Rules of Civil Procedure ("SCRCP").[1] By way of return, Respondent argued she was not required to notify opposing counsel because the subpoenas commanded the appearance of a witness and the production of documents at a hearing rather than before the hearing; therefore, discipline is improper. A five member hearing panel ("Hearing Panel") for the Commission on Lawyer Conduct ("Commission") disagreed with Respondent. As a result, a majority of the Hearing Panel recommended Respondent: receive a public reprimand; be directed to pay the costs of the proceedings; and be ordered to attend the South Carolina Bar's Legal Ethics and Practice Program Ethics School. We accept this recommendation.

I. Factual and Procedural History

Respondent represented Husband in a divorce action. Due to Wife's delay in producing **308 a financial declaration, Respondent issued two subpoenas to the records custodian at Wife's employer. The subpoenas were titled "Hearing Subpoena (Duces Tecum)" and commanded the records custodian appear at a temporary hearing and produce various documents related to Wife's employment. The cover letter to the subpoenas provided: "[i]f you are able to produce the requested documents to me prior to the hearing date, it may not be necessary for your records custodian to appear." Respondent signed the subpoenas, certifying that they were "issued in compliance with Rule 45(c)(1) and that notice as required by Rule 45(b)(1) ha[d] been given to all parties." In actuality, Respondent did not provide opposing counsel notice of either subpoena.

*387 ODC subsequently filed formal charges against Respondent, alleging she committed misconduct by failing to provide opposing counsel notice of the subpoenas as required under Rule 45(b)(1), SCRCP. In response, Respondent argued she was not required to notify opposing counsel because the subpoenas were titled "hearing subpoena duces tecum" and commanded the appearance of a witness and the production of documents at the hearing. Although Respondent recognized she invited the records custodian to produce the documents before the hearing, Respondent attempted to dismiss this fact by asserting it was merely a request not a command. In light of her assertions, Respondent requested the charges be dismissed.

After a hearing, the Hearing Panel issued its report in which it agreed with ODC. In finding Respondent's actions constituted professional misconduct, the Hearing Panel relied on the fact that: (1) Respondent issued two subpoenas without providing notice to opposing counsel as required under Rule 45(b)(1), SCRCP; (2) Respondent nevertheless certified that notice to opposing counsel had been provided; and (3) the subpoenas commanded the production of documents in contravention of Rule 25 of the South Carolina Rules of Family Court ("SCRFC"), which prohibits discovery in the family court without a court order or a stipulation by both parties. Based on these facts and Respondent's prior disciplinary history, which will be discussed in greater detail below, three

panel members recommended Respondent receive a public reprimand. Two panel members recommended Respondent receive an admonition. In addition, the entire panel recommended Respondent be directed to pay the costs of the proceedings and be directed to attend the South Carolina Bar's Legal Ethics and Practice Program Ethics School within one year of the imposition of any discipline imposed. Respondent now asks this Court to review the Hearing Panel's findings.

II. Standard of Review

[1] **[2]** "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). "The Court is not bound by the panel's recommendation and may make its own findings of fact and ***388** conclusions of law." *In re Hazzard*, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008); *see* Rule 27(e)(2), RLDE, Rule 413, SCACR ("The Supreme Court may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission.").

[3] "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* 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.").

III. Discussion

[4] Respondent maintains she was not required to notify opposing counsel of the subpoenas. We disagree.

Rule 45 of the South Carolina Rules of Civil Procedure sets forth the procedures for issuing a subpoena. Rule 45(b)(1) explains when a party issuing a subpoena must provide notice of the subpoena to an opposing party. It provides, in pertinent part: "Unless otherwise ordered by the court, ***prior notice in writing of any commanded production of documents and things*** or inspection of premises before trial ***shall be served on each party*** in the manner prescribed by Rule ****309** 5(b) at least 10 days before the time specified for compliance." Rule 45(b)(1), SCRCP (emphasis added). South Carolina added this notice provision in accordance with a similar provision in Rule 45 of the Federal Rules of Civil Procedure,[2] which, at that time,[3] stated, in relevant part: "If the subpoena commands the ***389** production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party." Fed. R. Civ. P. 45(b)(1). This notice provision was added to the Federal Rules of Civil Procedure by a 1991 amendment, the comment to which explained:

> The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

Fed. R. Civ. P. 45(b)(1) cmt.

Respondent interprets Rule 45(b)(1), SCRCP as requiring notice to the opposing party only when issuing a subpoena commanding the production of documents before a hearing or a trial. Therefore, according to Respondent, she was not required to notify opposing counsel because the subpoenas commanded the production of documents at the hearing. While Respondent acknowledged she invited the records custodian to produce the documents before the hearing, Respondent attempts to distinguish this situation from one in which the notice requirement would apply under her interpretation of the rule by stating it was merely a request not a command.

We need not delve too deep into Respondent's argument because we disagree with Respondent's interpretation of Rule 45, SCRCP. Instead, we interpret the rule as requiring that notice be given to the opposing party anytime a party issues a subpoena commanding the production of documents, *regardless of when the*

documents are commanded to be produced. See James F. Flanagan, *South Carolina Civil Procedure*, at 387 (3d ed. 2010) ("The last sentence of Rule 45(b)(1) requires that notice be given to other parties if a subpoena requesting production of materials is served on a non-party. The notice keeps all parties abreast of the pending discovery and upon request, they may obtain copies of the material produced."). Our interpretation is consistent with the purpose of the notice ***390** provision, the remaining provisions of Rule 45,[4] decisions from federal courts interpreting the notice provision in Rule 45 of the Federal Rules of Civil Procedure,[5] and with a previous order from this Court in which we clarified:

> ****310** [A] subpoena may be used for the production, inspection or copying of books, documents or tangible objects, or for the inspection of premises. Rule 45(a), SCRCP. When used for this purpose, the subpoena may be issued only to compel a witness to produce materials in his possession or control at the time the subpoena is served; it may not be used to require a witness to perform any other affirmative act such as preparing a sworn statement. Wright & Miller, Federal Practice and Procedure: Civil § 2454 (1971); 97 C.J.S. Witnesses § 25e (1957). ***Unless otherwise ordered by the court, notice of the issuance of this kind of subpoena must be served on all parties to the action***. Rule 45(b)(1), SCRCP.

S.C. Sup. Ct. Order dated Oct. 9, 1993 (Davis Adv. Sh. No. 25) (emphasis added).

Accordingly, we hold Respondent violated Rule 45, SCRCP by failing to notify opposing counsel. We also conclude Respondent's issuance of the subpoenas contravened Rule 25, SCRFC, which prohibits discovery in the family court without a court order or a stipulation by both parties, since neither condition was in effect when Respondent issued the subpoenas. As the Hearing Panel pointed out:

> ***391** It is abundantly clear from the record that Respondent issued the subpoenas as a discovery tool to obtain the financial records of the opposing party because Respondent had not yet received the financial declaration. The subpoenas ... were clearly an attempt by Respondent to discover information and not to compel the appearance of a witness at a temporary hearing.

