

**Richland County Bar Association's**

**Annual Free CLE Ethics Seminar**

**Friday, October 28, 2016**

**Brookland Baptist Church Conference Center**

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## AGENDA

- 8:00 - 8:30 am Registration: Check-in
- 8:30 - 8:45 am Introduction  
The Honorable Costa M. Pleicones  
Chief Justice of the South Carolina Supreme  
Court
- 8:45 - 9:30 am 2016 Year in Review: An Update on Ethics  
Advisory Opinions in South Carolina  
Michael J. Virzi, Esq.  
USC School of Law  
mjv@virzilaw.com
- 9:30 - 10:15 am Rule 3.3 of the South Carolina Rules of  
Professional Conduct and Online Lead Generation  
and the limits of Fee Sharing with Legal  
Marketing Companies  
Matthew T. Richardson, Esq.
- 10:15 - 10:30 am Break
- 10:30 - 11:15 am Ethics & Magistrate Courts  
The Honorable Michael R. Davis  
Retired Magistrate Court Judge
- 11:15 - 12:00 pm Ethics & Probate Court  
The Honorable Amy W. McCulloch

## SPEAKER BIOGRAPHIES

**Judge Michael R. Davis** attended public schools in Columbia and was a member of the first graduating class from A.C. Flora High School in 1962. He received his bachelor's degree in 1968 from Clemson University and was appointed as a Magistrate for Richland County in 1970.

Since Judge Davis' election to the Bench, he has participated in the South Carolina Summary Court Judges Association and served as the President. He has also served on the "Clemson Board of Visitors" from 2013 - 2016.

Judge Davis retired from the bench on June 30, 2016. He holds the honor of being the longest serving Magistrate in the history of Richland County, 45 years, 9 months, and 8 days.

**The Honorable Amy W. McCulloch** graduated from the University of South Carolina in 1987. She graduated from the University of South Carolina School of Law in 1990 and was admitted to the South Carolina Bar the same year.

Judge McCulloch clerked for Judge Tom Ervin, State Circuit Judge and Judge William Catoe, Federal Magistrate. She became an Assistant Solicitor for Richland County in 1991 and remained there until December of 1996.

Judge McCulloch had a private practice with her husband, Joe McCulloch from 1996 to 1998. During this time she was also an Adjunct Professor at the University of South Carolina and Midlands Technical College teaching courses in business law, civil law, criminal law, and ethics.

Judge McCulloch was sworn in as the Richland County Probate Judge in January of 1999. She served as President of the South Carolina Association of Probate Judges in 2003-2004.

**Chief Justice Costa M. Pleicones** was born in Greenville, South Carolina, in 1944. He is the son of Lecha and Mike Pleicones, both deceased.

Justice Pleicones grew up in Columbia, South Carolina, attending its city schools through graduation from Columbia High School in 1961. He then attended Wofford College from which he graduated in 1965 with a degree in English. Following graduation from Wofford, Justice Pleicones attended the University of South Carolina School of Law, from which he received a Juris Doctor degree in 1968.

After law school, Justice Pleicones entered the United States Army, serving both as an enlisted member and as an officer in the Judge Advocate's General Corps, until his release from active duty on March 1, 1973. Justice Pleicones continued his membership in the military until retirement from the United States Army Reserve in March 1999 after more than thirty years of active and reserve service.

Upon leaving active military service, Justice Pleicones entered practice as a public defender for Richland County, South Carolina. Later, while in private practice with Lewis, Babcock, Pleicones and Hawkins, he also served as a part-time municipal judge for the City of Columbia, and as County Attorney for Richland County. In 1991 he was elected Resident Circuit Court Judge for the 5th Judicial Circuit. He served as a circuit judge from July 1, 1991, until March 23, 2000, when he was elected as an associate justice of the South Carolina Supreme Court on February 9, 2000. On May 27, 2015, Justice Pleicones was elected as Chief Justice of the South Carolina Supreme Court.

