South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Government Law Section

"Current Topics in Government Law"

Friday, January 19

SC Supreme Court Commission on CLE Course No. 240026

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Panel: Strategies for Handling Vexatious FOIA Requests and Hostile Government Meetings

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Strategies for Handling Vexatious FOIA Requests and Hostile Government Meetings

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2017 FOIA Changes

- § 30-4-100(A)—amended DJ enforcement provision to require scheduling of a hearing within 10 days of filing and must conclude within 6 months (if not decided at initial hearing) but may extend time for good cause shown.
- § 30-4-110—rewrote violation section. Previously, a willful violation was a misdemeanor and fined upon 1st conviction with imprisonment for 2nd and 3rd violations. Now:
  - **Body can file hearing request for relief from unduly burdensome, overly broad requests or where it is unable to make a "good faith" determination on exemption**
  - If a request could result in release of materials exempt under § 30-4-40(a)(1), (2), (4), (5), (9), (14), (15) or (19) person with specific interest in materials has the right to request a hearing or to intervene

2017 FOIA Changes

- Court relief may include:
  - Equitable relief
  - Actual or compensatory damages
  - Reasonable attorneys' fees and other costs unless there is a finding of good faith, which is a bar to attorneys' fees
- If court determines records not subject to disclosure, constitutes good faith finding and is complete bar to award of attorney's fees/costs if reversed on appeal
- If requestor prevails in part, subject to attorneys' fees and cost or appropriate portion, unless otherwise barred
- If court finds that body has arbitrarily or capriciously refused or delayed, impose a $500 fine in addition to actual or compensatory manages or equitable relief.

Recent cases

- *S.C. Lottery Comm'n v. Glassmeyer*, 433 S.C. 244, 857 S.E.2d 889 (2021)(not brought under current version of 30-4-110(A), but court limited FOIA request under Declaratory Judgments Act).
- *State Election Commission v. James John Todd Kincannon*, No. 2018-CP-40-2285, (S.C.Com.Pl. June 20, 2018)(granting injunctive relief against unduly burdensome, overly broad, vague repetitive, or otherwise improper FOIA requests under current version of 30-4-110(A).

Tools for Handling Public Meetings

1. A good set of Rules. *See* S.C. Code Ann. § 5-7-250(b) ("The council shall determine its own rules and order of business and shall provide for keeping minutes of its proceedings which shall be a public record.").
    - Rules for meeting conduct
    - Content neutral rules regarding public comment (ex: limit to topic under discussion, limit duration)
    - Remedies for violations (ex: ejection)
2. Adherence to the Agenda. S.C. Code Ann. § 30-4-80.

3. Training on the Rules and the requirements of FOIA. For example, S.C. Code Ann. § 30-4-70(d) allows for removal of individuals who willfully disrupt meetings to the extent that orderly conduct of the meeting is seriously jeopardized.

Recent authority:

- *Lockaby v. City of Simpsonville*, 440 S.C. 156, 889 S.E.2d 631, (Ct. App. 2023) (finding ejection of council member covered by legislative immunity)
- 2023 WL 3975070, at *1 (S.C.A.G. June 5, 2023) (responding to request for an advisory opinion addressing a public body's ability to regulate public participation and disruptions at local government meetings (e.g., council meetings, planning commission meetings, board of zoning appeals meetings, etc.))

Recent authority:

- § 30-4-100(A)—amended DJ enforcement provision to require scheduling of a hearing within 10 days of filing and must conclude within 6 months (if not decided at initial hearing) but may extend time for good cause shown.

- § 30-4-110—rewrote violation section. Previously, a willful violation was a misdemeanor and fined upon 1st conviction with imprisonment for 2nd and 3rd violations. Now:
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Impact of the SCOTUS Decision in *Students for Fair Admissions v. President and Fellows of Harvard College* on Affirmative Action and DEI Initiatives

John Nichols

Professionalism

--

Keeping Civility in the Courtroom

--

John S. Nichols
Bluestein Attorneys

SC Bar Convention
January 19, 2024

"Professionalism" is a broad concept that, for lawyers, derives from various sources. As one recent essay put it:

> Given the breadth of the roles of expert, counselor, and leader, it is imperative that lawyers understand that their ethical responsibilities are correspondingly broad as well. The sources for ethical responsibilities, which arise both from the lawyer as a trained professional and from their status as highly educated citizens, include: the spirit and letter of the Model Rules of Professional Conduct; an implied social contract between state-licensed professionals and the rest of society; the enlightened self-interest of the institutions in which lawyers serve; the role of law, regulation, and norms as the foundation and expression of public policy and private ordering; and lessons about lawyers' roles in the history of our constitutional democracy and political economy.
>
> At least since the founding of the republic, there have been important and spirited debates about just how broad the ethical responsibilities of lawyers should be. Some have argued for a relatively narrow ethical view, which places paramount importance on the lawyer's duty to advance the private interests of clients. Others have argued for a much more expansive view that celebrates lawyers as "high priests of law" with broad duties to the rule of law and the public interest, and who are capable of mediating between the powerful and the people.
>
> Still other theorists have argued that the whole idea of legal ethics is largely a sham, operating principally as a shield for lawyer self-interest. Although we write in the shadow of these broad sources and great debates, and frequently borrow from them, it is not our intention either to reprise or resolve them here. Instead, we wish to call on what we believe to be a broad—although certainly not universal—consensus that in return for their privileged status as "licensed professionals," lawyers have explicit and implicit obligations to protect the interests of clients, to promote the rule of law, and to generally provide services in the public interest. And that in addition to these direct professional commitments, that lawyers have also—although certainly not always—played a critical role as exemplary "citizens" throughout our history, by helping to design the

public and private institutions (including great companies, law firms, and law schools) that have helped our country prosper.

Given this consensus, we believe that lawyers and legal academics should understand themselves as having four interrelated sets of obligations, however open-textured, each of which are of signal importance, as they consider how to act in particular contexts across the full spectrum of their careers:

1. Responsibilities to the people and organizations that their own institution serves (such as corporate stakeholders, law firm clients, and law students and faculty).

2. Responsibilities to the legal system and rule of law that are the foundation of our political economy and constitutional democracy, including contributing to access to justice, strengthening the rule of law and legal institutions in the United States and around the world, and supporting efforts by other lawyers to uphold their own professional responsibilities.

3. Responsibilities to the institution in which lawyers work—e.g., corporations, law firms, and law schools—and to the people employed by such institutions, such as a corporation's global workforce or a law firm's or law school's diverse employees.

4. Responsibilities to secure other broad public goods and enhance sound private ordering— complementary to the rule of law—in order to create a safe, fair, and just society in which individuals and institutions (including major corporations, major law firms, and major law schools) can thrive over the long-term.

We do not mean to suggest that any lawyer can—or should—honor all four of these responsibilities equally in every setting. Although in many circumstances the four ethical responsibilities will be complementary, in others they may be in tension or even conflict. As a result, we recognize that lawyers will sometimes be in the difficult position of choosing which of these responsibilities will take precedence in guiding specific courses of action. Criminal defense lawyers, for example, generally believe that they have, in particular matters, far greater obligations to protect the interests of their

clients—and far fewer obligations to protect the rule of law or the public interest—than lawyers who are advising companies on prospective regulatory compliance, where the substantive and procedural context is very different. Even in the criminal defense context, however, we believe that lawyers should consider whether their actions are within a fair interpretation of "the bounds of the law," and that those lawyers in any event have an obligation to participate in efforts to reform the legal framework, or society more generally, to better serve the goal of protecting the rights of criminal defendants and the public interest in the fair and efficient administration of justice.

Similarly, we do not believe that there is any single path that every lawyer should follow to achieve these goals. There is not now, nor has there ever been, "one true faith" for ethical lawyering. To the contrary, great lawyers throughout history have grounded their ethical responsibilities in traditions that are both "progressive" and "conservative"—and every permutation in between. But regardless of their political preferences, these great lawyers have also insisted that the legal profession has normative obligations along the lines of the four duties outlined above. It is to this broad consensus that we appeal.

Indeed, the legal profession's historic commitment to these four responsibilities has always been one of its principle appeals for new entrants—and one of the keys to the profession's success. Research consistently demonstrates that many of the most talented women and men applying to law school have a strong desire to devote an important part of their professional lives to work of public or private sector importance—to feel a strong connection between "who they are" and "what they do." Yet it is widely believed that it is increasingly difficult for many lawyers to feel this connection, particularly in the context of companies and law firms. By helping lawyers to focus on the broad ethical dimensions of their roles in these institutions, we hope to restore at least some of this critical connection. Whether working as lawyers in a particular setting, or on projects outside of their core institutions, lawyers must understand and navigate sometimes conflicting duties to clients, the legal framework, their own institutions, and the wider public. Although this process will often be challenging, it is also what makes the lawyers' role so

> potentially rewarding. As former Harvard Law School Dean Robert Clark eloquently stated, the lawyers' fundamental role is not "law" per se, but "normative ordering." And in the context of lawyering, normative ordering requires attention to all four of the responsibilities outlined above.

Heineman, Ben W., Jr., *et al.*, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, at 11-12 (Harvard Law School Center on the Legal Profession), https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf.

These materials focus primarily on the roots of the concept of professionalism (and the need and requirement for civility) among members of the South Carolina Bar.

