



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

ADVANCE SHEET NO. 46
November 27, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

In the Matter of Douglas Andrew Gaines, Respondent.

Appellate Case No. 2019-001667

Opinion No. 27931

Submitted November 8, 2019 – Filed November 27, 2019

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Ericka M.
Williams, Senior Assistant Disciplinary Counsel, both of
Columbia, for the Office of Disciplinary Counsel.

Douglas Andrew Gaines, of Anderson, *pro se*.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension not to exceed two years. We accept the Agreement and suspend Respondent from the practice of law in this state for two years, retroactive to July 24, 2018, the date of his interim suspension. *In re Gaines*, 424 S.C. 16, 817 S.E.2d 632 (2018). The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent was retained by Kenneth and Sharon Smith to represent their company, Dakota Finance, LLC (Dakota Finance), in a civil action. The Smiths paid Respondent a \$3,000 retainer. On May 26, 2017, Respondent filed a

summons and complaint on behalf of Dakota Finance. The defendant filed an answer and counterclaim on July 18, 2017.

On August 18, 2017, Respondent contacted counsel for the defendant and requested a ten-day extension to answer or otherwise plead to the counterclaim. Defense counsel granted the extension, making the reply to the counterclaim due on August 28, 2017. On September 20, 2017, Respondent contacted defense counsel and left a message indicating the reply to the counterclaim would be filed on September 21, 2017. On October 3, 2017, defense counsel filed an affidavit of default based on Respondent's failure to file a reply to the counterclaim. On October 6, 2017, Respondent filed a reply to the counterclaim.

On November 10, 2017, Sharon Smith, on behalf of Dakota Finance, sent Respondent a letter terminating Respondent's representation and requesting a detailed invoice for services rendered, the client file, and a refund of the retainer fee paid. Respondent failed to timely provide these items.

On April 2, 2018, the case came before the circuit court on the non-jury motion roster. Respondent was given electronic notice of the hearing as he was still the attorney of record for Dakota Finance. Respondent failed to notify defense counsel or the circuit court that he was in the process of being relieved as counsel in the case. Respondent did not appear at the hearing and also failed to notify the Smiths or their new attorney of the hearing. On April 3, 2018, the circuit court granted an order of default as to the defendant's counterclaims due to the failure of Respondent and the Smiths to appear at the April 2, 2018 hearing.

On June 29, 2018, a notice to appear before Disciplinary Counsel on July 19, 2018, and a subpoena commanding Respondent bring two client files to his appearance were personally served on Respondent by the South Carolina Law Enforcement Division. However, Respondent failed to appear to respond to questions under oath or provide the subpoenaed files. On July 29, 2018, ODC mailed Respondent a supplemental notice of investigation to Respondent's address on file with the Attorney Information System (AIS). The supplemental notice of investigation was returned unclaimed.

Matter II

In 2009, Lou Moreno retained Respondent to represent him in a civil action captioned *Lou Moreno and Tracy Grant v. Rob Elsberry* (the Moreno/Grant lawsuit). Mr. Moreno paid Respondent a \$3,500 retainer. On June 9, 2010, Respondent signed a consent order staying the action and transferring the claims to binding arbitration. The executed order was filed on June 28, 2010. However, since 2010, Respondent has failed to (1) take any meaningful action in the case, (2) expedite the litigation consistent with the interest of his client, or (3) keep Mr. Moreno reasonably informed regarding the status of his case.

In 2008, NGM Insurance Company (NGM) issued a commercial general liability insurance policy to Robert Elsberry (d/b/a Five Starr Construction), the defendant in the Moreno/Grant lawsuit Respondent filed in 2009. On October 8, 2010, NGM filed a suit for declaratory judgment against Mr. Moreno and others (the NGM lawsuit), in an effort to avoid any potential liability arising out of the previously filed Moreno/Grant lawsuit.

The summons and complaint in the NGM lawsuit were served on Respondent as counsel for Mr. Moreno and Ms. Grant. However, Respondent failed to inform Mr. Moreno. On or about September 23, 2011, Respondent consented to a stipulation of dismissal in the NGM lawsuit without consulting with Mr. Moreno.