Justice Pleicones is admitted to practice before all South Carolina Courts, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, the Court of Appeals for the Armed Services, and the United States Supreme Court. He is frequently called upon as a lecturer in CLE programs conducted by the South Carolina Bar and other professional organizations.

Justice Pleicones married the former Donna Singletary of Lake City, South Carolina in 1965 and they have two daughters and one grandchild. Justice Pleicones is Greek Orthodox.

**Matthew Richardson** graduated from Duke University in Economics in 1995 and graduated from the University of South Carolina School of Law in 1998. While at the University of South Carolina School of Law, Matthew wrote for the South Carolina Law Review and served as its Editor in Chief from 1997-1998. He also earned the honor of the Order of the Wig and Robe.

After law school, Matthew clerked for the Honorable Kaye G. Hearn of the South Carolina Court of Appeals from 1998-1999 and then for the Honorable P. Michael Duffy of the United States District Court, District of South Carolina from 2000-2001. In 2001, he joined the Wyche law firm and practices out of the Columbia office.

Matthew's practice focuses on civil litigation, and he has participated in cases involving shareholder and minority owner oppression, consumer protection, voting rights and election protests, commercial and real estate law, copyright infringement, insurance bad faith, employment law, medical malpractice, personal injury, and product's liability. His experience includes jury trials, bench trials, agency hearings and contested cases, preliminary motions and injunctions, dispositive motions, class action certification determinations, mediations, arbitrations, and appeals.

**Michael J. Virzi** Has been a Legal Writing Instructor at the University of South Carolina School of Law for the past eight years, and he also teaches courses in Professional Responsibility and Law Practice & Professionalism. A former Assistant Disciplinary Counsel for the South Carolina Supreme Court, Michael's professional background is in lawyer discipline, ethics, and malpractice, and he currently represents attorneys in disciplinary proceedings and matters of lawyer ethics. Michael serves on the South Carolina Bar's Professional Responsibility and Ethics Advisory Committees, the latter of which he chaired from 2007-2010. Michael is also an instructor for the Supreme Court's Legal Ethics and Practice Program and is a frequent CLE speaker and guest lecturer on matters of the ABA Center for Professional Responsibility, the Association of Professional Responsibility Lawyers, and the South Carolina Association of Ethics Counsel. Michael graduated *cum laude* from the University of South Carolina School of Law in 2000.

# **RICHLAND COUNTY BAR ASSOCIATION ETHICS CLE**



**AMY W. MCCULLOCH  
PROBATE JUDGE**

# PROBATE COURT



- Probate Court deals with everything from estate administration, estate litigation, conservatorships and guardianships to mental illness and chemical dependency
- People from all walks of life
- Cases range from seemingly trivial to highly emotional
- Fighting over a stamp collection to exhuming a body
- In the Probate World the ordinary is extraordinary

# ETHICAL ISSUES

“Typically you are not the one creating the ethical issue, instead the ethical issue finds you and how you choose to react to it is what defines you as an ethical lawyer or not.”

Jesse Near, 1 of my favorite law clerks!

# **WAYS TO AVOID ETHICAL ISSUES IN PROBATE COURT**

- **COMMUNICATE CLEARLY**
- **KNOW WHEN TO KEEP IT CONFIDENTIAL**
- **TELL THE TRUTH, EVEN IF IT HURTS**
- **DON'T STEAL MONEY, NO REALLY DON'T STEAL MONEY**
- **BE RESPONSIBLE AND PROACTIVE**
- **PRACTICE CIVILITY**
- **KNOW HOW TO DEAL WITH MISCONDUCT**

# COMMUNICATE CLEARLY



- Lawyers are required to keep a client reasonably informed about the status of a matter. *S.C. Mod. Rules of Professional Conduct §1.4.*
- Communicate clearly with the personal representative and help them understand the probate process.
- Encourage the personal representative to keep all heirs informed.
- Set a goal of answering phone calls and returning emails within 24 hours.

