Ethics Watch

The Year in Review

By Nathan M. Crystal

Two themes stand out from my review of this year's cases and ethics opinions. First, we see a number of decisions and opinions that reflect the impact of technology on the practice of law. In general, these authorities warn lawyers to "be careful." Ethics Advisory Opinion 12-03 dealt with the propriety of lawyer participation in legal information websites. The committee advised lawyers to limit their involvement to providing general information and to avoid responding to requests for advice about specific situations. In a disciplinary case, the Supreme Court warned lawyers not to rely on the advice of nonlawyer Internet professionals about compliance with their ethical obligations. Revisions to Rule 1.15 dealing with client files include, among other changes, a recognition of the propriety of electronic storage. Nonetheless, many aspects of the impact of technology on law practice remain unanswered in this state. For example, are lawyers ethically allowed to use cloud computing services? My answer is "yes," provided reasonable precautions are taken. Second, the Supreme Court and the Court of Appeals have generally been resistant to a variety of civil liability claims against lawyers, rejecting on the facts of the particular cases claims for aiding and abetting breach of fiduciary duty, fraud, conspiracy, and violation of the Unfair Trade Practices Act. In addition, the Court endorsed the use of limited engagement agreements to restrict a closing lawyer's obligations to his client. However, the Supreme Court did rule that the expert affidavit required in professional negligence cases need not have an opinion on causation.

Advertising—legal information websites

In Ethics Advisory Opinion #12-03, the South Carolina Bar Ethics Advisory Committee decided that a lawyer could not ethically participate in a legal information website that goes beyond general information because the content of the website violated several ethics rules, including the prohibition against the use of the term "expert," Rule 7.4(b); testimonials or endorsements that did not comply with Rule 7.1(d); misleading disclaimer of an attorney-client relationship when participating lawyers gave legal advice based on detailed factual submissions; and use of an "as is" disclaimer that might be viewed as an attempt to limit prospectively malpractice liability in violation of Rule 1.8(h). Finally, to the extent that the website resulted in the formation of an attorney-client relationship, receipt of compensation by the lawyer from the service provider violated Rule 1.8(f) dealing with restriction on payments to lawyers from anyone other than the client. The committee's opinion went beyond the specifics of the particular website in question to discuss the propriety of lawyer participation in information websites in general:

> Lawyers may participate in such sites only to the extent their participation (1) is limited to providing information of general applicability, and (2) the lawyer's individual responses clearly advise against any reliance on the information as advice or application of it to a specific situation without a more thorough consultation with counsel … When an inquirer attempts to explore specific circumstances with a participating lawyer, the lawyer should decline to respond beyond advising the inquirer to seek legal advice; otherwise, she risks creating an attorney-client relationship.

Advertising—misrepresentation on websites

A young lawyer received a public reprimand for using profiles on Internet websites that contained:

1. material misrepresentations of fact by overstating and exaggerating the lawyer's reputation, skill, experience, and past results;
2. a form of the word "specialist," even though the lawyer was not certified by the Court as a specialist;
3. statements likely to create unjustified expectations about the results the lawyer could achieve; and
4. descriptions and characterizations of the quality of the lawyer's services.

The Court warned lawyers not to rely on the advice of nonlawyer Internet professionals about compliance with ethical obligations. *In re Dickey,* 396 S.C. 500, 722 S.E.2d 522 (2012).

Attorney-client relationship—formation and obligations without signed engagement agreement

In *In re Carter*, 2012 S.C. LEXIS 205, the respondent contended that he had not represented a client in an automobile accident case because the client had not signed a contingent fee agreement. The court held that the absence of a signed agreement did not prevent the formation of an attorney-client relationship or relieve the respondent of his obligation to clearly inform the court and the client that he was not representing the client. The lawyer had allowed the case to be dismissed for failure to prosecute. As a result the respondent received a public reprimand.

