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JANUARY 2025 VOLUME 36, ISSUE 3

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COVER PHOTO BY JOHN MANN

FEATURES

On the cover: Past Presidents of the SC Bar gathered at the May 2024 Assembly in Moncks Corner. Pictured L-R: ***Henry B. Smythe, Jr.****, Charleston (1997-98);* ***D. Michael Kelly****, Columbia (1999-2000);* ***Lanneau W. Lambert, Jr.****, Columbia (2007-08);* ***LeRoy F. Laney****, Columbia (2020-21);* ***M. Dawes Cook, Jr.****, Charleston (2018-19);* ***Fred W. Suggs, Jr.****, Greenville (2009-10);* ***Elizabeth Van Doren Gray****, Columbia (2001-02);* ***John O. McDougall****, Sumter (1998-99);* ***Russell T. Infinger****, Greenville (2023-24);* ***Beverly A. Carroll****, Rock Hill (2019-20);* ***William K. Witherspoon****, Columbia (2015-16);* ***Mary E. Sharp****, Beaufort (2021-22);* ***Daniel B. White****, Greenville (2005-06);* ***Shaheena R. Bennett****, Moncks Corner (2024-25);* ***J. Calhoun Watson****, Columbia (2014-15)*

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SC Lawyer, published bi-monthly by the South Carolina Bar, seeks to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and legal reform, and to facilitate the exchange of ideas pertaining to the practice of law from a variety of authors with differing viewpoints. Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the South Carolina Bar, its officers, Board of Governors, House of Delegates, Sections, Committees, Divisions, Editorial Board or staff. No endorsement of any product or service offered by any advertisement is intended or implied by publication. Advertisers are solely responsible for the content of their advertisement, and the South Carolina Bar reserves the right to edit or reject any ad copy for any reason.

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Writing Our History

BY EMMA DEAN

We were walking the cobble stone streets of Boston one dreary Fall day when the tour guide in colonial garb started talking about the Boston Massacre. Our children huddled for warmth around me as the tour guide shared about the mob confronting the British soldiers, and then continued to John Adams serving as an attorney for these same accused, hated British soldiers. Instantly, my children disappeared from my side and stopped making eye contact with me. They knew a lecture from me about the role of an attorney and the importance of fairness even when it was unpopular was coming. The tour guide gave the lecture instead, and I listened and smiled knowing that my kids, no matter how reluctantly, also know the importance of the justice system and fairness – that overarching theme that each attorney feels in our hearts.

As we start the Bar's 50th anniversary celebration, it is great to look back on the history of our profession, our history as a Bar, and each of our individual history of service. The history of our Bar is seen programmatically in the creation and expansion of Lawyers Helping Lawyers; in the mock trial students that are now real attorneys judging mock trial competitions in their spare time; and in the evolution of our pro bono program working to serve and assist our members as we serve the public within the justice system.

Our individual history in our profession is something we celebrate periodically, but we make every day. This winter, I spoke with the 300+ new members of our Bar at their swearing-in ceremony – the launch of their legal career. These new lawyers took the first steps in writing their history, and watching their families celebrate and seeing the excitement they have to start this journey is inspiring.

Other celebrations of individual history also bring deep inspiration. The Greenville County Bar Association, like many local bars, recently held their annual memorial service. It was a wonderful celebration of many legal careers and lessons from those attorneys. Lessons on the practice of law, where the story not only included notes about taking late night client calls, but also about not taking life too seriously. Stories of mentoring new attorneys and the impact that had on the new attorney's career. Hearing grandchildren (including two lawyers) remember their grandparent's legal career and how it impacted them; how they got to share stories from their first trial with their grandparent, a grandparent who shared the same bond we all have where the justice system and fairness are deep within our hearts. I'll have to ask those attorneys if they also got lectured about fairness as kids.

As we start this 50th year, let us remember we are writing our own history every day. Let us mentor our next generation. Let us support our colleagues and check on them. Let us be proud to be South Carolina lawyers.

Celebrating 50 Years of the South Carolina Bar

Reflecting on Accomplishments and Anticipating Future Success

BY SHAHEENA "SHY" BENNETT

This year marks the 50th anniversary of the SC Bar, a significant milestone that presents an opportunity to reflect on its achievements and look forward to its future accomplishments. Over the past five decades, the Bar has played a pivotal role in shaping the legal profession and promoting justice and the rule of law. Just as we take the time to reflect on the success of our legal career and celebrate our own remarkable journey, it is essential to acknowledge the progress made and envision what the next 50 years may bring for the Bar.

Achievements of the past 50 years

The SC Bar has had made notable achievements in its 50-year history. Some of the most significant include:

- Establishing high standards of professional excellence and ethical conduct for lawyers.
- Supporting access to justice initiatives, including pro bono services and legal aid for underserved communities.
- Promoting diversity and inclusion within the legal profession. Jean Hoefer Toal was appointed as the first female Chief Justice of the South Carolina Supreme Court in 1988. I'm the first Black female President of the SC Bar. Emma Dean is the first female Executive Director of the SC Bar. This list goes on and on, and we will celebrate these and other accomplishments at our upcoming gala during the Bar Convention and throughout the year.
- Advocating for law reform and the improvement of the justice system.
- Providing continuing legal education and professional development opportunities. We will continue to travel to local bars and provide CLEs that will enhance your knowledge and prepare you for pro bono service.
- Connecting with and meeting the needs of our membership, promoting the value each member contributes to the success of the Bar.
- Promoting the resources available through the Lawyers Helping Lawyers Commission and the Wellness Committee.
- Connecting with and supporting our South Carolina law school students.

Looking forward to the next 50 years

As we celebrate the Bar's past successes, it is equally important to anticipate future accomplishments and set ambitious goals for the next 50 years. Some areas of focus include:

- Addressing emerging legal challenges and issues related to technology, environmental concerns, global affairs, poverty and homelessness.
- Enhancing efforts to increase diverse representation within the legal profession, including rural communities and certain practice areas.
- Expanding access to justice initiatives and addressing unmet legal needs.
- Strengthening collaboration with other stakeholders in the justice system, to include the courts and community organizations.
- Promoting public understanding and trust in the legal profession and the rule of law.

The 50th anniversary of the Bar is a testament to the organization's enduring commitment to advancing the legal profession and promoting justice. As we celebrate this milestone, let us continue to learn from our past accomplishments, embrace new challenges, and work together towards an even more successful and impactful future.

I am so proud of the tremendous work that's being done by our membership. Here's to the next 50 years of the Bar and its contributions to the legal profession and society as a whole.

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Nominations of Bar Officers

The Nominating Committee, chaired by **Russell T. Infinger** of Greenville has met and nominated Bar members **Nekki Shutt** of Columbia for President-elect, **Lindsay Joyner** of Charleston for Treasurer and **Brad Richardson** of Anderson for Secretary. Nominations for Board seats are **Scott Dover** of Greenville for Region 1, **Lyndey Bryant** of Columbia for Region 2 and **Kimberly Barr** of Kingstree for Region 3. **Roy F. Laney** of Columbia was nominated for ABA State Bar Delegate. Any eligible Bar member may file a petition to run against a nominee by following the procedure in Section 9.3 (b) of the Bar constitution.

In addition to Infinger, other members of the Nominating Committee were **Allen O. Fretwell**, Greenville; **S. Leslie McIntosh**, Anderson; **La'Jessica Stringfellow**, Columbia; **Michelle Duncan Powers**, Greenwood; **Doward Harvin**, Kingstree; **J. Rene Josey**, Florence; **Benjamin Dennis**, Moncks Corner and **I. Ryan Neville**, Charleston.

Thank You Middle School Mock Trial Volunteers!

The Law Related Education team would like to thank the following members for dedicating countless hours to building a pipeline into the profession through our Middle School Mock Trial program. The program held regional competitions on Saturday, November 9 and State Championships December 6-7.

Judges
Wallis D. Alves
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Rachel A. Hedley
Gary C. Lemel
Sheniya K. Marshall
Blair B. Massey
English H. Maull
Ruth D. Nagee
Samantha A. Owen
Robert Heath Owen
Tucker S. Player
Delbert H. Singleton, Jr.
George Smit
Deanene P. Thornwell
Jeff J. Wiseman

If you would like to volunteer for High School Mock Trial competitions this Spring, please contact LRE Director Donald Lanier at dlanier@scbar.org

2025 High School Mock Trial

- **February 22** | **Regional Competitions**
  Beaufort, Columbia, Conway, Georgetown, Greenville, or Lexington | Saturday, 8:15 a.m. – 6:15 p.m.
- **March 7** | **State Competition Rounds 1 & 2**
  Columbia | Friday, 11:45 a.m. – 6:30 p.m.
- **March 8** | **State Competition Round 3**
  Columbia | Saturday, 8:30 – 11:30 a.m.
- **March 8** | **Two State Championship Rounds**
  Columbia | Saturday, 11:30 a.m. – 6:30 p.m.

In Memoriam

Robert M. Deeb, Jr., 65, of Hilton Head Island, passed away on April 11, 2024.

William E. Leber, 77, of Delaware, OH passed away on July 13, 2024.

Susan A. Fretwell, 68, of Spartanburg, passed away on October 18, 2024.

The Honorable Rodney A. Peeples, 84, of Barnwell passed away on October 24, 2024.

Robert Howard Grubbs, 78, of Blowing Rock, North Carolina died on Sunday, November 10.

The South Carolina Public Defender's Association honored several outstanding public defenders at its annual conference in North Myrtle Beach. Pictured from left to right:

Melissa Inzerillo, President of the SCPDA and Deputy Public Defender, Sixteenth Circuit, received an award from the South Carolina Public Defender Investigator's Association for supporting public defender investigators.

Katherine Taylor Cummings, Associate Public Defender, Sixteenth Circuit, was awarded the Martha Browning Dicus Award for her dedication to professionalism and service to the indigent.

Haley Kiser, Juvenile Defender, Fifteenth Circuit, was named Juvenile Defender of the Year for 2024.

James Scruggs III, Assistant Public Defender, Fourth Circuit, was named Public Defender of the Year for 2024.

Charleston School of Law President J. Edward Bell, III, has announced **the appointment of Professor Jonathan A. Marcantel as interim dean for the remainder of the 2024–25 academic year.** Marcantel, who joined Charleston Law in 2011, previously served as associate dean of assessment at Lincoln Memorial University-Duncan School of Law. A nationwide search for a permanent dean is underway, with a committee of faculty and board members overseeing the recruitment and selection process. The Charleston School of Law looks forward to Marcantel's leadership during this transition and the continued growth of the institution.

Ashley Pennington of Burnette Shutt & McDaniel has received the prestigious James Louis Petigru Award from the Charleston County Bar Association

This award, which is rarely given, recognizes individuals who bring honor to the legal profession, and Pennington is only the sixth recipient in its history.

His dedication to justice and community service has made a lasting impact in South Carolina's legal landscape.

At the recent South Carolina Solicitors' Annual Conference in Myrtle Beach, Deputy Solicitor Ashley Hammack from the 2nd Circuit Solicitor's Office and Assistant Deputy Attorney General Kinli Abee from the South Carolina Attorney General's Office were recognized for their exemplary contributions to the criminal justice system.

The Ernest F. Hollings Awards, established in 1997, honor outstanding achievement in prosecution and acknowledge the dedication and hard work of state prosecutors in overcoming the challenges they face while delivering justice.

The Honorable Amy W. McCulloch, who has served as Richland County's Probate Judge since 1998, was sworn in as President of the National College of Probate Judges on Friday, November 15. Known for her integrity and compassion, Judge McCulloch has devoted over 25 years to serving the residents of Richland County, impacting countless lives with her dedication to fairness and justice. Her contributions have earned her respect and admiration from colleagues and constituents alike, marking her as a distinguished leader in probate law.

SC Lawyers Making a Difference with Hurricane Relief Efforts

After Hurricane Helene devastated western North Carolina, **Greenville defense attorney Matt Kappel**, along with a small fleet of local pilots, flew essential supplies into hard-hit areas.

The **Greenville County Bar Association held their 3rd Annual Barbecue Competition and focused on relief for those affected by Hurricane Helene**. Attendees donated canned goods, boxed meals, hygiene products and cleaning supplies.

Roger Edward "Ed" Henderson, Jr., an attorney at Hatfield Temple Law in Florence, was deployed with his National Guard unit to assist with hurricane relief efforts in Florida.

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For specific research questions, please contact vLex Fastcase's Support Team. Customer support is available from 8 a.m. to 9 p.m. Eastern time, Monday through Friday at 866-773-2782 or helpdesk-us@vlex.com.

Christopher A. Wellborn is the new President of the National Association of Criminal Defense Lawyers (NACDL), having been sworn-in in July. A solo criminal defense attorney with a J.D. from the University of San Diego School of Law (1988) and a B.A. from Bates College (1983), Wellborn represents clients in South Carolina facing a range of criminal charges in both state and federal courts.

Online Dispute Resolution Order Clarification

The Bar has received several inquiries concerning the December 6 Supreme Court Order that rescinded the online dispute resolution order issued during the COVID-19 pandemic.

In 2020, The ADR Commission recommended amendments to the ADR Rules that would allow remote mediation. The Court adopted those recommendations and submitted proposed rule changes to the General Assembly. Those changes went into effect on April 29, 2021, after the 90-day waiting period. The original order rescinded by the December 6 order was inadvertently not rescinded when the rules were adopted. The December 6 order was simply cleaning up a previous order that was left hanging. ADR Rule 2(l) defines ODR. ADR Rule 5(h) allows for the mediation to be conducted in whole or in part via ODR with the consent of the parties. If one party does not consent and the other deems ODR necessary, they may make a motion to the CJAP to allow that party to attend via ODR and that order can be granted by the CJAP. ADR Rule 5(h)(2) provides that the mediator shall be in control of the ODR.

Mediations and ENE may still be conducted via ODR. That recent order does NOT stop that from happening.

Reintroducing the SC Bar Pro Bono Program

BY ZACH OHANESIAN

As the newest head of the Pro Bono Program at the South Carolina Bar, I look forward to the opportunity to collaborate with the talented attorneys of our state as we seek, together, to provide vital legal services to low-income individuals and families in South Carolina. As a native South Carolinian, I care deeply about the people of our state and ensuring a level playing field for all.

Prior to my tenure with the Bar, a consulting firm was hired to fine-tune the pro bono program. Part of this venture included several working groups with experienced stakeholders and surveys of practicing attorneys to obtain their perception of the program. While many respondents provided positive observations, much of what we heard voiced concerns and provided feedback that is now pushing the program to grow in a way that is future-focused and member-driven. As always, this is what the South Carolina Bar strives to do.

The five areas below provide a glimpse of the direction in which the program is heading.

1. Rerouting the Public

We continue to hear that attorneys participating in pro bono activities want limited scope opportunities, and not the pressure of a full representation case. While there will still be opportunities for those interested, moving forward, our program will point members of the public to legal aid providers already doing this great work across the state, as well as the Legal Resource Finder tool created and implemented by the South Carolina Access to Justice Commission.

Not only does this help serve our members, it also provides clarity on where the Bar stands in relation to other pro bono organizations.

2. Working with Legal Service Providers

As noted above, the Pro Bono Program will also seek to maintain and improve its relationships with legal service providers across South Carolina. This involves aiding in the placement of cases that have been sent to our program by South Carolina Legal Services due to conflicts and income-eligibility restrictions.

3. Recognizing the Contributions of Attorneys and Firms

Pro bono legal services are made possible through the help of volunteer attorneys. The Bar wants to highlight, recognize and promote the great work our volunteers are doing in the community, whether that be through the Pro Bono Honor Roll, Pro Bono Awards, eBlasts, social media, newsletters, or CLE certificates. The SC Bar Pro Bono Program is committed to showcasing the work our volunteers do.

4. Bridging the Access to Justice Gap

The South Carolina Access to Justice Commission has done a tremendous job in identifying the areas in which low-income citizens in South Carolina face the most challenges, both geographically and by substantive area of law. The Pro Bono Program is committed to collaborating with the Commission, the South Carolina Bar Foundation, and legal service providers to identify these needs and provide opportunities for the state bar members to contribute to the services we can provide.

5. Providing Training and Resources

I understand those who may have

fears or hesitations about volunteering in legal areas that go beyond their daily practice. Our goal is to provide training and resources for volunteers so that these fears can be quelled. Eventually, we also want seasoned attorneys to serve as volunteer mentors, willing to accept brief attorney-to-attorney telephone calls or email exchanges to provide guidance and advice. With this, practitioners of all experience levels will be able to partake in the program's goals.