# **PROBATE ISSUE #1**

**In estate planning, you should only meet with your client because here is one scenario...**

**A lawyer represents a client in estate planning matters. The lawyer meets with the client and the client's daughter to discuss changes to her estate plan. The lawyer subsequently receives an inquiry from the client's other children about the meeting. Can the lawyer reveal information about the meeting?**

# KEEP IT CONFIDENTIAL



- Lawyers should not reveal information relating to the representation of a client unless the client gives informed consent. *S.C. Mod. Rules of Professional Conduct §1.6.*
- Communications between the lawyer and the fiduciary are subject to attorney-client privilege unless waived by the fiduciary.  
*S.C. Code Ann. § 62-1-110 .*
- The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

# ON THE EDGE OF CAPACITY

- You've known the client forever
- You see diminished capacity
- Client wants to name spouse as agent under POA
- You know this will be the best for your client

**IT IS IMPORTANT TO KNOW WHAT YOUR INVOLVEMENT IS IN THE EXECUTION OF A LEGAL DOCUMENT, LIKE A POA SAYS HISTORICALLY ABOUT WHEN YOUR CLIENT HAD CAPACITY TO MAKE DECISIONS AT OR AFTER THIS TIME.**

# SO KNOWING THAT...

- What if the daughter is the Power of Attorney for her mother?
- How do you determine if your client still has appropriate capacity?
  - To allow her daughter's presence?
  - To waive the attorney client privilege?

# RECOGNIZING THE SIGNS OF DIMINISHED CAPACITY

**The ABA recommends that the lawyer consider and balance such factors as:**

- the client's ability to articulate reasoning leading to a decision;
- Variability of the client's state of mind;
- Client's ability to appreciate consequences of a decision;
- the substantive fairness of the client's decision; and
- the consistency of the decision with the known long-term commitments and values of the client. *S.C. Mod. Rules of Professional Conduct §1.14 Comment [6].*

# **PROBATE ISSUE #2**

**You represent a married couple for their estate planning. The husband tells you, in the presence of his wife, that he wants a will drafted in which the wife will get everything. The husband then later tells you privately to draft a will that excludes his wife and he asks you not to reveal this change to the wife. Can you keep the contents of a client's will a secret from the client's spouse, who is also a client?**

# **BEFORE YOU AGREE TO REPRESENT A COUPLE...**

- You must discuss the potential conflicts that could occur
- You must include in your retainer agreement that you discussed them and have an agreement that deals with “should a conflict occur...”
- Know when to walk away from representing both of them!!! The money isn't worth the risk.



- Do not bring frivolous claims before the Court. *S.C. Mod. Rules of Professional Conduct §3.1.*
- Always be honest and truthful when communicating with the Court and completing probate forms. *S.C. Mod. Rules of Professional Conduct §3.3.*

# AFFIDAVITS

- Please don't sign an Affidavit swearing to what your client would swear to...have them do their own. (EVEN WHEN THEY LIVE IN ANOTHER STATE AND MAILING IS INVOLVED)
- When assisting your client with a sworn statement, you may need to see any and all documents that support the statement. BANK STATEMENTS, MORTGAGE STATEMENTS, CAR TITLES, DEEDS, CANCELED CHECKS...

# ACCOUNTINGS

- ALWAYS make your clients bring you the bank statements...not just some...all.
- Don't use "their numbers", look at the supporting documents.
- Make sure they really used their personal money when they are claiming reimbursements.

# DON'T STEAL MONEY



- Attorney fees and expenses in estate litigation should be reasonable *S.C. Code Ann. §62-3-720*
- The personal representative takes a 5% fee of the value of personal property in the probate estate, plus 5% of the net value of real estate sold within probate. *S.C. Code Ann. §62-3-719.*
- Properly distribute estate funds.

# \$\$\$ MONEY \$\$\$

- What if the attorney is serving as the Personal Representative – should he charge the 5% commission, fees by the hour, or both?
- What if you represented the estate in a wrongful death action and received 1/3 of the settlement and now you are assisting in the estate administration – should you charge additional fees?

