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Professional Responsibility

John M.G. McLeod

PROFESSIONAL RESPONSIBILITY

I. Discipline for Attorney's Refusal to Present Perjured Testimony of Criminal Defendant

In *In re Goodwin*,[1] the South Carolina Supreme Court established procedures for lawyers to follow when a client intends to present perjured testimony at trial. The court held that if defense counsel in a criminal action knows a client intends to present false testimony, counsel should allow the defendant to take the stand and deliver the testimony in narrative form. Counsel should not, however, examine the defendant or use the false testimony in closing argument.[2]

Goodwin had moved to withdraw from the case in an *in camera* hearing before the trial judge. She asserted that continued representation of the defendant would violate Disciplinary Rule (DR) 2-110(B)(2),[3] which requires withdrawal when representation would violate a Disciplinary Rule, and DR 7-102(A),[4] which prohibits an attorney from presenting perjured testimony. The trial judge denied the motion and subsequently held Goodwin and co-counsel Fairey in contempt for disobeying his order

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1. 279 S.C. 274, 305 S.E.2d 578 (1983).

2. *Id.* at 277, 305 S.E.2d at 580. The court adopted the procedures suggested by the American Bar Association for handling such a conflict. Standards Relating to the Defense Function § 1.7 (1971). The standards suggest that the lawyer first advise his client against taking the witness stand to testify falsely. If the defendant insists on testifying, the standards suggest the lawyer withdraw if feasible. If withdrawal is not feasible, the standards suggest the attorney follow the procedure the court adopted in *Goodwin*.

3. (B) Mandatory withdrawal. A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

. . .

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

S.C. Sup. Ct. R. 32, DR 2-110(B)(2) (Supp. 1983).

4. (A) In his representation of a client, a lawyer shall not:

. . .

(4) Knowingly use perjured testimony or false evidence.

S.C. Sup. Ct. R. 32, DR 7-102(A)(4) (Supp. 1983).

to proceed.[5]

In upholding the contempt citation,[6] the supreme court reasoned that although an attorney has an ethical duty not to present perjured testimony, the defendant's constitutional right to representation by counsel must be protected.[7] If the trial judge had allowed the withdrawal, new counsel would be confronted with the same problem and a series of withdrawals could follow. More significant, however, is the likelihood that new counsel would unknowingly present the false testimony.[8] Therefore, the court held that since counsel cannot reveal the specific conflict to the judge,[9] a motion to withdraw is within the discretion of the trial judge and the judge's ruling will not be disturbed absent clear abuse.[10]

This procedure, which attempts "to accommodate [the] conflicting ethical duties"[11] of defense counsel, has received some criticism. The most significant is that the accused is denied effective assistance of counsel.[12] In *Johns v. Smyth*,[13] a federal

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5. The trial judge also enjoined the Richland County Defendant Corporation from paying salaries to any of its attorney employees. The court reversed this portion of the order, holding that the trial judge lacked authority to interfere because the supreme court has exclusive regulatory authority over the Corporation. 279 S.C. at 278, 305 S.E.2d at 580.

6. The court, although sympathetic to the attorneys' position, stated that Goodwin and Fairey's refusal to proceed violated Circuit Court Rule 7, which provides that an attorney may not withdraw except by order of the circuit judge. Since this was a novel issue, however, the court imposed no sanctions. *Id.* at 277, 305 S.E.2d at 580.

7. *Id.* at 276, 305 S.E.2d at 579.

8. *Id.*

9. The Disciplinary Rules prohibit a lawyer from revealing a confidence or secret of his client. S.C. SUP. CT. R. 32, DR 4-101(B)(1) (Supp. 1983). Therefore, without his client's informed consent, Goodwin could not inform the court of the details of the conflict.

10. The court stated that the trial judge should consider several factors in determining whether the motion to withdraw should be granted. The judge should "consider the timing of the motion, the inconvenience to the witnesses, the period of time elapsed between the date of the alleged offense and the trial, and the possibility that any new counsel will be confronted with the same conflict." 279 S.C. at 277, 305 S.E.2d at 579.

11. Conflict exists because the defense lawyer has dual obligations. He is both an officer of the court and the legal advocate for his accused client. Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75, 82 (1982).

