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Professional Responsibility

PROFESSIONAL RESPONSIBILITY

I. Discipline for Attorneys' Neglect of Clients' Affairs and Failure to Cooperate with Grievance Board

In *In re Bruner*[1] and *In re Haddock*[2] the South Carolina Supreme Court repeated its warning that the court will impose an appropriate sanction for an attorney's inattentiveness and delay in handling a client's legal affairs. This neglect constitutes a violation of the South Carolina Code of Professional Responsibility.[3] The court indicated in both cases that an attorney's failure to cooperate fully during Board of Grievances' investigations constitutes additional misconduct to be considered in determining proper disciplinary action.[4] Finding that Bruner and Haddock engaged in both types of misconduct, the court publicly reprimanded each respondent.[5]

The neglect charge in *In re Bruner* stemmed from a real

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1. 283 S.C. 114, 321 S.E.2d 600 (1984).
2. 283 S.C. 116, 321 S.E.2d 601 (1984).
3. DR 6-101 (Supp. 1984) provides in relevant part:

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

S.C. Sup. Ct. R. 32, DR 6-101 (Supp. 1984).

4. The obligation to cooperate with the Board arises as a result of its members' status as officers of the supreme court appointed to investigate complaints of professional misconduct. 283 S.C. at 116, 321 S.E.2d at 601. The supreme court, therefore, regards failure to respond to the Board's inquiries as the equivalent of refusal to respond to the court. *In re* Treacy, 277 S.C. 514, 517, 290 S.E.2d 240, 241 (1982). For a discussion of how an attorney's failure to cooperate with the Board's inquiries affects disciplinary sanctions imposed, see Annot., 96 A.L.R.2d 823, 851 (1964).

5. In cases of an attorney's negligence in handling clients' affairs, the court has imposed various sanctions, depending on the degree of culpability and wilfulness of the attorney's conduct. In cases of simple negligence, the court has publicly reprimanded the attorney. *See, e.g., In re* Hodge, 277 S.C. 507, 290 S.E.2d 237 (1982); *In re* Davis, 276 S.C. 532, 280 S.E.2d 644 (1981); *In re* Kitts, 276 S.C. 242, 277 S.E.2d 602 (1981). In other cases, the court has imposed indefinite suspension. *See, e.g., In re* Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982); *In re* Wooten, 260 S.C. 12, 193 S.E.2d 808 (1973). The court has disbarred attorneys found guilty of fraud or wilful misconduct. *See, e.g., In re* Hines, 275 S.C. 271, 269 S.E.2d 766 (1980); *In re* Shuford, 271 S.C. 304, 247 S.E.2d 323 (1978); *In re* Crosland, 270 S.C. 546, 243 S.E.2d 198 (1978); *In re* DuPre, 270 S.C. 264, 241 S.E.2d 896 (1978). *See also* Annot., 96 A.L.R.2d 823 (1964)(discipline for neglect of a legal duty).

estate transaction in which Bruner acted as counsel for the purchasers and was responsible for recording the mortgage on the property. He fulfilled this duty, but failed to forward notification or the recorded mortgage to the seller's attorney. After several futile requests for the document, the seller's attorney filed a complaint against Bruner with the Board. Only then, more than seven months after the initial transaction, did Bruner comply with the requests. The Hearing Panel concluded that this misconduct violated DR 6-101(A)(3), which prohibits an attorney from neglecting a legal matter entrusted to him.[6]

In August 1982 the Executive Committee had admonished Bruner for failure to supply promptly information requested by the Board of Grievances during an investigation. The Hearing Panel recommended that the neglect charge and this earlier infraction be treated together and a private reprimand imposed. The Executive Committee agreed with the Panel's decision.

