Richland County Bar Association

Annual Ethics CLE Seminar

Friday, October 25, 2019

University of South Carolina School of Law

Course # 198594

2019 Richland County Bar Association Annual Ethics CLE

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AGENDA

8:00 – 8:30 am	Registration
8:30 – 8:45 am	Introduction The Honorable Shiva V. Hodges
8:45 – 9:30 am	Overview of Advertising and Solicitation in South Carolina Barbara M. Seymour, Esq.
9:30 – 10:15 am	That's a Really Good Question – The Effectiveness of Corporate Compliance and Ethics Programs John J. Garrison, Esq.
10:15 – 10:20 am	South Carolina Bar Foundation Megan Sweeney Seiner, J.D., Executive Director
10:20 – 10:30 am	Break
10:30 – 11:30 am	Discovery Ethics from the Plaintiff's Perspective: Collection, Clients, and Cutting to the Chase Chris Kenney, Esq.
11:30 – 12:00 pm	2019 Ethics Year-in-Review Michael J. Virzi, Esq.

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Combined Biographical Information:

Judge Shiva V. Hodges was appointed to the bench of the United States District Court for the District of South Carolina as a Magistrate Judge in 2010, where she has presided over bench and jury trials while managing employment discrimination and other civil cases, social security appeals, habeas corpus petitions, and prisoner civil rights actions. Additionally, Judge Hodges's criminal duties include initial appearances, arraignments, detention/bond hearings, criminal complaints, search warrants, and grand jury matters. In addition to her formal role as a Magistrate Judge, she routinely handles mediations at the request of District Judges and federal practitioners. Before her appointment, Judge Hodges served as a career law clerk for six years to then-Chief District Judge Joseph F. Anderson, Jr. Prior to entering public service, she was a litigator for Parker Poe Adams & Bernstein, LLP, handling employment disputes, general civil disputes, and bankruptcy matters, practicing in the federal and state courts of South Carolina and North Carolina.

She obtained a Bachelor of Science in Biology from the University of South Carolina's Honors College, a Juris Doctor from the USC School of Law, and a Master in International Business Studies (Italian track) from the Darla Moore School of Business. Judge Hodges taught Advanced Legal Writing at the USC School of Law from 2013–2016 and is active in legal education and mentoring programs for lawyers and students. She is a frequent speaker on a variety of topics, including employment law issues, e-discovery, ethics and social media, and evidentiary pitfalls. Judge Hodges enjoys judging mock trials and arguments, including at the Department of Justice's National Advocacy Center and middle and high school competitions. She serves as the Fourth Circuit Director on the Board of the Federal Magistrate Judge Association and has served on its Diversity, Civics Education, Convention, and History subcommittees.

Barbara Seymour represents lawyers, law firms, judges, and law students in matters related to ethics, professional discipline, and Bar admissions at the law firm of Clawson and Staubes, LLC in Columbia, SC. She earned her Bachelor's Degree in Management and Marketing from the University of North Carolina at Greensboro in 1990 and her Juris Doctor from the University of Georgia in 1993. Barbara worked as a trial lawyer at Harris & Graves until 2000 when she joined the staff of the Office of Disciplinary Counsel. She served as the Deputy Disciplinary Counsel from 2007 until 2017. Barbara is a member of the South Carolina Bar, the Georgia State Bar, the Association of Professional Responsibility Lawyers, the South Carolina Association of Ethics Counsel, and the South Carolina Women Lawyers Association. She currently serves on the Law Related Education, Professional Responsibility, Unauthorized Practice of Law, Future of the Profession, and Diversity Committees at the South Carolina Bar. She was a 2006 and 2011 Fellow of the National Institute for the Teaching of Ethics and Professionalism. Barbara has served as an adjunct instructor in the Professional Legal Assistants Program at Converse College and the Paralegal Degree Program at Midlands Technical College. Her courses have included Civil

Litigation, Legal Research & Writing, Business Law, Torts, Legal Ethics, and Law Office Management. www.linkedin.com/in/barbaraseymour

John J. Garrison heads global compliance for Unum Group, a leading provider of financial benefits in the US, UK and Poland. Unum's compliance organization includes compliance assurance, ethics, investigations, privacy and records governance. Admitted to practice in South Carolina in 1987, John has practiced more than 27 years in house with Unum or its local subsidiary Colonial Life. He was named Chief Compliance Officer for Unum Group in May 2015. Prior to that he was Colonial Life's General Counsel and a part of Colonial Life's Sr. Management team. He served the S.C. State Senate as director of research and attorney to the Banking and Insurance Committee and as staff counsel in the Office of Senate Research prior to joining Colonial Life in 1992. John also worked in private practice and served as a circuit court law clerk. He received his Bachelor of Science from Francis Marion University and his Juris Doctorate from the University of South Carolina School of Law. He has been on the adjunct faculty for the Moore School of Business and Chairs the South Carolina Life, Accident & Health Guaranty Association.

Christopher "Chris" Phillip Kenney is an associate with Richard A. Harpootlian, P.A. whose practice includes complex civil litigation, whistleblower and false claims cases, class actions, business disputes, and personal injury cases. Mr. Kenney is a native of Toledo, Ohio and a 2004 graduate of Xavier University in Cincinnati, Ohio where he received his B.A. in history from the University's honors program. In 2011, Mr. Kenney received his J.D. from the University of South Carolina School of Law and was admitted to practice in South Carolina that same year. Since joining Richard A. Harpootlian, P.A. in 2011, Mr. Kenney has appeared before appellate and trial courts throughout the state and federal systems, including the South Carolina Supreme Court and the United States Court of Appeals for the Fourth Circuit.

Michael Virzi teaches Legal Writing and Professional Responsibility at the University of South Carolina School of Law, where he has also taught Fundamentals of Law Practice and Professionalism and Advanced Legal Writing. He has a solo practice in Columbia, focusing on lawyer ethics, discipline, and malpractice for the past sixteen years. Prior to that, Michael served for three years as an Assistant Disciplinary Counsel in the South Carolina Supreme Court's Office of Disciplinary Counsel. He is currently the Chair of the Bar's Professional Responsibility Committee and a Past Chair of the Ethics Advisory Committees. Michael is also the Ethics Chair for the South Carolina Association for Justice and is a frequent CLE speaker and law school guest lecturer on the topics of ethics, malpractice, and lawyer discipline. He is a member of the ABA Center for Professional Responsibility, the Association of Professional Responsibility Lawyers, the South Carolina Association of Ethics Counsel, and Phi Delta Phi. He graduated *cum laude* from the University of South Carolina School of Law in 2000, after which he practiced primarily business litigation for several years before joining the Office of Disciplinary Counsel.

Overview of Advertising and Solicitation in South Carolina

Barbara M. Seymour

(08/01/2019)

Every lawyer in private practice advertises. Some use traditional media, such as television, yellow pages, or billboards. Others use newsletters, firm brochures, sponsorships, websites, and social media. Still others rely on word-of-mouth, in-person marketing, and online professional networks. Regardless of the venue or the vehicle, it is all "communication concerning a lawyer's services" and it is all restricted by the Rules of Professional Conduct. There are five subsections in RPC that cover "advertising" issues. The following materials outline the restrictions and requirements for all forms of lawyer communication in an effort to help you avoid complaints regarding your firm's marketing, regardless of the format you choose.