THE RULES

The primary rules governing civility and professionalism in South Carolina are:

- Rule 402(h), SCACR
- Rule 4.4(a), RPC, Rule 407, SCACR
- Rules 8.4 (a), (e), RPC, Rule 407, SCACR
- Rule 7(a)(1), (5), (6), (7), RLDE, Rule 413, SCACR
- Rule 11(a), SCRCP

These basic rules are designed to promote professionalism and create an atmosphere of cooperation and integrity among lawyers. *Cf. In re Chastain*, 340 S.C. 356, 532 S.E.2d 264 (2000) (Court cited favorably to *Matter of Discipline of Babilis*, 951 P.2d 207, 214 (Utah 1997) (disciplinary proceedings are civil in nature and do not involve a criminal penalty; goal is to maintain the honesty, integrity and professionalism of the Bar)). As the Supreme Court expressed nearly 30 years ago:

> We further admonish the trial bench that the fair and efficient functioning of our trial system demands the cooperation of both the lawyers and parties on the one hand and the judiciary on the other. Mutual respect, civility and courtesy are the lubricants which oil this great adversarial engine-the American system of adjusting citizens' disputes which is unique among the nations.

Spartanburg County DSS v. Padgett, 296 S.C. 79, 85, 370 S.E.2d 872, 876 (1988) (emphasis added).

To further advance civility, the Court amended the Attorney Oath several years ago. The Court also created the Chief Justice's Commission on the Profession. The expressed purpose of the Commission was to address the "need for the emphasis upon and encouragement of professionalism in the practice of law." The Commission's responsibilities include:

The Commission shall ensure that the practice of law remains a high calling which serves clients and the public good. Its major responsibilities are:

(1) To monitor and coordinate South Carolina's professionalism efforts in the bar, the courts and the law school;

(2) To monitor professionalism efforts in other jurisdictions;

(3) To plan and conduct symposiums, seminars, and other meetings on professionalism;

(4) To ensure the presence of a professionalism component in the Bridge the Gap and Essentials Series Programs;

(5) To make recommendations to the Court, the South Carolina Bar, voluntary bar associations and the law school concerning additional means by which professionalism can be enhanced;

(6) To receive and administer grants and to make expenditures therefrom as the Commission shall deem prudent; and

(7) To receive and respond to inquiries concerning professionalism from the judiciary and the bar. The Commission shall have no authority to respond to complaints within the province of the Commission on Lawyer Conduct or the Commission on Judicial Conduct.

Rule 420, SCACR.

The South Carolina Bar has also promulgated "**Standards of Professionalism**," including a "**Statement of Principles**":

1. Principle: A lawyer should revere the law, the judicial system and the legal profession and should, at all times in the lawyer's professional and private lives, uphold the dignity and esteem of each, and exercise the right to improve it.

2. Principle: A lawyer should further the legal profession's devotion to public service and to the public good.

3. Principle: A lawyer should strictly adhere to the spirit as well as the letter of the Rules of Professional Conduct, to the extent that the law permits and should, at all times, be guided by a fundamental sense of honor, integrity and fair play.

4. Principle: A lawyer should not knowingly misstate or improperly distort any fact or opinion.

5. Principle: A lawyer should conduct himself or herself to assure the just, prompt and economically efficient determination and resolution of every controversy consistent with thoroughness and professional preparation.

6. Principle: A lawyer should avoid all rude, disruptive, and abusive behavior and should, at all times, act with dignity, decency and courtesy consistent with any appropriate response to such conduct by others and a vigorous and aggressive assertion to appropriately protect the legitimate interests of a client.

7. Principle: A lawyer should respect the time and commitments of others.

8. Principle: A lawyer should be diligent and punctual in communicating with others and in fulfilling commitments.

9. Principle: A lawyer should exercise independent judgment without compromise of a client and should not be governed by a client's ill will or deceit.

10. Principle: A lawyer's word should be the lawyer's bond.

These standards of professionalism are guides and goals for lawyers in the conduct of their professional life at the Bar. They are to always be construed and consistent with the duty to reasonably and effectively represent the client.

Violation of a guideline, principle or standard should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The civility guidelines are designed to

> provide guidance to lawyers and define a structure for helping lawyers deal in a responsible fashion and are not designed to be a basis for civil liability nor a basis for any disciplinary action since disciplinary action is governed by Rule 407 concerning Rules of Professional Conduct.

South Carolina Bar Lawyers Desk Book (2015-2016 Ed.) p. 683. These principles are not binding, but at least one recently retired member of the Supreme Court believed they reflect accurately the standards of professionalism applicable to lawyers in South Carolina:

> I join the majority's serious concern with the conduct of the McClurgs' counsel in the manner in which he pursued this case. While no duty technically existed to notify New Prime or Zurich of the filing of suit against Deaton, the failure to do so under the circumstances of this case compromises the high ethical standards attaching to the practice of law. As the majority points out, the McClurgs indicated in correspondence to Zurich that New Prime would be served as a defendant in the event a settlement could not be reached, stating emphatically: "If I haven't heard from [Zurich] by that time, I will file suit and serve the Defendant and send you a courtesy copy of the pleadings." The maxim that a lawyer's word is his bond is not only a time-honored tradition; it is included as a guiding principle in the South Carolina Bar's Standards of Professionalism.

McClurg v. Deaton, 380 S.C. 563, 582, 671 S.E.2d 87, 97 (Ct. App. 2008) (Hearn, CJ, concurring and dissenting) (emphasis added). Although Justice Hearn had yet been elevated to the Supreme Court, she revealed in *McClurg* her view that lawyers must follow these principles to uphold the "high ethical standards" that attach to the practice of law.

Professionalism is a personal obligation of any lawyer. In a recent opinion in a case involving release of a 911 tape under FOIA, the prosecutor in charge of the criminal trial testified before the circuit court that he would have suffered harm. He contended that allowing the City to release the tape prior to trial would have caused him to lose his license to practice law, for he would have thereby violated Rules 3.6 and 3.8(e) of the South Carolina Rules of Professional Conduct, which generally prohibit a prosecutor from creating pre-trial publicity. Rules 3.6 and 3.8(e), RPC, Rule 407, SCACR. The Supreme Court noted:

> We appreciate the prosecutor's desire to act professionally, but the Rules of Professional Conduct did not affect whether the 911 tape was exempt from disclosure under FOIA. Disclosure under FOIA is the obligation of the government. Professionalism is the personal obligation of a government attorney. *See Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 799-800, 461 S.E.2d 850, 861-62 (W.Va.1995) (distinguishing between the state attorney general's professional obligations and the state's FOIA obligations).

Evening Post Pub. Co. v. City of North Charleston, 363 S.C. 452, 458 n. 7, 611 S.E.2d 496, 499 n. 7 (2005) (emphasis added).

Lawyers police each other and themselves. Although Rule 8.3, RPC, provides some discretion, what underlies that Rule is the notion that our profession is "self regulated." And these rules apply any time we are dealing with another person, whether it is another lawyer, a judge, or a nonlawyer. As the Supreme Court stated:

> We remind the Bar that although a deposition is not conducted in a courtroom in the presence of a judge, it is nonetheless a judicial setting. Because there is no presiding authority, it is even more incumbent upon attorneys to conduct themselves in a professional and civil manner during a deposition.

In re Golden, 329 S.C. 335, 343, 496 S.E.2d 619, 623 (1998). *See also In re Haddock*, 283 S.C. 116, 118, 321 S.E.2d 601, 602 (1984) (court found lawyer's "lack of professionalism in engaging in the practice of law, resulting in neglect of legal matters, and his refusal to cooperate with Board investigations render a public reprimand the appropriate sanction"); *Stone v. Reddix-Smalls*, 295 S.C. 514, 516, 369 S.E.2d 840, 841 (1988) (Probate judge found lawyer in contempt "after several retorts challenging the judge's authority, including a disparaging comment on the judge's 'professionalism'"; supreme court found the record indicated probate judge "did not abuse her discretion in holding respondent in contempt for her exhibition of disrespect for the court.").

The following Rules govern or inform any inquiry into professionalism of members of the legal profession.

A. Rule 402(h), SCACR

Rule 402(h), SCACR, contains the "Lawyer's Oath." By that oath, all members of the South Carolina Bar agree to abide by both general and specific rules of professionalism and civility. Members swear or affirm that they, among other things:

- will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them;

- pledge faithfulness, competence, diligence, good judgment and prompt communication to clients;

- pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications to opposing parties and their counsel;

- will employ, for the purpose of maintaining the causes confided to the member, only such means as are consistent with trust and honor and the principles of professionalism;

- will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law;

- will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which the lawyer is charged;

- will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice.

Each of these separate promises derive, in part, from basic notions of professionalism, fairness and civility.

The Court has had several recent occasions to instruct the Bar regarding this oath. For instance:

> [F]or the benefit of the bar, we take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication. We are concerned with the increasing complaints of incivility in the bar. We believe United States Supreme Court Justice Sandra Day O'Connor's words elucidate a lawyer's duty: "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L.Q. 5, 8 (1998).

In re Anonymous Member, 392 S.C. 328, 332, 709 S.E.2d 633, 635 (2011). *See also In re Naert*, 414 S.C. 181, 777 S.E.2d 823 (2015) (lawyer agreed use of opposing counsels' names as keywords in an Internet marketing campaign in a derogatory manner violated provisions of the Lawyer's Oath contained in Rule 402(k), of the South Carolina Appellate Court Rules (SCACR) (by taking Lawyer's Oath, lawyer pledges to opposing parties and their counsel fairness, integrity, and civility in all written communications and to employ only such means consistent with trust, honor, and principles of professionalism)); *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011) (in finding a violation of Rule 402(k), the Court stated "an attorney may not, as a means of gaining a strategic advantage, engage in degrading and insulting conduct that departs from the standards of civility and professionalism required of all attorneys").[1]

[11] Civility oath case summaries are attached to these materials to provide more detail for the reader.