# PROBATE ISSUE #3

**A client instructs you to draft a will to include leaving a gift to you in his will.**

**Lawyers are prohibited from soliciting gifts from a client or from preparing an instrument on behalf of a client that includes such a gift. S.C. *Mod. Rules of Professional Conduct §1.8.***

EASY SOLUTION – If they are adamant about including you in the will, send them to another lawyer to prepare the document. NO, you should not be a witness or the notary.

# **PROBATE ISSUE #4**

**You represent a Personal Representative who inherits  $\frac{1}{4}$  from the Estate along with his 3 siblings. You discover that your client has been paying his own mortgage, water and electricity bills with estate funds.**

**You also find out that your client has not distributed equal amounts to his siblings to compensate for his personal bills.**

# Does it matter that...

- There is more than enough money in the estate account to equal the distributions to the siblings later?
- The Personal Representative is living in the estate residence during the administration of the estate and the bills are associated to some degree with estate property?



# **BE RESPONSIBLE AND PROACTIVE**

- **Don't rely on your secretary or paralegal to do everything**
- **Open your own mail**
- **Make reasonable efforts to expedite estate litigation and close the estate in a timely manner. *S.C. Mod. Rules of Professional Conduct §3.2.***
- If they draft, you still must edit – especially orders!
- Especially bank statements – reconcile your accounts
- Calendar your hearings.
- Create to do lists – use your reminders.

# PROBATE ISSUE #5

**A lawyer represents a client in estate planning matter. After the client shows signs of dementia, the client's children approach the lawyer and ask him to file a guardianship petition on their behalf.**

**Can the estate planning lawyer for the allegedly incapacitated person (AIP) appear on behalf of the AIP's children who now seek to be appointed the AIP's guardian?**

**- A lawyer can not represent a client if the representation involves a concurrent conflict of interest.**

**- A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client. *S.C. Mod. Rules of Professional Conduct §1.7.***

# PROBATE ISSUE #6

**Could the lawyer, on his own behalf, seek the appointment of a guardian for his client?**

***- Rule 1.14, a lawyer should not do so without giving the matter thoughtful consideration that takes into account the wishes, values, and, of course, best interests of the client.***

# PRACTICE CIVILITY



- **Be respectful, kind, and courteous to all Probate Court employees.**
- **This includes everyone from the Judge to the front desk receptionist.**
- **Remember you only get one chance to make a first impression**

# EX PARTE

- communication outside of the presence of the opposing party or the opposing party's attorney.
- **Avoid missteps by keeping communication procedural in nature**



# MISCONDUCT

- You find out that your client who is serving as the Personal Representative lied on a sworn form filed with the Probate Court?
- You discover that your client who was the POA for their now deceased mother used her money for her own benefit?

# QUESTIONS & CONCERNS

- **Contact the Richland County Probate Court:**



- **Visit: 1701 Main Street Room 207**
- **Via phone (803) 576-1961**
- **Website: [www.rcgov.us](http://www.rcgov.us)**
- **More Information on South Carolina Probate**  
**[www.judicial.state.sc.us](http://www.judicial.state.sc.us)**

# RCBA Ethics CLE

## Candor Toward the Tribunal

October 28, 2016

# Does the Law Promote Dishonesty?

*“Why no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion. You are not to tell lies to a judge.”*

4 Boswell, *The Life of Samuel Johnson*, at 47.

# **RULE 3.3, RPC**

**“SHALL NOT KNOWINGLY”**

**LIE TO OR MISLEAD THE TRIBUNAL**

# TRIBUNALS

- **Court**
- **Arbitration**
- **Legislative body or administrative agency acting in an adjudicative capacity**
- **Ancillary proceeding to the tribunal's adjudicative authority**

Rule 1.0(q), RPC, Rule 407, SCACR.

# Commission on CLE

Don't claim CLE credit for ethics when you arrive at the seminar after it's over.

(Or sign in and then leave.)

*In re Diggs*, 344 S.C. 392 (2001).

# Depositions



*In re Hammer*, 395 S.C. 385 (2011).