12. The Erickson article, *supra* note 11, lists several other criticisms of the ABA standards. First, if the trial is about to commence or has already begun, the trial judge will probably deny counsel's motion to withdraw. Second, since the attorney-client privilege prohibits an attorney from disclosing the specific conflict, denial of the motion is inevitable. Furthermore, the court will likely conclude that the defendant intends to commit perjury, and an enhanced sentence may result. Third, the prosecutor may object

district court criticized defense counsel's refusal to argue to the jury statements made by his client which he believed were false. The court stated that, "The failure to argue the case before the jury . . . manifestly enters the field of incompetency when the reason assigned is the attorney's conscience."[14] In *Lowery v. Cardwell*,[15] defense counsel sought to withdraw for similar reasons. Judge Hufstedler stated that, "When defense counsel moved to withdraw, he ceased to be an active advocate of his client's interests. Despite counsel's ethical concerns, his actions were so adverse to [the defendant's] interests as to deprive her of effective assistance of counsel."[16]

Although there have been no Supreme Court decisions on this issue, Chief Justice Burger, as an appellate judge, wrote:

> [When] the lawyer's immediate withdrawal from the case is either not feasible, or if the judge refuses to permit withdrawal, the lawyer's course is clear: *He may not engage in direct examination of his client to facilitate known perjury.* He should confine himself to asking the witness to identify himself and to make a statement but he cannot participate in the fraud by direct examination.[17]

The decision in *In re Goodwin* is consistent with Chief Justice Burger's words. The South Carolina Supreme Court has, therefore, discarded the notion that the attorney's "obligation of confidentiality"[18] requires the attorney to aid in the presentation

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to the narrative form of testimony. By emphasizing the defense lawyer's failure to develop his client's testimony, the focus of the trial shifts from a determination of defendant's guilt or innocence to an inquiry into the defendant's perjury. Finally, if the lawyer is permitted to withdraw, the defendant may seek to obtain a series of such withdrawals or may be able to persuade an unsuspecting new lawyer to aid him in presenting the false testimony. *Id.* at 82, 83.

13. 176 F. Supp. 949 (E.D. Va. 1959).

14. *Id.* at 953. The court went on to conclude:

> It is as improper as though the attorney had told the jury that his client had uttered a falsehood in making the statement. The right to an attorney embraces effective representation throughout all stages of the trial, and where the representation is of such low caliber as to amount to no representation, the guarantee of due process has been violated.

Id.

15. 575 F.2d 727 (9th Cir. 1978).

16. *Id.* at 732 (Hufstedler, J., specially concurring).

17. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 13 (1966-67) (emphasis in original).

18. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The*

of perjured testimony. The procedure adopted offers criminal defense attorneys a method by which the confidence need not be disclosed, and at the same time prevents them from perpetrating a fraud upon the court.

II. DISCIPLINE FOR ATTORNEY'S ATTEMPT TO LIMIT MALPRACTICE LIABILITY

The South Carolina Supreme Court, in *In re Clarke*,[19] expressed its disapproval of attorneys attempting to limit liability to their clients. The court also reaffirmed its willingness to take appropriate disciplinary action independent of the recommendations of the Hearing Panel and Executive Committee of the Board of Commissioners on Grievances and Discipline.[20]

Clarke was charged with a violation of DR 6-102(A),[21] which prohibits an attorney's attempt to limit malpractice liability. Clarke required his client to sign a release when she sought to obtain her file after an unsuccessful trial of her claim.[22] The client sought the file so that another attorney might pursue her appeal. She refused to sign the release, and Clarke never delivered the file to her.

The Hearing Panel Report, which was adopted by the Executive Committee, found that Clarke had simply made an effort to obtain a receipt for the file.[23] The Report recommended that the complaint against Clarke be dismissed. The supreme court,

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Three Hardest Questions, 64 MICH. L. REV. 1469, 1477 (1966). The attorney has an obligation to preserve his client's confidences. S.C. SUP. CT. R. 32, Canon 4 (Supp. 1983). *See supra* note 9.

19. 278 S.C. 627, 300 S.E.2d 595 (1983).