On March 7, 2018, Mr. Moreno sent a certified letter to Respondent terminating Respondent's services and requesting his complete client file and a refund of unused retainer funds. Respondent failed to respond to Mr. Moreno's request for his client file and failed to return any unused retainer fees.

A notice of investigation was emailed to Respondent and sent to his physical and post office box addresses on file with AIS requesting a response within fifteen days. When Respondent failed to respond within the allotted time period, ODC mailed certified letters pursuant to *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), to Respondent's physical and post office box addresses again requesting a response to the notice of investigation. Respondent failed to submit a written response to the notice of investigation.

Matter III

On September 29, 2011, Respondent was retained by James G. Clarke to represent TM Equity Company in the handling of a foreclosure action on a property in Belton, South Carolina. Respondent was paid a \$2,500 retainer and an additional \$500 for estimated fees. Since 2011, Respondent has failed to (1) take any meaningful action in the case, (2) expedite the litigation consistent with the interests of his client, or (3) keep Mr. Clarke reasonably informed regarding the status of the case.

On April 18, 2018, Respondent was placed on administrative suspension for failing to file a report showing his compliance with the continuing legal education requirements pursuant to Rule 408, SCACR, for the reporting year ending in February 2018. Following his administrative suspension, Respondent failed to refund the unused portion of the fees to Mr. Clarke.

Respondent also failed to respond to both ODC's initial notice of investigation and a subsequent *Treacy* letter.

Law

Respondent admits that by his conduct he has violated Rules 1.1 (competence); 1.2(a) (scope of representation and allocation of authority); 1.3 (diligence); 1.4 (communication); 1.16(d) (declining or terminating representation); 3.2 (expediting litigation); 3.4(c) (fairness to opposing party and counsel); 8.1(b) (knowingly failing to respond to a lawful demand for information from an admissions or disciplinary authority); and 8.4(e) (engaging in conduct prejudicial to the administration of justice), RPC, Rule 407, SCACR.

Respondent also admits the above allegations constitute grounds for discipline under Rules 7(a)(1) (violating the Rules of Professional Conduct); 7(a)(3) (knowingly failing to respond to a lawful demand from a disciplinary authority, including a request for a response); and 7(a)(5) (engaging 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), RLDE, Rule 413, SCACR.

Conclusion

We find Respondent's misconduct warrants a definite suspension from the practice of law in this state for two years. Accordingly, we accept the Agreement and suspend respondent for a period of two years, retroactive to the date of his interim suspension.

Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission), or enter into a reasonable payment plan with the Commission, within sixty (60) days of the date of this opinion. Additionally, Respondent shall enter into a restitution repayment plan within sixty (60) days of the date of this opinion for the payment of restitution to James Clarke in the amount of \$3,000 and to Lou Moreno in the amount of \$3,500, and for reimbursement of the Lawyers' Fund for Client Protection for any claims paid on Respondent's behalf.

We also take this opportunity to remind Respondent that, prior to seeking reinstatement, he must demonstrate his compliance with Rule 33, RLDE, Rule 413, SCACR (reinstatement following a definite suspension of nine months or more), including completion of the Legal Ethics and Practice Program Ethics School within one year prior to filing a petition for reinstatement.

Finally, within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR (duties following suspension).

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

In the Matter of Elizabeth Anne Perkins, Petitioner.

Appellate Case No: 2019-001736

ORDER

On March 28, 2019, Petitioner was suspended from the practice of law for a period of six months. *In re Perkins*, S.C. Sup. Ct. Order dated Mar. 28, 2019. Petitioner has filed an affidavit demonstrating she has complied with the requirements of Rule 32, RLDE, Rule 413, SCACR (reinstatement following a definite suspension of less than nine months).