# Integrity of the adjudicative process

“present the client’s case with persuasive force”

“while maintaining confidences of the client”

“qualified by the advocate’s duty of candor to the tribunal”

Rule 3.3 cmt. 2, RPC.

# Potential Sanctions

<b>Sanction</b>	<b>Attorney's Mental State</b>	<b>Actual or Potential Injury to Party or Effect on Proceeding</b>
Disbarment	Intentional	Serious injury to party or Significant adverse effect on proceedings
Suspension	Knowing	Injury to party or adverse effect
Reprimand	Negligent	Injury to party or adverse effect
Admonition	Isolated Incident	Little to no injury or Little to no adverse effect

# Disclosure of Legal Authority

In the controlling jurisdiction,

Known to be directly adverse, and

Not disclosed by opposing counsel

Rule 3.3(a)(2), RPC.

# Use of Unpublished Orders or Opinions

“Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.”

Rule 268(d)(2). SCACR.

# Ex Parte Proceedings

All material facts known

that will enable an informed decision

whether adverse or not

Rule 3.3(d), RPC.

# Ghostwriting

*“With such participation, the attorney guides the course of litigation while standing in the shadows of the Courthouse door.”*

*In re Mungo, 305 B.R. 762 (Bankr. D.S.C. 2003).*

# AVOID ANY COVER-UP

*In re Dodds*, 366 S.C. 304 (2005).

1. Don't forge court documents.
2. Don't mislead the Court.
3. Don't misrepresent the Court's ruling in proposed order.

*In the Matter of Jennings*, 321 S.C. 440 (1996); see also S.C. Bar EAO 00-06 (subpoena where attorney does not believe the court has jurisdiction); S.C. Bar EAO 97-39 (second attempt at guilty plea).

# DO NOT ENGAGE IN MONEY LAUNDERING

LOCAL

AUGUST 8, 2014 7:17 AM

## Former state Rep. Thad Viers facing federal criminal charges

... indicted by a federal grand jury on 14 felony charges related to helping an associate hide assets in a road construction project.

The charges carry a combined maximum sentence of 145 years in prison.



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CRIME

APRIL 8, 2015 6:25 AM

# Viers pleads guilty to money laundering



Don't file affidavits with  
material misrepresentations.

(Also, attorney must review an affidavit before submitting it to the Court.)

*In re Massey*, 408 S.C. 483 (2014); see also S.C. Bar EAO 08-14 (identify  
hearsay).



Developer...

*"I thought I was guilty until my lawyer straightened me out on that."*

# Former Texas prosecutor Charles Sebesta disbarred for putting innocent Anthony Graves on death row for 12 years

February 10, 2016, 9:13 AM



Don't file a false voucher for CJA payments.

*In re Cleaver-Bascombe*, 892 A.2d 396 (D.C. 2006).

Candor is required of attorneys as parties, too.

Preamble cmt. 5, RPC; *In re Barker*, 352 S.C. 71 (2002).

89° FULL FORECAST

# Tampa Bay Times

WINNER OF 12 PULITZER PRIZES

Today's Paper E-Newspaper Search

Bay Area AIR CONDITIONING INC. 40 Years in Business

SPA MANUFACTURERS, INC. CELEBRATING 34 YEARS IN CLEARWATER

Make us your home page 4:29.PM, Wednesday, October 19th, 2016

- HOME
  - MY EDITION
  - NEWS**
  - POLITICS
  - SPORTS
  - THINGS TO DO
  - VIDEO
  - OPINION
  - FEATURES & MORE
- BREAKING NEWS
  - LIVE BLOG
  - WEATHER
  - OBITUARIES
  - BUSINESS
  - PINELLAS
  - HILLSBOROUGH
  - PASCO
  - HERNANDO
  - FLORIDA
  - US/WORLD
  - MORE