Thus, we find there is clear and convincing evidence Respondent violated Rule 8.4(e), RPC, Rule 407, SCACR (providing a lawyer shall not "engage in conduct that is prejudicial to the administration of justice"); Rule 7(a)(1), RLDE, Rule 413, SCACR (proclaiming lawyer shall not violate the Rules of Professional Conduct or any other rules regarding the professional conduct of lawyers); and Rule 7(a)(5), RLDE, Rule 413, SCACR (prohibiting lawyer from "engag[ing] in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or demonstrating an unfitness to practice law"). We further find clear and convincing evidence Respondent violated Rule 4.1(a), RPC, Rule 407, SCACR (explaining "lawyer shall not knowingly ... make a false statement of material fact or law to a third person") and Rule 8.4(d), RPC, Rule 407, SCACR (recognizing it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"), because Respondent signed the subpoenas, certifying she notified opposing counsel as required under Rule 45, SCRCP.[6]

[5] ***392** In addition to the misconduct that gave rise to this case, Respondent has been sanctioned for misconduct in two previous instances that involved improperly subpoenaing an out-of-state party and issuing a subpoena in a case that was not pending. These incidents coupled with Respondent's misconduct in this case indicate an admonition is insufficient to deter Respondent from improperly issuing subpoenas in the future.

IV. Conclusion

For the abovementioned reasons, we find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the majority of the Hearing Panel's recommendation ****311** to publicly reprimand Respondent for her misconduct. In addition, Respondent

shall, within thirty days of the date of this opinion, pay the costs incurred in the investigation of this matter by ODC and the Commission. Finally, Respondent shall complete the South Carolina Bar's Legal Ethics and Practice Program Ethics School within one year of the date of this opinion. Respondent shall provide proof of her completion to the Commission no later than ten days after the conclusion of the program.

PUBLIC REPRIMAND.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN and FEW, JJ., concur.

All Citations

418 S.C. 384, 793 S.E.2d 306

Footnotes

1 Rule 45 states, in relevant part: "[u]nless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance." Rule 45(b)(1), SCRCP.

2 *See* Rule 45, SCRCP cmt. ("Rule 45 is amended to conform to federal Rule 45, as amended in December 1991.").

3 In 2013, the Advisory Committee on Rules of Civil Procedure ("Committee") moved the notice provision to Rule 45(a)(4), and clarified that the notice must include a copy of the subpoena. Fed. R. Civ. P. 45(a)(4) cmt. The Committee made these changes in order "to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials." *Id.* Accordingly, Rule 45(a)(4) now provides: "If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party." Fed. R. Civ. P. 45(a)(4).

4 For example, Rule 45 provides that the opposing party must make a written request in order to receive a copy of the documents procured from a subpoena. Rule 45(c)(2)(A), SCRCP. In order to make such a request, however, the opposing party must have notice of the subpoena.

5 *See, e.g.*, *Judson Atkinson Candies, Inc. v. Latini–Hohberger Dhimantec*, 529 F.3d 371, 386 (7th Cir. 2008) ("A party must serve each party with prior notice if the subpoena commands the production of documents."); *Murphy v. Bd. of Educ. of Rochester City Sch. Dist.*, 196 F.R.D. 220, 222 (W.D.N.Y. 2000) ("Without question, Rule 45(b)(1) requires a party issuing a subpoena for the production of documents to a non-party to 'provide prior notice to all parties to the litigation.' ") (quoting *Schweizer v. Mulvehill*, 93 F.Supp.2d 376, 411 (S.D.N.Y. 2000)); *Anderson v. Gov't of Virgin Islands*, 180 F.R.D. 284, 291 (D.V.I. 1998) ("Before serving any subpoena, a party is required to provide notice to all other parties in the litigation to allow them the equal opportunity to review and obtain the materials at the same time as the party who served the subpoena.").

6 It has also come to our attention that some attorneys will receive documents from a witness prior to the time the witness was commanded to appear with the documents. Once the attorney receives the documents, the witness is generally released from their obligation to appear without any notice to the opposing party, who is still under the expectation that the witness will appear at the trial or hearing with the requested documents. We caution against this practice. Further, we conclude not only must an attorney notify the opposing party when subpoenaing the production of documents, but the opposing party must also be notified anytime the party issuing the subpoena receives the documents prior to the time requested in the subpoena. To hold otherwise would circumvent the purpose of the notice provision and would allow the party issuing the subpoena to gain a competitive advantage over the opposing party who may have no knowledge of the contents of the documents until the trial or hearing.

End of Document

803 S.E.2d 707
Supreme Court of South Carolina.

Vance L. BOONE, Thelma Boone, Travis G. Messex, Theresa S. Messex, Brian Johnson, and Kelli Johnson, on behalf of themselves and all others similarly situated, Petitioners,
v.
QUICKEN LOANS, INC. and Title Source, Inc., Respondents.

Appellate Case No. 2013-002288
|
Opinion No. 27727
|
Heard October 19, 2016
|
Filed July 19, 2017
|
Rehearing Denied September 13, 2017

Synopsis

Background: Homeowners petitioned for class relief and a declaration that online mortgage lender and title insurer engaged in unauthorized practice of law in mortgage refinance transactions. The Supreme Court accepted the matter in its original jurisdiction.

Holdings: The Supreme Court, Kittredge, J., held that:

[1] examination of title and preparation of abstracts were performed under supervision of licensed attorney;

[2] legal instruments were adequately reviewed by licensed attorneys prior to closings;

[3] transactions were closed with appropriate attorney supervision; and

[4] attorneys authorized and supervised recording of all necessary documents and disbursement of funds.

Declaratory judgment issued.

West Headnotes (11)

[1] **Attorney and Client**
Practitioners Not Admitted or Not Licensed;Unauthorized Practice of Law

The practice of law is limited to licensed attorneys.

Cases that cite this headnote

[2] **Attorney and Client**
Representation of others in general
Attorney and Client
Drafting or preparation of documents in general

The generally understood definition of the "practice of law" embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts.

Cases that cite this headnote

[3] **Attorney and Client**
What Constitutes Practice of Law; Prohibited and Permitted Acts
Attorney and Client
Drafting or preparation of documents in general

The practice of law includes the preparation of legal documents when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law.

Cases that cite this headnote

[4] **Attorney and Client**
Practitioners Not Admitted or Not Licensed;Unauthorized Practice of Law

There is no comprehensive definition of the practice of law.

Cases that cite this headnote

[5] **Attorney and Client**

Real estate;mortgages and liens;title insurance

A mortgage refinance process does not constitute unauthorized practice of law as long as a licensed South Carolina attorney is involved at each critical stage and exercises independent professional judgment, including making corrections if necessary, at the key points throughout the transaction.

Cases that cite this headnote

[6] **Attorney and Client**

Practitioners Not Admitted or Not Licensed;Unauthorized Practice of Law

In evaluating whether challenged conduct constitutes the unauthorized practice of law, the Supreme Court carefully considers the specific constellation of facts presented and legal rights implicated to determine whether the degree of attorney involvement appropriately protects the public from potential legal pitfalls without unduly burdening consumer choice or needlessly increasing consumer costs.