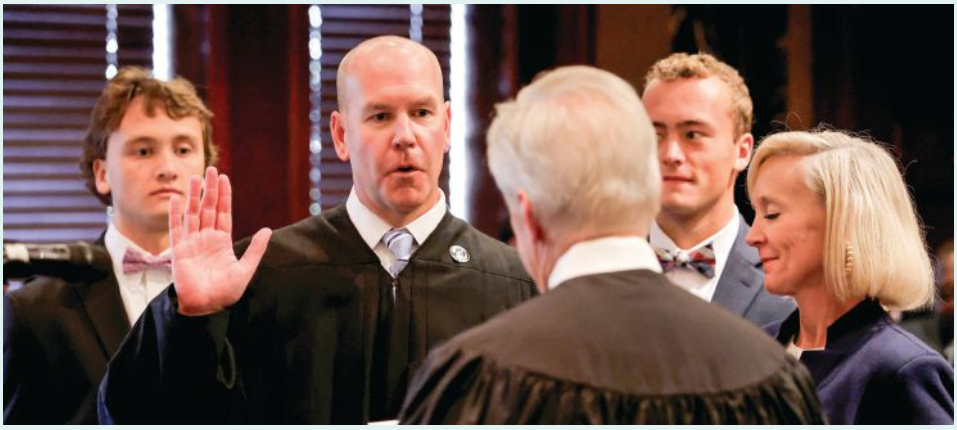
In closing, the SC Bar Pro Bono Program understands that a shift is necessary, and we are working towards the goals noted above. Without our members, this program is not able to succeed. We look forward to seeing you at clinics and various training courses soon.

If you have any questions, comments, or when you are ready to get involved, please contact me at (803) 576-3795 or via email at zbo@scbar.org

Appellate Court Updates

Justice Letitia H. Verdin Officially Sworn In to the SC Supreme Court

On Thursday, October 24, Justice Letitia H. Verdin was officially sworn in by Chief Justice John W. Kittredge to the South Carolina Supreme Court following her election by the South Carolina General Assembly. Surrounded by family and colleagues, the investiture ceremony celebrated her diverse legal expertise and unwavering dedication to justice. The South Carolina Bar extends its gratitude and support to Justice Verdin as she begins this significant chapter of her career.

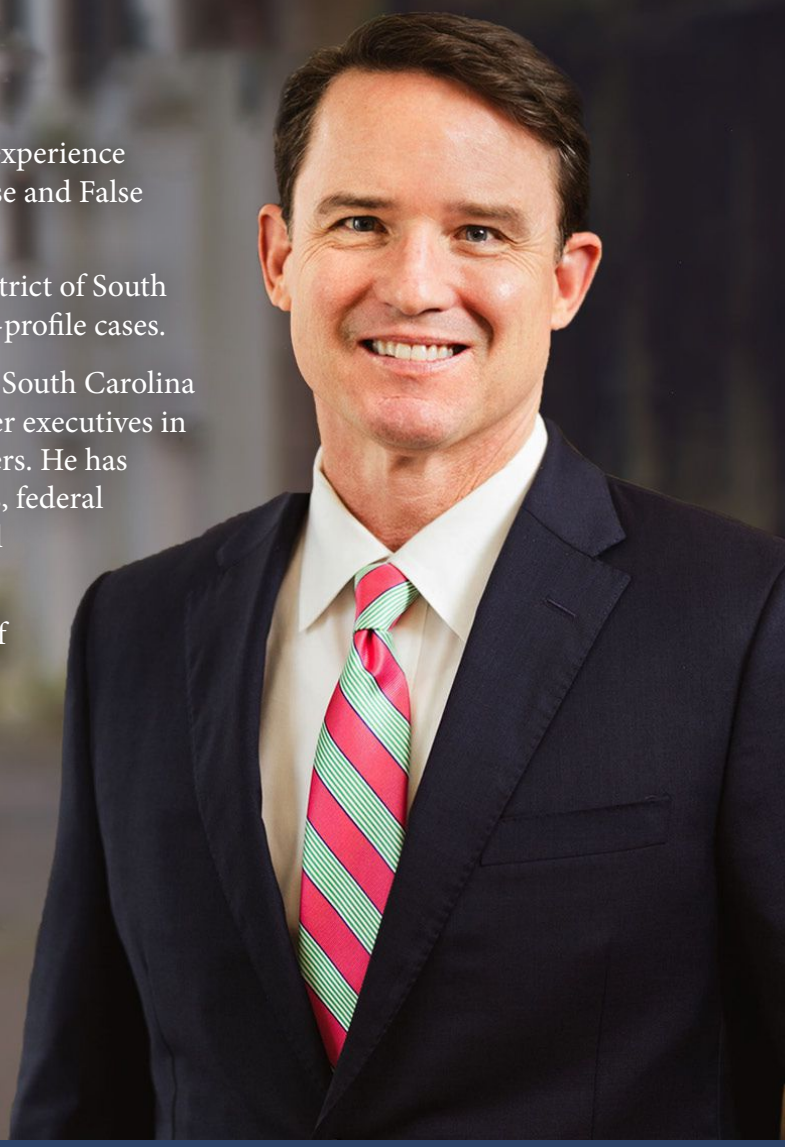


Judge Matthew Price Turner Officially Sworn In to the SC Court of Appeals

On Thursday, October 24, Judge Matthew Price Turner was officially sworn in as the newest judge on the South Carolina Court of Appeals. Judge Turner was celebrated by family, friends and legal colleagues for his unwavering commitment to justice and the rule of law. We look forward to his continued contributions to the profession and our judiciary!

Matthew R. Hubbell

White Collar / False Claims Act



Matt Hubbell is a former federal prosecutor with decades of experience advising and defending clients in white collar criminal defense and False Claims Act/Qui Tam cases.

As an Assistant United States Attorney for 10 years in the District of South Carolina, he prosecuted complex white collar and other high-profile cases.

In private practice for over 20 years, Matt is a go-to lawyer in South Carolina for health care providers, defense contractors, CEOs and other executives in high-stakes white collar and False Claims Act/Qui Tam matters. He has extensive experience in complex trials, internal investigations, federal and state grand jury investigations, and parallel criminal/civil proceedings.

Among other distinctions, Matt has served as the President of the Federal Bar Association (S.C.), the Chair of the Judicial Merit Selection Panel appointed by the Chief United States District Judge, and the Chair of the South Carolina Bar Health Care Section. For many years he has been awarded the highest AV Preeminent Martindale Hubbell peer rating.

Matt is well known in South Carolina as a prolific speaker and author of numerous articles and books on legal issues related to white collar criminal and False Claims Act/Qui Tam matters.

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"Self-Compassion: The Proven Power of Being Kind to Yourself "

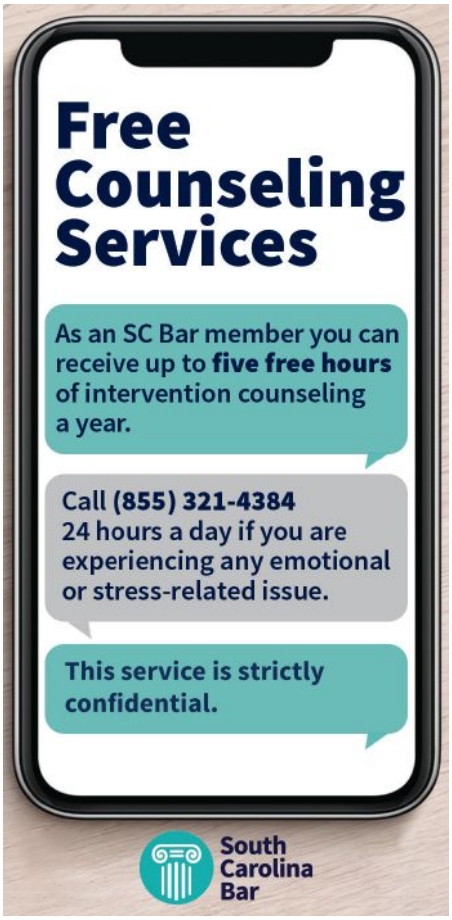
BY W. LIPPFERT, LHL COMMISSION MEMBER

When I told Frances Anderson with Lawyers Helping Lawyers I would love to read and write a short review of "Self-Compassion" by Kristin Neff, her response was something along the lines of, "Are you sure you have time; you're busy with work and have two young children." I assured her I did have the time. Now, here I am, two weeks after my deadline, finally typing the first few sentences of the review. Unfortunately, this is not an uncommon situation for me. However, thanks to what I learned from reading (most of) the book, my reaction to finding myself in this situation yet again is far kinder than normal. I am not berating myself about how I always overcommit, how I never do the things I say I'm going to do, how I never seem to finish things on time, how I'm unreliable and worthless. Instead, I am reminding myself that everyone misses a deadline, this is a part of life, and I can treat myself kindly. For me, this shift in my internal dialogue is a small miracle.

In "Self-Compassion," Dr. Neff examines why, in modern American society, many of us are much more critical of ourselves than we are of friends or even strangers. We often forgive others for their shortcomings, such as missing a deadline or being late, but when we're the ones who fall short, we treat ourselves brutally. Dr. Neff opines that many of us are worried if we are kinder to ourselves, we will become less motivated, or we will become overly sappy and emotional. In fact, a growing body of empirical research suggests that the opposite is true. The more we treat ourselves with love and respect, the more motivated we are and the more emotionally resilient we become. "One of the most robust and consistent findings in the research literature is that people who are more compassionate tend to be less anxious and depressed." The current research on the subject is fascinating and convincing.

Dr. Neff describes how America's obsession with having high self-esteem has backfired. For starters, research indicates that while people with high self-esteem *perceive themselves* as being more popular and better at their jobs, they are not *actually* better in these areas than people with low self-esteem. America's attempt to foster high self-esteem through "unconditional praise" in schools has led to an explosion of narcissism. The unconditional praise movement was itself a backlash to the old days where teachers only praised success, which was equally bad. Praising success and criticizing failure caused people to have "contingent self-worth," whereby they feel great about themselves when they succeed and terrible about themselves when they fail. Contingent self-worth causes people to experience an endless, exhausting, rollercoaster of emotions. Neff posits that self-compassion, as opposed to self-esteem, offers a solution to the problems created by both unconditional praise and contingent self-worth. Self-compassion avoids placing value judgments on, and therefore being defined by, our successes and failures. "Our successes and failures come and go – they neither define us nor do they determine our worthiness. They are merely part of the process of being alive."

After identifying the problem, Dr. Neff delves into a variety of common situations where we tend to be particularly hard on ourselves, including procrastination, food choices and body image, parenting, relationships, emotional pain and loss, forgiveness, and perfectionism. For each, she provides relatable real-life accounts of people suffering from these issues and the positive impact self-compassion had on their lives. This provides a nice counterbalance to the empirical research discussed throughout the book. At the end of each section, Dr. Neff provides simple, practical exercises



to help the reader become more self-compassionate. For example, she suggests making a list of aspects of yourself that play a role in your self-esteem, such as being successful at your job, and then for each asking yourself: "1. Do I want to feel better than others, or to feel connected? 2. Does my worth come from being special, or from being human? 3. Do I want to be perfect, or be healthy?" I, like many lawyers, am competitive, and I have laid awake at night thinking obsessively about how to win a case. I am certainly prone to conditional self-worth based on winning or losing. When I take a step back, and ask myself the questions above, the absurdity of caring so deeply about winning and losing is almost comical. I'm not a great person when I win or a bad person when I lose, and the more I can treat myself and others with kindness, compassion, and respect, the better I'll be regardless. If you are interested in learning how to treat yourself more kindly, I highly recommend this book.

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Using ChatGPT 4o While Complying with Ethics Requirements

BY NATHAN CRYSTAL AND FRANCESCA GIANNONI-CRYSTAL

This is the third is a series of ethics watch columns in the "South Carolina Lawyer" on the use of generative artificial intelligence ("GAI"). "ABA Formal Opinion 512 on Ethical Issues in Using Generative Artificial Intelligence ("GAI")" (September 2024), discussed six ethical obligations examined by the ABA Opinion: competency, confidentiality, communication, meritorious claims and candor to the tribunal, supervisory responsibilities, and fees. After summarizing key points from this opinion, the article concluded:

> The ABA Opinion has many useful observations and cautions about the use of GAI tools, but one fundamental theme throughout the opinion is that compliance with these obligations depends on the particular GAI tool that the lawyer uses and the specific task that the lawyer asks the tool to perform as part of the lawyer's representation of the client.

The platform and task-specific references in the ABA opinion led to my second article, "Due Diligence to Protect the Duty of Confidentiality Before Using ChatGPT 4o" (November 2024), which, as of the date this column is being written, is Open AI's most advanced product and is appropriate for complex tasks. See https://platform.openai.com/docs/models. The article specified the questions addressed to ChatGPT 4.0 about use of the platform and concluded that "a lawyer or law firm is not ethically precluded from using this program." The article went on to recommend for

> every lawyer to perform a due diligence analysis before employing tools like ChatGPT 4o, just as they would before using any other platform, such as cloud services, asking as many questions as they deem relevant and keeping the responses on file to demonstrate that they conducted proper due diligence.

However, the article emphasized that due diligence with regard to a platform is only part of the due diligence examination. In addition, a lawyer must evaluate whether use of the platform to perform specific tasks is ethically proper. Lawyers can use ChatGPT in their practice in various ways, but it is important to recognize that some uses align with ethical rules while others may not. In most cases, the use itself is not outright permitted or prohibited; rather, it is the manner of use that determines whether it complies with ethical obligations. Evaluation of the use of ChatGPT 4o for specific lawyering tasks is the focus of this article.

Drafting emails or other communications

While ChatGPT 4o is highly effective at drafting communications and can streamline tasks such as client correspondence or internal memoranda, caution is warranted when using it for these purposes. It is ethically proper to use ChatGPT 4o for this purpose by giving general instructions, for example directing ChatGPT 4o to draft a demand letter in a particular type of case. You can instruct ChatGPT 4o on the degree of forcefulness of the letter, and if you are not satisfied with the draft, you can ask ChatGPT to make it stronger, or more friendly, or whatever tone you are trying to achieve. However, you should not insert the name of the client or of the other side, and you should avoid any detail that would make the matter recognizable. If you want ChatGPT to draft a response to an email or letter, you can copy and paste the text of the document or upload the document (with confidential information appropriately redacted) and provide instructions

for drafting the response. It is more questionable whether you can actually share confidential information, i.e., sharing documents or text without redaction. As shown in our due diligence inquiry into ChatGPT 4o, the platform does not retain any uploaded documents beyond the particular session with the attorney. ChatGPT 4o does have a search feature (the hourglass) that allows users to access and search prior chats; these are retained for 30 days. Users can turn off the search feature for greater confidentiality or can delete particular chats that the user considers to be especially sensitive. Also, it appears that ChatGPT 4o does not use uploaded information for training purposes and that any information provided, including uploaded documents or text, is used solely to assist with the user's specific request during the conversation. While these features could be sufficient to satisfy the ethical requirement of Rule 1.6(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"), as a matter of best practice, lawyer redaction of confidential information before uploading it to any platform, including ChatGPT 4o, minimizes the risk of accidental disclosure, technical vulnerabilities, or any unforeseen issues.

Initial research

ChatGPT 4o is very useful in doing initial research into a problem both in the home jurisdiction or in other jurisdictions that might govern the matter. Unlike traditional search tools, ChatGPT 4o can infer what you might be looking for even if you do not express it precisely with the correct search terms, making it a valuable tool for exploring complex or poorly defined queries. For example, if you want to know whether California imposes limitations on contingent fees, ChatGPT 4o will provide a useful summary, which is an efficient way of beginning research into a topic. It is ethical to use ChatGPT 4o this way, however, the use becomes unethical when a lawyer relies on the AI's output without thoroughly reviewing and verifying the information. It is well-known that AI is subject to "hallucinations" – inaccurate statements about the law or other matters – so users cannot rely on any such statements without verification. Failing to check the results could lead to inaccuracies or omissions that might misinform clients or affect legal outcomes, violating the lawyer's duty of competence. Because ChatGPT 4o is prone to errors, it is not a reliable substitute for research with databases like LexisNexis or Westlaw.

Case summarization

In briefs or memoranda lawyers often need to summarize cases. Summaries can sometimes be extensive when the case is significant or short when the case is less important. Lawyers can upload to ChatGPT 4o pdfs of cases for which they need summaries and ask ChatGPT 4o to prepare the summary. Moreover, the request can state the number of words allotted for the summary. If the lawyer wants the summary to include quotations of particularly significant language, ChatGPT 4o will do that. It is ethical for a lawyer to use ChatGPT 4o in this manner, as there are no issues of confidentiality involved when summarizing publicly available cases. However, the lawyer retains the duty to review the output for accuracy.

Explanation of unfamiliar concepts

ChatGPT 4o is very useful in educating lawyers on concepts with which they may be unfamiliar. Educating oneself with these concepts through ChatGPT 4o is ethical, whether the issues are personal to the lawyer's practice or related to client matters. For instance, suppose a lawyer is not experienced in bankruptcy and has a client that has not paid the lawyer's fees and has now filed for bankruptcy under Chapter 11. The lawyer is thinking about filing suit against the client. An inquiry into ChatGPT 4o will inform the lawyer that bringing suit would violate the automatic stay in bankruptcy under 11 U.S.C. §362 and expose the lawyer to potential sanctions by the bankruptcy court. ChatGPT 4o will provide the lawyer with other information, including the process for filing a proof of claim. ChatGPT 4o can similarly assist a lawyer in understanding unfamiliar aspects of a client's bankruptcy matter, such as the implications of different chapters of bankruptcy or the requirements for objecting to a discharge. Another useful feature of ChatGPT 4o is its ability to respond to follow-up questions. In our bankruptcy example, you might ask about the deadline for filing a proof of claim, and ChatGPT 4o will provide highly useful information. While this use is ethical, lawyers must always verify the information obtained to ensure its accuracy and reliability to avoid violation of the duty of competency.