A. Rule 7.1 (Communications Concerning a Lawyer's Services)

Rule 7.1 addresses "Communications Concerning a Lawyer's Services." It governs everything lawyers say about themselves and their law firms. It applies to media advertising, direct mail solicitation, promotional materials, and in-person statements. Generally, Rule 7.1 prohibits any communication that is "false, misleading, or deceptive," about the lawyer or the lawyer's services. It also provides specific prohibitions, including statements that are truthful, yet misleading; statements that create unjustified expectations or imply that results can be achieved by unethical means; statements that compare the lawyer's services to others that cannot be factually substantiated; testimonials without required disclaimers; and, nicknames or trade names that imply an ability to obtain results for clients.

The Commission on Lawyer Conduct frequently cites Rule 7.1(a) in letters of caution to lawyers for listing the names of unlicensed (out-of-state) lawyers without indicating the geographical limitations on their ability to practice law.[1]

The Court has amended Rule 7.1 to eliminate the blanket restriction on testimonials in lawyer advertising. While testimonials are now permitted, the Rule requires that they be accompanied by a clear and conspicuous disclaimer that "any result the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate similar results can be obtained for other clients." Further, the lawyer must disclose if it is a paid endorsement or if it is made by someone other than an actual client.

The Comment says that statements about results obtained for specific clients (including client testimonials), the amount of prior damage awards, and the lawyer's record in obtaining favorable verdicts are precluded if they are likely to create an unjustified expectation that the prospective client can expect similar results. Further, the Comment says that reports of past results, even if true, can be misleading without "reference to the specific factual and legal circumstances of each client's case." The Comment also states that statements of past results should be accompanied by a clear and conspicuous disclaimer that "any result the lawyer or law firm may have achieved on behalf of clients in other matters does not necessarily indicate similar results can be obtained for other clients."

[1] Unlicensed (out-of-state) lawyers are allowed to advertise legal services in South Carolina. However, those communications are governed by Rule 418, SCACR (Advertising and Solicitation by Unlicensed Lawyers), which requires compliance with the lawyer communication provisions of RPC and subjects the unlicensed lawyer to the SC disciplinary process for rule violations.

B. Rule 7.2 (Advertising)

Rule 7.2 covers lawyer communications that are commonly considered “advertising,” but also covers all communication (including written or recorded solicitation) that is not in-person or real time. The rule includes all advertising of services “though written, recorded, or electronic communication, including public media.” Don’t let the heading of the rule mislead you into thinking it is limited to media advertising. While the term advertising is not specifically defined in the Rules, the Comments refer to "organized information campaigns" and "an active quest for clients."

This rule emphasizes the importance of restricting law firm advertising to the dissemination of factual information in order to preserve the integrity of the legal profession. Rule 7.2(a) states that "[a]ll advertisements shall be predominately informational such that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication."

Comment 4 expounds on this theme:

> Regardless of medium, a lawyer's advertisement should provide only useful, factual information presented in an objective and understandable fashion so as to facilitate a prospective client's ability to make an informed choice about legal representation. A lawyer should strive to communicate such information without the use of techniques intended solely to gain attention and which demonstrate a clear and intentional lack of relevance to the selection of counsel, as such techniques hinder rather than facilitate intelligent selection of counsel. A lawyer's advertisement should reflect the serious purpose of legal services and our judicial system. ... This rule is intended to preserve the public’s access to information relevant to the selection of counsel, while limiting those advertising methods that are most likely to have a harmful impact on public confidence in the legal system and which are of little or no benefit to the potential client.

Rule 7.2 contains several specific substantive requirements. Subsection (d) states that the communication must include the name and office address of at least one lawyer responsible for its content. The Commission on Lawyer Conduct interprets this to mean the full name of a responsible lawyer; therefore, the firm name is not sufficient unless it contains at least one lawyer's full name. If there is a complaint about a lawyer communication or advertisement and the full name of at least one lawyer is not included, an investigative file may be opened on each of the partners in the firm. At a minimum, that complaint will result in a letter of caution citing Rule 7.2(d) for failing to include the responsible lawyer’s full name.

The Comment sets out an exception to the Rule 7.2(d) requirement of disclosure of the name and address of a responsible lawyer for certain types of promotional items. The Comment says that the requirement only to substantive communications that contain “statements and inferences beyond a lawyer or law firm's mere name, design logo, and ordinary contact information.” A law firm is permitted to advertise through promotional items (pens, clothing, coffee mugs, signage, etc.) without including the name and address of an individual responsible lawyer as long as the item or sign is limited to the firm name, a design-only logo, and contact information. A design-only logo is “a design shape and not a depiction,” such as an animal, object,

or other recognizable thing. Note that the inclusion of a tagline or slogan is considered substantive advertising, which would require the disclosure set out in subsection (d). A slogan or tagline could include a talking phone number or descriptive email or web address (e.g., www.sclawyer.com or 1-800-SC-LAWYER). Nothing in this subsection prohibits a lawyer from disseminating promotional items. It is up to the lawyer whether or not to include substantive communications like depiction logos or law firm slogans. If such is included, the name and address of the responsible lawyer must also be included. If the promotional item is limited to name, design, and contact information, the name and address of the responsible lawyer does not need to be included.

In addition, subsection (h) requires that written and recorded communications regarding a lawyer's services disclose the city or town where the legal services will actually be performed. This alerts potential clients in smaller markets when their cases will actually be handled out of an office in another geographical location. A firm might have a satellite office in a particular town, but the lawyers and files are located elsewhere. This must be disclosed.

Subsection (f) requires lawyers to include an explanation of how costs will be charged to the client in all communications that contain information about legal fees. For example, a lawyer can state that there will be "no fee unless we win" in a phone book ad, but whether expenses will be charged regardless of the outcome has to be disclosed. Another example is when a lawyer includes a flat rate for services, such as filing a bankruptcy petition or an uncontested divorce. If the lawyer quotes the fee, the ad must indicate whether or not that fee includes costs. In addition, if a lawyer advertises a specific rate or fee, subsection (g) requires the lawyer to honor that rate or fee for ninety days after dissemination in a periodical (such as a newspaper) or for a full year after dissemination in an annual publication (such as the phone book). If a rate or fee is advertised on the Internet, the lawyer must honor that rate or fee for ninety days after the last day that information was available. Setting a shorter coupon-style "expiration date" (such as "Only three days left on our $500.00 traffic ticket representation!") will not be sufficient to overcome the requirement of this rule. In fact, stating an expiration date or term of offer less than the period established by the rule could be considered misleading or false advertising.

Rule 7.2 also contains administrative requirements. First, the lawyer responsible for the content of the communication must review it prior to dissemination in order to ensure that it is compliant with the Rules of Professional Conduct. Second, each lawyer is required to maintain copies of all marketing materials and a record of when and where all 7.2 communications were disseminated for a period of two years. If a grievance is filed about an advertisement, a copy of the lawyer's ads, solicitation letters, Internet materials, and record of dissemination will be requested in the course of the investigation. Failure to maintain or produce those records can result in discipline, even if there is no substantive violation of RPC's content restrictions.