Affirming the Board's finding of professional misconduct, the supreme court emphasized that attorneys are required to cooperate fully with the Board during investigations.[7] The court concluded, therefore, that Bruner should be publicly reprimanded because of his uncooperativeness and "lackadaisical attitude toward his duties."[8]

The respondent in *Haddock* had also received a prior warning from the Board for unresponsiveness to Board inquiries during an investigation.[9] The events leading to the neglect charge commenced when a client contacted Haddock in 1978 concerning a breach of warranty claim. Haddock filed a complaint on the client's behalf, but failed to pursue the matter further or respond to the client's telephone calls, letter, or notes.[10] Contacting Haddock was almost impossible because he did not maintain regular office hours, a full-time office staff, or an efficient way to receive mail or calls. When the client subsequently

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6. 283 S.C. at 115-16, 321 S.E.2d at 600-01. See *supra* note 3 for text of S.C. SUP. CT. R. 32, DR 6-101(A)(3)(Supp. 1984).

7. *Id.* at 116, 321 S.E.2d at 601. *See supra* note 4 and accompanying text.

8. 283 S.C. at 116, 321 S.E.2d at 601.

9. *Id.* at 118, 321 S.E.2d at 602. The first investigation concerned a complaint against Haddock for failure to pay a private investigator for his services. Respondent later paid, and the complaint was dismissed.

10. For a discussion of disciplinary proceedings arising from an attorney's failure to communicate with his client, see Annot., 80 A.L.R.3D 1240 (1977).

requested her file, Haddock refused to relinquish it, contending that she owed him money for a deposition.[11]

Finding in Haddock's action a "lack of professionalism" that led to the neglect of his legal duties, the court refused to accept his inefficient office system as an excuse or justification for his misconduct.[12] Repeating an earlier holding,[13] the court stated that the client's file belonged to her and should have been returned upon request. The court concluded that because of the respondent's lack of professionalism and his unresponsiveness to the Board's inquiries and warnings, a public reprimand was appropriate.[14]

The court's decisions in *Bruner* and *Haddock* serve as reminders that an attorney must act promptly and diligently in serving his client's interests. Late compliance, as in *Bruner*, is not satisfactory. Nor will an attorney be spared disciplinary sanction because his office system prevented him from communicating with his client. Finally, if the Board is investigating an allegation of misconduct, the attorney must cooperate fully with the Board's inquiries.

Tammie E. White

II. Discipline for Attorney's Communication with Veniremen Despite Ignorance of Rules and Inexperience

In *In re Rivers*[15] the South Carolina Supreme Court publicly reprimanded a young attorney with no trial experience for aiding in the communication with veniremen[16] and failing to re-

11. 283 S.C. at 117, 321 S.E.2d at 601-02.
12. *Id.*, 321 S.E.2d at 602.
13. *In re* Crosland, 270 S.C. 546, 243 S.E.2d 198 (1978).
14. 283 S.C. at 118, 321 S.E.2d at 602.
15. ___ S.C. ___, 331 S.E.2d 332 (1984).
16. DR 7-108 provides in relevant part:

> (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.
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> (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 veniremen or a juror.

S.C. Sup. Ct. R. 32, DR 7-108 (Supp. 1984).

veal this misconduct to the court.[17] The court's refusal to accept ignorance of the rules as an excuse for professional misconduct is in accord with other jurisdictions.[18]

Rivers graduated and was admitted to practice in 1976. His legal work experience consisted of three years in the Office of the Judge Advocate General, United States Army, and two months as a law clerk for a circuit court judge. When Rivers began practicing law in 1983, as the partner of an established trial attorney, he had no trial experience.[19]

In preparation for a civil trial, Warlick, Rivers' partner, employed an investigator to contact veniremen and ask their opinion on issues relevant to the case. After assurance by Warlick that this procedure was ethical, the investigator began work on the project using questions that Rivers had helped draft.[20]

The investigator subsequently informed Warlick that two attorneys he knew had advised him that the investigation was unethical. Warlick stated he would take care of it, but proceeded to use the information obtained from the investigator to select the jury. The case, scheduled for trial in federal court, was subsequently settled.[21] The misconduct was discovered, however, when a juror informed the judge that he had been contacted by

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17. DR 1-102 provides in relevant part:

> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> (2) Circumvent a Disciplinary Rule through actions of another . . . .
> . . . .
> (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 (Supp. 1984). DR 7-108 provides in relevant part:

> (G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror, or a member of his family, of which the lawyer has knowledge.