Drafting marketing materials and writing articles

Marketing is a key aspect of modern legal practice, and ChatGPT 4o can assist in creating various materials, such as blogs, presentations, LinkedIn posts, and firm brochures. Whatever the product, lawyers must make sure they comply with the applicable rules of professional conduct. They cannot rely on ChatGPT 4o to determine which ethical rules apply to lawyer advertising in their jurisdictions and must independently verify such requirements. For

example, in New York many forms of lawyer marketing must contain the statement "Attorney Advertising." See NYRPC 7.1(f).

Lawyers may use ChatGPT 4o to help draft scholarly articles or other publications, and such a use of ChatGPT 4o is ethical. ChatGPT 4o is at its best in this task when used to refine ideas and theories, much like brainstorming with a colleague in a back-and-forth exchange.

Use of ChatGPT 4o for privilege review

One of the questions we asked ChatGPT 4o as part of our due diligence (see the November article) was whether ChatGPT 4o could be used for privilege review. ChatGPT 4o responded that it did not have the capability of making determinations of privilege or work product, but the program could be used to review and flag documents as possibly subject to attorney-client privilege or work product. However, while it is not unethical to use ChatGPT 4o for privilege/work product review because our due diligence analysis persuades us that ChatGPT 4o provides reasonable protections of confidentiality comparable to other cloud computing programs, for several reasons in our opinion the program should not be used for this task. First, the review requires uploading documents that contain information subject to the ethical duty of confidentiality, and it is obviously desirable to limit the disclosure of confidential information even when it is adequately protected. (With regard to privilege/work product review, redaction is not an option because that would undermine the accuracy of the review). Second, ChatGPT 4o has limitations on the size and number of documents that can be uploaded. Third, the limited flagging review that ChatGPT 4o can do will mean that further work is needed to make privilege/work product determinations. However, as discussed in the next section ChatGPT 4o can be used for software identification to find programs tailored to the specific needs of the lawyer.

Use of ChatGPT 4o for software and hardware identification

ChatGPT 4o can be highly useful in identifying and evaluating software and hardware tailored to the specific needs of the lawyer. For example, having determined that ChatGPT 4o was not appropriate for privilege/work product determinations, we asked it to identify inexpensive programs that could be used for privilege/work product review, and it responded with four choices along with a suggestion as to how Microsoft Word or Excel could be used when budget constraints are significant. The program could be used for hardware identification and evaluation, such as comparing laptops or other hardware. Obviously, there is nothing confidential in

these types of searches. These tasks are necessary for a law firm but can take time away from client matters.

Compliance with supervisory obligations

The Rules of Professional Conduct impose supervisory obligations on managers of firms and supervising lawyers over both other lawyers and nonlawyers employed by the firm. See SCRPC 5.1 (lawyers) and 5.3 (nonlawyers). Managers of a firm have an obligation to adopt policies and procedures designed to give reasonable assurance that lawyers and nonlawyers employed by the firm adhere to the Rules of Professional Conduct. One aspect of that obligation is providing for proper training of lawyers and staff regarding use of AI. Preparation of a comprehensive set of policies and procedures for use of AI by lawyers and staff is a complicated, time consuming task. What should firms, especially small firms, do? My suggestion is to start, and here are three policies/procedures that firms could adopt immediately: (1) All lawyers and staff must participate in two hours of educational programs each year on the use of AI. The firm could arrange for in-house programs or compile a list of approved programs for lawyers and staff to attend. (2) No lawyer or staff member may use an AI platform to provide legal services unless the platform has been approved by the firm for use in client matters. (3) The firm should designate a member who is responsible for developing additional policies and procedures governing the use of AI by firm attorneys and staff. And of course ChatGPT 4o can also be used to draft firm's policies and to prepare training materials.

Reasonable fees for using AI

Several ethics opinions deal with fees for using AI: ABA Formal Opinion 512, DC Ethics Opinion 388; Kentucky Bar Assn. Ethics Op. E-457. To date South Carolina has not issued an ethics opinion on AI. In general these opinions stand for the following propositions: (1) It is proper to charge clients for use of AI based on the time expended by the providers at their normal hourly rates; (2) with client consent it is proper to charge clients the actual cost incurred by the lawyer in using AI; (3) it is not proper to charge clients for the time the lawyer saves by using AI; (4) flat fees for AI searches may be proper but lawyers should still make sure that the flat fee complies with the requirement of reasonableness under SCRPC 1.5(a); (5) It is improper to charge clients for time involved in learning to use AI because lawyers have a duty of competency regarding new technologies such as AI, see SCRPC 1.1, comment 8.

Disclosure and client consent to use of AI

Lawyers have an ethical duty to communicate with their clients,

which includes communication about the means by which the lawyer will seek to achieve the client's objectives. See SCRPC 1.4(a)(2). What do these communication duties require of lawyers when using AI? ABA Formal Opinion 512 contains an extensive discussion of these duties, but as noted above the opinion concludes that it is impossible to give a specific answer on the application of the duty to communicate to the use of AI particularly GAI:

> It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool . . . . ABA Formal Op. 512 at 9.

This article following the guidance of Star Trek (with some modification) – "To boldly go where no man (or woman) has gone before" – offers the following observations about disclosure and client consent regarding use of AI:

1) If the use of AI does not involve the disclosure or uploading of client information, for example initial legal research, summarization of cases, drafting of communications with general language only, disclosure and client consent are not ethically required;
2) If the use does involve disclosure of client information, for example, privilege review or analysis of a settlement offer, then informed client consent is required;
3) For both marketing reasons and as a matter of professional prudence (even if not ethically required), lawyers should include in their engagement agreements general reference to use of AI, for example:

Use of Electronic Devices and Services. As is common in contemporary legal practice, in carrying out this engagement this firm uses various electronic devices, such as laptops, tablets, smart phones, flash drives and copy and fax machines, and a number of software services ("SAS"), including cloud computing and artificial intelligence services. In using such technology, the firm takes reasonable steps to protect client confidentiality and to comply with other ethical and professional requirements. If you or your client have confidentiality concerns about our use of electronic devices or services, please inform us in writing regarding your concerns and we will discuss the matter further. By signing this agreement, you express your understanding of the risks involved in the use of electronic devices and services and you consent to our firm's use thereof.

(continued on page 23)

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Rule 409 – Offers to Pay Medical and Similar Expenses

BY WARREN MOÏSE

Hey. Remember this Rule way back in Wally Reiser's evidence class? It had something to do with medical bills, didn't it?

Well, here's an example of how it works to refresh your memory:

Bob, your drunk next-door-neighbor, drives his Mack truck into your kitchen, breaking your arm. Bob climbs out from behind the window and spurts out, "Don't worry, man! I'll pay for it all." Yeah, right.

The next day, old Bob vacates town and disappears in his 18 wheeler. Word is, Bob's dead. It's now a year later, you're at trial where you want to introduce into evidence that damning admission. The defense lawyer objects, citing Rule 409. In whose favor does the judge rule? Well, first, let's look at the rule itself.

> **Federal Rule of Evidence 409: Offers to Pay Medical and Similar Expenses**
> Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

28 words, rarely cited at trial, and even less the subject of an appeal. I'm convinced that many lawyers don't know the rule exists.

Even so, let's take a look at Rule 409 in case it reaches up and grabs you by the neck when you least expect it.

The basics

For starters, the staff notes to the South Carolina Rules of Evidence claim that the Federal and South Carolina Rules of Evidence at issue are identical. They are not. The federal rules themselves are more or less like a volcano flow. In other words, they are constantly changing (some more than others).

Federal Rule 409 was changed for stylistic reasons. No substantive changes were intended. South Carolina Rule of Evidence 409 has never been revised.

The underlying theory for federal Rule 409 is sometimes referred to as being based on humanitarian motives. *See also* Federal Rule of Evidence 409 Advisory Committee Note. For rules from other jurisdictions on the same subject, and phrased in terms of "humanitarian motives," see Uniform Rule 52; California Evidence Code §1152; Kansas Code of Civil Procedure §§60–452; and New Jersey Evidence Rule 52. In this regard, Rule 409 bears a relationship to Good Samaritan Laws protecting care givers from liability when they stop and render aid to an injured person.

President Gerald Ford signed the federal Rules of Evidence into law on January 2, 1975. However, the first draft of the proposed federal Rule 409 was different than today.

Advisory Committee Notes to the 2011 Amendment show that: "[t]he language of Rule 409 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility."

Underlying considerations

The considerations underlying Rule 409 parallel those of Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. *See* W.R. Habeeb *Admissibility of Evidence to Show Payment, or Offer or Promise of Payment, of Medical, Hospital, and Similar Expenses of an Injured Party by the Opposing Party*, 20 A.L.R.2d 291, 293 (1951). ("[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.").

There is one critical difference between Rules 408 and 409. As noted by the Advisory Committee's Note (and contrary to Rule 408, dealing with offers of compromise),

the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This is true even if the assistance was only to mitigate damages.

This difference in courts' treatment of these two rules arises from basic differences in human nature and how settlements are reached. Free and open communication is, of course, critical if compromises are to be effected (for example, a demand letter for settlement), and consequently broad protection of such statements is needed.

But this is not really true in cases of payments or offers or promises to pay medical expenses, where factual statements often are expected to be incidental in nature. Exclusion is required only when the evidence is used to prove liability. Berger and Weinstein, *Weinstein's Evidence Manual* § 7.06 (2010).

For example, words, admissions, arguments and other communications blurted out by a defendant at an accident scene ("I'll pay your bills"), or medical assistance in an emergency, are different from statements made in a lengthy and well-thought- out demand letter. However, Rule 409 doesn't extend to conduct or statements not a part of the act of furnishing or offering or promising to pay.

Collateral-source rule, Rule 403, and other scenarios

Then there's the interaction between Rule 409 and the common-law collateral-source rule, which has its potential problems. *See Covington v. George*, 359 S.C. 100 (Sup. Ct. 2004) (emphasis added). The collateral source reads thusly: a tortfeasor cannot "take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is "'an insurance company, an employer, a family member, or other source.'" . . .

In *Covington*, the supreme court held that the amount a hospital accepted as payment was inadmissible under the collateral source rule. The court further noted the trial judge's dilemma in applying the collateral-source rule:

> The collateral source rule provides "that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer." *Citizens & S. Nat'l Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). A tortfeasor cannot "take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is 'an insurance company, an employer, a family member,

or other source.' *Pustaver v. Gooden*, 350 S.C. 409, 413 (Ct. App. 2002); in this case, the actual payment amounts were made by a collateral source." (*Id.* at 144.)

"[A]ny attempts on the part of the plaintiff to explain the compromised payments would necessarily lead to the existence of a collateral source. Inevitably, the inquiry would lead to the introduction of matters such as contractual arrangements between health insurers and health care providers, resulting in the very confusion which the trial judge sought to avoid in his proper application of Rule 403, SCRE." *Covington* at 104.

As for law in other jurisdictions discussing Rule 409 or settlement issues, see Fed. R. Evid. Advisory Committee Note; *Savoie v. Otto Candies*, 692 F.2d 363 (5th Cir. 1982); *Port Neches Independent School Dist. v. Soignier*, 702 S.W.2d 756, 757 (Tex. App. 1986)(all bills should be sent to employer; portion of letter admitting injury covered by worker's compensation were admissible). *See also* Mueller and Kirkpatrick, *Evidence* §4.27 (3d ed. 2003) (insurers' advance-payment programs designed to foster goodwill settlements).

And in conclusion . . . .

Rule 409, Rule 408, the collateral-source rule, *Covington*, the opening-the-door-doctrine, and possibly others all regulate different type communications and which may be used to exclude witnesses' testimony in order to protect them. How the judiciary will apply these rules largely remains to be seen as there is not a large body of law in South Carolina on the subject.

The answer to the questions is . . . .

Ethics Watch
(continued from page 19)

***

Some additional materials and videos on the use of ChatGPT 4o, Mike Robinson, How to use (and NOT use ChatGPT 4o at your law firm, www.infotrack.com/blog/how-to-use-chatgpt/ (Sept. 11, 2023); Chris Dreyer, ChatGPT for Lawyers: Embracing AI to Enhance Your Legal Practice, https://rankings.io/blog/chat-gpt-for-lawyers#getting-the-best-results-from-chatgpt-for-lawyers (visited November 20, 2024)

Conclusion

For those of you who have not used ChatGPT 4o, you will be amazed at what it/he/she can do, and for those of you who have, you will find many uses that can facilitate your practice -- and while doing so you may make a new friend, Mr. or Ms. Chat himself or herself.

I Will Assist

Understanding Civil Legal Needs & Bridging the Justice Gap In SC

BY HANNAH HONEYCUTT, EXECUTIVE DIRECTOR, SC ACCESS TO JUSTICE COMMISSION
AND OLIVIA S. JONES, EXECUTIVE DIRECTOR, SC BAR FOUNDATION

In 2021, the SC Access to Justice Commission, the SC Bar, and the NMRS Center on Professionalism at USC School of Law commissioned South Carolina's first-ever Statewide Civil Legal Needs Assessment. The resulting report is both comprehensive and granular, giving us a deeper understanding of the legal needs of low- and moderate-income South Carolinians and how they access (or can't access) our system of justice. Each installment of this column will focus on a key takeaway from the assessment's Executive Summary, in hopes that you will come away better informed about legal needs in South Carolina and what you can do to help.

Key Finding #6: Legal services agencies are looking for more ways to reach out to communities in need.

People who need legal help don't often get it for a host of reasons, including concern about cost, not understanding their problem is a legal one, not knowing where to go for help (see key finding #5), and there just not being enough legal aid resources to meet the need (see key finding #1).

South Carolina's legal aid organizations are constantly coming up with new, creative ways to address one of the most significant of these barriers: just not knowing where to look. They advertise on social media and with local news outlets; they place brochures and other materials in courthouses, libraries, and community centers; they partner with community services organizations to hold clinics and educational sessions on wills, landlord-tenant issues, and divorce.

While legal aid organizations stretch their dollars to provide legal assistance, they often have limited resources to devote to marketing and outreach efforts. "As much as we've done," said one legal aid lawyer, "there are so many people and lawyers that don't know about us." In focus groups for the Legal Needs Assessment, clients of these organizations recounted their own difficulties getting connected with legal help and expressed that they want those that come after them to have an easier time.

Meaningful and accurate referrals are a crucial mechanism for ensuring people in need of legal help find what they need, and an area where everyone in the legal community can pitch in. The SCATJ Commission developed the South Carolina Legal Resource Finder to help make these meaningful referrals. Incorporating eligibility criteria from South Carolina's legal aid organizations, this comprehensive web-based tool guides users to legal referrals and self-help resources tailored to their income, location, and specific legal problem. Whether you're a private attorney, court staff, or a concerned citizen helping a friend, the Legal Resource Finder is an easy way that you can make sure you're pointing someone who needs help in the right direction.

Legal services agencies are looking for more ways to reach out to communities in need, and you can help:

Educate: Tell someone about the issues. Send them a copy of the SCATJ Commission's 2023 Legal Needs Assessment or 2021 Justice Gap Report. Talk to your local leaders about the need for civil legal aid. Direct people who ask you for help to the South Carolina Legal Resource Finder (scaccesstojustice.org/get-help).

Volunteer: Take the time to volunteer; contract with legal aid providers around the state; take a case for a low rate or even pro bono.

Donate: Make a donation to one of our legal aid provider partners or to the SC Bar Foundation, which makes grants to fund civil legal aid in South Carolina.

Next time: South Carolina attorneys do not contribute enough pro bono legal services.

Don't want to wait? Read the Assessment and explore the data at scaccesstojustice.org/legal-needs.

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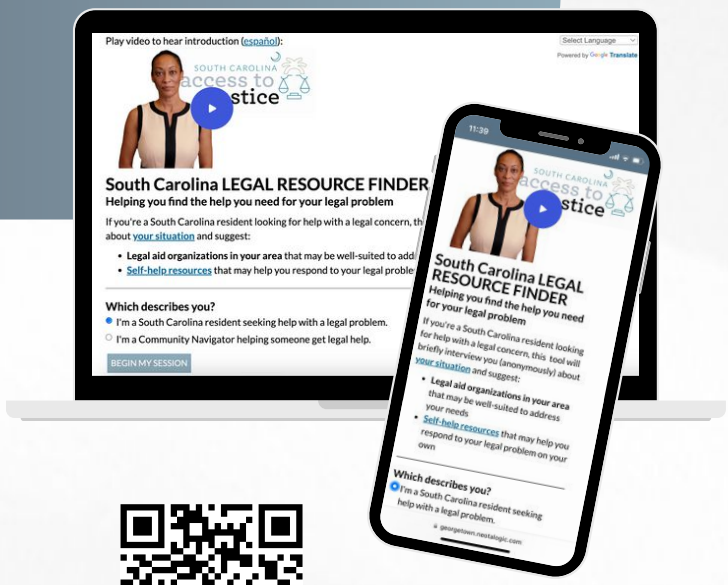

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The South Carolina Supreme Court Access to Justice Commission works to expand access to civil legal assistance for all South Carolinians by assessing essential civil legal needs, fostering collaboration, and identifying innovative solutions. Learn more about our work at scaccesstojustice.org.