Finally, Rule 7.2 governs the use of third parties, including other lawyers, to advertise legal services. Lawyers are prohibited from giving anything of value in exchange for a recommendation of legal services, except for paying the reasonable cost of advertising, paying usual charges for participating in a legal services plan or not-for-profit lawyer referral service, and purchasing an existing law practice. A lawyer may only participate in a legal service plan or nonprofit referral service if the service is in compliance with RPC. In addition, if one lawyer advertises with the intent to refer cases to another lawyer or firm, that fact must be disclosed in the advertisement, including the relationship between the two lawyers/firms and the name and address of the "nonadvertising" lawyer/firm.

C. Rule 7.3 (Solicitation)

A communication to a specific potential client that is not initiated by the potential client (solicitation) is governed by the general provisions of Rule 7.1 and the specific provisions of Rule 7.2, discussed above. In addition, there are a number of restrictions and requirements that are unique to solicitations, found in Rule 7.3.

Most importantly, all direct, in-person contact is prohibited unless the person contacted is another lawyer, a family member, a close personal friend, or a former client. A lawyer cannot visit a potential client personally, call a potential client on the phone, or contact a potential client with real time electronic communication (such as a chat room or instant message). Even if you are otherwise permitted by Rule 7.3 to solicit a potential client, you are prohibited from contacting anyone (in-person or by written or recorded communication) who has made a desire not to be solicited known to you; from using coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence; or, from contacting someone who is already represented by an attorney or who is likely to be unable to exercise reasonable judgment as a result of a physical, emotional, or mental condition. The rule also prohibits using any means to contact someone in connection with a personal injury or wrongful death within thirty days of the incident.

Solicitation of members by prepaid or other legal service insurance plans is addressed in subsection (j). A lawyer is allowed to participate in this type of plan; however, the lawyer must insure that the plan's marketing practices conform to Rules 7.1, 7.2, and 7.3(b). The exception is that the plan may solicit potential members or customers in-person and through real time communication. The plan may not, however, contact any individual known to be in need of legal services in a particular matter.

Although communication with a potential client by direct mail (including email) or by recording is permitted, Rule 7.3 includes a number of content and format restrictions. For example, subsection (d)(1) requires that the envelope and the front of every page of written communication must contain the words "ADVERTISING MATERIAL" in prominent type and in all caps. Recorded communication must include a clear statement that it is an advertisement at the beginning and the end. This disclaimer requirement also applies to email correspondence. The Rule specifically provides that the words "ADVERTISING MATERIAL" in prominent type and in all caps be included in the subject line of an electronic communication and appear at the beginning and end of the message.

In addition, there are three disclaimers in Rule 7.3(d)(2) and (3) that must be copied or read verbatim in the communication. These disclaimers alert the potential client to options other than retaining the lawyer, to the risk of unjustified expectations, and to the fact that complaints about the communication can be filed with CLC. Each disclaimer has specific type size and style requirements that must be followed.

Direct mail can only be sent regular mail, not certified or registered (subsection (e)) and the envelope cannot reveal the nature of the potential client's legal problem (subsection (h)). Direct mail cannot be "made to resemble legal pleadings or … documents" (subsection (f)). Any written solicitation must disclose how the lawyer found out about the potential client's legal problems (subsection (g)). Finally, if someone other than the lawyer signing the letter is likely to be handling the potential client's case, whether it's another attorney in the firm or an outside referral, that fact has to be disclosed in the letter (subsection (i)).

Like advertising, lawyers must also keep a record of solicitations for a period of two years. This record must include the basis for the lawyer's belief that the potential client was in need of legal services and the factual basis for any statements made in the communication.

D. Rule 7.4 (Communication of Fields of Practice and Specialization), Rule 7.5 (Firm Names and Letterhead), and a Note about Firm Announcements.

One of the most common rule violations that results in letters of caution from CLC is use of some form of the words "expert," "specialist," "certified," or "authority" in violation of Rule 7.4(b). The Supreme Court's Commission on CLE and Specialization certifies lawyers in several fields of practice[2] through rigorous application and testing processes. The Commission also vets other certifying bodies, known as Independent Certifying Organizations (ICO), to permit the issuance of certificates of specialization to South Carolina lawyers.[3] Only lawyers who are certified in this way may use the terms expert, specialist, certified, or authority or any form of those terms in communications regarding their services. Lawyers who are not certified specialists may relay information regarding their fields of practice in advertising, solicitation, and other communications regarding their services. However, such statements must be "strictly factual" and all forms of the prohibited words must be avoided.

Rule 7.5 governs the use of firm names and other professional designations. A firm name may not be misleading. If a firm or lawyer uses a trade name, it may not imply an affiliation with a government agency, a public legal services organization, or a charitable legal services organization (subsection (a)). Further, a firm cannot use the name of a lawyer holding public office if that lawyer is not actively or regularly practicing with the firm (subsection (c)). A lawyer can state or imply a partnership with other lawyers only if there is in fact a partnership (subsection (d)).

With regard to letterhead, subsection (b) of Rule 7.5 allows firms with offices in more than one state to use the same name in South Carolina that they use in other states. However, if individual lawyers who are not licensed here are identified on the letterhead, the firm must indicate the jurisdictional limitation on those lawyers' ability to practice.

There is some confusion among the members of the Bar about how firm announcements fit in with the regulation of lawyer communications. Firms frequently issue announcements about formation, new partners and associates, changes to practice areas, relocation of the office, opening a new office, etc. Lawyers use a variety of different vehicles to make such announcements, such as newspapers, trade or bar magazines, television, and direct mail. There are several things to keep in mind when issuing such an announcement. First, it is a communication concerning a lawyer's services and, therefore, subject to the limitations set forth in Rule 7.1, including the prohibitions on misleading or false statements and limitations on the use of testimonials, comparative statements, past results, and nicknames or monikers. It is also an advertisement, subject to the specific requirements of Rule 7.2. In particular, it must be included in the record of dissemination, as discussed above. Also, the announcement cannot contain any of the stated words in Rule 7.5 unless the lawyer is, in fact, certified as a specialist by the Supreme Court. There is one instance

[2] The Commission on CLE and Specialization currently certifies lawyers in the fields of Bankruptcy & Debtor/Creditor Law; Employment & Labor Law; Estate Planning & Probate Law; and, Taxation Law.

[3] The Commission on CLE and Specialization currently recognizes three ICOs: American Board of Professional Liability Attorneys; National Board of Trial Advocacy; and, National Elder Law Foundation.

where a firm announcement is not subject to the same requirements as other communications regarding the lawyer's services. The Comment to Rule 7.3 states that such an announcement does not constitute communications soliciting professional employment from a client known to be in need of legal services. That means that the specific disclaimer provisions of Rule 7.3(d) that otherwise apply in such circumstances do not apply to firm announcements sent through the mail. However, a solicitation letter cannot be disguised as a firm announcement in order to avoid the disclaimer provisions of the Rule.