Petitioner's petition for reinstatement is granted, and Petitioner is hereby reinstated to the practice of law in this state. However, we remind Petitioner of the Court's previous order requiring her continued compliance with the one-year monitoring contract she executed with Lawyers Helping Lawyers on April 4, 2019, and warn Petitioner that failure to comply with the terms of that contract could result in additional disciplinary action, including suspension from the practice of law.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

November 27, 2019

The Supreme Court of South Carolina

In the Matter of George Hunter McMaster, Respondent.

Appellate Case No. 2019-001521

ORDER

Respondent has submitted a motion to resign in lieu of discipline pursuant to Rule 35, RLDE, Rule 413, SCACR. We grant the motion to resign in lieu of discipline. In accordance with the provisions of Rule 35, Respondent's resignation shall be permanent. Respondent will never be eligible to apply, and will not be considered, for admission or reinstatement to the practice of law or for any limited practice of law in South Carolina.

Within fifteen (15) days from the date of this order, Respondent shall file an affidavit with the Clerk of Court showing Respondent has complied with Rule 30, RLDE, and shall also surrender his Certificate of Admission to Practice Law to the Clerk of Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

November 27, 2019

The Supreme Court of South Carolina

Re: Amendments to Rule 426, South Carolina
Appellate Court Rules

Appellate Case No. 2019-000846

ORDER

The South Carolina Bar has filed a petition requesting the Court adopt comments to Rule 426 of South Carolina Appellate Court Rules. The comments are currently contained in the American Bar Association's Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. We grant the Bar's request to add the comments, with minor modifications to ensure the comments are consistent with Rule 426.

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution, Rule 426 of the South Carolina Appellate Court Rules is amended as set forth in the attachment to this Order. The amendment is effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
November 27, 2019

Rule 426, South Carolina Appellate Court Rules, is amended to add the following comments to the rule:

Comment:

[1] A major disaster in this or another jurisdiction may cause an emergency affecting the justice system with respect to the provision of legal services for a sustained period of time interfering with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or, though independent of the disaster, whose legal needs temporarily are unmet because of disruption to the practices of local lawyers. Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services are provided on a pro bono basis through an authorized not-for-profit entity or such other organization(s) specifically designated by the Supreme Court. A major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency, or an event caused by terrorists or acts of war.

[2] Under paragraph (a)(1), the Supreme Court shall determine whether a major disaster causing an emergency affecting the justice system has occurred in this jurisdiction, or in a part of this jurisdiction, for purposes of triggering paragraph (b) of this Rule. The Supreme Court may, for example, determine that the entirety of this jurisdiction has suffered a disruption in the provision of legal services or that only certain areas have suffered such an event. The authority granted by paragraph (b) shall extend only to lawyers authorized to practice law and not disbarred, suspended, or otherwise restricted from practice in any other manner in any other jurisdiction.

[3] Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended, or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency caused by a major disaster; notwithstanding that they are not otherwise authorized to practice law in the affected jurisdiction. Other restrictions on a lawyer's license to practice law that would prohibit that lawyer from providing legal services pursuant to this Rule include, but are not limited to, probation, inactive status, disability inactive status, or a non-disciplinary administrative suspension for failure to complete continuing legal education or other requirements. Lawyers on probation may be subject to monitoring and specific limitations on their practices. Lawyers on inactive status, despite being characterized in many jurisdictions as being "in good standing," and lawyers on disability inactive status are not permitted to practice law. Public protection warrants exclusion of these lawyers from the authority to provide legal services as defined in this Rule. Lawyers permitted to provide legal services pursuant to this Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. Alternatively, the Supreme Court may instead designate other specific organization(s) through which these legal services may be rendered. Under paragraph (b), an emeritus lawyer from another United States jurisdiction may provide pro bono legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer is authorized to provide pro bono legal services in that jurisdiction pursuant to that jurisdiction's emeritus or pro bono practice rule. Lawyers may also be authorized to provide legal services in this jurisdiction on a temporary basis under Rule 5.5(c) of the Rules of Professional Conduct.