B. Rule 4.4(a), RPC, Rule 407, SCACR - Respect for Rights of Third Persons

Rule 4.4(a), RPC, provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person...." Rule 4.4(a), Rule 407, SCACR. Comment [1] to Rule 4.4 states:

> Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client lawyer relationship.

Lack of professionalism or civility may rise to the level of a violation of Rule 4.4(a). In fact, conduct may still violate this rule even if it could have served other purposes that are legitimate. *See In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011) (finding letter that had as "substantial purpose" to intimidate and embarrass those lawyer perceived as being contrary to his client's legal position still violated Rule 4.4 even if the letter could have served other purposes; Court cited *In re Norfleet*, 358 S.C. 39, 595 S.E.2d 243 (2004) (finding an attorney who became angry and spoke in a threatening manner to a school principal who refused to turn over a student's file had violated Rule 4.4; the attorney was attempting to obtain the file for the otherwise legitimate purpose of using it in litigation)).

C. RULE 8.4, RPC, Rule 407, SCACR - Misconduct

Rule 8.4, RPC, is a general catchall provision of the Rules of Professional Responsibility. The Rule provides:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> * * *

(e) engage in conduct that is prejudicial to the administration of justice;

Rule 8.4, RPC. The Rule may apply even though the act amounting to misconduct involved the practice of law. See annotations collected in Wilcox & Crystal, *Annotated South Carolina Rules of Professional Conduct* pp. 386-393 (2013 Ed. SC Bar).

D. RULE 7, RLDE, RULE 413, SCACR - Grounds for Discipline; Sanctions Imposed; Deferred Discipline Agreement

(a) Grounds for Discipline. It shall be a ground for discipline for a lawyer to:

(1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers;

* * *

(5) engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law;

(6) violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR;

(7) willfully violate a valid court order issued by a court of this state or of another jurisdiction...

This Rule stands apart from the Rules of Professional Conduct found in Rule 407, and serves as an independent basis for discipline. The Rule specifically references violation of the civility oath found in Rule 402(k). Rule 7(a)(6), Rule 413, SCACR.

E. RULE 11, SCRCP - Signing of Pleadings; Attorneys

Professionalism is also reflected in several rules governing trial procedure. One such example is Rule 11(a), SCRCP, which provides in part:

> All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held. There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants.

F. RULE 30, SCRCP - Depositions Upon Oral Examination

Rule 30(j), SCRCP, outlines behavior expected of lawyers during depositions. These derive from *In re Anonymous Member*, 346 S.C. 177, 552 S.E.2d 10 (2001). Again, one basis of the Rule as well as the holding of Anonymous Member is a notion of basic civility, fairness and professionalism.

Rule 30(j) provides:

> **Conduct During Depositions.**
>
> (1) At the beginning of each deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness' own counsel, for clarifications, definitions, or explanations of any words, questions or documents presented during the course of the deposition. The witness shall abide by these instructions.
>
> (2) All objections, except those which would be waived if not made at the deposition under Rule 32(d)(3), SCRCP, and those necessary to assert a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion pursuant to Rule 30(d), SCRCP, shall be preserved.

(3) Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege*[FN 1]* or a limitation on evidence directed by the court or unless that counsel intends to present a motion under Rule 30(d), SCRCP. In addition, counsel shall have an affirmative duty to inform a witness that, unless such an objection is made, the question must be answered. Counsel directing that a witness not answer a question on those grounds or allowing a witness to refuse to answer a question on those grounds shall move the court for a protective order under Rule 26(c), SCRCP, or 30(d), SCRCP, within five business days of the suspension or termination of the deposition. Failure to timely file such a motion will constitute waiver of the objection, and the deposition may be reconvened.

> *[FN 1].* For purposes of this rule, the term "privilege" includes but is not limited to: attorney-client privilege; work product protection; trade secret protection and privileges based on the United States Constitution and the South Carolina Constitution.

(4) Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's objections shall be stated concisely and in a non-argumentative and non-suggestive manner, stating the basis of the objection and nothing more.

(5) Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

(6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.

(7) Any conferences which occur pursuant to, or in violation of, section (5) of this rule shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record.

(8) Deposing counsel shall provide to opposing counsel a copy of all documents shown to the witness during the deposition, either before the deposition begins or contemporaneously with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least two business days before the deposition, then the witness and the witness' counsel do not have the right to discuss the documents privately before the witness answers questions about them. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to privately discuss the documents before the witness answers questions concerning the document.

(9) Violation of this rule may subject the violator to sanctions under Rule 37, SCRCP.

Note to 2000 Amendment:

Rule 30 is amended by adding Paragraph (j) which provides deposition guidelines similar to those used in federal district court in South Carolina. The final subsection differs from the federal rule by making the imposition of sanctions for violations of the rule discretionary. The intent of the amendment is to help eliminate conduct tending to interfere with or impede depositions.

Note to 2001 Amendment:

Rule 30(j) is amended to clarify that any consultation between lawyer and client permitted by Rule 30 will be private.

[Last amended by order dated April 27, 2005]

CONCLUSION

Professionalism is a concept that dates back to the earliest days of the Republic. See *Flemming v. Ball*, 1 S.C.L. (1 Bay) 3 (1784) (in granting judgment for plaintiff in a civil action for assault and battery, the court noted defendant "was in liquor, and behaved rather rudely" while plaintiff "was sober and had behaved himself with civility"). Civility and courtesy remain at the forefront of the practice of law today, and are "the lubricants which oil this great adversarial engine-the American system of adjusting citizens' disputes which is unique among the nations." *Spartanburg County DSS v. Padgett*, 296 S.C. 79, 85, 370 S.E.2d 872, 876 (1988).

CIVILITY OATH CASES

The "Civility Oath" is found in Rule 402, SCACR. [Exhibit E]. It is attached to these materials. Anyone who is admitted to practice law in South Carolina has not only read it, they have sworn to uphold its provisions. The Supreme Court takes this oath very seriously.

For instance, Rule 7(a)(6), RLDE, provides it "shall be a ground for discipline for a lawyer to...violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR." This can also lead to a finding that the lawyer violated Rule 8.4(e), RPC, which provides "It is professional misconduct for a lawyer to.... engage in conduct prejudicial to the administration of justice...." [Appendix F]. The Comments to Rule 8.4 explain:

> [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Note that last sentence. A *Batson* violation, standing alone, does not establish a violation of Rule 8.4(e).

The Supreme Court has recently expressed concern over civility, even after adopting the "new" oath. The Court stated:

> [F]or the benefit of the bar, we take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication. We are concerned with the increasing complaints of incivility in the bar. We believe United States Supreme Court Justice Sandra Day O'Connor's words elucidate a lawyer's duty: "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L.Q. 5, 8 (1998).

In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 332, 709 S.E.2d 633, 635 (2011) [Appendix G].

Some recent decisions discussing the civility oath are:

A. *Matter of Magistrate Rutledge Martin*, 437 S.C. 265, 878 S.E.2d 865 (2022). The Supreme Court ordered a public reprimand for a magistrate who scolded a lawyer for not listening and directed the lawyer to "get the f**cking wax out of his ears." The magistrate also shouted at a scheduling clerk in a loud

and agitated manner. The Court also ordered the magistrate to complete anger management counseling.

B. *Matter of Traywick*, 433 S.C. 484, 860 S.E.2d 358 (2021). Lawyer suspended for six months for violating the civility oath regarding offensive posts on social media that the Court found "troubling." The Court found the statements were intended to incite gender or race-based conflict.

C. *Matter of Peeler*, 424 S.C. 441, 818 S.E.2d 723 (2018). Probate judge admitted calling court personnel "heifers" and "DW" (double wide). He claimed he was joking when he made the comments. He also admitted to "pranks and jokes" he instigated and participated in during working hours and which were unprofessional and discourteous. The judge admitted by this behavior he violated Canon 1A, Rule 501, CJC (a judge should participate in establishing and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2A (a judge shall avoid impropriety and the appearance of impropriety by acting at all times in a manner that promotes public confidence in the integrity of the judiciary); and Canon 3B(4) (a judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity). Judge had resigned so the strongest sanction available was a public reprimand with the condition that the judge not seek judicial office without written permission from the Court and notice to ODC.

D. *Matter of Swan*, 422 S.C. 328, 811 S.E.2d 777 (2018) - On several occasions, Lawyer made sexually inappropriate comments to his client on the telephone while she was in jail - he did the same on one occasion with another client. There was no evidence they had sexual relations or engaged in inappropriate touching, or that Lawyer requested sexual services in exchange for anything. Lawyer contended the comments were merely "raunchy banter" or joke between jailed clients and their lawyer, and he did not expect them to become public. The Court stated, "our review of the portions of the telephone conversations at issue revealed [Lawyer's] comments to be sexually explicit and highly offensive in nature. We find such comments made to a client by a member of the legal profession are entirely inappropriate and they will not be tolerated." Lawyer admitted to violating the oath found in Rule 402(h)(2), SCACR. Public reprimand.