Cases that cite this headnote

[7] **Attorney and Client**

Real estate;mortgages and liens;title insurance

Examination of title and preparation of abstracts were performed under supervision of licensed attorney, and thus did not constitute unauthorized practice of law by online mortgage lender and title insurer engaged in mortgage refinance transactions; even though non-lawyer created abstract, attorney always personally reviewed abstractor's report and only issued title certificate if he was confident of its legal sufficiency.

Cases that cite this headnote

[8] **Attorney and Client**

Real estate;mortgages and liens;title insurance

Legal instruments utilized in mortgage refinance transactions by online mortgage lender and title insurer were adequately reviewed, and corrected if necessary, by licensed attorneys prior to closings, and thus preparation of documents did not constitute unauthorized practice of law; even though lender and insurer were primarily responsible for preparing loan documents, closing attorneys reviewed the documents for accuracy and compliance with the law prior to closing.

Cases that cite this headnote

[9] **Attorney and Client**

Real estate;mortgages and liens;title insurance

Mortgage refinance transactions were closed with appropriate attorney supervision, and thus closings did not constitute unauthorized practice of law by online mortgage lender and title insurer; licensed attorney who had previously reviewed closing documents for accuracy and legal sufficiency was physically present at each closing to answer questions and to instruct borrowers in the manner in which to execute the closing documents.

Cases that cite this headnote

[10] **Attorney and Client**

Real estate;mortgages and liens;title insurance

Attorneys authorized and supervised recording of all necessary documents and disbursement of funds in mortgage refinance transactions, and thus online mortgage lender and title insurer did not commit unauthorized practice of law at this stage of closing transactions; attorneys were required to verify that loan proceeds were properly disbursed and that all necessary documents were recorded properly in correct county.

Cases that cite this headnote

[11] **Attorney and Client**

Real estate;mortgages and liens;title insurance

In the context of a residential real estate loan closing, the disbursement of loan proceeds constitutes the practice of law and must be supervised by an attorney.

Cases that cite this headnote

***708 IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT**

Attorneys and Law Firms

Charles L. Dibble, of Dibble Law Offices, of Columbia, Steven W. Hamm, of Richardson Plowden & Robinson, P.A., of Columbia; C. Bradley Hutto, of Williams & Williams, of Orangeburg and Daniel Webster Williams, of Bedingfield & Williams, of Barnwell, for Petitioners/Respondents.

Benjamin Rush Smith, III, Allen Mattison Bogan, and Carmen Harper Thomas, all of Nelson Mullins Riley & Scarborough LLP, of Columbia, and Jeffrey B. Morganroth, of Morganroth & Morganroth, PLLC, of Birmingham, MI, pro hac vice, for Respondents/Petitioners.

Opinion

JUSTICE KITTREDGE:

We accepted this declaratory judgment matter in our original jurisdiction to determine if Respondents/Petitioners Quicken Loans, Inc. (Quicken Loans) and Title Source, Inc. (Title Source) have engaged in the unauthorized practice of law (UPL).[1] In their complaint, Petitioners/Respondents Vance L. and Thelma Boone, Travis G. and Theresa S. Messex, and Brian and Kelli Johnson (collectively "Homeowners"), alleged the residential mortgage refinancing model implemented by Quicken Loans and Title Source in refinancing the Homeowners' mortgage loans constitutes UPL. In addition to seeking declaratory relief, Homeowners' complaint also sought class certification and requested class relief.[2]

We referred this matter to a Special Referee to take evidence and issue a report containing proposed findings of fact and recommendations to the Court regarding the UPL issue, as well as on the issues of class certification and class relief. Following an evidentiary proceeding during which the parties submitted extensive testimony and documentary evidence, the Special Referee issued a report proposing various factual findings and recommending this Court declare that Quicken Loans and Title Source engaged in UPL but opining that neither class certification nor class relief were appropriate under the circumstances. Quicken Loans and Title ***709** Source took exception to the Special Referee's proposed findings of fact and UPL recommendation. Homeowners took exception to Special Referee's recommendation that class certification and class relief were unwarranted under the circumstances.

We find the record in this case shows licensed South Carolina attorneys were involved at every critical step of these refinancing transactions, as required by our precedents. We also find that requiring more attorney involvement would not effectively further our stated goal of protecting the public from the dangers of UPL. We therefore respectfully reject the Special Referee's conclusion that Quicken Loans and Title Source committed UPL. Because we reject the finding of UPL, we need not address the parties' remaining exceptions, including Homeowners' request that we declare their mortgages void and certify this case as a class action.

I.

Quicken Loans is a nationwide online mortgage lender that provides, among other things, residential mortgage loan refinances. Prior to expanding into the South Carolina market, Quicken Loans engaged South Carolina attorneys—with expertise in real estate transactions and knowledgeable of our UPL jurisprudence—to review the Quicken Loans refinance procedure. After reviewing the procedure, the attorneys opined that the procedure would not constitute UPL, as evidenced by the sufficient involvement of a South Carolina lawyer at each critical step. Buoyed by the supporting opinions of South Carolina lawyers, Quicken Loans moved forward with offering residential mortgage loan refinance services to South Carolina borrowers.

Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan. The process begins with a potential borrower completing a loan application, which is typically done online. Thereafter, the borrower speaks on the telephone with a licensed mortgage banker employed by Quicken Loans. Each borrower is informed that he or she has the right to select legal counsel to represent him or her in the transaction and asked whether he or she has a preference as to a specific attorney.[3] If the borrower does not desire to use a particular attorney during the loan transaction, Quicken Loans engages Title Source, a nationwide provider of settlement services and title insurance, to provide the necessary settlement services. Title Source, in turn, subcontracts with various individuals and entities (including licensed South Carolina attorneys) to perform those various services in compliance with South Carolina law.

For the transactions at issue in this case, Title Source turned to a non-attorney abstractor (Abstractor) to perform a title search and prepare a title abstract. In each of these transactions, Title Source initiated the title search by ordering a title abstract from Abstractor via email for each particular parcel of property to be refinanced. The scope of each title search was directed by Title Source in the email ordering the search; for loan refinances, no transfer of ownership takes place, so the title search includes two years back from the relevant vesting deed. Upon receiving a title abstract order from Title Source, Abstractor determined the county in which the property is located, then traveled to the relevant county land records office to locate and photocopy the pertinent documents on record, such as deeds, mortgages, mortgage assignments, loan modifications, tax documents, and personal judgments against the borrower(s). Thereafter, Abstractor prepared an "abstract" or index of the documents pulled from the public records, scanned and uploaded the abstract sheet along with the documents themselves, and electronically transmitted both the abstract and supporting documents back to Title Source through a web portal.[4]

***710** After Abstractor's reports were transmitted to Title Source through the web portal, Title Source subsequently digitally transmitted those reports to David Aylor, a South Carolina attorney, who personally reviewed the title abstract and accompanying documents. If appropriate, based on his review of the documents, Aylor used an electronic template to generate and digitally sign title review certificates, verifying that he had reviewed the title documents and that the property owners held fee simple title to the property they were seeking to refinance.[5] Following receipt of the title certification, Title Source produced a title commitment, which it submitted to Quicken Loans.