20. The Board of Commissioners on Grievances and Discipline consists of members of the South Carolina Bar from each judicial circuit, equal to the number of circuit judges in each respective circuit. The board members are appointed by the South Carolina Supreme Court. S.C. SUP. CT. R. DISC. P. § 3A (Supp. 1983). The court appoints a chairman and four members to comprise the Executive Committee. *Id.* at § 4(A). A complaint is assigned to a hearing panel, which consists of three non-Executive Committee members. *Id.* at §§ 12(A), 2(G).

21. (A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for personal malpractice.

S.C. SUP. CT. R. 32, DR 6-102(A) (Supp. 1983).

22. The document which Clarke had prepared stated in part: "I hereby state that I have been completely satisfied with the said David Ross Clarke's representation of me in said suit, and agree to hold him harmless, forever, in connection with any past, present or future developments concerning this matter." 278 S.C. at 629, 300 S.E.2d at 597.

23. *Id.* at 632, 300 S.E.2d at 598.

however, found Clarke guilty of misconduct and held that a public reprimand was the appropriate sanction.[24] The court concluded that the document was not a receipt but was an exoneration agreement in which Clarke sought to obtain a release from a possible malpractice action. The court found that Clarke's actions were such as to bring the legal profession into disrepute and that he should be publicly reprimanded.[25]

The supreme court established in *Clarke* that any attempt to limit liability to a client will be dealt with harshly. The sanction imposed has case law support. In *Tallon v. Committee on Professional Standards*,[26] the court temporarily suspended an attorney who had directed his client to execute a general release of all malpractice claims she had against him. Attorneys should, therefore, be careful not to include in agreements signed by clients any language that appears to be exculpatory. Additionally, an attorney considering an appeal in a disciplinary matter should be aware of the supreme court's willingness to impose sanctions unrestricted by recommendations of the Board of Commissioners.[27]

III. DISCIPLINE FOR ATTORNEY'S MISLEADING ADVERTISEMENT

In two recent disciplinary hearings, *In re Burgess*[28] and *In re Hodges*,[29] the South Carolina Supreme Court reiterated its position that although constitutionally protected,[30] lawyer advertising may exceed protected limits. For violations of state regulations, the court will impose disciplinary sanctions.

The charges against Burgess were that his advertisements

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24. *Id.*, 300 S.E.2d at 598.

25. The court concluded that the matter was aggravated because the release Clarke was seeking might be prejudicial to a minor, the true litigant in the action, and that the minor's guardian had no right to sign a release. *Id.*, 300 S.E.2d at 598.

26. 86 A.D.2d 897, 447 N.Y.S.2d 50 (1982).

27. As support for its independence in imposing sanctions, the court cited Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1967), which held that the Board's report is advisory only, and that the duty of the supreme court is to adjudge whether professional misconduct has been shown and what, if any, disciplinary action should be taken. *Id.* at 331, 117 S.E.2d at 307.

28. 279 S.C. 44, 302 S.E.2d 325 (1983).

29. 279 S.C. 128, 303 S.E.2d 89 (1983).

30. The landmark decision regarding advertising by lawyers is Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The Supreme Court recently addressed the issue again in *In re* R.M.J., 455 U.S. 191 (1982). *See infra* notes 45-46 and accompanying text.

violated Disciplinary Rules 2-101(A)(1)(b), (A)(2)(f), and (E).[31] Burgess was also charged with repeatedly neglecting legal matters entrusted to him in violation of DR 6-101(A).[32] The court held that the advertisements violated the standards set forth in the Disciplinary Rules. The court also found Burgess guilty of misconduct for repeated negligent misrepresentation of his clients.[33]

The court found that the advertisements did not further the legitimate aim of attorney advertising, which is to educate the public and facilitate intelligent selection of counsel.[34] Furthermore, the advertisements failed to disclose the nature of the services offered and were presented in a showy and undignified manner.