E. Disclaimers and Disclosures.

Many of the provisions of the Rules of Professional Conduct related to advertising and solicitation require a disclaimer or disclosure of certain information. In 2014, the Supreme Court amended Rule 7.2 to add subsection (i), which provides detailed guidance about the format of those disclaimers and disclosures. In addition to the specific requirements set forth in each subsection that requires a disclaimer or disclosure, the new rule mandates that all disclosures and disclaimers that appear in an advertisement or unsolicited written communication "must be of sufficient size to be clearly legible and prominently placed so as to be conspicuous to the viewer." If the disclosure or disclaimer is televised or broadcast in an electronic or video medium, it must be displayed for a sufficient time to enable the viewer to both see and read it. If the disclosure or disclaimer is spoken aloud, the new subsection requires that it be plainly audible to the listener. Statement made on a lawyer's website, online profile, Internet advertisement, or other electronic communication must be accompanied by the required disclosure or disclaimer on the same page as the statement being disclosed or disclaimed.

F. Confidentiality.

Before a law firm can include any information related to a particular client (whether the client's name is used or not), that client must give informed consent. Remember that Rule 1.6 says that all information related to the representation of a client is confidential. The lawyer is only permitted to disclose such information if it is impliedly required to advance the interests of the client in the matter, if the client gives an informed waiver, or if one of a number of specified exceptions apply. The list of exceptions found in Rule 1.6 does not include lawyer advertising, even if the information is already public knowledge. The foundation of the relationship between a lawyer and a client is the understanding that the lawyer will not discuss the client's case unless it is necessary and appropriate.

In 2019, the Supreme Court of South Carolina reminded lawyers that there is no advertising or "generally known" exception to confidentiality when it adopted a new Comment to Rule 1.6, RPC, which states:

> Disclosure of information related to the representation of a client for the purpose of marketing or advertising the lawyer's services is not impliedly authorized because the disclosure is being made to promote the lawyer or law firm rather than to carry out the representation of a client. Although other Rules govern whether and how lawyers may communicate the availability of their services, paragraph (a) requires that a lawyer obtain informed consent from a current or former client if an advertisement reveals information relating to the representation. This restriction applies regardless of whether the information is contained in court filings or has become generally known. See Comment [3]. It is important the client understand any material risks related to the lawyer revealing information when the lawyer

> seeks informed consent in accordance with Rule 1.0(g). A number of factors may affect a client's decision to provide informed consent, including the client's level of sophistication, the content of any lawyer advertisement and the timing of the request. General, open-ended consent is not sufficient.

Rule 1.6, RPC, Cmt. [7], adopted June 5, 2019.

Note this Comment says that a general consent or waiver – such as in a fee agreement – will not be sufficient under this Rule. A lawyer is not precluded from seeking consent to use information about the case in advertising at the outset of the representation. However, such consent must specifically state how and where the lawyer intends to use that information and provide sufficient explanation of the risks and advantages to the client to ensure that consent is informed as required by Rule 1.0(g), RPC.

G. Guidance.

The requirements and restrictions set out in the Rules of Professional Conduct for communications concerning lawyers' services are not complicated. The vast majority of the violations come not from any intent to violate the rules, but rather from failure to consult the rules at all. Simply reviewing the rules comments and taking care to examine all communications regarding legal services offered before dissemination will resolve most ethical problems. If the rules and comments don't answer your question, review decisions from the Supreme Court and the Ethics Advisory Committee for additional guidance. (Keep in mind that these opinions are a snapshot in time and their value might have diminished somewhat if the relevant rules have been revised since they were issued.) If a lawyer has concerns about a particular activity or advertisement and review of the rules and opinions doesn't resolve those questions, there are attorneys who will review proposed advertising and solicitation communications and give a legal opinion about ethical compliance.

That's a Really Good Question

The Effectiveness of Corporate Compliance and Ethics Programs

Richland County Bar Association

October 2019

Regulations Impacting Compliance & Ethics Programs

- (2002) Sarbanes-Oxley (SOX)
- (2004) Federal Sentencing Guidelines (FSG) Amendment
- (2008) McNulty Memo
- (2008) FSG Amendment – “Filip Factors”
- (2010) UK Bribery Act
- (2010) Office of the Whistleblower
- (2015) Yates Memo
- (2017) Evaluation of Corporate Compliance Programs Guidance
- (2019) Evaluation of Corporate Compliance Programs Guidance (Updated)

Three Fundamental Questions

Is the corporation's compliance program well designed?

Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively?

Does the corporation's compliance program work in practice?

We Find Ourselves in a Challenging Regulatory, Economic, and Cultural Environment

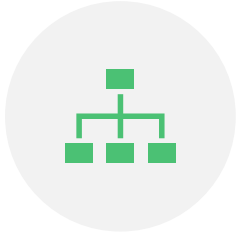
WELLS FARGO	Thousands of employees illegally opened two million unauthorized accounts, resulting in fines totaling $185M
FIFA For the Game. For the World.	Soccer officials abused position to acquire millions of dollars in bribes, resulting in 14 individuals charged
VimpelCom	Management concealed over $114M in bribes to officials to operate in Uzbekistan, ending up with $795M in fines
TEVA PHARMACEUTICAL INDUSTRIES LTD.	SEC and DOJ fined Teva $519M for paying bribes to foreign government officials in Mexico, Russia, and Ukraine
ODEBRECHT Braskem	Plead guilty and agreed to pay at least $3.5B in global penalties to resolve largest foreign bribery case in history
Deutsche Bank	Concealed transactions with countries under US sanctions, resulting in a $258M settlement with the Federal Reserve
UNAOIL	Bribed foreign officials to win contracts for global multinationals such as Honeywell, KBR, Halliburton, Samsung, and more
TOSHIBA	Management pressure led to a $1.3B earnings overstatement, resulting in the resignation of the CEO and seven other executives
	Ordered to pay a $2.8B criminal penalty in the US for cheating on emissions tests
BR PETROBRAS	More than 200 companies face charges after Petrobras funneled kickbacks off contracts awarded to construction companies

Is the Corporation's Compliance Program Well Designed?

RISK ASSESSMENT

POLICIES AND PROCEDURES

TRAINING AND COMMUNICATIONS



CONFIDENTIAL REPORTING STRUCTURE AND INVESTIGATION PROCESS

THIRD PARTY MANAGEMENT

MERGERS AND ACQUISITIONS (M&A)

Is the Corporation's Compliance Program Being Implemented Effectively?

COMMITMENT BY SENIOR AND MIDDLE MANAGEMENT

AUTONOMY AND RESOURCES

INCENTIVES AND DISCIPLINARY MEASURES

Does the Corporation's Compliance Program Work in Practice?

CONTINUOUS IMPROVEMENT, PERIODIC TESTING AND REVIEW

INVESTIGATION OF MISCONDUCT

ANALYSIS AND REMEDIATION OF ANY UNDERLYING MISCONDUCT

Leading an Integrity Revolution

Implementing FSG elements of an effective program has reduced observed misconduct, but systemic issues remain.

Ethics and Compliance professionals have to lead an integrity revolution.

Efforts must focus on the Board of Directors.