Thereafter, Title Source and Quicken Loans coordinated to schedule the loan closings and prepare the closing package, including the HUD-1 settlement statement, note, mortgage, and closing instructions, which were reviewed by the closing attorney prior to closing. In reviewing the closing package documents, the closing attorney confirmed that the title work was certified by a South Carolina lawyer and that the closing documents were accurate and complied with the law, and if necessary, made corrections or refused to proceed with the closing until the discrepancies were resolved.

Thereafter, the closing attorneys met with the borrowers in person, explained the legal effect of the loan documents, answered any questions the borrowers had, and supervised the borrowers' execution of the legal instruments.

Once the closing was finished, the attorney returned the executed documents to Title Source, along with detailed instructions on recording certain documents and disbursing loan proceeds. Upon the disbursement of funds, Title Source provided each closing attorney with a closing ledger, which the closing attorney used to confirm that disbursement of the funds was done in accordance with the HUD-1 settlement statement. Following recordation in the proper county land records office, a certified copy of each recorded document is mailed to the closing lawyer for their review.

Notably, each of the attorneys involved throughout these challenged transactions testified that they maintained their independence and were not controlled by Quicken Loans or Title Source in the exercise of their professional judgments. Moreover, at the hearing before the Special Referee, William Higgins, an expert in ethical and professional responsibility issues associated with real estate transactions in South Carolina, opined that Quicken Loans and Title Source had developed an

"efficient, automated, consumer-friendly method" and "they've done so in a way that includes direct and appropriate involvement of South Carolina licensed lawyers, and they've done it in a way that [ ] allows those lawyers to act independently that does not impinge on their professional responsibilities or their professional independence."

Nevertheless, at the conclusion of the evidentiary hearing, the Special Referee issued a report recommending this Court declare Respondents' conduct to be UPL and issue an injunction against Respondents conducting real estate refinance transactions in South Carolina. In so finding, the Special Referee focused on the proper issue, that is, whether the supervision by the South Carolina attorneys was sufficient and "meaningful."

*711 Quicken Loans and Title Source take exception to the Special Referee's recommendation that the Court find they engaged in UPL and contend the Report and Recommendation misconstrued this Court's UPL precedents and omitted and ignored material facts demonstrating Respondents' compliance with the law and protection of South Carolina consumers. Conversely, the Homeowners urge this Court to adopt the Special Referee's finding that Quicken Loans and Title Source engaged in UPL; the Homeowners further contend they are also entitled to additional relief beyond the injunction recommended by the Special Referee.

II.

[1] The South Carolina Constitution assigns to this Court the duty to regulate the practice of law. S.C. Const. art. V, § 4. "South Carolina, like other jurisdictions, limits the practice of law to licensed attorneys." *Brown v. Coe*, 365 S.C. 137, 139, 616 S.E.2d 705, 706 (2005) (citation omitted). "[T]he policy of prohibiting laymen from practicing law is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure *the public* adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law." *State ex rel. Daniel v. Wells*, 191 S.C. 468, 5 S.E.2d 181, 186 (1939) (emphasis added).

[2] [3] "The generally understood definition of the practice of law embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts." *Crawford v. Cent. Mortg. Co.*, 404 S.C. 39, 45, 744 S.E.2d 538, 541 (2013) (quoting *State v. Despain*, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995)) (internal quotation marks omitted). Further, this Court has recognized that "[t]he practice of law is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability." *State v. Buyers Serv. Co.*, 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). This includes the preparation of legal documents "when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law." *Franklin v. Chavis*, 371 S.C. 527, 531–32, 640 S.E.2d 873, 876 (2007).

[4] However, "[o]ther than these general statements, there is no comprehensive definition of the practice of law." *Roberts v. LaConey*, 375 S.C. 97, 103, 650 S.E.2d 474, 477 (2007) (citing *Linder v. Insurance Claims Consultants, Inc.*, 348 S.C. 477, 487, 560 S.E.2d 612, 617–18 (2002)).

The absence of a precise definition is deliberate. This Court has resisted attempts to establish a bright-line definition of what constitutes the practice of law,[6] explaining "what constitutes the practice of law must be decided on the facts and in the context of each individual case." *Id.* Indeed, in 1992, we declined to adopt a set of rules proposed by the South Carolina Bar which were designed to define and delineate those activities which constitute the practice of law because we determined "it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules." *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 305–07, 422 S.E.2d 123, 124–25 (1992). Instead, we determined "the better course is to decide what is and what is not the unauthorized practice of *712 law in the context of an actual case or controversy" rather than through an abstract set of guidelines. *Id.* However, in making our determination, we also urged "any interested individual who becomes aware of conduct" that might constitute UPL "to bring a declaratory judgment action in this Court's original jurisdiction to determine the validity of the conduct." *Id.* at 307, 422 S.E.2d at 125. And it is pursuant to that directive that Homeowners filed this action asking the Court to examine the residential mortgage-refinance business model implemented by Quicken Loans and Title Source.

During the last three decades, this Court has explored many times what activities constitute the practice of law in the context of a residential real estate transaction. Almost thirty years ago, in the seminal case of *Buyers Service*, we first identified four steps in a residential real estate purchase transaction that constitute the practice of law and, therefore, must be performed or supervised by a South Carolina-licensed attorney: (1) the preparation of "deeds, notes[,] and other instruments related to mortgage loans and transfers of real property";[7] (2) title examination and the "preparation of title abstracts for persons other than attorneys";[8] (3) overseeing "real estate and mortgage loan closings" and "instructing clients in the manner in which to execute legal documents";[9] (4) and giving "instructions to the Clerk of Court or Register of Mesne Conveyances as to the manner of recording" documents.[10] *Buyers Serv.*, 292 S.C. at 430–34, 357 S.E.2d at 17–19 (citations omitted). Thereafter, we recognized a fifth step that must be supervised by an attorney—the disbursement of funds. *Doe Law Firm v. Richardson*, 371 S.C. 14, 18, 636 S.E.2d 866, 868 (2006). Although we acknowledged that the "disbursement of loan proceeds [does not] in and of itself 'entail[] specialized legal knowledge and ability' such that it constitutes the practice of law," we nevertheless explained that "disbursement of funds in the context of a residential real estate loan closing cannot and should not be separated from the process as a whole." *Id.* (quoting *Buyers Serv.*, 292 S.C. at 430, 357 S.E.2d at 17)).