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Your CLE in SC

Avoid Someone Else's Mistakes From Becoming Yours On Appeal

BY SKYLER C. WILSON

Preservation is an appellate doctrine that trial lawyers cannot afford to overlook. It applies to appeals at all levels and across all courts and administrative bodies. In 2023 alone, before the South Carolina Court of Appeals nearly 1 in every 4 opinions involved preservation in some way.[1] In 2023, if the South Carolina Supreme Court ruled after accepting writ, nearly 1 in every 5 opinions referenced preservation.[2] Preservation was not always a deciding factor, but many appeals where preservation is mentioned involved issues the courts refused to address because of a failure to preserve—as opposed to finding the issues preserved and addressing the merits.

Despite the years of work many lawyers devote to a case seeking justice or defending meritless claims, chances are a mistake occurred during litigation that the appellate court won't address on preservation grounds. The failure to preserve affects not only the parties to the appeal, but also the bench and bar who are deprived of needed guidance. Indeed, many attorneys can recall arguing "there is no South Carolina law on point." But with preparation and an understanding of preservation, trial attorneys can increase the likelihood their clients' issues are meaningfully reviewed on appeal in a way that provides guidance to the bench and bar.

Preservation generally

Preservation sounds simple: If you want an appellate court to address a matter then that matter must be raised to and ruled on by the lower court.[3] Preservation is important because appellate courts are generally courts of review—to determine if the lower court made an error.[4] To facilitate review, attorneys must raise the matter to the lower court and give the lower court a fair opportunity to rule on the matter.[5] In short, an appellate court cannot review errors if the errors are not preserved.

Preservation applies to both issues and arguments.[6] If a matter is raised to the lower court but not ruled upon, the litigant must file a post-trial motion and seek a ruling.[7] Only one post-trial motion is required.[8] But a matter cannot be raised for the first time in a post-trial motion.[9] Post-trial motions are reserved for obtaining rulings on matters already presented to the lower court. Typically, preservation is raised by a party to an appeal, but the appellate court can raise preservation *sua sponte* even if no party raises it.[10]

Distilled to its essence, preservation is a requirement of substance over form and remaining mindful of changed circumstances.[11] Preservation is not intended to be a "gotcha" game setting traps for unwary litigants, or used in a hyper-technical manner to avoid deciding the merits of a legitimate appeal.[12] Attorneys are not required to use magic words, or specific language or phrases to preserve matters.[13] Courts generally prefer to decide cases on their merits. Therefore, if it is questionable whether a matter is preserved, the appellate court will usually find the matter preserved and decide the appeal on its merits.[14] Ultimately, preservation rules must "be applied consistently and not selectively."[15]

What it means to be "raised to"

Where most litigants struggle on preservation is "raising the matter" to the lower court. When considering whether a matter was "raised to" the lower court, the appellate court

PHOTO BY GEORGE FULTON


STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
ACME HEALTH, INC.)
Plaintiff/Appellant)
vs..)
GOOD GUY TRADING)
Defendant/Respondent)
IN THE COURT OF COMMON PLEAS
FOR THE 13TH JUDICIAL CIRCUIT
2019CP2302484
COMMON PLEAS CASE NUMBER
2017CV2130021836
MAGISTRATE CIVIL CASE NUMBER
MEMORANDUM OF LAW
IN SUPPORT OF CIVIL APPEAL
Appellant Acme Health, Inc. hereby submits this Memorandum of Law in support of the Corporation's timely filed and served Notice of Appeal. This Cricket Court has jurisdiction and a broad standard of review for this appeal pursuant to S.C. Code § 18-6-160 which states:
Upon hearing the appeal, the [Circuit Court] shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.
OVERVIEW OF THIS APPEAL
Acme Health, Inc. is appealing the Final Judgm
listed case (Fairview/Austin Summ
Peas
in the County of Gree

examines whether the matter was raised with sufficient specificity.[16] The argument must be sufficiently clear so that it can be understood by the lower court and ruled upon.[17] Although not required for preservation, citing the precise legal doctrine or specific case law is the easiest way to raise an issue with sufficient specificity. However, if preservation is doubtful the appellate court will evaluate the record to determine if the matter was fairly raised such that the lower court had a fair opportunity to rule, and the parties were aware of the issue or argument.[18]

For example, arguing to the lower court that "an arrest was not being made when the appellant ran from police" was sufficient to preserve argument on appeal that there was not a seizure under the Fourth Amendment, despite the appellant never using the terms "seizure" or "Fourth Amendment."[19] Also, a Confrontation Clause argument was preserved on appeal when the appellant argued that a written statement should be excluded because he could not cross examine the witness.[20] Because these litigants argued the substance of the doctrines to the lower court without citing statutes or case law, those matters were preserved on appeal.

On the other hand, a matter is not "raised to" the lower court if the arguments below do not clearly present the substance of the matter to the lower court. Take estoppel for example, which requires proving the estopped party accepted the benefits of the void judgment.[21] So, when a father argued to the family court that the mother had "agreed to arbitration," it was insufficient to preserve his argument on appeal that the mother should be estopped from challenging the order affirming arbitration because the father did not argue the mother accepted the benefit of the arbitration award.[22] In other words, the substance of the estoppel argument was not raised to the lower court with sufficient specificity and it was not preserved.

"Raised to" also includes raising the matter to the lower court on the record.[23] Matters raised in off-the-record conferences or in-chambers discussions will not preserve a matter for appeal and the error cannot be cured by raising the matter in a post-trial motion.[24] Nevertheless, the appellate court will still determine if enough information was presented *on the record* to show what occurred *off-the-record* for the purpose of preservation.[25]

What it means to be "ruled upon"

If the lower court doesn't rule, the appellate court cannot determine if the lower court erred in its ruling.[26] Our courts have phrased it as "there is nothing to appeal without a ruling," highlighting its critical importance to preservation.[27] The easiest way to meet the requirement is if the court expressly rules on the matter. In some circumstances, however, the appellate court will find the lower court ruled on a matter if it can be implied from a different ruling. For example, a negligence claim was preserved despite the lower court not expressly ruling on a motion to amend to add the claim because the lower court expressly granted summary judgment on the negligence claim.[28] It wasn't necessary for the appellant to ask the court for a ruling on the motion to amend because, by granting summary judgment on negligence, the court "treated the complaint as if it had been amended."[29]

"Ruled upon" also means that the lower court's ruling should be a final determination on the matter. This is typically an issue for evidentiary objections at trial or when the lower court defers a final ruling until later. For example, a ruling on a motion in limine is not

a final ruling. Thus, if the motion is denied and the challenged evidence is allowed, the losing party must object when the evidence is offered to preserve the issue for appeal.[30] If the court excludes testimony, the losing party must proffer the testimony and get it on the record to preserve the issue of exclusion for appeal.[31] Even if the lower court finds testimony admissible immediately before it is offered, if additional evidence is offered between that ruling and when the challenged evidence is admitted, an additional contemporaneous objection is required.[32] Further, winning may not be enough. If an objection is sustained, the appellant must request a curative instruction or move for mistrial.[33] If the curative instruction is accepted or not objected to, the appellant will be deemed to have waived subsequent arguments as to the evidence on appeal.[34]

If the lower court does not rule on the matter, the litigant must file a Rule 59(e) motion asking for a ruling.[35] If the lower court did not rule on the matter and that was addressed in a Rule 59(e) motion, then the matter is preserved even if the lower court again fails to rule on it.[36] There is a brighter line to show the lower court "ruled on" a matter than there is for "raising" a matter. The "ruled upon" requirement seems much easier to meet, but the failure to meet it has just as serious consequences to appeals as the failure to raise a matter. For example, our supreme court reversed a court of appeals decision remanding a case for further proceedings on the issue of whether a driver in a car accident was a permissive user because the supreme court's review of the record revealed the lower court did not rule on the issue and the appellant did not move to alter or amend on that ground.[37] The appellant had made it through the lower court and court of appeals *raising* permissive user, but, seven years after filing, the suit was denied by the supreme court for not obtaining from the lower court a *ruling* on permissive user.[38]

Limited exceptions to preservation

Exceptions to preservation are rare. But it is not always necessary that a matter be raised to and ruled upon by the lower court for the appellate court to address it. Subject matter jurisdiction can be raised at any time even if not presented to the lower court.[39] Also, issues related to the best interests of the child will be addressed on appeal even though not presented to the family court.[40]

Further, an appellate court will address illegal sentences on appeal despite the failure to preserve them based on efficiency—not wanting to waste judicial resources to force a PCR action when the State concedes the sentence is illegal.[41] Also, a court can waive issue preservation to provide future guidance to the

bench and bar. For example, our supreme court recently addressed an issue related to the procedure for an in-camera hearing that no party argued or objected to at the hearing.[42]

In addition, Rule 220(c) allows the appellate court to affirm—not reverse—a lower court's decision for any ground appearing in the record on appeal.[43] Rule 220(c) allows respondents to raise matters on appeal that appear in the record regardless of whether they were presented to or ruled upon by the lower court.[44] That seems an unfair appellate advantage for respondents, but it is supported by the policy goals of judicial economy and finality of disputes.[45]

Doctrines related to preservation

Doctrines similar to preservation can also bar appellate review, including the law of the case doctrine and the two-issue rule.[46] These doctrines further illustrate how matters need to be presented to, ruled upon and appealed at the first opportunity. The law-of-the-case is a discretionary appellate doctrine that precludes a party from litigating matters after an appeal that were (1) raised on appeal and rejected by the court, or (2) not raised on appeal but should have been.[47] The second category includes a bar against relitigating certain lower court decisions that were unappealed, or appealed and abandoned.[48] It applies specifically to decisions finally determining a substantial right, as opposed to interlocutory decisions on collateral issues essential to a case progressing.[49]

A recent example from our state supreme court shows how difficult this can be for litigants to navigate. In *Wilson*, one circuit court judge ruled on a preliminary injunction that the plaintiff did not have standing to sue, and a second circuit court judge on a subsequent motion to dismiss agreed with the first judge and found the standing ruling was the law of the case.[50] Our supreme court acknowledged standing was a substantial right, but that it was not finally determined by the first circuit court because a ruling on a preliminary injunction is interlocutory and not binding in a subsequent trial. Therefore, the law of the case doctrine did not bar the party from relitigating standing in response to the motion to dismiss or on appeal.

The two-issue rule is similar to the law of the case doctrine. When the lower court rules on more than one ground, the appellate court must affirm unless all grounds are appealed because the unappealed ground is the law of the case.[51] Where litigants run into problems is where the lower court awards the same relief on more than one theory or cause of action. For example, if a lower court grants the same relief under theories of negligent misrepresentation, breach of contract and unjust enrichment, but the appellant does not appeal the unjust enrichment decision, the appellate court will not consider the appeal on the other theories based on the two-issue rule.[52]

Preservation rules and the related doctrines are sometimes considered together, and their combination can be fatal to an appeal. For example, in *Gibbons v. Aerotek, Inc.*, the appellant appealed the lower court's decision denying an award of attorney's fees, finding the appellant (1) did not meet the pleading standard for a claim for attorney's fees and (2) did not authenticate the agreement under which it claimed the fees.[53] The lower court denied attorney's fees on two different grounds, ruling *sua sponte* on the authentication ground. The appellant, however, did not file a post-trial motion asking the trial court to reconsider the authentication ground. On appeal, the court held the appellant failed to preserve the authentication issue because it did not move to reconsider, affirming the decision on that ground. Because the trial court denied attorney fees on two grounds, and the authentication issue was unpreserved and became the law of the case, the court declined to address the other issue based on the two-issue rule.[54]

The culmination of these preservation-related doctrines requires an appellant to present a matter to a court at the first opportunity to do so[55], or all at once, and to appeal all grounds upon which a challenged decision is made. If a litigant does not appeal to all grounds upon which a challenged ruling is made with respect to a specific matter, an appeal on that matter could be barred by the two-issue rule or law of the case doctrine.[56]

Preserving your issues for appeal

Although a significant number of decisions involve preservation, the burden falls on the attorneys and not the judges to preserve issues for appeal. Understanding the purpose of preservation and how it works, in addition to some tips below, should help litigants avoid falling victim to preservation.

Preparation is key—and common sense. You should have a firm grasp of the issues, arguments and supporting law before a hearing or trial so you can raise them to the court with sufficient specificity. Specifically citing the case, statute, doctrine or fact is best. But understanding the underlying principles or substance of the law and raising it to the court is sufficient. While you don't need to exclaim to the court "estoppel," you should argue estoppel's substance, like how the person accepted the benefit of the judgment they are now seeking to avoid.

Get it in writing. This overlaps with preparation, including submitting thorough memoranda to the

court and using outlines. In the heat of oral argument, you may blank on a case name, statute or fact, or the judge gives you "that look" and you realize you need to be brief. You can rely on your written submissions to raise the issues or arguments. Further, preparing an outline might be enlightening, sparking new arguments or additional case law not included in the memoranda that you want to raise at the hearing or trial. "Getting it in writing" includes ensuring matters are recorded by the court reporter or are clear in the WebEx recording. Arguments or decisions made in off-the-record or in-chambers conferences must be reiterated on the record to be preserved.

Raise it at the first opportunity. Matters cannot be raised for the first time in a post-trial motion, no matter how inspiring your after-the-fact arguments are. Your issues and arguments need to be fleshed out and presented to the court at the first opportunity to do so.

Get a final ruling. If the lower court does not rule on a matter presented, bring it to the court's attention via a post-trial motion. If you lose a motion before trial or early in trial, continue to raise the issues and arguments until you get a final ruling. One consideration for deciding when a ruling is final is whether circumstances have changed since obtaining a ruling. If summary judgment is denied, move for directed verdict and, if denied, move for judgment notwithstanding the verdict. If you lost a motion in limine, contemporaneously object to the introduction of the challenged evidence. Even if the ruling is deemed "final," you must object again if additional evidence was offered between the "final" ruling and when the challenged evidence is introduced. In each of the above examples, something changed between raising the issue and receiving a ruling.

Conclusion

Preservation can be thought of in terms of mistakes. Someone pre-trial or at trial makes a mistake. That mistake could be granting a dispositive motion, an incorrect evidentiary ruling, or making prejudicial statements to the jury. When that person is not you, you must raise that mistake and get a ruling. If you don't, that mistake becomes your mistake when the appellate court declines to address it on preservation grounds.

This article is not intended to be a comprehensive guide to preservation. However, considering the percentage of recent appeals involving preservation, it is very much a current issue plaguing trial attorneys. Hopefully, a refresher on the doctrine and a few tips will help attorneys avoid taking ownership on appeal of someone else's mistakes, further their client's interests and contribute to developing precedent for the bench and bar.

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Endnotes

[1] The South Carolina Court of Appeals issued 494 published and unpublished decisions in 2023, and preservation was either argued or addressed in 113 of those decisions. Opinions were counted only once, even if the opinion was withdrawn, modified, and refiled.

[2] The South Carolina Supreme Court issued 72 published and unpublished decisions in 2023, and preservations was either argued or addressed in 12 of those opinions. Decisions that dismissed writs as improvidently granted were not included in those numbers.

[3] *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 144, 638 S.E.2d 650, 661 (2006). I use "lower" court for simplicity to refer to all types of courts in which a matter could be pending prior to being appealed, not to imply those courts are "less than" appellate courts.

[4] *Powers v. City of Aiken*, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970).

[5] *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

[6] *Id.*

[7] *Kosciusko v. Parham*, 428 S.C. 481, 506, 836 S.E.2d 362, 375 (Ct. App. 2019).

[8] *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–80 (2004).

[9] *Id.*

[10] *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

[11] *Moses v. State*, 442 S.C. at 263, 269, 898 S.E.2d 174, 177 (Ct. App. 2024); *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023).

[12] *Id.*

[13] *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

[14] *Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc. v. Island Pointe, LLC*, 440 S.C. 190, 209 n.16, 890 S.E.2d 603, 613 n.16 (Ct. App. 2023).

[15] *Atl. Coast Builders & Contractors, LLC*, at 329, 730 S.E.2d at 285.

[16] *Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

[17] *Id.* at 466, 719 S.E.2d at 642.

[18] *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 596 (2010).

[19] *Id.*

[20] *State v. Mitchell*, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008).

[21] *Kosciusko v. Parham*, 428 S.C. 481, 506, 836 S.E.2d 362, 375 (Ct. App. 2019).

[22] *Id.*

[23] *Carroll v. Isle of Palms Pest Control, Inc.*, 441 S.C. 1, 16, 892 S.E.2d 161, 169 (Ct. App. 2023).

[24] *Id.*

[25] *Nelson v. Harris*, 441 S.C. 379, 387–88, 893 S.E.2d 592, 596 (Ct. App. 2023).