E. *In re DuPree*, 401 S.C. 553, 737 S.E.2d 849 (2013). "While vacationing in Utah, respondent was a passenger in a vehicle that was pulled over by law enforcement on March 22, 2012. Utah Highway Patrol Trooper David Wurtz asked the driver for his license, vehicle registration, proof of insurance, and other information. Trooper Wurtz began to ask the driver about whether he had been drinking. Respondent repeatedly interrupted and told the driver not to answer the trooper's questions. Respondent told Trooper Wurtz he was a lawyer and that the driver did not have to do what the trooper asked.

Trooper Wurtz called for backup and other troopers arrived on the scene. When Trooper Wurtz requested the driver exit the vehicle, respondent, who was obviously intoxicated, became belligerent, repeatedly used profanity, and refused to cooperate with the troopers' requests to calm down. Respondent again reminded the troopers he was a lawyer. When the troopers told respondent to stay in the vehicle, he tried to get out. A few minutes later, when the troopers asked respondent to get out of the vehicle so it could be towed, respondent refused and locked the vehicle doors every time the troopers unlocked the doors. Respondent continued to berate the troopers and call them derogatory names.

The troopers were required to use force to remove respondent from the vehicle. One of the troopers deployed his TASER, but it did not function properly. When the troopers managed to remove respondent from the vehicle, respondent attacked the troopers. During the attack, respondent struck Trooper Wurtz in the mouth and bit him on the arm. Eventually, respondent was subdued and taken into custody. He was arrested and charged with two counts of assault on a police officer, disorderly conduct, resisting arrest, and public intoxication.

On September 12, 2012, respondent, through counsel, pled guilty to two counts of assault, one count of interference with a peace officer making a lawful arrest, and one count of failure to disclose identity, all misdemeanors. The pleas were entered *nunc pro tunc* to March 22, 2012, the date of respondent's arrest. Respondent was sentenced to one hundred and eighty (180) days on each charge, concurrent. The sentences were stayed and respondent was placed on probation for six (6) months under the following conditions: maintaining good behavior and no violation of any laws, payment of a $1,500.00 fine, payment of $840.52 to the Utah Worker's Compensation Fund, receipt of a substance abuse evaluation and completion of all recommended treatment, delivery of two letters of apology, one to Trooper Wurtz and one to another trooper, and service of one (1) day in the Summit County Jail with credit for one (1) day previously served. On September 17, 2012, the Third District Court in and for Summit County, Utah, found the conditions had been satisfied."

F. *In re Hursey*, 395 S.C. 527, 719 S.E.2d 670 (2011). The Panel found Respondent had committed the following Acts: * * * maintained a webpage on MySpace.com that contained profanity and nudity along with the name of his law firm and the city of its location; among his comments, Respondent stated he would "take the 5th" in regards to what drugs he had done in the past as well as which drugs he had done in the past week (The Disciplinary Counsel Matter).

G. *In re Lovelace*, 395 S.C. 146, 716 S.E.2d 919 (2011) Respondent represented the plaintiff in a civil suit. On April 2, 2008, the deposition of the plaintiff had just concluded and respondent was preparing to take a second deposition. The deponent in the second case was a defendant in the lawsuit. Respondent asked if anyone wanted to take a break. The defendant, who was seated across the table from respondent, said something to the effect of "No, let's get this crap over with." Respondent then stood up and pointed at the defendant's face and warned him not to speak to him in that manner. The defendant stood up and told respondent not to point his finger at him. Respondent then slapped the defendant in the face.

The defendant initiated criminal charges of simple assault and battery against respondent. Respondent pled "no contest" and was sentenced to payment of a fine.

Respondent self-reported this incident to ODC on the day it occurred.

H. *In re Poff*, 394 S.C. 37, 714 S.E.2d 313 (2011). The Panel and the Court found the lawyer assisted an employee in defrauding Medicaid. The Court stated:

> Rule 7.4(a)(5) provides a venue for discipline when a lawyer engages in conduct tending to pollute the administration of justice or conduct that brings disrepute to the legal profession. Respondent's assistance in deceiving the government, engagement in fee sharing, mishandling of his trust account, and improper disclosure of confidential client information to a third party certainly brought disrepute to the legal profession. Rule 7.4(a)(6) provides a ground for discipline when a lawyer violates the oath of office. Respondent's actions caused him to violate his oath that he would "respect and preserve inviolate the confidences of my clients" and would "maintain the dignity of the legal system." Rule 402(k), SCACR. We do not believe it was necessary for the Panel to expound upon its reasoning for finding these grounds for discipline, as they are commensurate with its finding that Respondent committed numerous violations of the Rules of Professional Conduct. Like the Panel, we find Respondent in violation of Rule 7(a)(1), 7(a)(5), and 7(a)(6), RLDE, Rule 413, SCACR.

I. *In re Walker*, 393 S.C. 305, 713 S.E.2d 264 (2011). In August 2010, respondent pled guilty to solicitation of a felony. Specifically, respondent admitted attempting to hire a "hit man" to murder another member of the South Carolina Bar. Respondent paid the "hit man" in part with a post-dated check because he did not have sufficient funds in his account to pay the check's face value. Respondent was sentenced to ten (10) years imprisonment, suspended upon service of three (3) years imprisonment and five years of probation.

J. *In re Anonymous Member of South Carolina Bar*, 392 S.C. 328, 709 S.E.2d 633 (2011). The formal charges in this matter arose out of a disciplinary complaint regarding an e-mail message Respondent sent to opposing counsel (Attorney Doe) in a

pending domestic matter. Respondent represented the mother and Attorney Doe represented the father in an emotional and heated domestic dispute. It was within this context that Respondent sent Attorney Doe the following e-mail (the "Drug Dealer" e-mail):

> I have a client who is a drug dealer on ... Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near ... Street. Think about it. Am I right?

Attorney Doe's spouse, also an attorney, filed the complaint in this matter after Attorney Doe disclosed the "Drug Dealer" e-mail to him. At the hearing, Respondent admitted that Attorney Doe's daughter had no connection to the domestic action.

At the hearing, Respondent asserted that the e-mail was in response to daily obnoxious, condescending, and harassing e-mails, faxes, and hand-delivered letters from Attorney Doe. These communications allegedly commented on the fact that Respondent is not a parent and therefore could not advise Respondent's client appropriately. In support of this contention, Respondent submitted five e-mail exchanges between Respondent and Attorney Doe, four of which were dated after the "Drug Dealer" e-mail. In further support of Respondent's assertions, Respondent claimed to possess ten banker's boxes full of e-mails and other documents that constituted daily bullying from Attorney Doe; however, these documents were not produced. Due to a lack of evidence supporting Respondent's assertions, the Panel found Respondent's testimony to be entirely lacking in credibility. Ultimately, the Panel found Respondent was subject to discipline for sending the "Drug Dealer" e-mail to Attorney Doe.

K. *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011). "In 2004, Respondent represented the Atlantic Beach Christian Methodist Episcopal ChurchFN1 ("Church") in a legal action it filed against the Town regarding a zoning dispute. The Town Attorney was Charles Boykin. The parties settled the action in 2007. As part of the settlement, the Church's action was dismissed, the Town paid damages to the Church, and the Church promised future compliance with all of the Town's building, permitting, and zoning requirements.

FN1. It also appears in the record as the Christian Methodist Episcopal Mission Church.

On April 30, 2009, Kenneth McIver, the new Town Manager, sent a notice about the need for zoning compliance to the owners of the Church property, Vonetta M. Nimocks and Eboni A. McClary ("Church's Landlords"). In his notice, McIver stated that as part of the prior settlement, "the judge ordered that the Church must comply with the Town's Zoning Ordinances and that a request for compliance must come from you, the owner[s]." McIver copied the notice to the Church's pastor, who gave it to Respondent.

On May 6, 2009, Respondent sent a letter about McIver's notice to the Church's Landlords. Respondent sent copies of his letter to McIver and Boykin. The remarks made by Respondent in his May 6th letter are the subject of this disciplinary proceeding. The letter reads in full as follows:

> You have been sent a letter by purported Town Manager Kenneth McIver. The letter is false. You notice McIver has no Order. He also has no brains and it is questionable if he has a soul. Christ was crucified some 2000 years ago. The church is His body on earth. The pagans at Atlantic Beach want to crucify His body here on earth yet again.
>
> We will continue to defend you against the Town's insane [sic]. As they continue to have to pay for damages they pigheadedly cause the church. You will also be entitled to damages if you want to pursue them.
>
> First graders know about freedom of religion. The pagans of Atlantic Beach think they are above God and the Federal law. They do not seem to be able to learn. People like them in S.C. tried to defy Federal law before with similar lack of success.

McIver delivered the letter to the Town Council, and three council members thereafter filed a disciplinary complaint against Respondent. ODC instituted formal charges against Respondent as a result of his conduct.

At the hearing on June 8, 2010, counsel for ODC stated: "ODC alleges that [Respondent's] statements questioning whether Mr. McIver has a soul, saying that he has no brain, calling the leadership of the Town pagans and insane and pigheaded violates his professional obligations, which include his obligation to provide competent representation to his clients; his obligation under Rule 4.4 to treat third parties in a way that doesn't embarrass them; Rule 8.4 to behave in a way that doesn't prejudice the administration of justice; and also [ ] the letter was not in conformity with his obligations under his oath of office, Rule 402(k)." Counsel for ODC further alleged that Respondent had failed to cooperate with disciplinary authority by refusing to answer the allegations against him, threatening to sue the complainants for filing the grievance, and questioning ODC's authority.