The common thread running through our decisions is the desire to protect the public. We determined that UPL claims should be analyzed on a case-by-case basis "to strike a proper balance between the legal profession and other professionals which will ensure the public's protection from the harms caused by the unauthorized practice of law." *In re Unauthorized Practice of Law Rules*, 309 S.C. at 307, 422 S.E.2d at 125. As the Supreme Court of Georgia has observed regarding that state's similar requirement that an attorney oversee real estate transactions, "[i]f the attorney fails in his or her responsibility in the closing, the attorney may be held accountable through a malpractice or [ ] disciplinary action. In contrast, the public has little or no recourse if a non-lawyer fails to close the transaction properly." *In re UPL Advisory Opinion 2003–2*, 277 Ga. 472, 588 S.E.2d 741, 742 (2003).

Indeed, the goal of consumer protection was at the heart of this Court's reasoning in *Buyers Service*, no more so than when the Court stated, "The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is ... for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." 292 S.C. at 431, 357 S.E.2d at 18.[11] We ***713** further observed that requiring the closing to be performed by a licensed attorney would help ensure the involvement of at least one professional "possessed of the requisite skill, competence and ethics," and would provide true accountability by allowing meaningful recourse to members of the public. *Id.*

Indeed, the complete lack of attorney involvement was what prompted this Court to find UPL had occurred in *Buyers Service* and in *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011). Buyers Service was a commercial title company that, along with a lender, performed entire real estate transactions with no attorney oversight. *See Buyers Serv.*, 292 S.C. at 428–29, 357 S.E.2d at 16–17. The Court determined Buyers Service had committed UPL by settling the transactions —including ordering and filling out legal instruments relating to the transfer of real property, such as mortgages and deeds; performing title searches and creating abstracts to determine ownership of property; giving legal advice, including as to how purchasers could acquire fee simple title; conducting closings; depositing loan proceeds into its escrow account and disbursing funds; and transferring documents to the land records office for recording—without any lawyer input or supervision.[12] *Id.* Similarly, in *Matrix*, we found the lender engaged in UPL by hiring a non-lawyer "to perform the title search, prepare the documents, and close the refinance loan—all admittedly without the supervision of a licensed attorney." 394 S.C. at 139, 714 S.E.2d at 534. We explained, that because the presence of attorneys in real estate closings is required for the protection of the public, "[l]enders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard." *Id.* at 140, 714 S.E.2d at 535.

As protection of the public is, and has always been, the lodestar of our context-dependent approach to determining whether an activity constitutes the practice

of law, this Court has refused to require attorney involvement it did not find necessary to protect the public. For instance, even though the Court has determined that, in the context of a real estate transaction, the disbursement of loan proceeds must be supervised by an attorney, the Court nevertheless refused to "specify the form that supervision must take." *Richardson*, 371 S.C. at 18, 636 S.E.2d at 868. Rather than requiring loan proceeds to pass through a closing attorney's trust account, we instead left it up to the supervising attorneys to decide how best to satisfy their obligations to their clients. *Id.* Additionally, we have held that attorney supervision over loan modifications is not required because the cost to consumers would be greater than any benefit, given the "the existence of a robust regulatory regime and competent non-attorney professionals" involved in the loan-modification process. *Crawford*, 404 S.C. at 47, 744 S.E.2d at 542.

[5] Likewise, in *Doe v. McMaster*, we found a lawyer's association with a lender and title company did not violate "the proscription against the unauthorized practice of law." 355 S.C. 306, 316, 585 S.E.2d 773, 778 (2003). *McMaster* was a declaratory judgment action brought by a lawyer seeking a determination of whether his association with a lender and title company was proper under our UPL rules. *Id.* at 309, 585 S.E.2d at 774. We held a lawyer may associate with a lender or title company to perform real estate transactions so long as (1) the lawyer "ensure[s] ***714** the title search and preparation of loan documents [were] supervised by an attorney";[13] (2) the lawyer is independent from the lender and "reviews and corrects, if needed, the [loan] documents [prepared by the lender] to ensure their compliance with law";[14] (3) the lawyer "supervise[s] the loan's closing and provide[s] legal advice to the buyer";[15] and (4) the lawyer supervises the recording of the mortgage and other documents.[16] *Id.* at 312–16, 585 S.E.2d at 776–78. Regarding this last step, the Court held it was sufficient that the lawyer "forward[ed] properly executed loan documents to [the title company] with specific instructions regarding how, when[,] and where to satisfy the existing first mortgage and to record the new mortgage and any assignments, if applicable."[17] *See id.* at 316, 585 S.E.2d at 778. Thus, a refinance process does not constitute UPL as long as a licensed South Carolina attorney is involved at each critical stage and exercises independent professional judgment, including making corrections if necessary, at the key points throughout the transaction. To be clear, the lawyer's involvement and supervisory role remain vital and necessary; however, this Court has never found that, as a matter of consumer protection, attorneys are required to personally conduct the myriad clerical tasks required to prepare for a transaction closing.

[6] As a result, in evaluating whether challenged conduct constitutes the unauthorized practice of law, this Court carefully considers the specific constellation of facts presented and legal rights implicated to determine whether the degree of attorney involvement appropriately protects the public from potential legal pitfalls without unduly burdening consumer choice or needlessly increasing consumer costs. It is through this lens we must evaluate the procedures employed by Quicken Loans and Title Source to determine whether either or both of those entities have engaged in UPL in the residential real estate transactions at issue.

A. Title Search and Certification

[7] First, for every transaction challenged in this lawsuit, a South Carolina attorney issued a title review certificate saying he had carefully reviewed the records for the subject property and made a determination as to the ownership of that property. The express purpose of issuing the certificate was "to affirm that the residential title work and search were conducted under the supervision of a South Carolina attorney." *Id.* We do not believe the effectiveness of the title certificates is altered by the fact that a non-lawyer created the abstract reviewed by the attorney, for we have held that "if a licensed attorney reviews the title abstractor's report and vouches for its legal sufficiency by signing the report, title abstractors would not be engaged in the unauthorized practice of law." *Ex parte Watson*, 356 S.C. 432, 436, 589 S.E.2d 760, 762 (2003). Moreover, Aylor, the attorney who issued the title certificates in this case, testified that he always personally reviewed the abstractor's report and only issued a title certificate if he was confident of its legal sufficiency. Aylor said he took steps to ensure he complied with all applicable laws, including South Carolina's rules on UPL.[18] We believe Aylor's conduct satisfies the requirement of *Buyers Service* that examination of title and preparation of abstracts only be performed by, or under the supervision of, a licensed attorney. *See Buyers Service*, 292 S.C. at 432–33, 357 S.E.2d at 18–19.

B. Preparation of Instruments

[8] Next, although Quicken Loans and Title Source were primarily responsible for preparing the loan documents utilized in these refinance transactions, we find the legal ***715** instruments were adequately reviewed (and corrected if necessary) by licensed attorneys prior to the closings. Although Respondents prepared the forms, there is nothing improper about that "as long as an independent attorney reviews and corrects, if needed, the documents." *McMaster*, 355 S.C. at 314, 585 S.E.2d at 777. Here, the closing attorneys all stated that they reviewed the documents for accuracy and compliance with the law prior to closing.