[26] *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

[27] *Gleaton v. Orangeburg Cnty.*, 440 S.C. 350, 359, 891 S.E.2d 390, 395 (Ct. App. 2023).

[28] *Staubes*, at 414, 529 S.E.2d at 547.

[29] *Id.*

[30] *Samples v. Mitchell*, 329 S.C. 105, 108, 495 S.E.2d 213, 215 (Ct. App. 1997).

[31] *State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 20 (Ct. App. 2009).

[32] *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023).

[33] *State v. McEachern*, 399 S.C. 125, 146, 731 S.E.2d 604, 615 (Ct. App. 2012).

[34] *Id.*

[35] *Bean v. S.C. Cent. R. Co.*, 392 S.C. 532, 560, 709 S.E.2d 99, 113 (Ct. App. 2011).

[36] *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–80 (2004).

[37] *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991).

[38] *Id.*

[39] *Singh v. Singh*, 434 S.C. 223, 232 n.7 , 863 S.E.2d 330, 334 n.7 (2021).

[40] *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 107, 536 S.E.2d 372, 374 (2000).

[41] *State v. Plumer*, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023).

[42] *State v. Lawrence*, 439 S.C. 611, 618, 889 S.E.2d 557, 561 (2023).

[43] Rule 220(c), SCACR.

[44] *I'On, L.L.C.*, 338 S.C. at 420–21, 526 S.E.2d at 723–24.

[45] *Id.*

[46] J. Toal, *Appellate Practice in South Carolina*, pp. 212–19 (3rd ed. 2016).

[47] *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015).

[48] *Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119, 754 S.E. 2d 486, 490 (2014).

[49] *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022).

[50] *Id.*

[51] *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012).

[52] *Id.* 730 S.E.2d at 285.

[53] *Gibbons v. Aerotek, Inc.*, 441 S.C. 180, 184, 893 S.E.2d 326, 328 (Ct. App. 2023).

[54] *Id.* at 186, 893 S.E.2d at 329–30.

[55] *Daufuskie Island Util. Co., Inc. v. S.C. Off. of Regul. Staff*, 440 S.C. 523, 535 n.8, 892 S.E.2d 302, 309 n.8 (2023).

[56] *See generally Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996).

Risky Business:
What Every S.C. Attorney Should Know about the Cloud

BY CONSTANCE A. ANASTOPOULO

All lawyers use some form of document storage nowadays, but what happens if the software company is hit with malware? Or raises its fees to an amount the attorney can no longer afford? Or provides such bad service the attorney is forced to choose another provider? Or goes out of business? What is the attorney's recourse? Who owns the data? How does the attorney get it back? In what form is it returned? These are questions every lawyer should consider.

Once upon a time, there were filing cabinets where attorneys kept their paper files. Those files included sensitive information about the clients, including names, telephone numbers, addresses, social security numbers, bank accounts, etc., as well as attorney work-product such as motions, complaints, settlement documents, notes and other materials. All this information is known as "data."[1] When a case was concluded, the files were stored in boxes, and then kept in a storage facility or storeroom. If the client or the attorney needed something from the file during the representation, access was easy — one just went to the file cabinet and pulled the file. If the client or attorney needed something from the file after it was sent to storage, it was as easy as asking for the file from the storeroom or storage facility.[2]

Then came computers, and attorneys' files were stored on computer drives in addition to the paper files. But as technology progressed, and courts moved to electronic filings, paper files became obsolete, lawyers needed a place and a system to store their electronic files...enter the "cloud."

The term cloud in the context of computing refers to a network of remote servers hosted on the internet that store, manage and process data, rather than a local server or a personal computer. Cloud computing allows users to access and use computing resources (such as servers, storage, databases, software,

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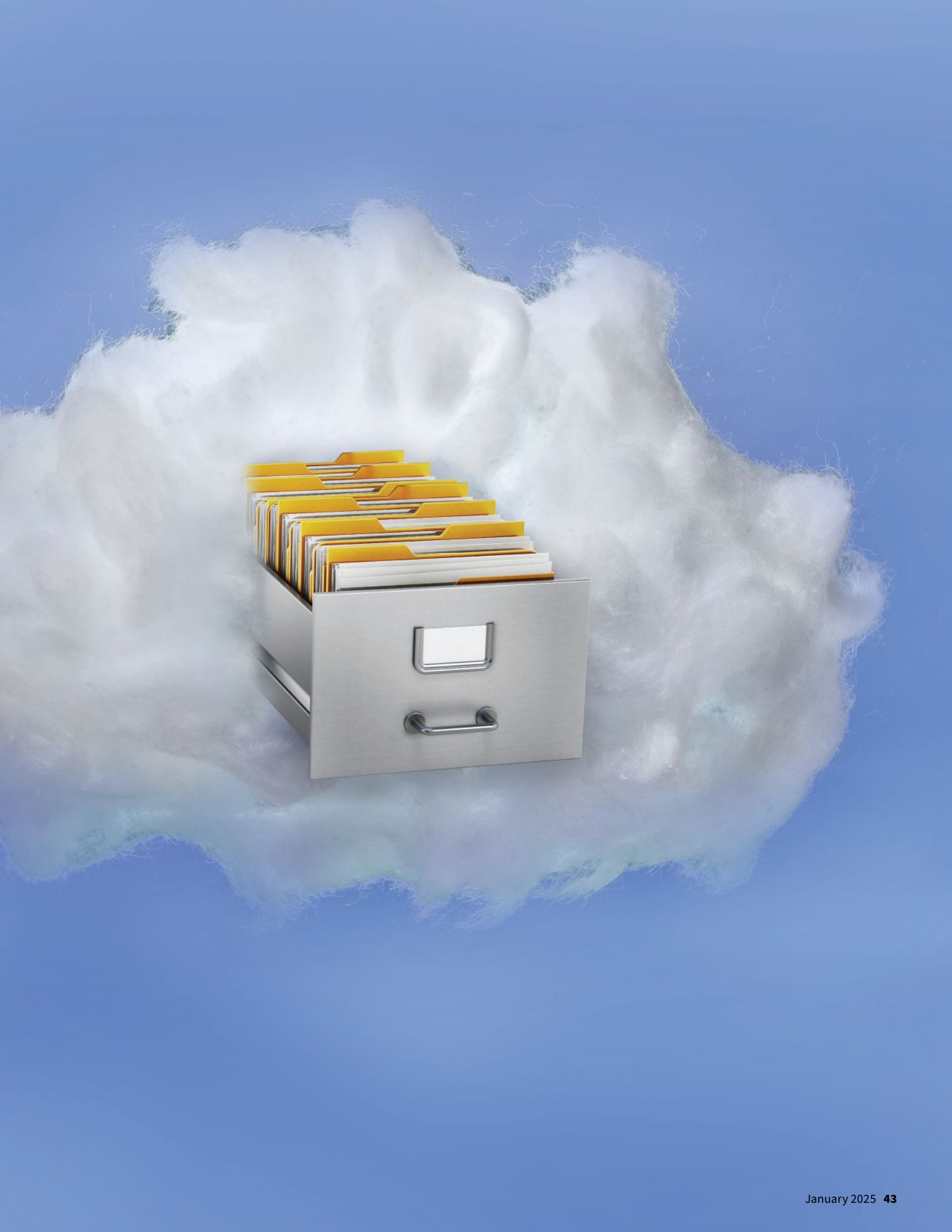


analytics and intelligence) over the internet, typically on a pay-as-you go basis.[3]

There are various deployment models, including:

1. Public Cloud: Services are provided over the internet and are available to anyone who wants to purchase them. Examples include Amazon Web Services (AWS), Microsoft Azure and Google Cloud Platform.[4]
2. Private Cloud: Services are used exclusively by a single organization. The infrastructure can be managed by the organization or a third party.[5]
3. Hybrid Cloud: Combines elements of both public and private clouds. It allows data and applications to be shared between them.[6]

Additionally, many attorneys utilize cloud-based service products to manage and organize caseloads called Software as a Service (SaaS) that deliver software applications over the internet, eliminating the need for users to install, maintain and run the applications on their devices.[7] Examples include Litify, Filevine, TrialWorks, CloudLex and others. As attorneys upload data to their Software as a Service (SaaS) provider, that information is held by a cloud service such as AWS or Google Cloud platform. The SaaS serves as the middleman between the customer (attorney) and the cloud service provider where the data is held. These services generate an internal number to link separate data pieces, and when information is needed, the customer generally accesses the information via the cloud service provider's proprietary user interface and the software compiles the data from the links, displaying it to the user. Access to the proprietary interface is granted to the customer through the subscription agreement. This is important to understand if problems arise because the cloud service stores data in the general subject area such as notes, messages, filings and photographs, and when the attorney requests files after a problem, the only obligation of the cloud service provider is to produce the data list by internal number and by general subject area. What an attorney may receive is pages of spreadsheets with information listed by cloud service number without any identifying information to match with the actual client's name or case. Without the SaaS provider's proprietary user interface and software to "put Humpty Dumpty back together again"[8], the lawyer can be left with useless pieces of data.

It is important for attorneys to understand the issues and the responsibilities when utilizing these products. In South Carolina, attorneys have an ethical duty to ensure the confidentiality of client information when using cloud services. This duty is rooted in the attorney-client

privilege, which encourages clients to make full and frank disclosures to their attorneys, who are then better able to provide candid advice and effective representation.[9] The obligation to preserve client confidential information extends beyond merely prohibiting an attorney from revealing confidential information without client consent. A lawyer must also take reasonable care to affirmatively protect a client's confidential information.[10] This obligation includes all data held in the cloud. This duty extends to supervising the technical operations of the cloud service provider and obtaining the informed consent of the client.[11]

Unfortunately, most, if not all, SaaS agreements explicitly state that their customers are responsible for their (and their clients') data and for backing up all the data that is uploaded.[12] If a disagreement arises with the cloud service provider or the provider is hacked, client data can be held for ransom. Additionally, companies like Filevine may have provisions in their contracts with lawyers that the provider can use the data *indefinitely*.[13] It is the responsibilities of the lawyer to ensure access and confidentiality of client data.

Another issue may arise with accessing the client file stored in the cloud. With no physical back-up at the attorney's location, data, including confidential client information may be gone or produced in such a manner that the attorney does not know what data belongs to which client. Attorneys can be left explaining the loss of data to their clients and the state Bar. What is the duty of the software company or Amazon Web Services or Microsoft Azure when this happens? What are they required to provide? Will they assist the attorney at a disciplinary hearing? Will they indemnify the attorney if clients sue? Therefore, attorneys should have information regarding the use of the cloud for file storage in the engagement agreement with the client and obtain the informed consent of the client before uploading information to and utilizing cloud storage services.

Some attorneys may be backing up their documents internally or firms may have a policy that data is backed up on other providers such as Dropbox (which is another cloud provider rather than internal or local), believing this may solve these concerns about accessibility and confidentiality through a back-up system. However, it is important for attorneys to closely read the agreements with Dropbox or other similar back-up systems as they may be violating ethical rules regarding confidentiality. For example, Dropbox's service agreement, and potentially others, states that Dropbox will have the right to access and anonymize all data and "this data is owned by Dropbox."[14] Furthermore, attorneys should address all ethical issues pertaining to outsourcing in

the "terms of service" agreement with the cloud computing vendor.[15] In the context of cloud computing, a preliminary issue arises as to whether the third-party vendor providing the cloud service or the party using the service actually owns and controls the documents.[16] Allowing a back-up service such as Dropbox or similar provider to "own this data" in any form may violate an attorney's ethical duty of confidentiality.

Also, there is a great deal of data that resides in the attorney's SaaS system that must be preserved in addition to documents. All the data entered in the system is not only relevant and important information regarding a client's case, but also, should a fee dispute arise, is evidence of work performed by the attorney and the law firm staff and can be considered part of the preservable file. This data may include things like digital correspondence, notes, messages, case contacts, in addition to pleadings, legal documents, evidence, discovery, legal research, transcripts, correspondence, drafts and notes.[17]

Additionally, attorneys must ensure that the cloud service providers they use are competent and must oversee the execution of the agreement adequately and appropriately. This is part of an attorney's duty of supervision. Depending on the sensitivity of the information being provided, attorneys should consider investigating the security of the provider's premises, computer network and even recycling and disposal procedures.[18] Lastly, the responsibility of the attorney to protect the client data can be more challenging due to the reliance of cloud computing on the internet and interconnected computer systems which are themselves vulnerable to hacking.[19]

Recognizing the issues and evolving technology related to cloud storage of client information by attorneys, the New Yort State Bar Association promulgated specific guidelines to assist attorneys in understanding their ethical duty in this area. These guidelines required lawyers to proactively take measures regarding the duty of confidentiality and cloud storage by taking the following steps:

1. Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information.
2. Investigating the online data storage provider's security measures, policies, recoverability methods and other procedures to determine if they are adequate under the circumstances.
3. Investigating the storage provider's ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons change storage providers.[20]

The opinion further recognizes that technology and storage of data is rapidly changing. Therefore, the opinion encourages lawyers to periodically reconfirm that the provider's security measures remain effective considering advances in technology.[21]

Consistent with the above measures, South Carolina requires that when using third-party electronic or internet-based file storage, attorneys must make reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of client information. This includes a system of regular and frequent back-up procedures, especially if trust records are computerized.[22] Furthermore, records required by the rules should be readily accessible and available to be produced upon request of a client or third person who has an interest in said records, as provided in the South Carolina Rules or upon official request of a disciplinary authority.[23] This includes return of the client file and property upon request of the client.[24] Specifically in *Matter of White*, the client requested return of her file upon the termination of the attorney.[25] The attorney asserted a retaining lien, however, after a motion for contempt was filed against the attorney, the attorney returned the client's file and received a public reprimand for various violations of professional conduct rules including impermissibly failing to return the client's file and property upon request.[26] In another attorney disciplinary matter, the attorney failed to return the client's file after three different requests.[27] The attorney also received a reprimand.[28] If the file is inaccessible once it is uploaded to a cloud, an attorney could face similar disciplinary action, even absent an intent to retain the file because of an issue related to the storage in the cloud, rather than a dispute over ownership.

The South Carolina Rules also address not only when information must be produced, but also the manner in which it is required to be produced. Personal identifying information in records produced upon request of a client, third person or disciplinary authority should remain confidential and should be disclosed only in a manner to ensure client confidentiality as otherwise required by law or court rule.[29] In other words, under the South Carolina Rules, attorneys must be able to produce and have available any information that has been uploaded to a cloud storage system in a manner that is readable to the client within a reasonable time upon request of the client, a disciplinary authority, or third party as specifically provided by Rule 1.16(d).[30] The problems arise when the attorney cannot access the cloud. This may occur for various reasons, such as wi-fi not being available or accessible, or because the cloud service provider cannot or will not produce the information, or the files have been hacked at the cloud service provider or at the attorney's internal system or for any other reason. Without a back-up system that stores the data in the same manner in which it was uploaded so that it can be produced in a readable form to the client and that is readily accessible, lawyers may be in violation of ethical rules.

One state Bar addressed this issue in a recent ethics opinion. The Bar received an inquiry from an attorney with a litigation practice in which most documents, such as discovery materials and transcripts, are received or generated in electronic form. The inquirer stores such documents in electronic form.[31] In those instances in which the inquirer receives documents in hard-copy form, such as documents received from clients, the documents are scanned and either returned to the client or kept in a separate electronic file.[32] Generally, when a former client requests a copy of his or her file, the firm provides a link to a secure, password-protected cloud storage facility containing the client's file.[33] One former client, who retained the firm to represent him in a criminal matter and who is now incarcerated, requested that the firm send a printed copy of his electronic file to the former client's spouse. The firm had no hard-copy documents for this client.[34]

The question posed to the ethics commission was to what extent must a lawyer provide a former client with the client file in the form in which the client requests it?[35] Specifically, must the lawyer produce the client file is a readable form, including a printed version to the client if so requested?

The state Bar issued an ethics opinion in answering the inquiry stating that where the client is unable to read electronic documents, the lawyer should make reasonable efforts to transmit the file in a form in which the client can access the documents.[36] Again, the problem with cloud storage is that the documents, when available, may be returned in an unreadable format that is useless to the attorney and the client without the proper tools to decode the information and put the pieces back together again.

The good news is that recognizing these problems, new entities are filling the gap by providing services to both back-up data stored in cloud service providers and provide it to attorneys when needed, as well as utilize programs that decode the data so that it is produced in an understandable and useful way back to the attorney.[37] If attorneys are going to utilize and rely upon cloud-based systems, they have a duty to remain abreast of and implement the latest data security and preservation technology or to employ someone who can do that on their behalf.[38]

In conclusion, attorneys in South Carolina have a duty to ensure the confidentiality of client information

(continued on page 50)

Criminal Defense Social Media Subpoenas

BY ALICIA VACHIRA PENN

If you subpoena a company like Meta or Snap, Inc. for records, what will you get? The answer depends on who you are, what you ask for, where you ask for it, and what you argue.