* * *

Respondent argues the rule contains its own "safe harbor" that protects "uncivil" remarks when they serve other purposes. However, the fact that the letter could have served other purposes does not prevent his conduct from being in violation of Rule 4.4(a). See, e.g., *In re Norfleet*, 358 S.C. 39, 595 S.E.2d 243 (2004) (finding an attorney who became angry and spoke in a threatening manner to a school principal who refused to turn over a student's file had violated Rule 4.4; the attorney was attempting to obtain the file for the otherwise legitimate purpose of using it in litigation).

Moreover, an attorney may not, as a means of gaining a strategic advantage, engage in degrading and insulting conduct that departs from the standards of civility and professionalism required of all attorneys. *See In re Golden*, 329 S.C. 335, 341, 496 S.E.2d 619, 622 (1998) (determining the attorney's conduct in questioning a witness by using sarcasm, unnecessary combativeness, threatening words, and intimidation served no legitimate purpose other than to embarrass, delay, or burden another person and, even if the witness was being uncooperative, it would not justify the attorney's insulting conduct, which was found to have "completely departed from the standards of our profession" as well as "basic notions of decency and civility").

It is clear from the record in this matter that Respondent sent the letter as a calculated tactic to intimidate and insult his opponents. Although Respondent maintains he used many of the words at the request of his client, the Church, Respondent cannot discharge his responsibility for his use of disparaging name-calling and epithets by simply stating he was asked to behave in this unprofessional manner by his client.

Respondent has also justified his conduct by arguing that he has a duty to provide zealous representation. We agree that an attorney has an obligation to provide zealous representation to a client. However, an attorney also has a corresponding obligation to opposing parties, the public, his profession, the courts, and others to behave in a civilized and professional manner in discharging his obligations to his client. Legal disputes are often emotional and heated, and it is precisely for this reason that attorneys must maintain a professional demeanor while providing the necessary legal expertise to help resolve, not escalate, such disputes. Insulting and intimidating tactics serve only to undermine the administration of justice and respect for the rule of law, which ultimately does not serve the goals of the client or aid the resolution of disputes.

* * *

After considering the record in this matter, we conclude Respondent has committed misconduct in the respects identified by the Hearing Panel, except for the allegation regarding the failure to cooperate. We further find the Hearing Panel's suggestion of a definite suspension is appropriate under the circumstances.

Based on Respondent's blatant incivility and lack of decorum in this instance and the aggravating factors found by the Hearing Panel, including his disciplinary history, we impose a definite suspension of ninety days. We further order Respondent to complete the Legal Ethics and Practice Program administered by the South Carolina Bar within six

months of reinstatement. Respondent's conduct in this matter reflects poorly on himself as a member of the legal profession and reflects negatively upon the profession as a whole. He represented to this Court at oral argument that in the future he will conduct himself in accordance with the RPC and treat all persons in a civil, dignified, and professional manner as is expected of all members of the South Carolina Bar. We expect nothing less."

The Ethics of Civility

John S. Nichols

Civility

Rules

- Rule 402(h), SCACR
  (Lawyer Oath)

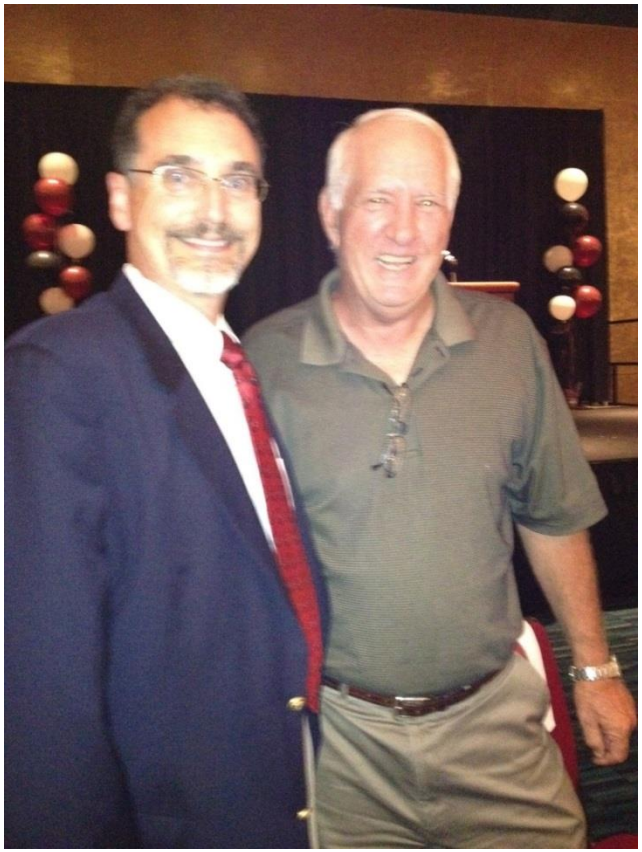
- Rule 4.4(a), RPC, Rule 407, SCACR
  (Respect for Rights of Third Persons)

- Rules 8.4 (a), (e), RPC, Rule 407, SCACR
  (Misconduct)

- Rule 7(a)(1), (5), (6), (7), RLDE, Rule 413, SCACR
  (Grounds for Discipline)

- Rule 11(a), SCRCP
  (duty to consult)

Rule 402(h), SCACR
Civility Oath



Rule 402(h) promises

- will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them

- pledge faithfulness, competence, diligence, good judgment and prompt communication to clients

- pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications to opposing parties and their counsel

Rule 402(h) promises

- will employ, for the purpose of maintaining the causes confided to the member, only such means as are consistent with trust and honor and the principles of professionalism

- will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law

Rule 402(h) promises

- will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which the lawyer is charged

- will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice

Rule 402 cases

- *In re Anonymous Member*, 392 S.C. 328, 332, 709 S.E.2d 633, 635 (2011)

- *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011)

- *In re Naert*, 414 S.C. 181, 777 S.E.2d 823(2015)

Rule 402 cases

In re Traywick, 433 S.C. 484, 860 S.E.2d 358 (2021)

Beginning in June 2020, ODC received complaints from **forty-six** separate individuals regarding statements Respondent made on his Facebook page.

Rule 402 cases

In re Traywick, 433 S.C. 484, 860 S.E.2d 358 (2021)

At that time, Respondent maintained a personal Facebook account with a privacy setting of "public," meaning his posts were visible to anyone, not just his Facebook "friends," and even if the person did not have a Facebook account. In his Facebook profile, Respondent identified himself as a lawyer and referenced his law firm.

Rule 402 cases

In re Traywick, 433 S.C. 484, 860 S.E.2d 358 (2021)

ODC identified twelve statements Respondent made in Facebook posts ODC believes tended to bring the legal profession into disrepute and violated the letter and spirit of the Lawyer's Oath. * * *

Rule 402 cases

In re Traywick, 433 S.C. 484, 860 S.E.2d 358 (2021)

All twelve of Respondent's statements are troubling. Nevertheless, we focus our analysis on only two of them. We do this mindful of Respondent's right to freedom of speech under the First Amendment to the United States Constitution.

Rule 402 cases

In re Traywick, 433 S.C. 484, 860 S.E.2d 358 (2021)

We find these two comments warrant a six-month suspension. These comments are not expressive; they are expressly incendiary. Both are statements by a lawyer on his social media account identifying him as such and listing the name of his law firm.

Rule 402 cases

In re Traywick, 433 S.C. 484, 860 S.E.2d 358 (2021)

The statements were intended to incite, and had the effect of inciting, gender and race-based conflict beyond the scope of the conversation Respondent would otherwise have with his Facebook “friends.” The fact Respondent is a lawyer exacerbated this effect.

Rule 402(h)

BOTTOM LINE: You always wear your "lawyer's hat" after you are sworn in and take the oath.

Rule 4.4, RPC
Respect for Rights of Third Persons

Rule 4.4(a), RPC

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person....”

Rule 4.4(a) comment

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons.

Comment [1]

Rule 4.4(a) comment

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

Comment [1]

Rule 4.4(a) cases

- *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011)

- *In re Norfleet*, 358 S.C. 39, 595 S.E.2d 243 (2004)

Rule 4.4(b), RPC

“A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

Rule 4.4(b), RPC

Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers.

Comment [2]

Rule 4.4(b), RPC

If a lawyer knows or reasonably should know that a such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures.

Comment [2]

Rule 4.4(b), RPC

Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.

Comment [2]

Rule 4.4(b), RPC

Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.

Comment [2]

Rule 4.4(b), RPC

For purposes of this Rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form.

Comment [2]

Rule 4.4(b), RPC

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address.

Comment [3]

Rule 4.4(b), RPC

Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 [Scope of Representation/Allocation of Authority] and 1.4 [Communication].

Comment [3]

Rule 8.4, RPC Misconduct

Rule 8.4, RPC

It is **professional misconduct** for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

Rule 8.4, RPC

It is **professional misconduct** for a lawyer to:

(d) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(e) engage in conduct that is prejudicial to the administration of justice;

Rule 7, RLDE, Rule 413, SCACR Grounds for Discipline

Rule 7, RLDE

(a) Grounds for Discipline. It shall be a ground for discipline for a lawyer to:

(1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers;

Rule 7, RLDE

(a) Grounds for Discipline. It shall be a ground for discipline for a lawyer to:

(5) engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law;

Rule 7, RLDE

(a) Grounds for Discipline. It shall be a ground for discipline for a lawyer to:

(6) violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR;

Rule 7, RLDE

(a) Grounds for Discipline. It shall be a ground for discipline for a lawyer to:

(7) willfully violate a valid court order issued by a court of this state or of another jurisdiction...