C. Closing the Transaction

[9] As to the closings, we find the record shows all of the loans were closed with appropriate attorney supervision. *See Buyers Service*, 292 S.C. at 433–34, 357 S.E.2d at 19 (stating that real estate closings must be supervised by an attorney). Each closing attorney signed a Closing Attorney's Statement, indicating he or she had reviewed all of the relevant closing documents including the HUD-1 settlement statement, note, mortgage, and legal description prior to closing. Each attorney also stated that he or she reviewed and explained the documents to the borrowers, answered any questions the borrowers asked, and supervised the borrowers' execution of the documents. Because a licensed attorney who had previously reviewed the closing documents for accuracy and legal sufficiency was physically present at each closing to answer questions and to instruct borrowers in the manner in which to execute the closing documents, there is no basis for a finding of UPL with respect to this step of the challenged transactions. *Id.*; *In re Lester*, 353 S.C. 246, 247, 578 S.E.2d 7, 7 (2003).

D. Recording and Disbursement

[10] **[11]** Finally, we find the record shows lawyers authorized and supervised the recording of all necessary documents and the disbursement of funds. *See Richardson*, 371 S.C. at 18, 636 S.E.2d at 868; *Buyers Service*, 292 S.C. at 434, 357 S.E.2d at 19. Each closing attorney testified he or she monitored the disbursement and recordation process to ensure the refinance transaction was properly completed in compliance with South Carolina law. Further, the evidence shows that in each loan transaction here, the closing attorney authorized Respondents to record documents and disburse proceeds with specific instructions for Respondents to return proof of recordation and disbursement to the closing lawyer upon completion. Specifically, the closing lawyers insisted on receiving a detailed disbursement ledger showing how the loan proceeds were applied, which the lawyers reviewed to confirm loan proceeds were disbursed properly. The closing lawyers also required Respondents to provide the recording date and the book and page numbers of the recorded loan documents, which the lawyers then used to obtain copies of the recorded loan documents to confirm all necessary documents were properly recorded. Indeed, in each of the transactions at issue, the closing attorney's file contained a copy of the recorded mortgage. Because the attorneys were required to verify the proper disbursement of the loan proceeds and that all of the necessary documents were recorded properly in the correct county, there is no basis for finding Respondents committed UPL in this step of the closing process. [19]

III.

Given the extensive evidence of attorney involvement summarized above, we declare Respondents' conduct not does not constitute UPL. It appears Quicken Loans, Title Source, and those acting on their behalf took appropriate steps to ensure their actions complied with our state's UPL rules, including soliciting opinions from other South Carolina attorneys as to what lawyers must do during real estate transactions to avoid violating South Carolina's UPL rules. The record further reveals Title Source expected the South Carolina attorneys it engaged to take ***716** the steps needed to comply with South Carolina law. We do not suggest that such expectations are dispositive. Rather, these expectations must translate into actual compliance with the law. Here, we are firmly persuaded that, in each of the transactions at issue, the residential mortgage refinance practice utilized by Quicken Loans and Title Source, which includes direct and independent attorney supervision at each critical step, complies with the law. Because we find Quicken Loans and Title Source have honored this Court's precedents

requiring attorney involvement and allowed those South Carolina attorneys the opportunity to independently exercise their professional judgment, we find the process utilized in these transactions does not constitute UPL.

Likewise, other courts have declined to require more robust attorney involvement under almost identical facts. For example, the Supreme Judicial Court of Massachusetts held that a title insurance company which contracted with lenders to coordinate settlement services in residential mortgage refinance transactions did not engage in UPL by ordering title examinations and abstracts from non-attorney third parties or by preparing HUD-1 and other settlement-related documents. *Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Services*, 459 Mass. 512, 946 N.E.2d 665, 677–79 (2011). In so finding, the court emphasized that both the title examination and the closing documents were reviewed by licensed Massachusetts attorneys prior to closing and that neither the title company nor the lender directed "the attorneys how to conduct the closing or fulfil their legal, professional, and ethical obligations." *Id.* at 530, 946 N.E.2d at 682. So long as a licensed attorney interpreted the legal status of title, reviewed the settlement documents prior to closing, and remained free to exercise independent judgment in fulfilling their professional and ethical obligations, the title insurance company's involvement in coordinating the refinance process did not constitute UPL. As to the issue of whether the title insurance company's activities in contracting with licensed Massachusetts attorneys to attend real estate closings constituted UPL, the court noted that "[w]hen a third party interposes itself between an attorney and a client, the key question is who exercises and retains control over the attorney." *Id.* at 531, 946 N.E.2d at 682–83. The court acknowledged that a third party "may facilitate the creation of a relationship between an attorney and client, and also may pay the legal bills of the client.... However, there must be a genuine attorney-client relationship, and direction and control over the attorney's actions cannot rest with that third party." *Id.* at 531, 946 N.E.2d at 683–84 (explaining "[t]he degree of interposition and the facts of each individual case play a role in determining whether an inappropriate intermediary relationship exists—that is, one in which the intermediary, because of the degree of its control over the attorney, is itself deemed to be engaged in the unauthorized practice of law"). Here, because each attorney involved at every critical point in these challenged transactions remained free to exercise his or her independent professional judgment, the presence of a third party intermediary (such as Title Source) does not transform the practice into UPL.

Moreover, under the residential mortgage refinance process presented here, we believe a finding that Respondents' conduct constituted UPL would mark an unwise and unnecessary intrusion into the marketplace. We believe this is especially so, as the attorney involvement and supervision serve the goal of protecting the public. Once it is determined that sufficient attorney involvement is present and further that the interest of the public is protected, this Court should stay its hand and let the marketplace control. Indeed, there is no allegation here of fault in connection with any title search, closing, disbursement or otherwise—Homeowners do not allege they were harmed in any way by the Quicken Loans model. To the contrary, one homeowner testified she and her husband had no problems with their loan from Quicken Loans and they would refinance with Quicken Loans again if Quicken Loans were able to offer them a better interest rate.

Simply put, we believe requiring more attorney involvement in cases such as this would belie the Court's oft-stated assertion that UPL rules exist to protect the public, ***717** not lawyers. *See, e.g.*, *Crawford*, 404 S.C. at 45, 744 S.E.2d at 541 ("The unauthorized practice of law jurisprudence in South Carolina is driven by the public policy of protecting consumers."). In this context, where there is already "a robust regulatory regime[20] and competent non-attorney professionals," *id.* at 47, 744 S.E.2d at 542, we do not believe requiring more attorney involvement would appreciably benefit the public or justify the concomitant increase in costs and reduction in consumer choice or access to affordable legal services. *Cf. In re Unauthorized Practice of Law Rules*, 309 S.C. at 306, 422 S.E.2d at 124–25 (recognizing the strict licensing requirements for becoming a Certified Public Accountant (CPA) and holding "that allowing CPAs to practice in their areas of expertise, subject to their own professional regulation, will best serve to both protect and promote the public interest").

DECLARATORY JUDGMENT ISSUED.

BEATTY, C.J., HEARN, FEW, JJ., and Acting Justice Costa M. Pleicones, concur.