If you are a prosecutor[1] you can use warrants, subpoenas, and wiretaps to obtain the contents of communications and subscriber information from social media companies. Facebook has a webpage just for law enforcement to submit their request via a "Law Enforcement Online Request System."[2]

If you are a criminal defense counsel, there is no convenient link for you. The current landscape of social media subpoenas currently looks like this: if you ask for records of messages sent to your client, you should get them. 18 U.S.C. § 2702(b)(1)(2018); *see also Facebook, Inc. v. Pepe,* 241 A. 3d 248 (D.C. 2020). If you ask for subscriber information (i.e., things that are not considered contents of communications), you should get it. 18 U.S.C. § 2702(a)(1)(2018).

But what if you need a message that was not addressed to your client? Or photographs that were posted on someone else's page? Here we run into the Stored Communications Act ("SCA"), enacted by Congress in 1986. 18 U.S.C. §§ 2701-2712(2018). Some courts have interpreted the SCA to allow major technology companies to refuse to comply with criminal defense subpoenas,[3] while one[4] has recently held the SCA doesn't apply to major technology companies at all.

Legal scholars have identified the threats to justice caused by allowing subpoena avoidance and have outlined multiple solutions. In 2021 Rebecca Wexler argued major technology companies have enjoyed an undeserved court-created subsidy. "Privacy as Privilege: The Stored Communications Act and Internet Evidence," 134 Harv. L. Rev. 2721 (2021).[5] Wexler's scholarship provides a new path for defense counsel to argue the SCA does not and should not bar criminal defense subpoenas. The next year, Yale Law Journal published Rebecca Steele's article "Equalizing Access to Evidence: Criminal Defendants and the Stored Communications Act," 131 Yale L.J. 1584 (2022).[6] Steele's article provides a list of ways to access contents of communications within the boundaries of the SCA, plus sets out the constitutional challenges that should be made when the SCA is claimed as a shield.

This article compiles some of the law, rules, and arguments relevant to criminal defense counsel's

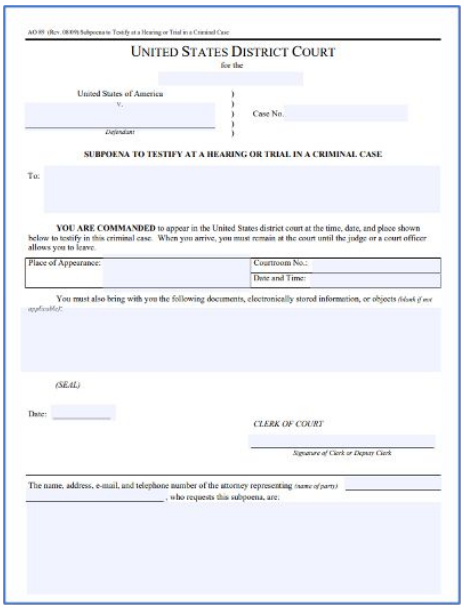
PHOTO BY GEORGE FULTON


SUBPOENA

quest to obtain social media evidence for a case.

Federal Rule of Criminal Procedure 17: Subpoena

A federal subpoena may order a witness to produce "any books, papers, documents, data, or other objects." Fed. R. Crim. P. 17 (c)(1). The subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify when the subpoena specifies. Fed. R. Crim. P. 17 (a). The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before it is served. Fed. R. Crim. P. 17 (a). A typical subpoena looks like this:



AO 89 (Rev. 08/09) Subpoena to Testify at a Hearing or Trial in a Criminal Case

UNITED STATES DISTRICT COURT

for the

United States of America

v.

Case No.

Defendant

SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE

To:

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place of Appearance:	Courtroom No.:
	Date and Time:

You must also bring with you the following documents, electronically stored information, or objects (blank if not applicable):

(SEAL)

Date:

CLERK OF COURT

Signature of Clerk or Deputy Clerk

The name, address, e-mail, and telephone number of the attorney representing (name of party) _____, who requests this subpoena, are:

Subsection (b) of rule 17 provides for ex parte applications by the defense. "Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense." Fed. R. Crim. P. 17 (b). Generally, the party seeking the 17(c) subpoena must show the documents are relevant, not otherwise reasonably procurable, needed for trial preparation and their absence might cause delay, and are being sought in good faith and not for a fishing expedition. *United States v. Nixon,* 418 U.S. 683, 699 (1974).

A party commanded to produce documents under a subpoena can fight the subpoena by filing a motion to quash or modify the subpoena. Fed. R. Crim. P. 17(c)(2).

South Carolina Rules of Criminal Procedure 13(a)(1): Issuance of Subpoenas

South Carolina Rule of Criminal Procedure 13(a)(1) states any party can request the clerk of court to issue a subpoena for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court, and that the subpoena shall command the person "to attend and give testimony, or otherwise produce documentary evidence at a specified court proceeding."

Anecdotally,[7] the 2019 amendment to the South Carolina Criminal Subpoena rule has had a chilling effect on defense attempts to obtain relevant evidence. In 2020, the South Carolina Office of the Attorney General opined few subpoenas would be allowed by rule 13(a)(1). 2020 WL 3120244 (S.C.A.G. May 22, 2020). Citing to caselaw from the District of Arizona in 2006, the Southern District of New York in 1951, the 6th Circuit in 1975, the 8th Circuit in 1993, the 10th Circuit in 1997, and South Carolina Rule of Civil Procedure 45, the opinion posits that subpoenas are only allowed for a "scheduled formal proceeding, such as a hearing or trial...it is our opinion that the parties are not authorized to issue subpoenas duces tecum for the inspection of documents prior to a hearing or trial." *Id.*

This reading of rule 13(a)(1) should be challenged. It needlessly turns "specified court proceeding" into "scheduled hearing or trial, not before the scheduled hearing or trial, and not an appearance date...a scheduled formal hearing such as a hearing or trial." The opinion does concede the procedural questions are fact-specific and "unlike a court, we cannot adjudicate facts or make independent findings of fact in an opinion." At time of writing, no caselaw was found that litigated the parameters of a "specified court proceeding" for the purposes of the rule.

The next step for any party seeking to subpoena social media contents is to follow the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, S.C. Code § 19-9-70. To serve an out-of-state subpoena in California, where Meta or Snap, Inc. are based, the subpoena must be domesticated[8] there.

The Stored Communications Act

Some companies, when faced with a criminal defense subpoena, will use the Stored Communications Act to excuse their non-compliance. Section 18 USC 2702 (a)[9] generally prohibits service providers from sharing the contents of electronically stored communications or records:

§2702. Voluntary disclosure of customer communications or records

(a) Prohibitions. Except as provided in subsection (b) or (c)—
  (1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and
  (2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—
    (A) on behalf of, and received by means of elec-

tronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

18 U.S.C. § 2702 (2018). Section 2702(b) lists nine exceptions. These are:

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A

(7) to a law enforcement agency—

(a) if the contents—

i. were inadvertently obtained by the service provider; and

ii. appear to pertain to the commission of a crime; or

(b) ...

(8) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or

serious physical injury to any person requires disclosure without delay of communications relating to the emergency; or

(9) to a foreign government pursuant to an order from a foreign government that is subject to an executive agreement that the Attorney General has determined and certified to Congress satisfies section 2523.

More exceptions are in 2702(c) and (d)[10] but because they are irrelevant to this article they are not produced here.

2702(b)(1): to an addressee or intended recipient of such communication or an agent of such addresses or intended recipient

The exception in 2702(b)(1)—"to an addressee or intended recipient of such communication or an agent of such"—has been interpreted to mean if a defendant is asking for communications sent or meant for them, the company must provide these records. *Facebook, Inc. v. Pepe*, 241 A. 3d 248, 2020 WL 1870591. In *Pepe*, Facebook fought compliance with a subpoena. Pepe argued what he was asking for—records of messages sent to him—fell under § 2702(b)(1) and thus the SCA provided Facebook no shield against compliance.

On appeal, the court addressed (1) Pepe's status as an "addressee or intended recipient," and (2) the enforceability of a subpoena for information the SCA permits Facebook to divulge. *Facebook, Inc. v. Pepe*, 241 A.3d 248, 254. It found Pepe's subpoena enforceable, affirming the trial court's order holding Facebook in contempt and its order denying Facebook's motion to quash. *Facebook, Inc. v. Pepe*, 241 A.3d 248, 265.

Facebook argued Pepe was not an "addressee or intended recipient" because the Instagram messages he sought were not visible on his Instagram platform after 24 hours. *Id.* at 254–255. The court disagreed, stating this reading was unsupported by the ordinary meaning of the words or by any definition in the SCA itself. *Id.* Facebook also argued that the SCA implicitly created "an absolute service provider discovery privilege whenever the SCA does not specifically require a service provider to permit discovery." *Id.* at 257. The court rejected this too, highlighting the presumption against inferring Congress intended to restrict rules of discovery in the judicial process. *Id.*

2702(b)(3): with the lawful consent of the originator

In *Facebook v. Superior Court (Hunter),* 4 Cal. 5th 1245; 417 P.3d 725 (2018), the Supreme Court of California held public posts had to be disclosed by technology companies in response to a defense subpoena. Section 2702(b)(3) of the SCA lists an exception to the general prohibition on disclosure that disclosure is permitted "with the lawful consent of the originator or an addressee or intended recipient of such communication."

The *Hunter* court held, as both parties agreed after supplemental briefing, that a social media communication configured as public fell within section 2702(b)(3)'s lawful consent exception. *Id.* at 745. It didn't go further in either direction, and disagreed with the defendants' argument public posts included restricted posts accessible only to a selected of friends or followers. *Id.* at 746–47. It also disagreed with the companies' argument 2702(b)(3)'s lawful consent exception authorized but didn't compel compliance with a defense subpoena.

Privacy as Privilege: The Stored Communications Act and Internet Evidence

In addition to the exploration of the SCA in caselaw, legal scholars have viewed its interpretation through a critical lens and proposed solutions to its injustices. Rebecca Wexler lays out a historical and legal path to argue the correct treatment of the intersection of the SCA and criminal defense subpoenas is to consider the SCA as creating a duty of confidentiality and not an absolute privilege.[11]

The article highlights the disparity of resources between companies and their well-funded legal teams vs. criminal defendants.[12] It starts with a litany of cases where a quashed subpoena impeded justice—a homicide defendant blocked from arguing self-defense, a murder defendant denied access to key impeachment material, etc. *Id.* at 2723. Wexler memorializes a federal public defender who says what some of us think even if we do not say it out loud: "Do I think that the content would be really helpful? Yes. Do I think that we could beat Facebook and Twitter in court? Probably not." *Id.* at 2725.

Wexler painstakingly shows how the result of reading privilege into the SCA—that defense counsel cannot subpoena certain information from major technology companies—is inconsistent with privilege law. *Id.* at 2745. The unfairness that results could be avoided if the SCA was correctly viewed as creating a duty of confidentiality like that assigned to doctors, lawyers, banks, etc. This duty could then be overcome, where merited, through proper judicial process. *Id.* at 2751. The contrast between companies that provide access to a social media platform and the professions associated with the most intimate parts of human lives—death, law, and taxes--drives home the ridiculousness of such a boon to these major technology companies. While defendants are entitled by law and right to medical records if relevant to their case, some courts have ruled the SCA will not allow

them to get social media posts that have been shared with the general public. This, Wexler explains, is legally wrong.

Her last section covers the policy implications of empowering major technology companies to escape criminal defense subpoenas. Instead of protecting privacy, courts have enabled its violation--"The primary effect of the current SCA privilege is not to protect privacy but, rather, to exempt technology companies from the administrative burdens of complying with subpoenas. The current SCA case law is...a subsidy that courts have gifted to technology companies and their data-mining markets...rather than protect privacy, the current SCA subsidy protects technology companies' privacy-invasive business practices." *Id.* 2782.

Equalizing Access to Evidence: Criminal Defendants and the Stored Communications Act

Rebecca Steele's article gives defense counsel other avenues. *Equalizing Access to Evidence: Criminal Defendants and the Stored Communications Act,* 131 Yale L.J. 1584, 1600, March 2022. First, the SCA's incorrect privilege can be avoided by subpoenaing the sender or recipient of a desired communication directly. Second, defense counsel could work with law enforcement to issue warrants. *Id.* Third, the company is not covered under the SCA at all. *Id.* The last portion of Steele's article reviews constitutional challenges: due-process rights and the sixth amendment.

In July 2024, an appellate court in California relied on the third avenue to rule Meta could not claim the SCA as a shield against a criminal defense subpoena. In *Snap v. Superior Court,* 2024 Cal. App. LEXIS 465 (July 23, 2024), the court held a company was excluded from the SCA's limitations because they used customer data for business purposes—"we conclude that the companies' ability to access and use their customers' information takes them outside the strictures of the Act." *Id.* at 2.

The court reasoned that Meta's terms of service for Facebook stated it would use personal data to target ads and content plus mine personal data and share it for business purposes. *Id.* at 31. It discussed the definition of an electronic communication service (ECS) and remote computing service (RCS) as defined by the SCA and concluded neither could access the contents of communications. Therefore, if a social media company did not act as an ECS or RCS and chose to access and use data for purposes other than temporary storage or processing, they could not then claim to be an ECS and RCS and use the SCA as a shield against criminal defense subpoena compliance. "[I]f an entity does not act as a provider of ECS or RCS with regard to a given communication, the entity is not bound by any limitation that the SCA places on the disclosure of that communication—and hence the entity cannot rely upon the SCA as a shield against enforcement of a viable subpoena seeking that communication." *Id.* at 45, *citing Facebook, Inc. v. Superior Court (2020),* 10 Cal. 5th 329 (267 Cal. Rptr. 3d 267, 471 P.3d 383 (Touchstone).

Conclusion

As legal understanding grows in the field of social media technology, there is optimism for defense attorneys seeking content. Older reviews of the SCA and defense subpoenas are not particularly defense-friendly, but are also neither robust nor controlling. Every criminal defense attorney understands that a single social media image or message can hold the key to a favorable result. The legal scholarship of Wexler and Steele, plus recent caselaw, map paths to get there.

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Endnotes

[1] For a detailed description of all the ways prosecutors and law enforcement can access data and defense counsel cannot, *see generally* Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Defense Investigations*, 68 UCLA L.Rev. 212 (2021), www.uclalawreview.org/privacy-asymmetries-access-to-data-in-criminal-defense-investigations/.

[2] *Law Enforcement Online Requests*, Facebook, www.facebook.com/records/login/ (last visited Nov. 6, 2024).

[3] For a collection of cases that have allowed technology companies to use the SCA as a shield against criminal defense subpoenas see *Facebook, Inc. v. Wint*, 199 A.3d 625, 629 (D.C. 2019).

[4] *Snap v. Superior Court*, 2024 Cal. App. LEXIS 465 (July 23, 2024), *see infra*

[5] Rebecca Wexler, *Privacy as Privilege: The Stored Communications Act and Internet Evidence*, 134 Harv. L. Rev. 2721 (2021), https://harvardlawreview.org/print/vol-134/privacy-as-privilege/.

[6] Rebecca Steele, *Equalizing Access to Evidence: Criminal Defendants and the Stored Communications Act*, 131 YALE L. J. 1584 (March 2022), www.yalelawjournal.org/pdf/Steele_131.5_qcj9fzmn.pdf.

[7] Based on conversations with South Carolina criminal defense attorneys.

[8] To domesticate means to make the subpoena enforceable in California even though it's from South Carolina via legal process.

[9] 18 U.S.C. § 2702.

[10] 18 U.S.C. § 2702.

[11] Wexler, *supra* note 5.

[12] "In many ways, it is unsurprising that an erroneous view of the SCA as barring judicially ordered criminal defense subpoenas has proliferated through the courts. On the one hand, this view has been advanced by multinational companies with power and privilege...on the other hand, this view has been marshaled against underresourced, decentralized public defenders managing full felony dockets and representing poor, disproportionately Black, and marginalized clients." *Id.* at 2725.

Risky Business

(continued from page 41)

when using cloud services. This duty includes making reasonable efforts to ensure that third-party storage providers have adequate procedures in place to protect client information as well as being in compliance with the state's ethics rules. Additionally, attorneys must ensure that client records are readily accessible and disclosed only in a manner that protects client confidentiality.[39] Attorneys must regularly monitor their cloud service providers or hire a service that will guarantee access regardless of possible interruptions such as power outages, hacking, disputes with the cloud service provider, or other events that may inhibit accessibility and protection of client information.

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Endnotes

[1] *Data*, Merriam-Webster Dictionary, https//merriam-webster.com/dictionary/data. (last visited June 25, 2024); S.C. Code Ann. §39-1-90 (2013) (...computerized data that compromises the security, confidentiality, or integrity of personal identifying information.)

[2] While "client file" is not specifically defined by most state rules of professional conduct, Arizona has defined "client file" to include "(without limitation) pleadings, legal documents, evidence, discovery, legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda." Ariz. Rules of Prof'l Conduct, R. 1.16, Cmt. 9.

[3] NIST Special Publication 800-145, *The NIST Definition of Cloud Computing*, U.S. Department of Commerce, https//doi.org/10.6028/NIST.SP.800-145.

[4] *Id* at 3.