Based on these findings and a previous public reprimand of Burgess,[35] the court concluded that the appropriate sanction was

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31. DR 2-101 provides in relevant part:

> (A) A lawyer shall not, on behalf of himself . . . use or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.
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> (1) Without limitation a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement or claim includes a statement which:
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> . . .
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> (b) Omits to state any material fact necessary to make the statement . . . not misleading;
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> (2) A lawyer shall not, on behalf of himself . . . use or participate in the use of any form of public communication which:
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> . . .
>
> (f) Is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jingles, or garish or sensational language or format.
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> . . .
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> (E) Any person desiring to expand the information authorized for disclosure . . . may apply to the Supreme Court of South Carolina. The relief granted . . . shall be . . . universally applicable to all lawyers.

S.C. SUP. CT. R. 32, DR 2-101 (Supp. 1983).

32. DR 6-101 provides in relevant part:

> (A) A lawyer shall not:
>
> . . .
>
> (3) Neglect a legal matter entrusted to him.

S.C. SUP. CT. R. 32, DR 6-101 (Supp. 1983).

33. The court found that because of the rapid growth of his bankruptcy practice, resulting from the advertising campaign, Burgess began to negligently handle the affairs of his clients. 279 S.C. at 46, 302 S.E.2d at 326.

34. *Id.*, 302 S.E.2d at 326.

35. 275 S.C. 315, 270 S.E.2d 436 (1980). In this earlier disciplinary action, the court found that Burgess charged and collected an excessive fee.

permanent disbarment.[36] Although the Executive Committee recommended indefinite suspension, the court reasoned that, independent of the advertising violations, Burgess' repeated negligent conduct would preclude his reinstatement in the future.[37]

In *In re Hodges*, the Board[38] initiated action against Hodges for publication of a misleading advertisement in violation of DR 2-101.[39] In a brief opinion, the court held that Hodges was guilty of misconduct and that the appropriate sanction was a public reprimand. The court stated that the advertisements were misleading, and pointed out that they were remarkably similar to those disapproved of in *Burgess*.[40]

In his dissenting opinion, Justice Harwell asserted that the advertisements were neither false nor misleading and did not violate the Disciplinary Rules. He further argued that Hodges' first amendment right of free speech would be violated by the sanction.[41]

Justice Harwell based his conclusion on two recent Supreme Court decisions, *Bates v. State Bar of Arizona*[42] and *In re R.M.J.*[43] In *Bates*, the Supreme Court recognized that attorney advertising is a form of commercial speech[44] entitled to the protection of the first amendment.[45] In *R.M.J.*, the Court expanded

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36. The court relied on S.C. SUP. CT. R. DISC. P. § 8(C) (Supp. 1983) which provides in part:

> A person who, having been publicly reprimanded for misconduct, is thereafter found guilty of subsequent misconduct, shall be suspended for an indefinite period from the office of attorney at law, or permanently disbarred, depending upon the seriousness of such misconduct.

S.C. SUP. CT. R. DISC. P. § 8(C)(Supp. 1983).

37. 279 S.C. at 48, 302 S.E.2d at 327.

38. *See supra* note 20 (explanation of composition of the Board).

39. *See supra* note 31 (relevant text of DR 2-101).

40. 279 S.C. at 129, 303 S.E.2d at 89.

41. *Id.* at 130-31, 303 S.E.2d at 90.

42. 433 U.S. 350 (1977).

43. 455 U.S. 191 (1982).

44. The Court relied in part on its decision in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Court held that commercial speech is protected by the first amendment and that the states therefore are not free to completely suppress the dissemination of truthful information about entirely lawful activities. *Id.* at 773.

45. The Court held that the state's attempt to prohibit newspaper publication of a truthful advertisement concerning the availability and terms of the attorney's legal services violated his first amendment rights. 433 U.S. at 384. The Court emphasized, however, that the states could continue to regulate and limit certain forms of advertising. *Id.* at 383.

the attorney's right to advertise by requiring a state to draw its restrictions carefully and to regulate in a manner "no more extensive than necessary to further [its] substantial interests."[46]