All Citations

803 S.E.2d 707

Footnotes

1 *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 309 S.C. 304, 422 S.E.2d 123 (1992).

2 Specifically, Homeowners requested that certain class members' mortgage liens filed after August 8, 2011, (the date this Court refiled its decision in *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011)), be declared void and that Quicken and Title Source be required to disgorge all fees collected during the refinancing process, together with prejudgment interest.

3 *See* S.C. Code Ann. § 37-10-102 (2015) (requiring mortgage lenders to ascertain a borrower's preference as to the legal counsel they wish to employ to represent them in connection with closing the loan transaction).

4 Abstractor testified that occasionally, she would receive follow-up inquiries seeking clarification or requests for additional documents, and in those cases, she would revisit the county courthouse to clarify or to obtain the requested document(s) and upload those through the Title Source web portal.

5 Aylor testified that in reviewing the documents in title abstracts, he would sometimes encounter a problem which required him to contact the abstractor with follow-up questions and occasionally, when the issue could not be resolved quickly, required him to notify Title Source that there would be a delay in issuing the title certificate. Aylor explained that sometimes the issue was as simple as poor copy quality of a particular document, but other times, it was "more serious than that." Aylor understood as the South Carolina attorney rendering an opinion as to the title of the property, he was responsible for reviewing the abstractor's report and vouching for its legal sufficiency. *See Ex parte Watson*, 356 S.C. 432, 436, 589 S.E.2d 760, 762 (2003) ("[W]e hold that when nonlawyer title abstractors examine public records and then render an opinion as to the content of those records, they are engaged in the unauthorized practice of law. But if a licensed attorney reviews the title abstractor's report and vouches for its legal sufficiency by signing the report, title abstractors would not be engaged in the unauthorized practice of law.").

6 Likewise, other states have also eschewed a rigid definition of what constitutes the practice of law in favor of a case-by-case approach. As the Massachusetts Supreme Judicial Court has explained:

> We believe it is impossible to frame any comprehensive and satisfactory definition of what constitutes the practice of law. To a large extent each case must be decided upon its own particular facts. But at least it may be said that in general the practice of directing and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered[,] or secured are all aspects of the practice of law.

In re Shoe Mfrs. Protective Ass'n, 295 Mass. 369, 3 N.E.2d 746, 748 (1936) (reaffirmed by *Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Info. Servs.*, 459 Mass. 512, 517–18, 946 N.E.2d 665, 674 (2011)).

7 *Buyers Serv.*, 292 S.C. at 430, 357 S.E.2d at 17.

8 *Id.* at 432, 357 S.E.2d at 18.

9 *Id.* at 433, 357 S.E.2d at 19.

10 *Id.* at 434, 357 S.E.2d at 19. Specifically, as to the fourth step, we explained,

> We do not consider the physical transportation or mailing of documents to the courthouse to be the practice of law. However, when this step takes place as part of a real estate transfer, it falls under the definition of the practice of law as formulated by this court ... It is an aspect of conveyancing and affects legal rights. The appropriate sequence of recording is critical in order to protect a purchaser's title to property.

Id.

11 Consistent with our approach, many other states also recognize the primacy of consumer protection in residential real estate conveyances and employ a similar analysis in determining the appropriate level of attorney involvement in mortgage transactions. *See, e.g.*, *In re First Escrow, Inc.*, 840 S.W.2d 839, 843–44 (Mo. 1992) (recognizing "the need to balance the protection of the public against a desire to avoid unnecessary inconvenience and expense" and "the duty to strike a workable balance between the public's protection and the public's convenience"); *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 96 Wash.2d 443, 635 P.2d 730, 733 (1981) (holding lay persons performing tasks relating

to real estate transactions were engaged in the unauthorized practice of law and explaining "[i]t is the duty of the court to protect the public from the activity of those who, because of lack of professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar." (quotation marks and citation omitted)).

12 The Court noted that after the proceedings against Buyers Service began, the company started using an attorney to review the closing documents. *Buyers Serv.*, 292 S.C. at 429, 357 S.E.2d at 16. However, the attorney answered only to Buyers Service and never met with the purchaser. *Id.* at 429, 357 S.E.2d at 17.

13 *McMaster*, 355 S.C. at 313, 585 S.E.2d at 776.

14 *Id.* at 314, 585 S.E.2d at 777.

15 *Id.* at 315, 585 S.E.2d at 777.

16 *Id.* at 315–16, 585 S.E.2d at 778.

17 *Id.* at 310, 585 S.E.2d at 775. According to the stipulated facts the lawyer also authorized the lender to disburse funds. *See id.*

18 Aylor's contract with Title Source also states that Aylor would be responsible for complying with South Carolina's rules regarding UPL, specifically mentioning this Court's rulings in *Buyers Service* and *McMaster*.

19 To the extent this Court's decision in *In re Breckenridge*, 416 S.C. 466, 787 S.E.2d 466 (2016), may be read to require the closing attorney utilize his or her own trust account to control the disbursement of loan proceeds, we hereby modify that decision. In doing so, we reaffirm our holding in *Richardson* that, in the context of a residential real estate loan closing, the disbursement of loan proceeds constitutes the practice of law and must be supervised by an attorney. *Richardson*, 371 S.C. at 18, 636 S.E.2d at 868. The attorney supervision required under Respondents' refinance model satisfies the *Richardson* standard.

20 Quicken is subject to regulation by, among other things, the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank), the Truth in Lending Act (TILA), and the Real Estate Settlement Procedures Act (RESPA).

End of Document

Ethics Advisory Opinion 17-01 | South Carolina Bar

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY.

SC Rule of Professional Conduct: 7.2

Facts: Lawyer is a solo practitioner with a virtual law office. (Lawyer represents that he practices wherever his smart phone and his laptop are, which, at any given moment, might be at Lawyer's home, a coffee shop, a park, Lawyer's car, or out of town on vacation.) Lawyer's practice generates very little paper, which is kept at Lawyer's house. Lawyer does not see clients in Lawyer's house; instead, Lawyer meets clients at their places of business or at a third-party meeting space. Lawyer uses a post office box for all law practice related mail.

Lawyer does not actively advertise the law practice beyond a single online directory listing. Lawyer is considering increasing his web presence for advertising purposes, but Lawyer does not want to disclose his home address to the public.

Question Presented: Will the inclusion of a post office box address in advertising materials satisfy the requirement in Rule 7.2(d) that advertising communications include the office address of at least one lawyer responsible for its content?

Summary: A post office address qualifies as an "office address" for purposes of Rule 7.2(d) provided the post office address is on file as the lawyer's current mailing address in the lawyer's listing in the AIS.

Opinion:

Rule 7.2, SCRPC, sets out certain restrictions upon and obligations of lawyers who advertise. One of the obligations imposed by the Rule is that "[a]ny communication made pursuant to [Rule 7.2] shall include the name and *office address* of at least one lawyer responsible for its content." (Emphasis added.) Rule 7.2(d).

The term "office address" is not defined in the Rules of Professional Conduct, but "[t]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Scope [1], SCRPC.