[5] *Id.*

[6] *Id.*

[7] *The NIST Definition of Cloud Computing*, *supra* note 3 at 2.

[8] Samuel Arnold, Juvenile Amusements (1797).

[9] *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 829 S.E.2d 707 (2019).

[10] Rule 1.4, Rule 407, SCACR (2018).

[11] Rule 1.16, SCACR (2018).

[12] *See Microsoft Azure Legal Information*, Microsoft, https://azure.microsoft.com/en-us/support/legal/ (Apr. 2023); *See also AWS Customer Agreement*, Amazon, https://aws.amazon.com/agreement/ (May 17, 2024).

[13] *Filevine Subscription Agreement, Section 7.2, Ownership of Subscriber's Data*, Filevine, www.filevine.com/subscription-agreement/(Oct. 9, 2024).

[14] *Dropbox Service Agreement, Section 4.7 Aggregate/Anonymous Data*, Dropbox, www.dropbox.com/terms (last visited June 25, 2024).

[15] 1-5 LN Practice Guide: NY e-Discovery and Evidence § 5.15 (2024).

[16] 1-1 LN Practice Guide NY e-Discovery and Evidence §1.09 (2024).

[17] Ariz. Ethics Op. 08-02, defining the term "file."

[18] 1-5 LN Practice Guide: NY e-Discovery and Evidence § 5.15 (2024).

[19] *Id.*

[20] N.Y. State Bar Ass'n, Comm. on Pro. Ethics, Formal Op. 842 (2010).

[21] *Id.*

[22] Rule 3, Rule 417, SCACR (2024).

[23] *Id.*

[24] *Matter of White*, 328 S.C. 88, 90-91, 492 S.E.2d 82 (1997).

[25] *Id.*

[26] *Id.* at 95.

[27] *In re Strait*, 343, S.C. 312, 314-315, 540 S.E.2d 460 (2000).

[28] *Id.* at 316.

[29] Rule 3, Rule 417, SCACR (2018).

[30] Rule 1.16(d); Rule 407 SCACR (2018); *White*, 328 S.C. at 92.

[31] N.Y. State Bar Ass'n, Comm. on Pro. Ethics, Formal Opinion 1142 (2018).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Cloudburst Inc. utilizes its patent pending process to compile data points from various computing infrastructure locales and deliver that data in industry standard formats (folders and files identified by client name). The data is delivered either by flash drive that can be physically stored at the attorney's location or can be delivered electronically to a Network Accessible Storage Device (NAS) or other physical or virtual receptacle. www.cloudbursttech.com/

38 Model Rules of Pro. Conduct, r. 1.1, Cmt. 8 (Am. Bar Ass'n 2024).

39 Rule 3, Rule 417, SCACR (2018).

Becoming One Bar

BY ROY LANEY

On February 14, 1975, South Carolina lawyers became unified as one bar when the South Carolina Supreme Court promulgated a rule which, "hereby created and established an organization to be known as the South Carolina Bar".[1] Prior to creating the South Carolina Bar, South Carolina had two predominant bars - the South Carolina Bar Association established in 1884, and the South Carolina State Bar established in 1968.[2] In creating the South Carolina Bar, the Supreme Court merged old and new to form a single, statewide bar open to all lawyers which would come to serve South Carolina's lawyers for the next fifty years.

The Foundation: the South Carolina Bar Association

On December 11, 1884, lawyers representing each of South Carolina's then thirty-four counties conducted an organizational "Bar Convention" at the Richland County Courthouse.[3] During this period, the South Carolina Supreme Court granted licenses to practice as an attorney.[4] However, South Carolina lacked a statewide association of lawyers in South Carolina. Although South Carolina lawyers previously had established the South Carolina Bar Association in 1826, the organization ceased to exist as of 1841.[5] In the 1870's and 1880's, a national trend of establishing bar associations emerged to reform and improve the practice of law.[6] The American Bar Association was organized in 1878, and by 1880, eleven states had organized bar associations.[7] Seeing the need for such an entity in South Carolina, the organizers adopted a constitution which formed the South Carolina Bar Association with the object to: "**maintain the honour, dignity, and courtesy of the profession of law; to advance the science of jurisprudence; to promote the due administration of justice, and reforms in the law; to encourage liberal education for the Bar; and to cultivate cordial intercourse among members of the South Carolina Bar.**"[8]

Although not mandatory for lawyers to join, the South Carolina Bar Association grew into a robust organization with significant membership and influence over the practice of law in South Carolina. Initially, membership in the Association required a nomination from a "Local Council" with one negative vote sufficient to defeat approval.[9] Members of the judiciary were honorary members.[10] Over the years, the Association's membership grew and its leadership included many of the state's most influential lawyers, such as George Bell Timmerman, James Byrnes, Strom Thurmond, Edgar Brown, and Solomon Blatt.[11] Miss James Perry became the first woman member in 1918.[12] The table on the next page, drawn from annual addresses of Association presidents, approximates Association membership levels as compared to the approximate total number of lawyers in South Carolina.[13]

The Association maintained numerous active committees.[14] The Committee on Grievances, by statute, was "empowered as a Commission of Inquiry with full power

THE TRANSCRIPT OF THE SOUTH CAROLINA BAR

Volume 19, Number 2 February, 1975

Now There Is One

On Friday, January 31, 1975, the South Carolina Bar Association voted itself out of existence. Meeting at Hilton Head Island, the members of the Association voted 103 to 16 to merge with the South Carolina State Bar into a new organization called the South Carolina Bar — thus ending over three years of intensive study and negotiation on the part of the two organizations.

Association President deRosset Myers presided and introduced the panelists who discussed the history of the merger negotiations, the proposed structure, Constitution, By-laws and Court Rule which would result from merger. Reese Smith, Past - President of the Florida Bar, detailed the history of the Florida Bar and discussed the advantages of a single unified organization. Following this presentation, Harry Haynesworth proposed the resolution for Merger on behalf of the Executive Committee of the Association. Lively debate followed. Following the meeting of the Association, State Bar President William M. Wilson convened a meeting of the South Carolina State Bar, which promptly adopted a resolution similar in content to that approved by the Association.

Panelists for the meeting were: President Wilson, who discussed the history and background of the merger negotiations; Claude Scarborough, President - Elect of the Association, who discussed the proposed structure, Constitution and By-laws of the new organization; James Parham, President - Elect of the South Carolina State Bar, who explained the Supreme Court Rule governing the new organization; William Pope, Association Treasurer; and Julius McKay, of the State Bar Council. Parham, Scarborough, Pope and McKay were members of the Joint Merger Committee.

In his discussion of the Florida Bar, Mr. Smith explained that he believed a unified Bar created greater awarness of professional responsibility, was better able to serve the member lawyers, solve problems in the public interest, provide greater strength and resources, and could exercise and enjoy powers a voluntary Bar could not possess. He said that the history of integrated Bars indicates Courts generally have allowed the Bars to be innovative without undue interference and that Florida had encountered no real trouble with its Supreme Court.

The primary concern of the opponents to the merger resolution appeared to be control of the organization by the Supreme Court, the compulsory nature of the proposed Bar and the cost. Seven members of the Association spoke against merger.

One of the opponents felt that the merger proposal contravened South Carolina's "Right To Work" statute and

See ONE p. 2

The President's Letter

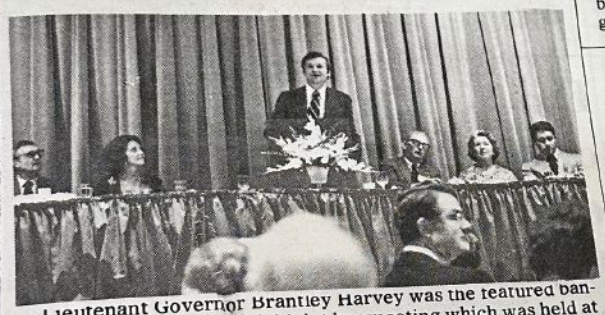
James C. Parham, Jr.

The appearance of this issue of The Transcript confirms one of the goals of the South Carolina Bar: to preserve and build upon the best in the traditions and programs of the Bar Association and the State Bar. The close schedule at Hilton Head did not allow time for appropriate recognition of the leadership of our predecessor organizations. We are deeply indebted to deRosset Myers and Bill Wilson and to the members of the Executive Committee and Council who have led us to this historic convergence. With the merger closes a chapter which, for all of its confusion, now finds us stronger and more committed than ever to integrity and excellence in the profession and to recapturing our historic role in the affairs of our state and country. In this connection, there is much concern about our "public image". Perhaps our public image may be largely a reflection of our self-image, and I hope that a good job done on the latter might go far toward taking care of the former.

The immediate task is to organize under the new Constitution and By-Laws (please read them if you haven't already). It is important that we all get a feel for the new structure as soon as possible. Elsewhere in this issue you will find printed a listing of the interim officers, Board of Governors and House of Delegates who will hold office until the annual meeting in May. The importance of your participation in this organizational period can hardly be overemphasized. You have already received a separate notice of the procedure and timetable for election of members to the House of Delegates. The results of this election will be announced in April. Nominees for officers and elected members of the Board of Governors to take office in May will be announced by the Nominating Committee

See PRESIDENT p. 2

Lt. Gov. Harvey Speaks At Merger Meeting



Lieutenant Governor Brantley Harvey was the featured banquet speaker at the special joint bar meeting which was held at Hilton Head, January 30-February 1, to consider creation of a unified South Carolina Bar. Shown in this photo (l to r) are deRosset Myers, formerly South Carolina Bar Association president, Mrs. Harvey, Harvey, William Wilson, formerly South Carolina State Bar president, Mrs. Wilson and James Parham, Jr., the initial president of The South Carolina Bar.

New Bar To Meet

The first annual meeting of The South Carolina Bar has been set at the Myrtle Beach Hilton, May 7-10.

Bar leaders urge all attorneys to plan to attend the meeting because of its importance to the future of South Carolina's organized Bar.

S.C. Bar Officers

January 1, 1975

Officers

President ..... James C. Parham, Jr.
President-Elect ..... Claude M. Scarborough, Jr.
Secretary ..... Louis P. Howell
Treasurer ..... William L. Pope

Board of Governors

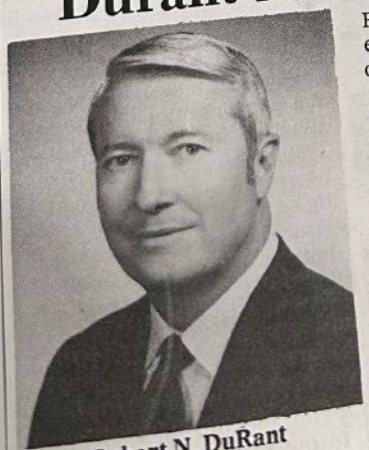
President ..... James C. Parham, Jr.
President-Elect ..... Claude M. Scarborough, Jr.
Immediate Past President, South Carolina Bar Association ..... deRosset Myers
Immediate Past President, South Carolina State Bar ..... William M. Wilson
Secretary ..... Louis P. Howell
Treasurer ..... William L. Pope
Elected Members ..... Philip Wilmeth, Knox L. Haynsworth, Jr., Bernard J. Warshauer, Thomas S. Tisdale, Jr., James E. McDonald, Thomas E. McCutchen
Dean of the Law School ..... Robert W. Foster
Young Lawyers Representative ..... C. Alvin Brown

House of Delegates

1. Members of the Board of Governors
2. South Carolina State Bar Council (Other than those on Board of Governors): Charlton B. Horger, J. Calhoun Pruitt, Alfred E. Dufour, Julius W. McKay, Thomas A. Babb, A. Francis Lever, Jr., Gerald C. Smoak, C. W. F. Spencer, Jr., Henry B. Smythe, Paul Hemphill, Jr., Morris Rosen, Wylie H. Caldwell, Jr., Meyer Rosen.
3. South Carolina Bar Association Executive Committee (Other than those on the Board of Governors): Harold W. Jacobs, Harry J. Haynsworth, Robert R. Carpenter, Joseph S. Mendelsohn, T. Hugh Simrill, Jr., William M. Bowen, E. M. Floyd, Jr., Doyle Martin, Frank J. Bryan, Thomas A. McKinney.

See BAR OFFICERS p. 2

Durant New Exec. Dir.



Robert N. DuRant

The Board of Governors of The South Carolina Bar has announced the appointment of Robert N. Durant to be the Executive Director of the new organized Bar.

Ralph C. McCullough II, who has served as Executive Director of the South Carolina Bar Association since 1972, suggested to the merger committee last year that he not be considered for the new post. McCullough will devote full time to teaching at the USC Law Center and Bar Continuing Education Programs.

Durant, a Juris Doctor graduate of University of South Carolina Law, is a native of Manning, South Carolina and has been a long time member of the S. C. Bar. He

See DURANT p. 10

Year	South Carolina Bar Association Membership	Total South Carolina Lawyers
1927	387	800
1935	518	1,000
1952	309	1,300
1955	701	1,380
1968	1,300	1,977

and authority to investigate as to the existence of any probable cause against any member of the Bar of South Carolina as to conduct contrary to law", with final disposition to be determined by the Supreme Court."[15] Its publications committee published a detailed annual report entitled "Transactions" and later periodicals entitled the "News Bulletin" and "Transcript."[16] The Association was closely connected with the University of South Carolina School of Law and maintained a committee charged with the duty of making an annual report upon the condition of the law school.[17] From 1948 to 1967, the Association provided support for the publication of the "South Carolina Law Quarterly," which became the "South Carolina Law Review" in 1962.[18] Additionally, the Association had a significant role in the planning and construction of USC Law School's Petigru building which opened in 1950.[19]

Following its constitutional purpose to, "cultivate cordial intercourse among members of the South Carolina Bar," the Association maintained a significant social role among attorneys. Excluding the period from 1892-1902 and in 1945, the Association conducted annual meetings.[20] The meeting site rotated around the state from Columbia, Charleston, Greenville, Spartanburg and Myrtle Beach.[21] The meeting, which evolved into a multi-day format, often included nationally recognized speakers, banquets and parties.[22] In 1969, the Association added a mid-winter meeting to be conducted each January at Hilton Head.[23] In conjunction with its annual meetings, the Association sponsored a cruise to Havana in 1936 and 1959, to Bermuda in 1963 and Jamaica in 1973.[24]

At least until 1968, the Association's membership was all white.[25] Further, membership records from 1968 through the Association's end in 1975 do not exist and, as such, there are no records supporting the admission of any Black members.[26] A well-known example of the Association's discrimination against Black attorneys occurred in the mid 1950's when newly admitted Black attorney Ernest Finney,

who later became South Carolina Supreme Court Chief Justice, was not allowed to attend the Association's social meetings because of his race. Finney had difficulty earning a living from his law practice and supplemented his income by serving as a waiter at the racially segregated Ocean Forest Hotel. When the Association held its convention at the hotel, Finney worked as a waiter for his fellow attorneys at the convention's annual dinner instead of attending as an attorney.[27]

The Movement to Create a Unified State Bar

The movement to create a unified bar of all practicing attorneys in South Carolina began in 1934, when "a committee of the South Carolina Bar Association appointed by President T. Frank Watkins recommended to the Association that legislation to incorporate the Bar be requested of the General Assembly." The General Assembly did not move forward with legislation on the matter.[28] In 1947, an Association committee chaired by Columbia attorney David Robinson, Jr. drafted a bill to require all attorneys to be members of a state association. The General Assembly again did not approve the proposed legislation.[29]

At the 1951 Association Convention, Robinson brought the issue forward again and moved "that this Association go on record as favoring an integrated bar in South Carolina." Robinson stated, "The work of the Bar Association would be simplified if we had a complete membership of all attorneys in the State which would produce revenue sufficient to give us a full-time secretary. The integrated bar means that all members of the Association, all licensed lawyers in the state, would be required to join the integrated bar and they would have general control over admissions to the bar and discipline in connection with the bar."[30]

The discussion following Robinson's motion included racially motivated comments to "go slow on that on this state" as "we would, certainly in the lower part of the state, be forced to accept these memberships into our social organization as well as our legal organization." [31] After discussion, the Association voted that the motion "be continued for another year for the further study and report back with a proposed draft of the Act."[32]

The following year on May 1, 1952, the Committee on the Integrated Bar presented an extensive report detailing the recommendations for the creation of a unified Bar. The committee gathered information from 25 states and recommended, "that the incoming President name a committee to draft appropriate legislation to counsel with the South Carolina Supreme Court and to press the enactment of such legislation at the 1953 session of the General Assembly."[33] Despite the Association's request, the General Assembly did not create a unified Bar following the 1953 recommendations and further rejected similar requests in 1964 and 1966.[34]