Civil liability—aiding and abetting breach of fiduciary duty, conversion, and conspiracy

Gordon v. Busbee, 397 S.C. 119,

2012 S.C. App. LEXIS 163 (2012), involved claims by the relatives of a decedent against her husband, who held her power of attorney, for misappropriation of the decedent's assets during her lifetime. The suit included claims against the husband's lawyer, who became personal representative of his estate after his death, for aiding and abetting breach of fiduciary duty, fraud/fraud benefit under Code §62-1-106, conversion, and conspiracy. The Court of Appeals affirmed the trial court's decision to grant a directed verdict for the attorney on all four counts. One of the elements of aiding and abetting a breach of fiduciary duty is "the defendant's knowing participation in the breach." The plaintiffs failed to present any evidence that the attorney knew about the transfers of money prior to or at the time they were made. Negligence or inattention on the attorney's part, even if proved, would not be sufficient to establish liability for aiding or abetting breach of fiduciary duty. With regard to the claim for damages under Code §62-1-106, plaintiffs failed to present any evidence that the attorney engaged in fraud or received a benefit from the husband's actions. The court rejected the plaintiff's argument that the filing of the inventory of assets amounted to fraud under the section because there was no evidence that the attorney knew that any of the filings were false at the time they were made. As to the claim of conversion, the attorney properly exercised control as personal representative of the husband's estate over the assets of his estate that were titled in his name at his death; the attorney did not exercise any control over assets in her personal capacity. Conspiracy requires parties to conspire for the purpose of harming another, causing him special damages. The record contained no evidence that the lawyer conspired with the husband or others to harm his wife, nor did the plaintiffs offer any evidence of special damages.

Civil liability—expert affidavit need not address causation

Code §15-36-100(B) provides that in actions for professional negligence, the plaintiff must file "as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." In *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012), a medical malpractice action, the plaintiff's expert affidavit was from a nurse who opined that the defendant breached the standard of care in multiple respects and that those breaches were a contributing cause of the decedent's death. However, the nurse was not qualified to render an opinion about the cause of death. On the defendant's motion, the trial court dismissed the complaint on the ground that the affidavit was defective because it did not contain a competent opinion on causation. The S.C. Supreme Court reversed. Applying a number of principles of statutory construction, the Court ruled that the statute did not require an opinion on causation. Because Section 15-36-100(B) is unambiguous, its plain language must be applied. "The language … [of] the affidavit … encompasses only the breach element of a common law negligence claim and not causation … [T]he General Assembly used a term of art which has a well-defined common law meaning as just breach, and we can find nothing indicating the General Assembly intended to vary from it." In addition, section 15-36-100 "restricts a plaintiff's common law right to bring a malpractice claim by imposing this requirement. Consequently, the language in the statute is to be strictly construed."

Civil liability—nonwaivable conflicts, limited engagements, relationship between malpractice and breach of fiduciary duty, and unfair trade practices

In *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166 (S.C. 2012), the Supreme Court dealt with a number of aspects of civil liability claims against attorneys. A purchaser of two lots in a real estate development sued the closing attorney on various theories. First, the purchaser claimed that as a *matter of law* the attorney had a nonwaivable conflict of interest in representing the buyer and the seller in the closing of a real estate transaction. The Court rejected this claim because the plaintiff had agreed that the claim involved *questions of fact for the jury*, which had returned a defendant's verdict. South Carolina ethics opinions and prior case law have held that a lawyer may represent both a buyer and seller in a real estate transaction provided the clients give informed written consent. See Wilcox & Crystal, Annotated South Carolina Rules of Professional Conduct 109-110 (2010 ed.).

Second, the purchaser contended that the attorney committed malpractice by failing to disclose to the purchaser that the lots being sold were being repurchased by the developer from a prior purchaser under a buy-back agreement and that the developer was financially unable to perform that agreement.

The Court rejected the plaintiff's claim that the trial court erred in denying its motion for a new trial with regard to this theory because the firm's engagement agreement limited the services that it would perform. The agreement excluded "substantive advice about how or whether to proceed with this transaction" and limited the attorney's services to closing the transaction, preparing a deed of conveyance, and performing ministerial acts associated with real estate closing. An expert testifying for the defendant opined that the defendant had complied with the standard of care for a real estate attorney and that the firm's engagement agreement limited the scope of representation.