The purpose of Rule 7.2(d) is to provide accountability for the content of lawyer advertising. Rule 7.2, Comment [10]. It provides accountability by ensuring that potential consumers of the services of a lawyer or law firm have a point of contact for the lawyer or law firm, along with an address for the purpose of communicating with that point of contact. While a physical address will allow for such communication, the same is true of a post office box address.

It used to be that lawyers only worked out of brick and mortar structures and everyone had a street address. However, as the North Carolina Bar has recognized in addressing this same question, the practice of law has changed.

...[R]equiring a street address in all legal advertising has proved problematic, particularly as the number of lawyers working from home offices or operating virtual law practices has increased. The requirement is no longer practical or necessary to avoid misleading the public or to insure that a lawyer responsible for the advertisement can be located by the State Bar.

2012 N.C. Formal Eth. Adv. Op. 6 at 2 (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-6/#.WEBYPgNCifY.em). Moreover, in South Carolina, as in North Carolina, the State Bar accepts post office addresses as a lawyer's address. In addition, the Supreme Court of South Carolina accepts post office addresses as a lawyer's address for purposes of its Attorney Information System[1] (AIS), and the contact information provided by lawyers for AIS is the "official contact information" for them. *See* Rule 410(e), SCACR ("The mailing and e-mail address shown in the AIS shall be used for the purpose of notifying and serving the member.").

A post office address qualifies as an "office address" for purposes of Rule 7.2(d) provided the post office address is on file as the lawyer's current mailing address in the lawyer's listing in the AIS. The committee notes that Rule 7.2(h) also imposes a geographic location disclosure requirement, which is not addressed by this opinion. [2]

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[1] "The AIS is a web-based system developed by the South Carolina Judicial Department to maintain and update information regarding members of the South Carolina Bar. Members use this system, which is accessed using a user name and password, to verify and update their contact information, and view their membership class and status. The mailing and e-mail address shown in the AIS shall be used for the purpose of notifying and serving the member." Rule 410(e), SCACR.

[2]*See alsoIn re Jardine*, 410 S.C. 369, 764 S.E.2d 924 (2014) (lawyer had several issues with a direct mail solicitation, including the listing of a "virtual office" in one state that he only used for the purpose of receiving mail when, in reality, he actually worked from an office in another state).

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EI and the Practice of Law

Rule 407 - SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, being a member of the legal profession, is a representative of clients, an officer of the legal system and a **public citizen having special responsibility** for the quality of justice.

[12] The legal profession's relative autonomy carries with it special responsibilities of **self-government.**

[13] Lawyers play a **vital role** in the preservation of society.

Can My EI Be Improved?

- Dedication and Personal Investment are key
- Are we coachable and willing to receive/give feedback?
- Self-initiative is one of the most important indicators for learning about and enhancing our EI

Hard Skills v. Soft Skills

A. Hard Skills

- 1. Often relate to education, life experience, job history, etc.
- 2. Can determine fitness for hiring
- 3. Indicators include aggressiveness, follow-through, speed, and persistence

B. Soft Skills

- 1. May be of equal or greater importance than Hard Skills
- 2. Can determine fitness for hiring and even greater contributions in the workplace
- 3. Indicators include creativity, listening, team-building, finesse, savvy, openness to criticism, and being a team player

EI and the Practice of Law

Rule 407 - SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly **inform the client** of any decision or circumstance with respect to which the client's informed consent.. is required..

Comment [5] The client should have sufficient information to **participate intelligently** in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. **Adequacy of communication** depends in part on the kind of advice or assistance that is involved.

EI and the Practice of Law

Rule 407 - SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other **considerations such as moral, economic, social and political factors**, that may be relevant to the client's situation.

Comment: Scope of Advice [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to **sustain the client's morale and may put advice in as acceptable a form as honesty permits.**

[2] ...Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

EI and the Practice of Law

Rule 407 - SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:
Unlawfully obstruct another party's access to evidence
Falsify evidence or testimony
Knowingly disobey an obligation
Make frivolous requests
Allude to irrelevant matters
Request a non-Client refrain from giving information to another party

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against...obstructive tactics in discovery procedure.

Blind Spots – Do I have one (or many)?

- Defined as behaviors that undermine effectiveness, limit results, and damage relationships

- Some say – "I don't have a blind spot!"

- Characterized by:
  - Mental tricks we play to deceive ourselves
  - Self-serving bias
  - Claiming too much credit
  - Accepting too little blame

Identifying Blind Spots in Our Lives

- How can I uncover them?
- What are the most common Blind Spots that derail leaders?
- Peeling away masks – can we really hide our true selves?
- What is our tendency? To blame others, stick with old habits, and act as if they don't exist

Results of Unaddressed Blind Spots

Breakdowns in Leaders, Organizations, and Societies Corrupt Decision-making

- Reduce our scope of awareness
- Lock in rigid and fixed viewpoints

Impact on Work Environments

- Lawyers and staff become lackluster and pessimistic
- People spend more time talking about what is not working than what is working
- Productivity and performance drop
- Mistakes and breakdowns are quietly covered-up
- No one is accountable
- Everyone freely hands out blame
- The firm focuses on looking good instead of being effective
- Cycles of unproductive behavior

Strategies for Addressing Blind Spots

- Critical first step – realizing that it's not someone else who needs to change! *The Anatomy of Peace*
- Engage in partnership with and support of others
- Extensive self-evaluation
- Two steps that are essential – bringing this issue to light and asking for advice, help, and accountability

Blind Spots Case Study

Reading a summary of events (a new file or incident report)

Small group discussion (litigation strategy session)

Formulating possible solutions (mediation/arbitration)

What Have I Learned?

How can I apply one thing I've learned to my life, both professionally and personally?

Measuring Success

- Share your goals with another person
- Self-analysis
- Seek feedback from others

Potential Training Modules

Giving and Receiving Feedback

The Johari Window

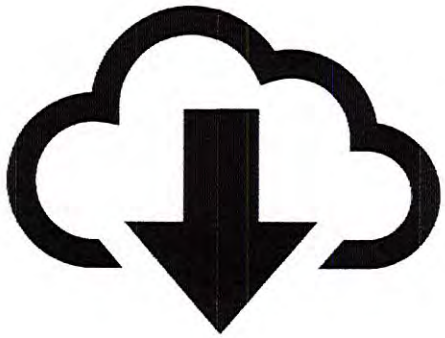
*Leadership and Self-Deception (*Getting out of the box)

Developing and Learning From a Personal X-Ray

Understanding the Amygdala Hijack

Strategies for coping with a prospective Amygdala Hijack

Understanding the MSCEIT test



Resources

Emotional Intelligence 2.0 – Travis Bradberry and Jean Greaves

Harvard Business Review

Immunity to Change: How to Overcome it and Unlock the Potential in Yourself and Your Organization – Robert Kegan and Lisa Laskow Lahey

Leadership and Self-Deception: Getting Out of the Box – the Arbinger Institute

The Power of Habit: Why We Do What We Do in Life and Business – Charles Duhigg

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