## Florida Bar recommends disbarment for three Adams & Diaco lawyers guilty of DUI setup

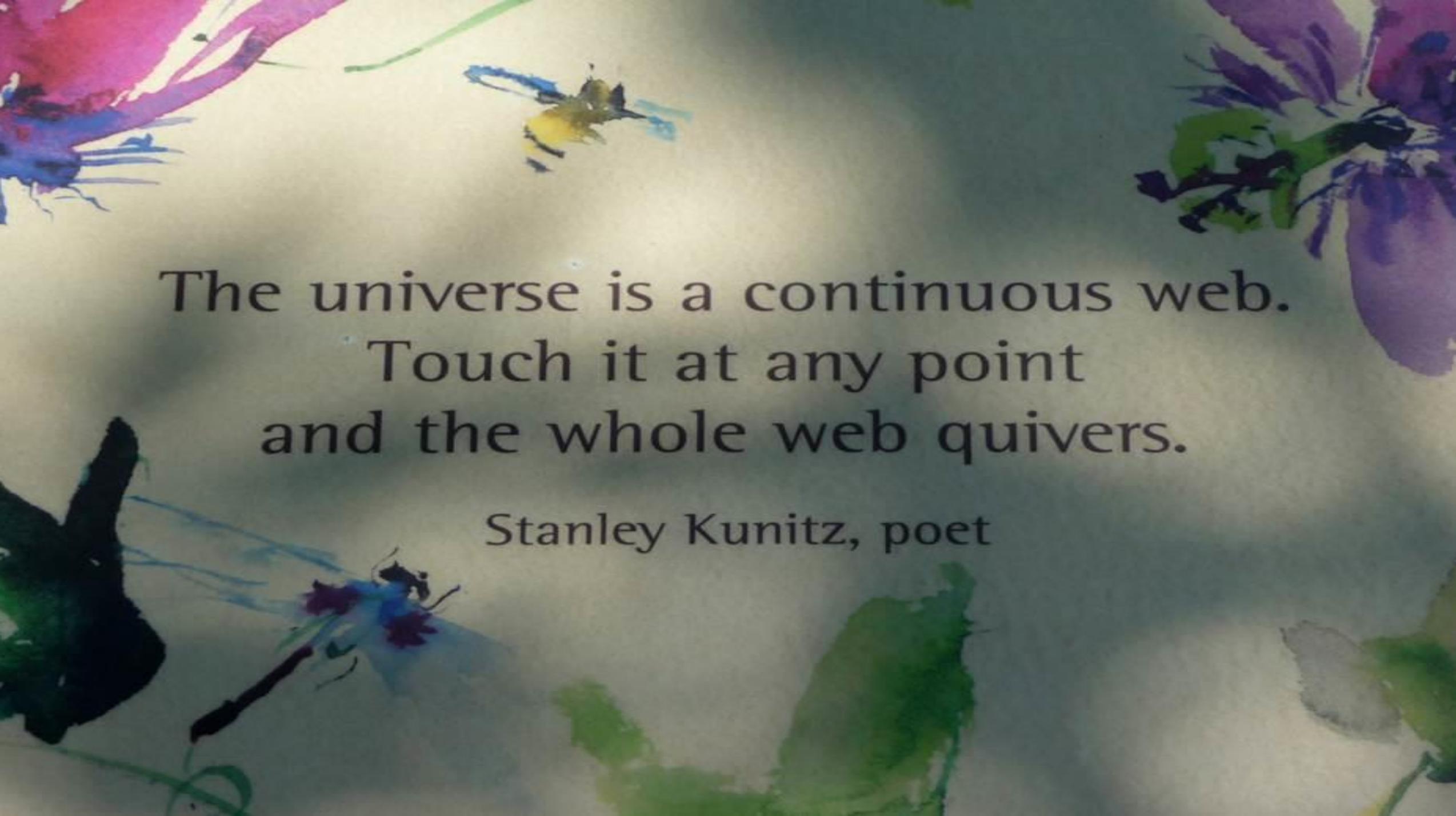
Monday, August 17, 2015 6:50pm





“Back at Malio's, Personius slipped onto a bar stool next to a man in his 60s. She drank and flirted, playing with her long dark hair.”