Third, the purchaser contended that the attorney breached his fiduciary obligations to the purchaser. The trial court had merged the breach of fiduciary duty and malpractice claims because the court found that they were redundant. The Supreme Court affirmed, holding that a claim for breach of fiduciary duty against an attorney states a cause of action only if it "arises out of a duty *other than* one created by the attorney-client relationship or because it is based on different material facts."

Fourth, as to the plaintiff's claim for violation of the South Carolina Unfair Trade Practices Act, the Court found that the trial court erred in holding that the "regulated industries" exception to the Act applied to the law firm's conduct. Quoting with approval a decision of the Alaska Supreme Court, the Court stated that the attorney disciplinary system and consumer protection legislation can coexist as long as the legislature does not attempt to take away the court's exclusive power to admit, suspend, discipline, or disbar lawyers. However, on the facts the Court found that the defendant had not violated the South Carolina UTPA because the jury had found that the defendants did not engage in deceptive conduct.

File destruction—new Supreme Court Rule

By order dated March 1, 2012, the S.C. Supreme Court amended Rule 1.15, adding paragraph (i) and comments 12 and 13. Revised section (i) requires a lawyer to "securely store a client's file for a minimum of six (6) years after completion or termination of the representation," unless the lawyer delivers the file to the client or the client's designee or the client has authorized in writing destruction of the file and there are no pending or impending proceedings known to the lawyer that relate to the file. If the client does not request the file within six years, the lawyer may treat the file as abandoned and destroy the file, unless the lawyer knows about pending or impending proceedings related to the file. When a lawyer destroys a file, the lawyer is required to take reasonable steps to protect client confidentiality. Comments 12 and 13 elaborate on these requirements. Comment 12 refers to shredding as one means of protecting confidentiality. Comment 13 authorizes lawyers to convert files to electronic form provided the lawyer can generate a paper copy. The comment also directs lawyers to adopt and clearly communicate to clients policies regarding file retention.

Practice with nonlawyers

The Ethics Committee was asked to render an opinion on whether it was proper for a lawyer who has her own practice and who is also a certified civil court mediator to form a partnership or agreement with several non-lawyers who are trained mediators to provide mediation services. The organization would operate for a profit, in which the lawyer would share. Rule 5.4 prohibits a lawyer from sharing legal fees with a nonlawyer. Rule 7.2(c) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's legal services. The committee reasoned that neither rule was applicable because both concern *legal services*, while "mediation is not the practice of law and … admission to the Bar is not a prerequisite to service as a mediator" (Ethics Advisory Opinion #94-10). The attorney, however, must be careful in avoiding "any appearance that he or she is practicing law concomitantly with the practice of mediation" (Ethics Advisory Opinion #12-06).

Honorable mention

Ethics Advisory Opinions ##12-02 and 12-07 advise lawyers that Rule 1.8(i) authorizes them to take a mortgage in property that is the subject of litigation to pay or secure their fees, but they must comply with a number of other rules, in particular Rules 1.5, 1.7(a)(2), and 1.8(a).

Opinion #12-08 provides guidance to lawyers in dealing with audits by title companies of their trust accounts.

Opinion #12-05 warns lawyers that SCACR 417 requires a licensed South Carolina lawyer to be the authorized signer for South Carolina trust accounts.

National developments

The ABA Ethics 20/20 Commission is nearing completion of its work on revisions to the Model Rules to reflect major changes in the legal profession, especially globalization and widespread use of technology. During its August 2012 Annual Meeting, the ABA House of Delegates approved a number of changes to the Model Rules and comments and related rules based on the recommendations of the Commission. The recommended changes are in the following areas: (1) technology and confidentiality, (2) technology and client development, (3) outsourcing, (4) practice pending admission, (5) admission by motion, and (6) detection of conflicts of interest and confidentiality. The Commission is likely to have additional recommendations dealing with choice of law agreements in connection with conflicts of interest and the rules governing inbound foreign lawyers. In addition, the Commission has prepared white papers on a number of issues for which it will not propose rule changes, such as the ethical aspects of litigation finance. See the website of the ABA 20/20 Commission for details about its work. ■