[4] Lawyers authorized to practice law in another jurisdiction, who principally practice in the area of such other jurisdiction determined by the Supreme Court to have suffered a major disaster, and whose

practices are disrupted by a major disaster there, and who are not disbarred, suspended, or otherwise restricted from practicing law in any other manner in any other jurisdiction, are authorized under paragraph (c) to provide legal services on a temporary basis in this jurisdiction. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. For purposes of this Rule, the determination of a major disaster in another jurisdiction should first be made by the highest court of appellate jurisdiction in that jurisdiction. For the meaning of "arise out of and reasonably related to," see Rule 5.5 Comment [14], Rules of Professional Conduct.

[5] Emergency conditions created by major disasters end, and when they do, the authority created by paragraphs (b) and (c) also ends with appropriate notice to enable lawyers to plan and to complete pending legal matters. Under paragraph (d), the Supreme Court determines when those conditions end only for purposes of this Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of this jurisdiction under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end 60 days after the Supreme Court makes such a determination with regard to an affected jurisdiction.

[6] Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of this jurisdiction. Court appearances are subject to the pro hac vice admission requirements in Rule 404 of the South Carolina Appellate Court Rules. The Supreme Court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in this jurisdiction under paragraph (b) to appear in all or designated courts of this jurisdiction without need for such pro hac vice admission. If such an authorization is included, any pro hac vice admission fees shall be waived. A lawyer who has appeared in the courts of this jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a

declaration under paragraph (d) that the conditions created by major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the Rules of Professional Conduct.

[7] Authorization to practice law as a foreign legal consultant or in-house counsel in a United States jurisdiction offers lawyers a limited scope of permitted practice and may therefore restrict that person's ability to provide legal services under this Rule.

[8] The ABA National Lawyer Regulatory Data Bank is available to help determine whether any lawyer seeking to practice in this jurisdiction pursuant to paragraphs (b) or (c) of this Rule is disbarred, suspended, or otherwise subject to a public disciplinary sanction that would restrict the lawyer's ability to practice law in any other jurisdiction.

The Supreme Court of South Carolina

Re: Amendments to Rules 1.0, 1.1, and 1.6, Rules of
Professional Conduct, Rule 407, South Carolina
Appellate Court Rules

Appellate Case No. 2019-000318

ORDER

The South Carolina Bar has filed a petition asking this Court to amend Rules 1.0, 1.1, and 1.6 of the Rules of Professional Conduct, which are contained in Rule 407 of the South Carolina Appellate Court Rules. The Bar proposes adopting modified versions of amendments the American Bar Association (ABA) made to the ABA Model Rules of Professional Conduct in 2012 as part of the ABA's Ethics 20/20 initiative. The amendments to these Model Rules are meant to provide guidance to lawyers about the benefits and risks of using certain technologies, with a particular emphasis on the protection of clients' confidential information.

After reviewing the Bar's petition and proposed amendments, as well as the ABA's amendments to these Model Rules, we elect to adopt the ABA's version of the amendments to Rule 1.0 and Rule 1.6, with minor changes to reflect the differences between the ABA Model Rules and the Rules of Professional Conduct adopted by this Court. We adopt a modified version of the Bar's proposed amendment to Comment 6 to Rule 1.1, and decline to adopt the Bar's proposed new Comment 7.

Pursuant to Article V, Section 4 of the South Carolina Constitution, we amend Rules 1.0, 1.1, and 1.6 of the Rules of Professional Conduct, which are contained in Rule 407 of the South Carolina Appellate Court Rules, as set forth in the attachment to this Order. The amendments are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
November 27, 2019

Rule 1.0(r), RPC, Rule 407, SCACR, is amended to provide:

(r) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment 6 to Rule 1.1, RPC, Rule 407, SCACR, is amended to provide:

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including a reasonable understanding of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit information related to the representation of a client, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.6, RPC, Rule 407, SCACR, is amended to add new paragraph (c), which provides:

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment 20 to Rule 1.6, RPC, Rule 407, SCACR, is amended to provide:

[20] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made

reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

Comment 21 to Rule 1.6, RPC, Rule 407, SCACR, is amended to add the following sentence to the end of the Comment:

Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.