*Tampa Bay Times*

A watercolor illustration on a light, textured background. In the upper center, a yellow and black striped bee is depicted in flight. To its left, a dragonfly with translucent wings and a dark body is shown. The scene is framed by various floral elements: a pink and blue flower in the top left, a purple flower in the top right, a dark butterfly in the bottom left, and a green leaf in the bottom center. The overall style is soft and artistic.

The universe is a continuous web.  
Touch it at any point  
and the whole web quivers.

Stanley Kunitz, poet

# RCBA Ethics CLE

## Fee Sharing with Legal Marketing Companies

October 28, 2016



*"Then we carefully disguise the bribes as legal fees  
by changing the word 'bribes' to 'legal fees.'"*

CN  
COLLECTION

# Fee Sharing

Compare S.C. Bar EAO 16-06 (advising against fee sharing)

with

S.C. Bar EAO 11-05 (allowing vouchers to be sold legal services).

# RCBA Ethics CLE

**Thank you**

October 28, 2016

## **Ethics in Magistrate Court**

The Honorable Michael Davis

Michael Davis is a recently retired Magistrate. He served 45 years as the Lykesland Magistrate in Richland County. His presentation on Ethics in the Magistrate Court begins with an overview of the Magistrate court system and its history. This includes several personal anecdotes. By going through the history of the Magistrate courts in Richland County, Judge Davis illustrated how ethics have become a larger concern in these courts. For example, Magistrates used to be publicly elected. Because of the inherent ethical issues tied to elections, Magistrates are now appointed. Magistrates also supplemented their salaries by keeping the fees and court costs. This is no longer the case. Judge Davis moves his presentation to present day issues in Magistrate court: courtesy between parties, candor with the court and avoiding the appearance of impropriety. Judge Davis ends his presentation by looking at the future of the Magistrate courts - highlighted by photos of the new Richland County Magistrate Central Court on Decker Boulevard.

## 2016 "Year in Review"

- Ethics and malpractice-related decisions and rule changes that have come out since last year's CLE (end of 2015 and 2016 thus far)
- Changes to the Rules of Professional Conduct, the Rules for Lawyer Disciplinary Enforcement, SC Bar Ethics Advisory Opinions, Supreme Court disciplinary opinions, and any malpractice and ethics-related civil opinions from the Court of Appeals and Supreme Court, including an update on two UPL petitions currently pending before the court (Boone v. Quicken and RTT v. Peck)
- New ethics issues that are being decided in other states and/or pending before our own Ethics Advisory Committee
- Rule change proposals that are pending either at the PR Committee or at the Court, and ABA Rule Changes that have not yet been proposed or considered in SC

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Michael Virzi teaches first-year Legal Research, Analysis and Writing I & II and Professional Responsibility. He has also taught upper-level courses in Advanced Legal Writing and Fundamentals of Law Practice and Professionalism. Prior to becoming a full-time faculty member, Mr. Virzi taught as an adjunct professor at the School of Law and taught Business Law I and II as an adjunct professor in the Paralegal Studies program at Midlands Technical College. He came to the School of Law from the South Carolina Supreme Court's Office of Disciplinary Counsel where he investigated and prosecuted attorneys for ethical misconduct. Prior to working for the Disciplinary Counsel, Mr. Virzi practiced in the areas of commercial and business litigation and creditors' rights.

Mr. Virzi received his B.A. in Political Science from the University of South Carolina in 1991 and graduated cum laude from the University of South Carolina School of Law in 2000. He is a

member of the South Carolina Bar, the North Carolina Bar (inactive), the U.S. District Courts of North and South Carolina, and the U.S. Court of Appeals for the Fourth Circuit.

Mr. Virzi has served on the South Carolina Bar's Professional Responsibility Committee since 2011 and the Ethics Advisory Committee since 2003, including as Chair from 2007–2010. He is a member of several state and national organizations involving legal ethics and is a frequent CLE speaker and law school guest lecturer on the topics of legal ethics and the disciplinary process.