Management has to be accountable.

Integrity can’t be outsourced to the compliance and ethics department.

Sources

- Evaluation of Corporate Compliance Programs, U. S. Department of Justice, April 2019
- Business and Ethics Leadership Alliance (BELA)
- Jim Nortz, “A Road Map to Leading an Integrity Revolution”, *CEP Magazine, October 2019*

Discovery Ethics from the Plaintiff's Perspective: Collection, Clients, and Cutting to the Chase

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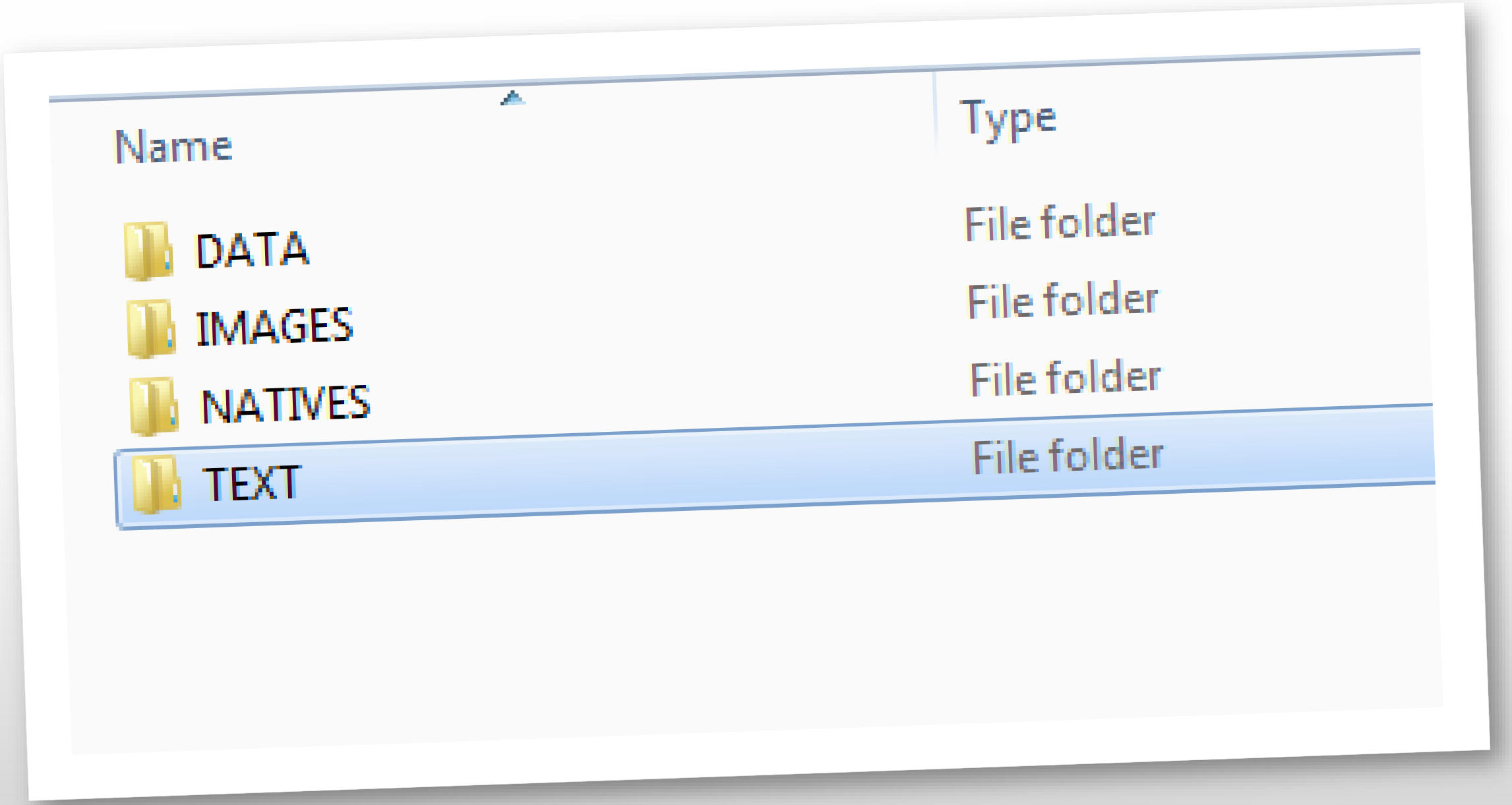
Collection
Clients
Cutting to the Chase

This sort of back and forth negotiation is required by the civil rules and predicated on the resisting party meeting its burden to show why discovery should not be had. See Rule 26(c), SCRCP. In construing the South Carolina Rules of Civil Procedure, our courts look for guidance to cases interpreting the federal rules, Maybank v. BB&T Corp., 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016), and the weight of federal authority holds that unsubstantiated, boilerplate objections are tantamount to making no objection at all and should be deemed waived. See, e.g., Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 363–64 (D. M.d. 2008); Guzman v. Irmadan, Inc., 249 F.R.D. 399, 400 (S.D. Fla. 2008); Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co., 246 F.R.D. 522, 528 (S.D.W. Va. 2007); A. Farber & Partners, Inc. v. Garber, 234 F.R.D. 186, 188 (C.D. Cal. 2006); Hall v. Sullivan, 231 F.R.D. 468, 473-74 (D. Md. 2005); St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508, 514 (N.D. Iowa 2000). As one district court explained:

> General objections such as the ones asserted by Defendant are meaningless and constitute a waste of time for opposing counsel and the court. In the face of such objections, it is impossible to know whether information has been withheld and, if so, why. This is particularly true in cases like this where multiple "general objections" are incorporated into many of the responses with no attempt to show the application of each objection to the particular request.

Heller v. City of Dallas, 303 F.R.D. 466, 483 (N.D. Tex. 2014) (brackets and quotations omitted) (quoting Weems v. Hodnett, No. 10–cv–1452, 2011 WL 3100554, at *1 (W.D. La. July 25, 2011)). Alternatively, when parties interpose specific objections and negotiate to resolve or narrow those disputes, it minimizes the need for judicial intervention and supervision of discovery. Again, that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T00000032.txt	Text Document	26 KB	Yes	71 KB	64%	8/26/2019 1:51 PM
T00000054.txt	Text Document	1 KB	Yes	1 KB	39%	8/26/2019 1:51 PM
T00000056.txt	Text Document	2 KB	Yes	3 KB	48%	8/26/2019 1:51 PM
T00000060.txt	Text Document	1 KB	Yes	2 KB	61%	8/26/2019 1:51 PM
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T00000129.txt	Text Document	3 KB	Yes	5 KB	54%	