The Rise of South Carolina's Black Lawyers

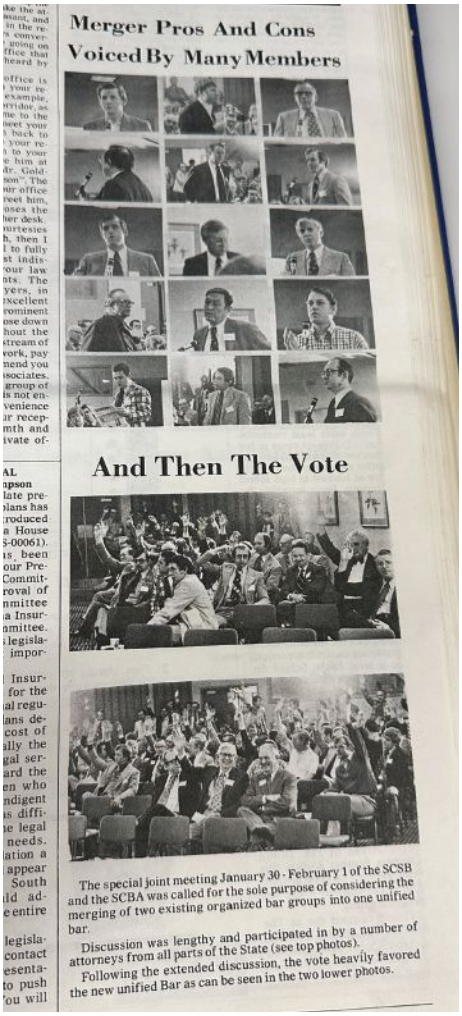
By the 1960's, following a sixty year decline, the number of Black lawyers in South Carolina was increasing. In 1880, South Carolina had 22 Black lawyers, some of whom received law degrees from the University of South Carolina, which admitted Black law students from 1873 until the school was closed in 1877.[35] After the University of South Carolina reopened in 1880, it denied admission to Black students.[36] To provide educational opportunities for Black Students, Claflin University and Allen University formed law schools.[37] During the 1880's, 31 Black students completed the programs at Claflin University and Allen University.[38] However, by 1898, both

Paul Cash, third row center, entered USC's School of Law in September 1964, becoming the first Black student since Reconstruction to enroll.

schools did not have active programs.[39] With no in-state law school for Black students, the number of Black lawyers dwindled. By 1940, the number of Black lawyers in the state had diminished to five.[40]

The number of Black lawyers began to increase with the creation of the Law School at South Carolina State College in 1947. From its opening in 1947 until it closed in 1966, 51 students graduated from the Law School at South Carolina State College, including preeminent lawyers such as Judge Matthew Perry and Chief Justice Ernest Finney.[41]

In 1964, the University of South Carolina began admitting Black law students. Paul Cash, a graduate of Benedict College, entered the University's School of Law in September 1964, becoming the first Black student since Reconstruction to enroll.[42] Cash attended the School of Law for one year.[43] In 1965, Jasper Cureton, later to become Judge of the South Carolina Court of Appeals, enrolled at the University of South Carolina School of Law. Cureton completed his first year of studies at South Carolina State and completed two years of school at the University of South



Merger Pros And Cons Voiced By Many Members

And Then The Vote

The special joint meeting January 30 - February 1 of the SCSB and the SCBA was called for the sole purpose of considering the merging of two existing organized bar groups into one unified bar.

Discussion was lengthy and participated in by a number of attorneys from all parts of the State (see top photos).

Following the extended discussion, the vote heavily favored the new unified Bar as can be seen in the two lower photos.

Carolina. In 1967, Cureton and fellow South Carolina State transferee Johnny Lake became the first Black students since Reconstruction to graduate from the University of South Carolina's School of Law .[44] In 1965, I.S. Leevy Johnson enrolled as a first year student at the University of South Carolina School of Law and in 1968 became the first Black student to complete all three years at the University of South Carolina. Johnson would become President of the South Carolina Bar in 1985.[45] Thus, with more opportunities for education, by 1960, South Carolina's population of Black lawyers increased to 36 and by 1970, increased to 60.[46]

1968–1975: Two Bars

In 1967, following 33 years of debate beginning in 1934, the South Carolina General Assembly authorized the creation of a bar for all lawyers of South Carolina. On May 12, 1967, the General Assembly enacted a statute which empowered the South Carolina Supreme Court with "organizing and governing an association known as the South Carolina State Bar which shall be composed of the attorneys at law of the State."[47] On December 14, 1967, the Supreme Court adopted rules creating the South Carolina State Bar, "as an administrative agency of the Supreme Court."[48] Pursuant to Rule III, "membership of the South Carolina State Bar shall consist of all persons admitted to the practice of law in the State of South Carolina...."[49] With the adoption of these Rules, South Carolina established a new bar organization which included all lawyers in the state, thus beginning the period from 1968 to 1975 during which South Carolina had two statewide bars.

The Supreme Court appointed David Robinson, Jr. as the first president of the South Carolina State Bar.[50] The new State Bar moved quickly to build a statewide organization. Initially, the State Bar had a total enrollment of 1977 attorneys and judges, as compared to the Association's approximate 1300 attorneys.[51] The State Bar organized committees on Procedural and Law Reform, Service to Indigents, Liaison with the Bench, Court Rules, Professional Responsibility, Economics of the Profession, Law School and Continuing Legal Education.[52] The State Bar's second president, Leo H. Hill, continued to build the organization, establishing 11 additional committees.[53]

Even though the Supreme Court had created the South Carolina State Bar, the Association continued its operations, with the two bars attempting to coordinate activities. From 1968–1971, the State Bar and the Association shared office space at the University of South Carolina and jointly employed an Executive Secretary.[54] In 1971, the State Bar moved to the new Supreme Court building on Gervais Street, thus separating the shared offices and staff of the two organizations.[55]

In 1971, the Bars conducted a study to evaluate the functions of each organization "in an effort to avoid competition between the two."[56] The two organizations agreed to allocate responsibilities. The Bar Association was responsible for "continuing legal education of members of the Bar, to improvement of their professional abilities, the improvement of the judicial system and the relations of the Bar with the public." The State Bar focused on "qualifications for admission to practice and the professional responsibility and duties of members of the Bar of this State."[57] Both organizations contributed to the publication of the "Transcript."[58] Further, beginning in 1973, the State Bar took responsibility for the January mid-winter meeting at Hilton Head.[59]

Now There is One

Despite the agreed upon division of responsibilities, the existence of two bars created "a degree of confusion in the minds of lawyers of the state."[60] Further, "The distinction between the two organizations blurred because of overlapping stated purposes, the creation of joint committees and similarity of names."[61] The leadership of both bars recognized the inefficiencies of operating two bars and concluded, "the most economical way both groups could serve their memberships was to merge their activities into one organization."[62]

The State Bar and the Association established a committee to study the merger of the organizations.[63] Members of the Joint Merger Committee were James Parham, Claude Scarborough, William L. Pope, and Julius McKay.[64] In January, 1974, the leaders of both groups recommended to the Supreme Court that it create a new organization

through a merger of the Association and the State Bar.[65] On October 17, 1974, the Supreme Court agreed with the recommendation and the Joint Committee began drafting a proposed constitution, bylaws, and rule for a new organization.[66]

From January 31-February 1, 1975, the State Bar and the Association conducted joint meetings in Hilton Head to discuss and vote upon the proposed merger. Proponents of the merger cited to the efficiencies and strength of a new organization as the reason for merger.[67] "The primary concern of the opponents to the merger appeared to be control of the organization by the Supreme Court, the compulsory nature of the proposed bar and the cost."[68] Both groups voted overwhelmingly to merge and notified the Supreme Court of the vote.[69]

On February 14, 1975, the Supreme Court adopted rules creating and establishing the South Carolina Bar. The new rules provided that all lawyers would be members of the organization and stated, "No person shall engage in the practice of law in the State of South Carolina who is not licensed by this court and a member in good standing of the South Carolina Bar."[70] The "Transcript's" headlines announced, "**Now There is One**", and reported that, "the South Carolina Bar Association and the State Bar passed into history and the South Carolina Bar born."[71]

James Parham, who had been President-elect of the South Carolina State Bar, served a six-month term as the first President of the South Carolina Bar. Following Parham's six-month term, Claude Scarborough became President of the South Carolina Bar.[72] Thus, the merger was complete, a debate which began in 1934 concluded, and all lawyers of South Carolina became unified in one Bar.

Note from the author: This article represents a summary of the works of Lewis Burke, "All for Civil Rights: African American Lawyers in South Carolina, 1868-1968" and "Generations of Lawyers: A History of the South Carolina Bar" by George C. Rogers, Jr. and all credit for the ideas and research for this article goes to those authors. Also, I thank Michael R. Mounter, Ph.D. Archivist/Historian of the Joseph F. Rice School of Law University of South Carolina for his guidance in the research for this article.

Roy F. Laney of Riley Pope & Laney in Columbia practices in the areas of commercial transactions and litigation, and served as President of the South Carolina Bar in 2020. He graduated cum laude from Washington and Lee University with a Bachelor of Arts degree in European History, and in 1991 from the University

of South Carolina School of Law where he was inducted into the Order of the Wig and Robe.

Endnotes

[1] *See generally* South Carolina Supreme Court, Supreme Court Rules Covering the South Carolina Bar (1975).

[2] Constitution and Bylaws of the South Carolina Bar Ass'n (adopted in 1884) (prior to the Bar unification); Supreme Court Rules Concerning the South Carolina State Bar – Rule II (effective March 1968); George C. Rogers, Jr. Generations of Lawyers: A History of the South Carolina Bar, 234, (1992).

[3] Rogers, *supra* note 2, at 77.

[4] General Statutes and the Code of Civil Procedure of the State of South Carolina, §2160, §2161 (adopted by the General Assembly of 1881–82).

[5] David J. McCord, *The Statutes at Large of South Carolina Containing the Acts Relating to Corporations and the Militia* (1826); Honorable William Harper, Memoir of the Life, Character and Public Services of the Late Henry Wm. De Sauassure (1841); South Carolina Bar Ass'n, Transactions, 410–411 (1959).

[6] J. Gordon Hylton, *The Bar Association Movement in the Nineteenth Century*, 81 Marq. L. Rev., 1029, 1029–1030 (1998).

[7] *Id.*

[8] Constitution and Bylaws of the South Carolina Bar Ass'n, Art. II (adopted in 1884) (prior to the Bar unification).

[9] *Id.* at Art. VII.

[10] *Id.* at Art. XVIII.

[11] South Carolina Bar Ass'n, *Officers*, in Transactions (1930); South Carolina Bar Ass'n, Transactions, 38 (1931); South Carolina Bar Ass'n, Transactions, 18 (1933); South Carolina Bar Ass'n, Transactions, 36 (1932); South Carolina Bar Ass'n, *Officers*, in Transactions (1935); Rogers, *supra* note 2, at 191.

[12] Rogers, *supra* note 2, at 143.

[13] *Id.* at 171, 174, 176, 194, 219, 223.

[14] South Carolina Bar Constitution § XVIII.

[15] South Carolina Code of Civil Procedure, 283 § 16, 289 § 22 (1922).

[16] Rogers, *supra* note 2, at 225.

[17] *Id.* at 202, 203, 213.

[18] *Id.* at 204–205; 227.

[19] Rogers, *supra* note 2, at 200; South Carolina Bar Ass'n, Transactions, 319 (1950).

[20] South Carolina Bar Association Report of Committee on Publication, February 19, 1930; Rogers, *supra* note 2, at 95, 180.

[21] Rogers, *supra* note 2, at 231–232; South Carolina Bar Ass'n, Transactions, 35 (1933).

[22] Rogers, *supra* note 2, at 106, 107, 133, 210.

[23] Rogers, *supra* note 2, at 243.

[24] *Id.* at 152, 232, 254.

[25] *Id.* at 268.

[26] This statement is based off a personal review of the Joseph F. Rice School of Law University of South Carolina and South Carolina Bar records.

[27] Ernest Adolphus Finney, Oral History Interview (June 8, 2011) (explaining working as a waiter in the mid 1950's instead of attending the event as a lawyer).

[28] David W. Robinson, Speech at South Carolina State Bar First Annual Convention (June 14, 1968) [hereinafter Speech].

[29] Rogers, *supra* note 3, at 206–208.

[30] *Bar Association Transactions: South Carolina Bar Association Annual Meeting*, S.C. L. Q. 1, 25–26 (1951).

[31] *Bar Association Transactions: South Carolina Bar Association Annual Meeting*, S.C. L. Q. 1, 26 (1951).

[32] *Id.* at 27.

[33] South Carolina Annual Bar Business Meeting, 4 S.C.L.Q. 451, 474–483 (1952).

34 Speech, *supra* note 28.

[35] W. Lewis Burke, All For Civil Rights: African-American Lawyers in South Carolina, 1868-1968, 3, 47, 56 (2019).

[36] *Id.* at 90.

[37] *Id.*

[38] *Id.* at 90, 96.

[39] *Id.* at 90.

[40] *Id.* at 3.

[41] Burke, *supra* note 35, at 182, 184, 185, 193.

[42] Letter from Dean Robert Figg, Jr. to Dean Hiram H. Lesar (Sept. 27, 1966).

[43] Letter from Dean Robert Figg, Jr. to Dean Hiram H. Lesar (Sept. 27, 1966).

[44] Burke, *supra* note 35, at 208.

[45] *Id.*; Miles S. Richard, *Johnson, Isaac Samuel Leevy*, South Carolina Encyclopedia, https://www.scencyclopedia.org/sce/entries/johnson-isaac-samuel-leevy/ (last updated Aug. 5, 2022).

[46] Burke, *supra* note 35, at 203.

[47] S.C. Code Ann. §40-5-20; Rogers, *supra* note 2, at 230.

[48] South Carolina Supreme Court, Supreme Court Rules Concerning the South Carolina State Bar – Rule II (1975); Rogers, *supra* note 2, at 230.

[49] South Carolina Supreme Court, Supreme Court Rules Concerning the South Carolina State Bar – Rule III (1975).

[50] Order Appointing David Robinson, Jr. as President of the South Carolina Bar, South Carolina Supreme Court January 10, 1968.

[51] Rogers, *supra* note 2, at 238.

[52] South Carolina State Bar Bylaws, Art. II § 1 (1968).

[53] Rogers, *supra* note 2, at 236–237.

[54] South Carolina Bar Ass'n, *Court Views Bar Merger Favorably*, The Transcript, October 1974 at 1.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id*

[59] *Id.*

[60] South Carolina Bar Ass'n, *Merger in Perspective*, The Transcript, November 1974, at 1.

[61] *Id.*

[62] South Carolina Bar Ass'n, *Court Views Bar Merger Favorably*, The Transcript, October 1974 at 1.

[63] South Carolina Bar Ass'n, *Meeting to Decide Merger Attendance Urged*, The Transcript, January 1975 at 1.

[64] South Carolina Bar Ass'n, *Now There is One*, The Transcript, February 1975 at 1 [hereinafter *Now There is One*].

[65] South Carolina Bar Ass'n, *Court Views Bar Merger Favorably*, The Transcript, October 1974 at 1.

[66] *Id.*

[67] *Now There is One*, *supra* note 63, at 1.

[68] *Id.* at 1.

[69] *Id.* at 7; Letter from James C. Parham, Jr. President-Elect of the South Carolina State Bar, to The Honorable Joseph R. Moss, Chief Judge. (Jan. 31, 1975).

[70] South Carolina Supreme Court, Supreme Court Rules Covering the South Carolina Bar (1975).

[71] *Now There is One*, *supra* note 63, at 1.

[72] South Carolina Bar Ass'n, *Officers – New Board Elect*, The Transcript, May 1975, at 1; South Carolina Bar Ass'n, *Parham Ends Term as First President of S.C. Bar*, The Transcript, May 1975, at 10.

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January

5 **Dispute Resolution Section Council**, Zoom

8 **Real Estate Section Council**, Teams

Trial & Appellate Advocacy Section Council, Teams

9 **Children's LawCommittee**, Boardroom/Teams

10 **Criminal Law Section Council**, Teams

16-19 **SC Bar Convention**, Columbia Metropolitan Convention Center

18 **Senior Lawyers Division Ex. Council**, Blue Marlin (Vista Room)

22 **Workers' Compensation Section Council**, Teams

24 **Children's Law Committee**, **Free Legal Answers Marathon**, Boardroom

30 **Administrative & Regulatory Law Committee**, Boardroom/Teams

February

3 **Civil Rights Section**, Zoom

4 **Corporate, Banking & Securities Law Section Council**, Teams

5 **Community Association Law Committee**, Teams

6 **Dispute Resolution Section Council**, Zoom

11 **Consumer Law Section Council**, Call

12 **Employment & Labor Law Section Council**, Call

Intellectual Property and Innovation Committee, Zoom

13 **Board of Governors**, Boardroom

In-House Counsel Committee, Teams

International Law Committee, Teams

14 **Ethics Advisory Committee**, Boardroom/Zoom

Professional Responsibility Committee, Boardroom /Zoom

18 **Government Law Section Council**, Call

19 **Military & Veterans' Law Section Council**, Boardroom/Call

20 **Environment & Natural Resources Section Council**, Call

21 **Diversity Committee**, Boardroom/Zoom

22 **High School Mock Trial Regional Competitions**, Regional

25 **Health Care Law Section Council**, Call

26 **Tax Law Section Council**, Teams

28 **Alternative Dispute Resolution Commission**, Zoom

ANNIVERSARY

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YEARS

~ 1975 - 2025 ~

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