For the practicing attorney, the *Bates* and *R.M.J.* decisions provide general guidelines but do not explicitly state criteria by which to draft advertisements.[47] A comparison of the advertisements in the *Burgess* and *Hodges* cases, however, may provide some assistance. The South Carolina Supreme Court found the only common violation was that both advertisements were misleading. The court found the advertisements in *Burgess* misleading because they promised relief from financial difficulty but failed to disclose that the relief offered was bankruptcy.[48] Similarly, in *Hodges*, the advertisements stated that the law firm could help those faced with financial problems, but failed to disclose that the service offered was also bankruptcy.[49] Based on this comparison, the format used by Hodges would probably have been acceptable had the advertisement stated that bankruptcy was the service offered. Although the result in *Hodges* may seem harsh, the Court in *Bates* stated that, "[T]he bar retains the power to correct omissions that have the effect of presenting an inaccurate picture. . . ."[50] Practitioners should bear this in mind when drafting advertisements in the future.

IV. DISCIPLINE FOR ATTORNEY'S COMMUNICATION WITH JURORS

Attorneys who communicate with jurors or prospective jurors of cases in which the attorneys are involved will be disciplined. In *In re Two Anonymous Members of The South Caro-*

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46. 455 U.S. at 191. The Court stated that "regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." *Id.* at 202. When the advertising is not false or misleading, the states may still regulate it, but they "must assert a substantial interest and the interference with speech must be in proportion to the interest served." *Id.* at 203.

47. Although expressing no opinion about the proposed ABA Model Rules of Professional Conduct, the Court included in a footnote the entire text of Rule 7.1, which prohibits misleading advertising. *Id.* at 201-02 n.14. This rule explains which communications are false or misleading, and may provide some guidance to attorneys contemplating advertising.

48. 279 S.C. at 46, 302 S.E.2d at 326. In addition, one advertisement did not reveal that Burgess was an attorney. *Id.*, 302 S.E.2d at 326.

49. 279 S.C. at 129, 303 S.E.2d at 89.

50. 433 U.S. at 375.

lina Bar[51] and *In re Delgado*,[52] the South Carolina Supreme Court reasserted the prohibition against this type of conduct.

In *Two Anonymous Members*, the respondents were charged with violating Disciplinary Rules 7-108(A) and (F)[53] which prohibit an attorney from communicating before trial with a juror, a prospective juror, or a member of a juror's family. The court held that respondents had knowingly communicated with a family member of a prospective juror in violation of the Disciplinary Rule.[54] Since the issue was of novel impression, the court adopted a "more lenient view" of the punishment than ordinarily would be required for a violation of this sort.[55] Thus, the court remanded the action for imposition of a private reprimand.

In *Two Anonymous Members*, the respondents were practicing law together when one was appointed by the court as counsel in a capital case. Each separately questioned a client, the sister of a prospective juror, regarding the juror's possible racial prejudice and attitudes toward capital punishment. In their defense, the respondents urged that the meaning of "members of a family" in DR 7-108(F) should be confined to relatives living in the same household. The supreme court, however, rejected this construction and concluded that "family" includes persons related by blood or marriage to the juror "within the sixth degree."[56] The court reasoned that DR 7-108(F) was intended to

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51. 278 S.C. 477, 298 S.E.2d 450 (1982).

52. 279 S.C. 293, 306 S.E.2d 591 (1983).

53. DR 7-108(A) provides:

> (A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

S.C. SUP. CT. R. 32, DR 7-108(A) (Supp. 1983). DR 7-108(F) provides:

> (F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

S.C. SUP. CT. R. 32, DR 7-108(F) (Supp. 1983).

54. 278 S.C. at 481, 298 S.E.2d at 452.

55. *Id.*

56. *Id.* at 480, 298 S.E.2d at 452. The standard method for determining the degree of kindred is to begin with the juror and continue up to the common ancestor and then down to the person claiming kindred, inclusively, each step being considered as a degree. *See* S.C. CODE ANN. § 21-3-20(6) (1976), which deals with determining the degree of kindred in intestate distributions.

eliminate contacts with those able to exert influence over or likely to communicate with the juror. The court felt that an expansive definition of "family" would best serve that purpose.

In *Delgado*, the court considered similar conduct during a criminal trial. Defense counsel faced charges that he communicated with a juror in violation of DR 7-108(B)(1),[57] which prohibits attorney-juror communication during trial. The supreme court unanimously held that the rule's prohibition was absolute and that the conversations with the juror violated the prohibition.