Item	Excerpts
	Eugene P. Warr Jr. GeneWarrl@gmail.com, Hubert
JL_00044	<< JL_00044 >> From: HERNANDEZ-LAROCHE, ARACELI AHERNANDEZ-LAROCHE@USCUPSTATE.EDU Subject: RE: Request for bio correctio on Presidential search committee website Date: December 21, 2018 at 9.11 AM To: Porsha Williams PorshaWilliams@parkersearch.com Cc: dallen@sc.edu, hugh@mobleyrx.com, WHICKMAN@mailbox
JL_00049	**<< JL_00049 >> From: HERNANDEZ-IAROCHE, ARACELI AHERNANDEZ-LAROCHE@USCUPSTATE.EDU Subject: Re: Presidential Search Date: June 17, 2019 at 5:50 PM ym To: HEATH JR., CANTEY canteyh@mailbox.sc.edu, wchjr1946 wchjr1946@att . net. ALLEN, DEBRA debraa@mailbox.sc.edu Cc: Mobley, Hubert F. (hugh@mobieyrx**
JL_00050	<< JL_00050 >> From: Mark Buyck MWBuyck(Vwillcoxlaw.com &.` Subject: RE: Presidential Search Committee Meeting on Monday, October 29 at 2:00 pm Date: October 22, 2018 at 10:11 AM' To: HEATH JR, CANTEY CANTEYH@mailbox.sc.edu, Hubert F. (Hugh) Mobley (hugh@mobleyrx.com) hugh@mobleyrxcom, John C
JL_00051	<< JL_00051 >> From: Mark Buyck MWBuyck@willcoxlaw.com l-. Subject: RE: Nov 30 and Dec. 13 Search Committee Meetings Date: November 21, 2018 at 952 AM ""t To: ALLEN, DEBRA DEBRAA@mailbox,sc.edu Cc: Hubert F. (Hugh) Mobley (hugh@mobleyrx.com)

Collection

Where is the evidence?

eDiscovery includes

- Electronically stored files (Word, Excel, PPT, etc.)
- Databases
- Social media
- Email
- Texts
- Internet of things

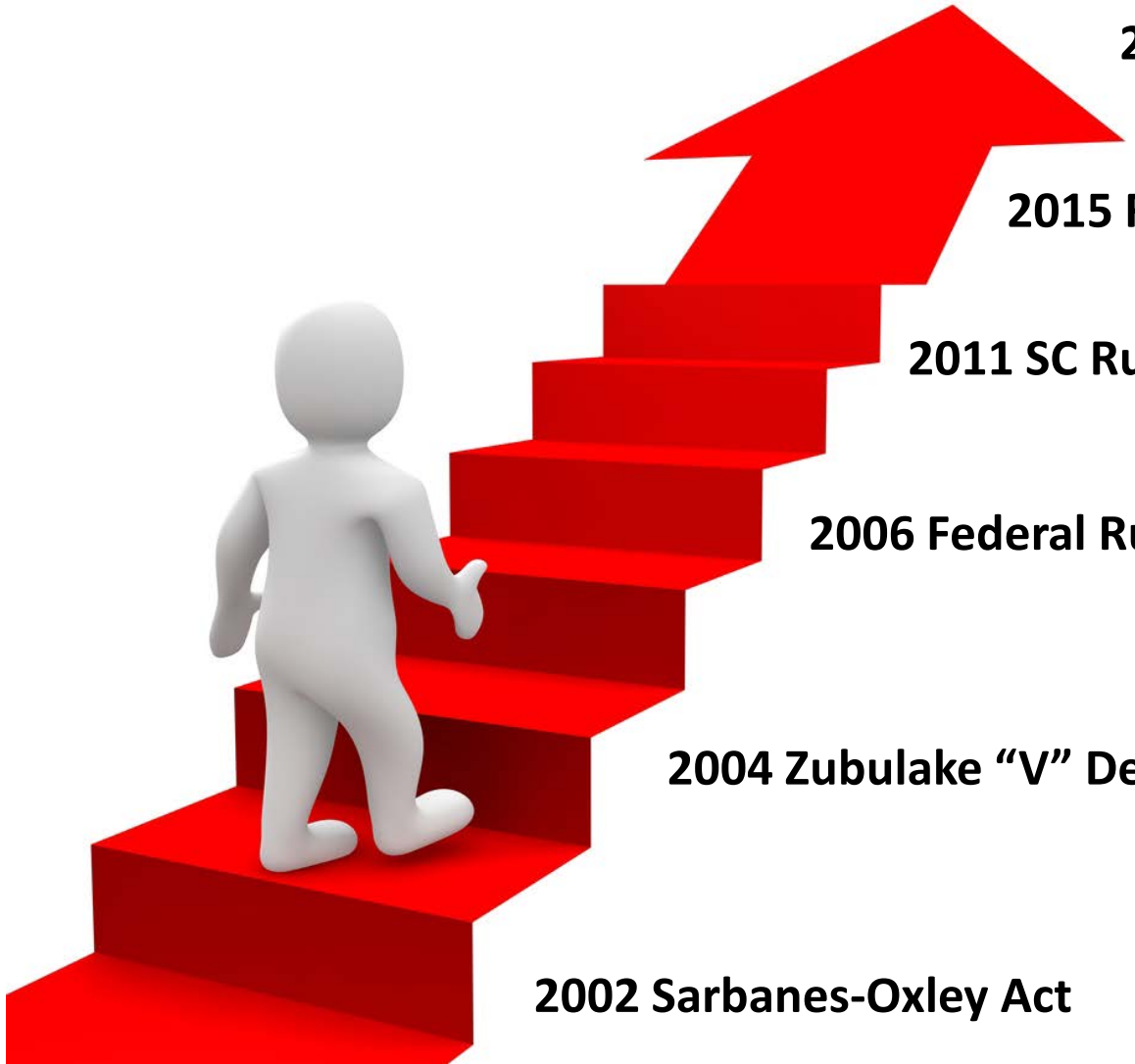
Slide images courtesy of Tim Thames,
eDiscovery Director at Legal Eagle

Sources of Information

Google

Slide courtesy of Tim Thames,
eDiscovery Director at Legal Eagle

The history of eDiscovery



2017 Federal Rules Amended

2015 Federal Rules Amended

2011 SC Rules Amended

2006 Federal Rules Amended

2004 Zubulake “V” Decision

2002 Sarbanes-Oxley Act

Slide courtesy of Tim Thames,
eDiscovery Director at Legal Eagle

Fed. R. Civ. P. 26(a) – Required Disclosures

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

Fed. R. Civ. P. 34

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

Fed. R. Civ. P. 26(b) – Discovery Scope and Limits

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Fed. R. Civ. P. Committee Notes—2006 Amendment

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

Rule 26, SCRCP Committee Note

Note to 2011 Amendment:

The amendments to Rules 16, 26, 33, 34, 37 and 45 of the South Carolina Rules of Civil Procedure concerning electronic discovery are substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure. The rules concerning electronic discovery are intended to provide a practical, efficient and cost-effective method to assure reasonable discovery. Pursuit of electronic discovery must relate to the claims and defenses asserted in the pleadings and should serve as a means for facilitating a just and cost-effective resolution of disputes.

Are you competent?