Rule 11, SCRCP

Rule 11(a), SCRCP

All motions filed shall contain an affirmation **that**

the movant's counsel **prior to filing the motion** has communicated, orally or in writing, with opposing counsel **and** …

Rule 11(a), SCRCP

All motions filed shall contain an affirmation **that** the movant's counsel **prior to filing the motion…**

has attempted in good faith to resolve the matter contained in the motion, **unless** …

Rule 11(a), SCRCP

All motions filed shall contain an affirmation

… unless the movant's counsel **certifies** that consultation would serve no useful purpose, or could not be timely held.

Rule 11(a), SCRCP

There is no duty of consultation on motions

- to dismiss,
- for summary judgment,
- for new trial, or judgment NOV, or
- on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or
- in real estate foreclosure cases, or
- with pro se litigants.

Rule 30(j), SCRCP
Conduct During Depositions

Rule 30(j), SCRCP

Deposition behavior:

- The witness must seek clarity from deposing counsel
- Objections are preserved (except as to privilege or under Rule 32(d)(3), SCRCP regarding errors or irregularities)
- Counsel may not direct a witness not to answer unless objection is made on the ground of privilege or court ordered limitation

Rule 30(j), SCRCP

Deposition behavior:

- No speaking objections or objections that suggest the answer
- No private, off-the-record conferences (except to assert privilege)
- Two business days notice of documents to be shown the witness

Deposition case

In re Anonymous Member, 346 S.C. 177, 552 S.E.2d 10 (2001)

SC Bar Standards of Professionalism

Principles stated as “guides and goals” for lawyer conduct

Civility as a concept has deep roots!

In granting judgment for plaintiff in a civil action for assault and battery, the court noted defendant "was in liquor, and behaved rather rudely" while plaintiff "was sober and had behaved himself with civility."

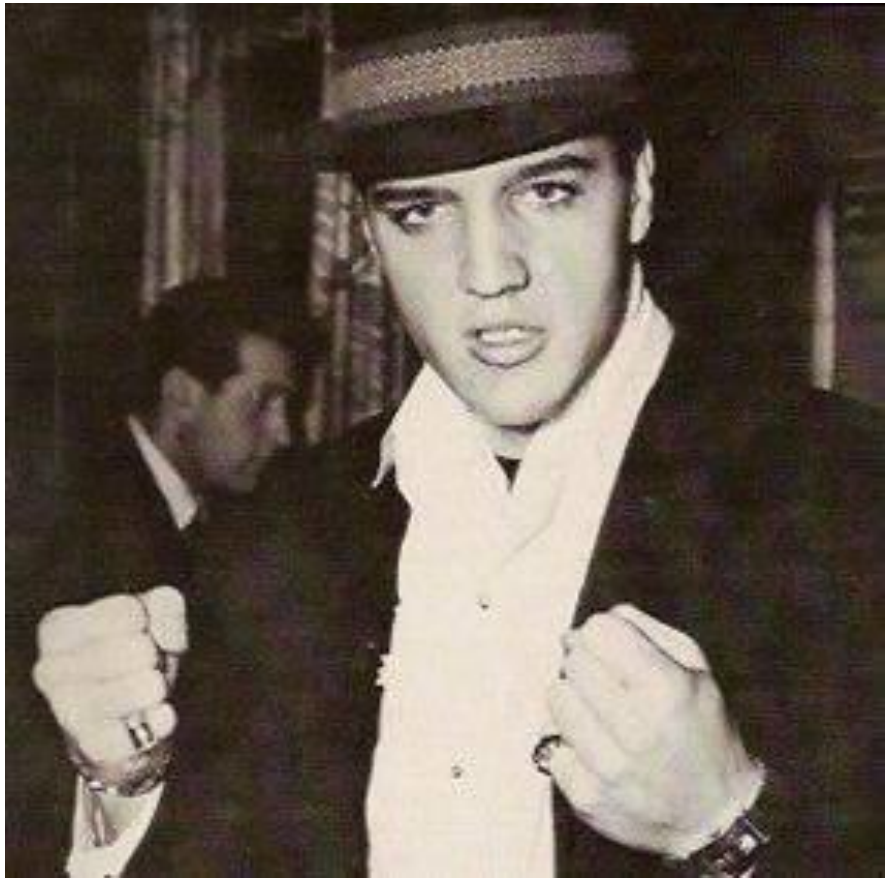
Flemming v. Ball, 1 S.C.L. (1 Bay) 3 (**1784**)

Lastly on Professionalism…

Civility and courtesy are "the lubricants which oil this great adversarial engine-the American system of adjusting citizens' disputes which is unique among the nations."

Spartanburg County DSS v. Padgett, 296 S.C. 79, 85, 370 S.E.2d 872, 876 (1988).

Questions?



South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Government Law Section

Friday, January 19

SCOTUS, Affirmative Action and DEI - Where to Now?

Rick Morgan

2024 South Carolina Bar Convention Government Law Section CLE- DEI And Affirmative Action after Students for Fair Admissions, Inc.

RICK MORGAN
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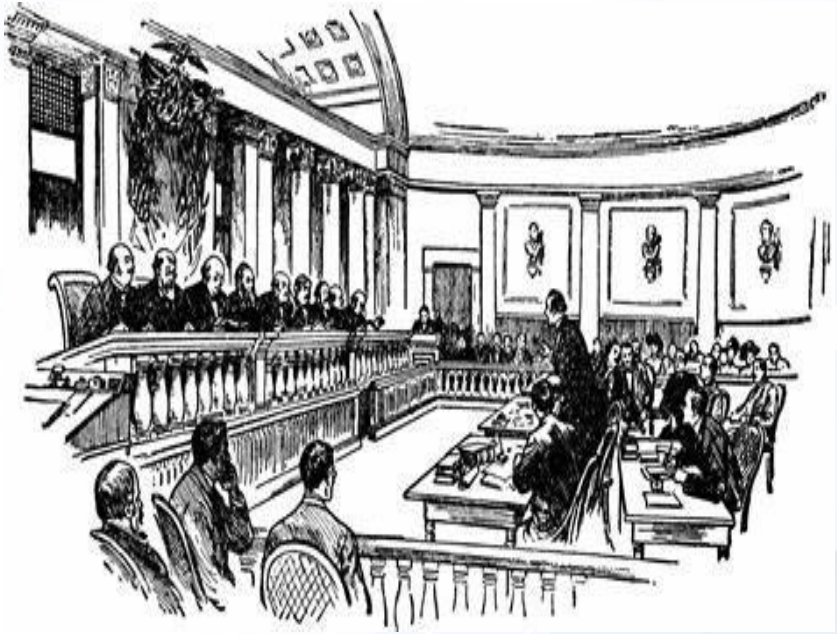
Students for Fair Admissions, Inc. (SFFA)

BURR FORMAN LLP

Students for Fair Admissions, Inc.



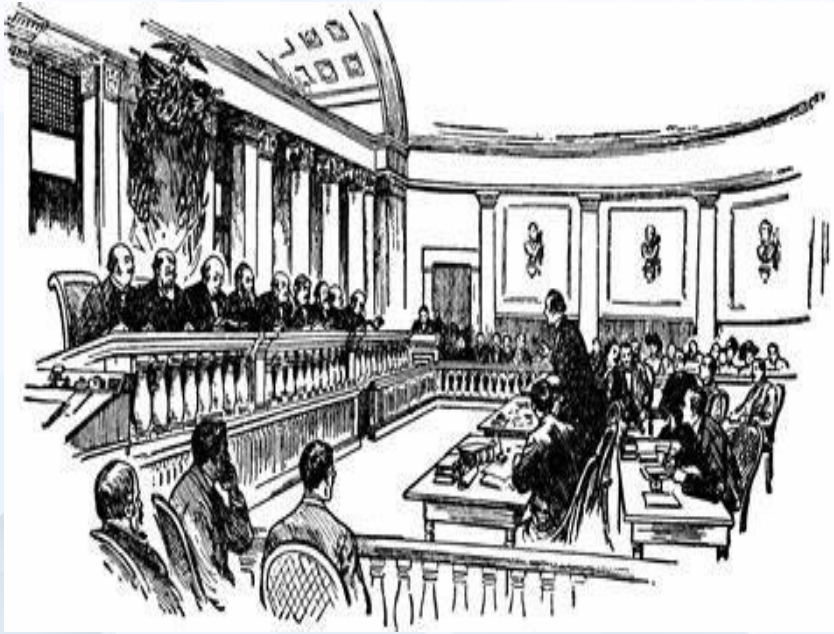
Background

The two cases filed by the Students for Fair Admissions, Inc. (“SFFA”) are the latest in a series of cases brought before the Supreme Court challenging the role of race-based admissions in higher education.

BURR FORMAN LLP

Students for Fair Admissions, Inc.