Delgado was speaking with jurors from a prior case about improving his trial skills, when a juror from his present case requested to join the group. The juror was allowed to join the group, although Delgado instructed him that they could not talk about the present case. Delgado asserted to the court that he was presented with the dilemma of either offending the juror by refusing to speak with him, or possibly violating a Disciplinary Rule. The court rejected this argument and stated that the rule prohibits all communication before and during a trial.[58] The court suggested that an attorney in such a situation should politely excuse himself from the conversation.[59]

The decision to admonish Delgado for his actions has support from other jurisdictions. In *Omaha Bank for Cooperatives v. Siouxland Cattle Cooperative*,[60] the Iowa Supreme Court stated that for a lawyer to accept a drink offered by a juror during the course of a trial was clearly misconduct. In *Florida Bar v. Peterson*,[61] an attorney went to a delicatessen during a court recess and allowed himself to be seated at a table occupied by two jurors serving in his present case. Although the nature and extent of their communication was unclear, the Florida Supreme

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57. (B) During the trial of a case:
(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.
S.C. SUP. CT. R. 32, DR 7-108(B)(1) (Supp. 1983).

58. 279 S.C. at 296, 306 S.E.2d at 593. The court referred to Ethical Consideration 7-29 of the Disciplinary Rules, which states in part that "there should be no extrajudicial communication . . . with jurors during trial by . . . a lawyer connected with the case."

59. The court noted that although the rules now allow an attorney to approach a juror after a case has been tried, he does so at his own peril. *Id.* at 297, 306 S.E.2d at 594.

60. 305 N.W.2d 458 (Iowa 1981). The Iowa case was not a disciplinary proceeding against the attorney; the misconduct served as grounds for a new trial.

61. 418 So.2d 246 (Fla. 1982).

Court held the attorney had violated DR 7-108(B)(1).[62]

In *Delgado*, the court also expressed its disapproval of lawyers, in a civil action, surreptitiously aiding the media to gain an interview with an inmate-client. Delgado was charged with violating DR 7-107(G),[63] which prohibits a lawyer's participation in extrajudicial statements relating to his client's character. He was also charged with violating DR 1-102(A),[64] which prohibits dishonest conduct by a lawyer.

After an unsuccessful attempt at arranging an interview for his client at the end of a post-conviction hearing of a capital case,[65] Delgado made an appointment to meet with the client, who was incarcerated at the Columbia Correctional Institute (CCI). He was accompanied at that meeting by a local newspaper reporter, who Delgado represented to prison personnel as being there on legal business.[66] The reporter, however, conducted a forty-five minute interview which was subsequently published.

The court held that the interview was not part of the legal representation of the client, and that Delgado knew, or should have known, that the interview was improper.[67] The court stated that the proper role of an attorney in such a situation is to pre-

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62. *Id.* at 247. The text of DR 7-108(B)(1) is identical in Florida and South Carolina. *See supra* note 57. The court imposed the sanction of a public reprimand and placed the attorney on probation for one year on the condition that he pass the ethics portion of the Florida Bar examination.

63. The rule provides in relevant part:

> (G) A lawyer . . . associated with a civil action shall not during . . . litigation make or participate in making an extrajudicial statement . . . that relates to:
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> . . .
>
> (2) The character, credibility, or criminal record of a party, witness, or prospectve witness.

S.C. SUP. CT. R. 32, DR 7-107(G)(2)(Supp. 1983).

64. The rule provides:

> (A) a lawyer shall not:
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> . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

S.C. SUP. CT. R. 32, DR 1-102(A)(4) (Supp. 1983).

65. The policy of the South Carolina Department of Corrections (SCDC) relating to press interviews with inmates on death row requires the approval of SCDC officials, the inmate's defense counsel, and the prosecuting solicitor. The prosecuting solicitor, however, refused to permit the interview. *Id.* at 297, 306 S.E.2d at 594.

66. Delgado entered in the log book, as required by CCI, that both were there to see the client regarding legal business. The court, however, found that no legal business was conducted. *Id.* at 298, 306 S.E.2d at 594, 595.