Slide courtesy of Tim Thames,
eDiscovery Director at Legal Eagle

ABA GROUPS

Model Rules of Professional Conduct

Rule 1.1: Competence

Client-Lawyer Relationship

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Slide courtesy of Tim Thames,
eDiscovery Director at Legal Eagle

Duty of technology competence

- ABA formally approved change to Model Rules of Professional Conduct in 2012
- 36 states have adopted “technology competence”

Slide courtesy of Tim Thames,
eDiscovery Director at Legal Eagle

South Carolina
JUDICIAL BRANCH

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

"Spoliation" is "the destruction or material alteration of evidence or ... the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001). Spoliation is prejudicial when it denies an opposing party the opportunity to present evidence essential to its underlying claim. Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 532 (D. Md. 2010). When the party alleging spoliation shows the other party acted willfully in failing to preserve evidence, the relevance of that evidence is typically presumed. See id.

> I charge you that when a party fails to preserve material evidence for trial, it is for you to determine whether the party has offered a satisfactory explanation for that failure. If you find the explanation unsatisfactory, you are permitted—but not required—to draw the inference that the evidence would have been unfavorable to the party's claim.

Stokes v. Spartanburg Reg'l Med. Ctr., 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006)

("We believe this language reflects the law of South Carolina and should have been charged based on the evidence presented in this case.").

Collection tips

- Discuss collection early (before you file suit).
- Explain the discovery process—collection, review, objections, and production—so client understands litigation goals.
- Ask about client concerns.
- Issue a legal hold to institutional and corporate clients.
- Take possession of paper records.
- Develop a strategy for ESI collection (targeted collection v. forensic image) based on case needs.
- Prepare for the Rule 26(f) conference.

Save backup copies and document procedure for all ESI so you can replicate your work *when* things go awry.

Clients

Negotiating discovery challenges.

South Carolina
JUDICIAL BRANCH

RULE 11
SIGNING OF PLEADINGS; ATTORNEYS

(a) Signature. Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is admitted to practice law in South Carolina, and whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. An attorney or party may only utilize an electronic signature in pleadings, motions or other papers that are E-Filed in the SCE-File electronic filing system.

South Carolina
JUDICIAL BRANCH

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) recognizes that the client has the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. A lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. The decisions specified in paragraph (a), such as whether to make or accept an offer of settlement of a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

South Carolina
JUDICIAL BRANCH

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

South Carolina
JUDICIAL BRANCH

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

Put it in the fee agreement!

3. RESPONSIBILITIES OF ATTORNEYS AND CLIENTS. Attorneys will perform legal services called for under this Agreement, keep Clients informed of progress and developments, and respond promptly to Clients' inquiries and communications. Clients agrees that Attorneys and any associated attorneys will be jointly responsible to represent Clients' interests and agree to be available for consultation with Attorneys.

Services Performed by Attorneys. Richard A. Harpootlian, P.A. shall be counsel of record and will be responsible for all court filings and appearances. Nothing in this agreement precludes Attorneys from associating additional counsel if necessary to pursue the claim.

Clients will be truthful and cooperative with Attorneys, disclose to Attorneys all facts relevant to the Representation, keep Attorneys reasonably informed of developments, and be reasonably available to attend any necessary meetings, preparation sessions, hearings, and trial. Clients shall: (1) follow the advice and instructions of Attorneys; (2) cooperate fully with Attorneys in the handling of the Representation; (3) act in connection with the Representation only through Attorneys; and (4) avoid all acts that are illegal, immoral, or unethical that might jeopardize the Representation. This includes discussing the subject matter of the Representation with anyone other than Attorneys without Attorneys' permission.

4. ATTORNEYS' RIGHT TO WITHDRAWAL. Clients and Attorneys agree that Attorneys are entitled to withdraw from the Representation and terminate this Agreement if Clients fails to pay the fee in the manner and amount provided by this Agreement or if Clients fails to honor any other provision of this Agreement, including Clients' duty to be truthful and cooperative with Attorneys. Clients agree that failure to cooperate during this Representation or failing to follow Attorneys' advice concerning strategic, legal, or other matters typically left to the professional judgment of attorneys acting in the interest of their clients, shall give Attorneys a right to withdraw from the Representation.

Collection tips

Ask about client concerns.

Cutting to the Chase

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Be thoughtful in your discovery requests.

Draft strategically

- Draft discovery with your complaint.
- Don’t use “instructions” that depart from the rules.
- Ask for documents “sufficient to show” the fact at issue when you don’t need “all” documents.
- Anticipate privileges and expressly disclaim that you are seeking “any communication between you and your litigation counsel.”
- Use the Rule 26(f) conference to discuss ESI systems and negotiate an ESI order.
- Press for data compilations in lieu of “all” underlying documents.
- Research the opposing party’s document systems or get an expert to help.

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Richard A. Harpootlian, PA
cpk@harpootlianlaw.com
(803)252-4848

2019 Ethics Year-in-Review

By Michael Virzi

Richland County Bar Association
Free Ethics Seminar

Friday, Oct. 25, 2019

I. Civil Cases

Derrick v. Moore
426 S.C. 521, 828 S.E.2d 68 (Ct. App. 2019)

Lawyer's fee agreement read: "ANY DISPUTE CONCERNING THE FEE DUE PURSUANT TO THIS AGREEMENT SHALL BE SUBMITTED BY THE DISSATISFIED PARTY FOR A FULL, FINAL RESOLUTION" to the Bar's Resolution of Fee Disputes Board (RFDB). After the case ended, Lawyer sued Client to collect her fee. Client asserted counterclaims and the defense that Lawyer failed to comply with this provision in the fee agreement. Lawyer moved for an order compelling Client to submit to the RFDB. The Court of Appeals held:

- The RFDB provision in the fee agreement is not subject to the Uniform Arbitration Act
- Attorney did not waive the right to enforce the provision because there could be no "dispute" until the client answered the Complaint, denying the fee was owed

Gibson v. Epting
426 S.C. 246, 827 S.E.2d 178 (Ct. App. 2019)

Lawyer had a reverse-contingency fee, based on the amount reduced from the foreclosing bank's deficiency claim, agreed to by email in February. 9 months later, Lawyer was close to getting deficiency waived, Client's separate counsel negotiated the fee down to 1/3 based on the waiver offer and drafted a fee agreement. Client signed it 10 days after the bank agreed to the waiver. Client later alleged $566,666 was an unreasonable fee, claiming she didn't know about the wavier before she signed. She had 2 expert opinions in support, based on the RPC. The court held:

- Client's expert opinions were based on the false premise that she didn't know about the waiver offer when she signed the fee agreement; her separate counsel said she knew.
- "The ethical rules were not designed to be weaponized for use by private litigants."
- The court also didn't like that she claimed her litigation lawyers drafted the fee agreement when it was in fact drafted by her own separate counsel.