In *Regents of the University of California v. Bakke* (1978), a divided Supreme Court found that while racial quota programs violated the Equal Protection Clause, race could be used as one of a set of factors that universities use in admission decisions. Critically, Justice Powell wrote that campus diversity was a "compelling interest" that universities could pursue so long as they used the least restrictive means available



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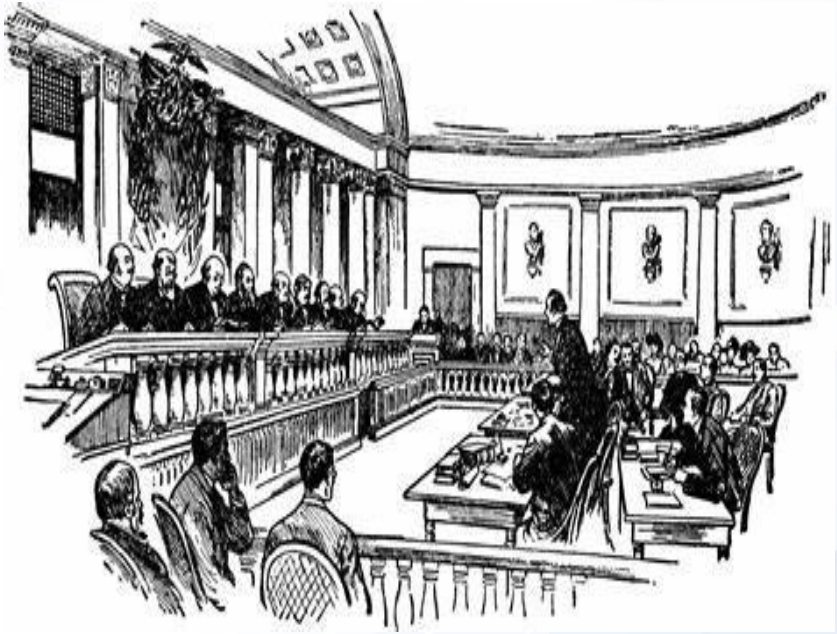
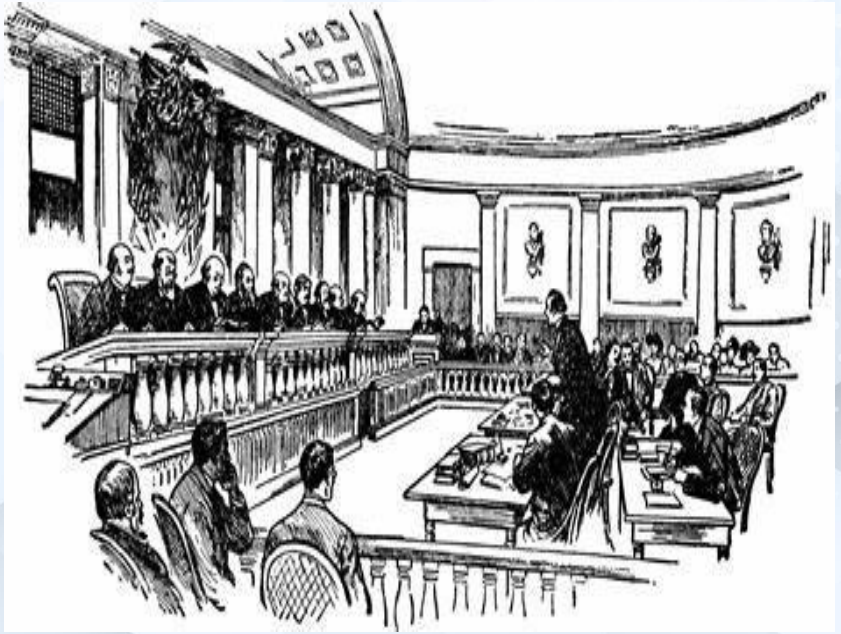
Students for Fair Admissions, Inc.



The Court next addressed the twin cases of *Gratz v. Bollinger* and *Grutter v. Bollinger* in 2003. In *Gratz*, the Supreme Court held that the university policy of granting points to an applicant based on race was unconstitutional because the practice made race a decisive factor in admissions. In *Grutter*, on the other hand, the Court found that a law school had a compelling interest in student diversity and that its use of an individualized assessment that considered race holistically was a narrowly tailored, and therefore permissible, practice.

Students for Fair Admissions, Inc.

The Supreme Court further refined its holdings on affirmative action in the two *Fisher v. University of Texas* cases. In *Fisher I* in 2013, the Court held that cases challenging race-conscious admissions programs are subject to the standard of strict scrutiny. Courts assessing university admissions programs must apply strict scrutiny to determine whether the programs are "precisely tailored to serve a compelling governmental interest." In *Fisher II* (2016), the Court found that the University of Texas met that standard.



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Students for Fair Admissions, Inc.

Harvard Case Issues

Challenged the use of race as a factor in university admissions decisions asserting that the college discriminated against Asian Americans by considering race and ethnicity as part of a candidate's personal rating.

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UNC Case Issues

Alleged that the university discriminated against White and Asian American students by considering race as part of a holistic admissions program.

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In both its briefing and oral arguments, SFFA asserted that the use of race in university admissions programs violates Title VI of the Civil Rights Act of 1964 and/or the Equal Protection Clause of the Fourteenth Amendment.

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Students for Fair Admissions, Inc.

- Title VI prohibits discrimination on the basis of race, color and national origin in any program assisted by federal funding.
- Almost all universities and colleges, including Harvard and UNC, receive federal funding in the form of student aid and research grants.
- The Equal Protection Clause prohibits race-based discrimination by state and federal governments except when: (1) furthering a compelling government interest, and (2) using the least restrictive means available.
- Since UNC is a state university, it is also subject to the Equal Protection Clause.

Students for Fair Admissions, Inc. Decision

Basic Holding

Harvard's and UNC's use of affirmative action in their admissions policies violates the Equal Protection Clause of the Fourteenth Amendment and Title VI.

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Students for Fair Admissions, Inc. Decision

A party must satisfy "strict scrutiny," a demanding level of review that permits discrimination on the basis of race only if it: (1) serves a compelling government interest, and (2) is narrowly tailored to achieve that interest.

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Core Analysis in SFFA of 6-3 Majority

- Its decisions have always reflected the "core purpose" of the Equal Protection Clause: to eliminate "all governmentally imposed discrimination based on race."
- Any exception must satisfy "strict scrutiny," a demanding level of review that permits discrimination on the basis of race only if it: (1) serves a compelling government interest, and (2) is narrowly tailored to achieve that interest.
- The Court concluded that the universities have "fallen short" of satisfying that burden.
- The universities' interest in obtaining the educational benefits of a diverse student body were "commendable goals" but not "sufficiently coherent for purposes of strict scrutiny."
- The objectives outlined by both institutions — like training future public and private sector leaders, preparing graduates to adapt to an increasingly pluralistic society, and enhancing cross-racial understanding — lacked precision and measurability.

Core Analysis in SFFA of 6-3 Majority

- The Court stated that it was "unclear how courts are supposed to measure any of these goals."
- The Court held that the universities' use of race was not narrowly tailored because the use of affirmative action did not necessarily further the goals the universities sought to achieve.
- Court emphasized that race-based admissions systems violate the Equal Protection Clause by using race "as a 'negative'" and by perpetuating racial stereotypes.
- By grounding their admissions policies in race-based considerations, the universities were failing to treat citizens as individuals and were, instead, classifying them as components of a racial class.
- The *Grutter* affirmative action survived constitutional review because it was temporary and had a "logical end point."

Core Analysis in SFFA of 6-3 Majority

- The Harvard and UNC admissions programs had no logical endpoint because it will never be clear when the universities' goals will have been achieved.
- Court concluded, the admissions programs violated the Equal Protection Clause because they "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful endpoints."
- The Court observed that universities can continue to consider how race has influenced an applicant's life experiences, specific to that applicant's "unique ability to contribute to the university." But "the student must be treated based on his or her experiences as an individual — not on the basis of race."

Impact of 6-3 SFFA Majority for Universities

- **Universities may not make use of race-based admissions systems.**
- **Universities which rely on a race-based admissions approach will need to retool their method of candidate selection.**
- **Universities should also anticipate increased scrutiny of their admissions programs by potential litigants and others for disallowed race-based admissions practices.**

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Impact of 6-3 SFFA Majority for Universities

Universities should be wary of indirect efforts to reestablish the prior system ("universities may not simply establish through application essays or other means the regime we hold unlawful today").

Universities may want to review other areas such as recruitment, financial aid and scholarships.

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Impact of 6-3 SFFA Majority for Universities

August Biden Administration Guidance of Permitted Activities

- **Targeted Outreach and Recruitment Programs**
- **Pipeline Programs**
- **Collection of Demographic Data**
- **Holistic Review and Race-Neutral Criteria**
- **Yield and Retention Strategies**

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Potential Impact of SFFA on Employers

- Understanding the challenged affirmative action programs were governed by Title VI and the Fourteenth Amendment while employment-based decisions are governed by Title VII, it is possible that lower courts may later use this precedent to analogize affirmative action in the university admissions context to the employment context.
- Understanding that the holdings in the SFFA cases do not directly address Title VII, courts have regularly borrowed from decisions construing Title VII in their consideration of Title VI cases and vice versa.
- Title VII and other employment-related anti-discrimination statutes prohibit consideration of race in employment decisions, with very few exceptions.
- One exception is voluntary affirmative action programs that meet the requirements outlined by the Supreme Court in *United Steelworkers of America v. Weber*, 443 US 193 (1979) and its progeny.

Potential Impact of SFFA on Employers

- In *Weber*, the Supreme Court held that voluntary affirmative action programs were permissible under Title VII so long as they: (1) were remedial in nature and designed to eliminate a clear imbalance in traditionally segregated job categories; (2) do not unnecessarily hinder the interests of non-diverse candidates; and (3) are temporary measures intended to attain, but not maintain, a balanced workforce.
- These voluntary AAP programs are rare, but the rationale in the SFFA cases could be used in the employment arena.

Diversity Equity and Inclusion

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Diversity Equity and Inclusion

General Definitions

Diversity, equity, and inclusion (DEI) are values and practices that promote fair treatment and full participation of all people, especially those who have historically faced discrimination or exclusion.