67. *Id.* at 299, 306 S.E.2d at 595.

sent the client's cause in the courts, not to change the public image of his client. The court further held that the manner in which Delgado misrepresented his purpose[68] violated DR 1-102(A)(4).[69] The court found Delgado guilty of misconduct for the two separate incidents and imposed the sanction of a public reprimand.

Two Anonymous Members and *Delgado* assure practitioners that communications with a juror or his family before or during a trial will result in discipline. The court indicated that future violations would receive harsh treatment. The *Delgado* decision also alerts practitioners that statements to the media by the attorney or client should strictly adhere to the standards established in the Disciplinary Rules.

V. Discipline Against Attorneys and Judges for Alcohol-Related Offenses

In two recent disciplinary proceedings, the South Carolina Supreme Court, reaffirmed its intolerance of driving under the influence of alcohol, and of drunk and disorderly conduct by judges and attorneys. In *In re Thomason*,[70] an attorney was charged with violating Disciplinary Rules 1-102(A)(1), (5) and (6),[71] which prohibit conduct by an attorney that violates a Disciplinary Rule or reflects adversely on the attorney or on the administration of justice.

The charges stemmed from Thomason's arrest and conviction for public drunkenness, disorderly conduct, destruction of city property, and resisting lawful arrest.[72] The Hearing Panel

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68. *See supra* note 66.

69. 279 S.C. at 300, 306 S.E.2d at 596. For text of DR 1-102(A)(4), see *supra* note 64.

70. 279 S.C. 197, 304 S.E.2d 821 (1983).

71. DR 1-102 provides in part:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

. . .

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

S.C. Sup. Ct. R. 32, DR 1-102(A)(1), (5), and (6) (Supp. 1983).

72. 279 S.C. at 198, 304 S.E.2d at 822. The charges were also based on allegations that Thomason, while representing a wife in a divorce action, talked with the husband about the pending action and made threats against him. *Id.* at 200, 304 S.E.2d at 822-23.

and Executive Committee of the Board of Commissioners on Grievances and Discipline[73] found Thomason guilty of misconduct and recommended a private reprimand.

In his defense, Thomason sought to introduce favorable character testimony from a circuit court judge and a family court judge. The court did not consider the testimony, holding it improper for a judge to testify as a character witness on behalf of one charged in a disciplinary proceeding.[74]

The court concurred in the Board's finding of professional misconduct, but imposed the sanction of a public reprimand.[75] The court reasoned that Thomason's conduct reflected adversely on the administration of justice by bringing the legal profession into disrepute.[76]

In *In re Bradley*,[77] a Lee County magistrate was publicly reprimanded for misconduct in office. The action arose out of the arrest and conviction of Bradley for driving under the influence of alcohol, and for his refusal to comply with requests made of him at the time of arrest.[78] The court found that Bradley's conduct violated Canons 1 and 2[79] of the Code of Judicial Conduct and publicly reprimanded Bradley.

The public reprimands issued by the supreme court illustrate that it considers alcohol-related offenses serious violations of the ethical obligations of attorneys and judges. While both decisions involved aggravating conduct by those involved, the supreme court is likely to similarly view any alcohol-related offenses.

John M. G. McLeod

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73. *See supra* note 20.

74. 279 S.C. at 200-01, 304 S.E.2d at 823. Additionally, the court instructed the Board not to issue subpoenas for judges to serve as character witnesses. *Id.* at 201, 304 S.E.2d at 823.

75. *Id.* at 201, 304 S.E.2d at 823. For an explanation of the court's authority to impose a more severe sanction, see *supra* note 27.

76. 297 S.C. at 201, 304 S.E.2d at 823.

77. 278 S.C. 426, 297 S.E.2d 797 (1982), *cert. denied*, 103 S. Ct. 1445 (1983).

78. Bradley refused to give the arresting officer his driver's license, to leave his automobile, to take a breathalyzer test, and to sign the receipt form required by the Implied Consent law. *Id.* at 426-27, 297 S.E.2d at 797.

79. Canon 1 requires a judge to maintain and enforce high standards of conduct, while Canon 2 requires a judge to respect and comply with the law. S.C. SUP. CT. R. 33, Canons 1, 2 (Supp. 1983).