II. Discipline Cases

In re Pyatt
425 S.C. 238, 821 S.E.2d 318 (2018)

- NSF caused by failing to ensure staff got a deposit to the bank on time
- Public Reprimand for not having done monthly reconciliations

In re Newman
425 S.C. 240, 821 S.E.2d 689 (2018)

- The going rate for failure to file income taxes is still a 90-day suspension:
    - Lawyer pled guilty to 2 counts and got a 6-month suspension
- Lawyer also put unearned flat fees directly into operating w/o appropriate language in his fee agreement

In re Meehan
Op. No. 27859 (S.C. Sup. Ct. filed Jan. 16, 2019)

- Resignation In Lieu of Discipline (RILD) in another state is reportable in S.C. (presumably under RPC 8.3(b) & RLDE 29(a))
- The appropriate reciprocal discipline for RILD in Texas (readmission allowed after 5 years) is disbarment in S.C. (RILD in S.C. is permanent)

In re Naderi
426 S.C. 476, 827, S.E.2d 582 (2019)

- Out-of-state lawyers are still getting permanently debarred for mortgage modification scams (California)

In re Ochoa
426 S.C. 483, 827 S.E.2d 586 (2019)

- Same at Naderi (but Florida)
- Lawyer was a solo using stock photos, claiming associated outside lawyers were "of counsel" & part of his "nationwide network of attorneys"
- Part of a growing trend of clever efforts to get the benefits of association with other lawyers without the costs and risks:
    - solos presenting as larger firms based on co-counsel & referral networks
    - out-of-state firms claiming a S.C. office without hiring a S.C. lawyer

In re Gay
427 S.C. 195, 830 S.E.2d 21 (2019)

- "While meeting with one of her criminal clients who was in custody related to a narcotics trafficking case, Respondent instructed the client's girlfriend to remove United States currency and paperwork from the bathroom of the client's home and take the currency and paperwork to an associate of the client."
- Lawyer served one day in jail for an unlawful communication in violation of S.C. Code Ann. § 16-17-430(A)(1).
- 6-month suspension

In re McCarty
Op. No. 27916 (S.C. Sup. Ct. filed Aug. 21, 2019)

- Moonlighting $100,000 in fees using firm resources (staff, computer, letterhead)
  - BUT he ran firm conflict checks, didn't cover it up, confessed, & settled
- Public Reprimand
- Prior range had been from 90-day suspension to disbarment

III. Rule Changes

Rule 1.6, Comment 7
No public records exception for advertising

[7] Disclosure of information related to the representation of a client for the purpose of marketing or advertising the lawyer's services is not impliedly authorized because the disclosure is being made to promote the lawyer or law firm rather than to carry out the representation of a client. Although other Rules govern whether and how lawyers may communicate the availability of their services, paragraph (a) requires that a lawyer obtain informed consent from a current or former client if an advertisement reveals information relating to the representation. This restriction applies regardless of whether the information is contained in court filings or has become generally known. See Comment [3]. It is important the client understand any material risks related to the lawyer revealing information when the lawyer seeks informed consent in accordance with Rule 1.0(g). A number of factors may affect a client's decision to provide informed consent, including the client's level of sophistication, the content of any lawyer advertisement and the timing of the request. General, open-ended consent is not sufficient.

IV. Rule Change Proposals

Rule 1.10
screening

The PR Committee has approved a proposal that the court adopt screening procedures to prevent imputed conflicts within a firm, consistent with the Model Rule and with screening procedures elsewhere in the S.C. Rules (1.11 for government lawyers moving into private practice and 1.18 for conflicts related to prospective clients). The Bar approved it, but the court sent it back for more clarification. The committee is working on revised white paper to re-submit the proposal to the Bar.

Rule 3.8(g) & (h)
post-conviction evidence of innocence

The PR Committee and the Bar have proposed that the court adopt a modified version of these Model Rule subsections to require prosecutors to disclose post-conviction evidence of innocence and, if it's within the prosecutor's jurisdiction, to investigate whether further evidence may confirm innocence. If the evidence is clear and convincing, the rule requires the prosecutor to take reasonable steps to remedy the conviction.

Rules 7.1-7.5
communication & advertising

The PR Committee has approved a proposal that the court revise the advertising and communication rules to accomplish several goals:

- eliminate misunderstandings about what is and is not advertising by changing the title of Rule 7.2 to "communications concerning a lawyer's services"
- codify the "accolades" opinion (S.C. Bar EAO 17-02)
- expand the referral fee prohibition to including giving <u>or promising</u> anything of value in exchange for referrals, but also to create two exceptions consistent with the ABA Model Rules:
    - nominal gifts
    - a mutual exchange of referrals between lawyers if:
        - it's not exclusive
        - the client is informed, and
        - it's in the client's best interest.
- limit the solicitation regulation to only those sent to people known to be in need of legal services
- eliminate the 30-day waiting period for solicitations in personal injury and wrongful death cases
- eliminate the antiquated special rules for patent & admiralty lawyers

V. Ethics Advisory Opinions

S.C. Bar EAO 18-04

using "reply-all" in an email copied to opposing party

Lawyer A sends an email to Lawyer B and copies Lawyer A's client. Lawyer A has not expressly consented to Lawyer B communicating with Lawyer A's client. The committee first noted that Rule 4.2 does allow consent to be implied, but opined that the mere fact that a lawyer copies her own client on an email does not constitute implied consent to a "reply to all" response. Additional circumstances may amount to implied consent, including whether the matter is adversarial, whether the substance of the email is merely scheduling availability, and whether such group emails are the normal course of business with a sophisticated client.

- Only 3 other jurisdictions have weighed in on this (North Carolina, Alaska, and the New York City Bar), but they all agree.
- The takeway is simply don't cc your clients in your emails to others. Instead, send the email, then forward the sent email to the client.

S.C. Bar EAO 19-01 & ABA Formal Op. 487

hold only disputed portion of funds in trust
successor counsel fees not governed by 1.5(e)

Client entered into a contingency fee agreement with Lawyer A, who did some intial work, then client fired Lawyer A and hired Lawyer B. Lawyer A asserted a charging lien for 15% of any recovery. Lawyer B settled the case, and Client doesn't want Lawyer A to get any fee. The committee reminded lawyers that they must hold the disputed portion of funds in trust and must pay the undisputed portion to the parties entitled to them, including the undisputed portion of Lawyer B's fee.

Similarly, the ABA clarified in June that this scenario does not require client consent because, as the comments not, it is not governed by Rule 1.5(e)'s client consent requirement for "division of fees between lawyers who are not in the same firm." Comment 8 to Rule 1.5 notes that client consent is not required under (e) for fee splitting in successor counsel scenarios.

S.C. Bar EAO 19-02

selling a judgment against a client

Lawyer obtained a judgment against a client for an unpaid fee. The committee opined that a lawyer may sell such a judgment to a third party but may not disclose any information related to the representation to that third party, despite that the lawyer may have already properly revealed confidential information during the litigation that resulted in the judgment. Although Rule 1.6(b)(6) allowed Lawyer to reveal confidential information "to establish a claim or defense … in a controversy between the lawyer and the client," the committee opined that the "controversy" exception does not extend to post-judgment collection.

S.C. Bar EAO 19-03

investing in a cannabis business

Lawyer wants to purchase an interest in a publicly traded company involved in the cultivation, production, management, and distribution of cannabis in those states where growing, selling, and using cannabis are allowed under state law, although they remain illegal under federal laws that the federal government is not enforcing in those states. The committee opined that whether it is unethical depends on:

1. whether merely owning an interest in such a company is a criminal act, and
2. if so, whether it is the kind of criminal act that is misconduct under Rule 8.4 (i.e., if it reflects adversely on the lawyer's honesty trustworthiness or fitness to practice law, or if it is a crime of moral turpitude)