- Diversity is the recognition and appreciation of difference and inequity;
- Equity is the removal of barriers and provision of resources;
- Inclusion is the creation of equal opportunity and a sense of belonging.

Diversity Equity and Inclusion

DEI Statement

[ABC Agency] is committed to promoting and cultivating a culture of diversity, equity, and inclusion. The agency realizes this culture, in part, by embracing and valuing all the characteristics that make employees unique, including differences in age, color, disability, ethnicity, family or marital status, gender identity or expression, language, national origin, physical and mental ability, political affiliation, race, religion, sexual orientation, socio-economic status, or veteran status. At [ABC Agency], we welcome varying perspectives and experiences, and we recognize diversity as a strength.

Diversity Equity and Inclusion

Goals & Initiatives

Our goal is to achieve inclusive, diverse and equitable outcomes in recruitment, retention, development, promotion, and compensation. Leading these efforts are the Agency's Chief Diversity & Inclusion Officer, who reports directly to the Executive Director, and its DEI Committee, which is comprised of managers and staff from across the Agency's geographic footprint. Together, they work to ensure that diversity, equity, and inclusion permeate the Agency's policies and practices, including:

- Participation in job fairs and campus recruitment efforts targeting diverse talent.
- Agency-wide unconscious bias training for attorneys and staff.
- Educational programming in conjunction with annual observances of cultural traditions and heritage month.
- A robust program offering summer internships, mentoring, and hands-on experience to students of diverse backgrounds.
- Support participation in and provide resources for diverse organizations and efforts related to the Agency’s mission.

Diversity Equity and Inclusion Challenges

- Not prioritized
- No measurable strategy in place for DEI
- Lack of goals and metrics
- Inadequate training
- No buy-in from leadership
- Budgetary restrictions
- Cultural resistance
- Limited accountability

Diversity Equity and Inclusion post SFFA case

- ***Conduct an audit of the entity's existing DEI programs and assess the potential risk of challenges in light of this decision.***
- ***Review and revise, if needed, internal communications about DEI programs and strategies.***
- ***Provide training to educate managers, recruiters, and other decision-makers about the entity's policies and procedures, including areas of risk.***
- ***Stay abreast of legal developments, including state-specific laws and directives.***

The Legal Background to Affirmative Action

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Affirmative Action

Affirmative action is generally defined as an effort to develop a systematic approach to eliminate the current and lingering effects of prior discrimination. In the employment context it is a race and sex conscious effort to achieve equal employment opportunity for all race/sex groups in a workforce. In the educational context it is an effort that is focused on the educational benefits that flow from diversity.

Executive Orders, Statutes and Federal Government Contracts

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Executive Orders

Executive Order 10925 – March 6, 1961

All government contractors, except in special circumstances, required to take affirmative action to ensure that applicants are employed and that employees are treated without regard to their race, creed, color or national origin.

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Executive Orders

Executive Order 11246 – September 24, 1965

The President's Committee on Equal Employment Opportunity (PCEEO) function divided between EEOC and Office of Federal Compliance – in 1975 renamed the Office of Federal Contract Compliance Programs within the United States Department of Labor

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Executive Orders

Benchmarks for plans

- **Applies to federal contracts and federally assisted contracts totaling more than $10,000**
- **At least 50 employees and a single contract of $50,000 or more must also develop and AAP as described in 41 CFR 60-.**
- **Construction only must comply with 16 specific affirmative actions outlined in the construction clause**

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Section 503 of the Rehabilitation Act, as Amended

- **Jurisdiction threshold adjusted to $15,000 for inflation**
- **If at least 50 employees and a single contract of $50,000 or more, then it must develop a Section 503 AAP as described in 41 CFR Part 60-741, Subpart C**
- **Applies to federal construction contracts, not federally assisted construction contracts**

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Vietnam Era Veterans' Readjustment Act of 1974, as amended

- **Jurisdiction threshold adjusted to $150,000 for inflation**
- **If at least 50 employees and a single contract of $150,000 or more, then it must develop a VEVRA AAP as described in 41 CFR Part 60-300, Subpart C**
- **Applies to federal construction contracts, not federally assisted construction contracts**

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THE CAVEAT

If state or local government has government contracts that meet the threshold for coverage, it is covered. However, the requirements of Executive Order 11246 apply only to the agency, instrumentality or subdivision of the State or local government that participates in work on or under the Government contract or subcontract. Further, except for universities and medical facilities, a state or local government agency, instrumentality, or subdivision that has a government contract is exempt from the requirement to develop and maintain a written affirmative action program.

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Potential Impact of SFFA on Employers

- It appears unlikely that such requirements will be affected by the Supreme Court's decisions.
- Affirmative action obligations for federal contractors are significantly different from those at issue in the SFFA cases. Federal contractors and subcontractors are expressly prohibited from considering race as a factor in an individual's hiring or any other employment-related decision.
- Federal contractors are not permitted to set quotas, preferences or set asides based on protected characteristics. Instead, covered contractors may only use collective data on protected characteristics as a tool, for example, to compare groups' actual employment against their availability, assess the effectiveness of recruitment and outreach efforts, and evaluate personnel processing and promotion standards.

State Statute

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South Carolina Human Affairs Law

SECTION 1-13-110. Affirmative action plans by State agencies; approval by Commission; action by General Assembly.

Each State agency shall develop an Affirmative Action Plan to assure equitable employment for members of minorities (race and sex) and shall present such Plans to the Human Affairs Commission. On or before February 1 of each year, the Human Affairs Commission shall submit a report to the General Assembly concerning the status of the Affirmative Action Plans of all State agencies. If any Affirmative Action Plans have been disapproved, the report shall contain the reasons for such disapproval. If the General Assembly takes no action within sixty (60) days on those Plans which have been disapproved, the action of the Human Affairs Commission shall be final.

South Carolina Human Affairs Law

SECTION 1-13-70. Powers of Commission.

The Commission shall have the power:

(c) To promulgate, in accordance with the provisions of this chapter, regulations including, but not limited to, regulations requiring the posting of notices prepared or approved by the Commission and the submission of equal employment opportunity plans and reports by any state agency or department or local subdivisions of a state agency or department, according to a format and schedule approved by the Commission.

(i) To require from any state agency or department or local subdivisions of a state agency or department such reports and information at such times as it may deem reasonably necessary to effectuate the purposes of this chapter.

South Carolina Human Affairs Law

South Carolina Code of State Regulations §65-20

Each State agency, to assure its practice of equal employment, shall submit an Equal Employment Opportunity Report to the State Human Affairs Commission. Supplementary reports pursuant to the said Report shall be submitted to the State Human Affairs Commission on a regular basis as and when requested by the State Human Affairs Commission.

South Carolina Code of State Regulations §62-21

Each State Agency Head shall designate an Equal Employment Opportunity Officer. Said Equal Employment Officer shall be responsible for the implementation and administration of the required Equal Employment Opportunity Report and shall be responsible for an and all reports due to the State Human Affairs Commission under said Report. The name of each State Agency's Equal Employment Opportunity Officer shall be submitted to the State Human Affairs Commission.

South Carolina Human Affairs Law

- **Each state agency, college or university submit for approval a written Affirmative Action Plan to the South Carolina Human Affairs Commission (SCHAC).**

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South Carolina Human Affairs Law

An Affirmative Action Plan sets forth employment goals for minorities and women whose representation in the workforce is less than would be reasonably expected by availability estimates of the qualified labor pool. The plan also names the positive affirmative steps the employer will take to recruit and to employ qualified minorities and women. If followed, the Affirmative Action Plan becomes the guide for a program that should result in fair employment for all race/sex groups, including white males.

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South Carolina Human Affairs Law

The goals component of the plan is not designed to be, nor should be interpreted to be, permitting unlawful quotas with respect to persons of any race or sex. Rather, the goals are used to target and measure the effectiveness of affirmative action efforts to eliminate and prevent discrimination.

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South Carolina Human Affairs Law

An Affirmative Action Plan approved by SCHAC means only that the plan meets our standards for an acceptable planning document. If the plan is not followed, the state employer has merely met its paper compliance obligations under the State Human Affairs Law but has failed to voluntarily implement a program.

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South Carolina Human Affairs Law

The South Carolina Human Affairs Commission cannot make an agency follow its affirmative action plan. SCHAC can monitor recruitment, hiring and promotion practices in state agencies but cannot tell state agencies whom to hire or promote. SCHAC can also train employers to recruit, hire and promote without discriminating but cannot guarantee that employers will recruit, hire and promote without discriminating.

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South Carolina Human Affairs Law

An Affirmative Action Plan and program will not immunize an agency against charges of discrimination. Thus, an agency may have the very best written Affirmative Action Plan but still be susceptible to charges of discrimination.

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Questions?

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Rick Morgan is certified by the South Carolina Supreme Court as a specialist in employment and labor law. He represents employers and has tried to verdict numerous employment defamation, discrimination, harassment and retaliation cases.

Rick advises and counsels employers on all aspects of employment and labor law issues and has experience representing employers in state and federal courts and in administrative tribunals. He has defended employers in litigation involving wage and hour laws, unemployment compensation, unfair labor practices, contract disputes, wrongful termination, negligent supervision, hiring, retention, intentional infliction of emotional distress, conspiracy and enforcement of non-compete agreements. In addition, Rick has advised employers during union organizing attempts and in OSHA matters. Rick sat as a part-time Municipal Judge for the City of Columbia for eight years.

350 Attorneys.

19 Offices.

1 Firm.

Results Matter.

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