S.C. SUP. CT. R. 32, DR 7-108 (Supp. 1984). DR 1-103 provides in relevant part:

> (A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

S.C. SUP. CT. R. 32, 1-103 (Supp. 1984).

18. *See* State of Florida *ex rel.* The Florida Bar v. Rhubalton, 132 So. 2d 395, 399 (Fla. 1961); People *ex rel.* Healy v. Macauley, 230 Ill. 208, 82 N.E. 612, 614 (1907); State v. Alvey, 215 Kan. 460, 464, 524 P.2d 747, 750-51 (1974).

19. ___ S.C. at ___, 331 S.E.2d at 332.

20. *Id.* at ___, 331 S.E.2d at 332.

21. Panel Report at 6.

the investigator.[22]

Disciplinary proceedings were brought against Rivers after he had been acquitted of contempt charges in federal court.[23] The South Carolina Supreme Court restated its holding from *In re Two Anonymous Members of the South Carolina Bar*[24] that attorneys are forbidden to communicate with jury members or members of their families within the sixth degree of kinship.[25] The court then held that Rivers had violated the Rules on Disciplinary Procedure by aiding in the contacting of jurors[26] and failing to report such misconduct.[27]

The court acknowledged Rivers inexperience and agreed with the Panel's finding that he was ignorant of the rules applicable to jury selection in civil trials. Nevertheless, the court stated that "[i]gnorance . . . is no excuse,"[28] and held that Rivers, like more experienced attorneys, had a duty to discover and obey the rules governing the profession.[29] He could not, therefore, avoid disciplinary sanctions. The court concluded, however, that Rivers' "honesty, integrity and high moral character,"[30] his

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22. ___ S.C. at ___, 331 S.E.2d at 332.

23. The contempt charge proceedings against Rivers' partner are reported in United States v. Warlick, 742 F.2d 113 (4th Cir. 1984).

24. 278 S.C. 477, 298 S.E.2d 450 (1982).

25. ___ S.C. at ___, 331 S.E.2d at 333. The court cited S.C. SUP. CT. R. 32, DR 7-108(A), (F)(Supp. 1984). For text of these rules, see *supra* note 16.

26. The court cited Rule 5, which provides in relevant part:

> Misconduct as the term is used herein means any one or more of the following:
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> . . .
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> B. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's Oath of Office or the Code of Professional Responsibility as is in effect and adopted by the Court, whether or not the act or omission occurred in the course of an attorney-client relationship.
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> . . . .
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> D. Conduct tending to pollute the administration of justice or to bring the courts or the legal professional into disrepute or conduct demonstrating unfitness to practice law.

S.C. SUP. CT. R. DISC. P. 5(B), (D) (Supp. 1984). The court also cited S.C. SUP. CT. R. 32, DR 7-108(A), (F), DR 1-102(A)(1), (2), (5), (6). For text of these rules, see *supra* notes 16 & 17.

27. The court cited S.C. SUP. CT. R. DISC. P. 5(B),(D); S.C. SUP. CT. R. 32, DR 7-108(G), DR 1-102(A)(1), (6), DR 1-103(A). For text of these rules, see *supra* notes 26 & 17.

28. ___ S.C. at ___, 331 S.E.2d at 333.

29. *Id.* at ___, 331 S.E.2d at 333.

30. *Id.* at ___, 331 S.E.2d at 333.

limited involvement, and his inexperience were strong mitigating factors and that the appropriate sanction, therefore, was a public reprimand.[31] The court's position in *Rivers* was justified; ample sources existed from which the respondent could have discovered the rule.[32] The court, although citing inexperience as a mitigating factor, explicitly rejected ignorance as an excuse, stating that the standard is the same for all attorneys. Thus, the court dispelled any misconceptions that ignorance resulting from inexperience would prevent the imposition of disciplinary sanctions and indicated that an attorney's duty to discover, obey, and report violations of the rules of practice and professional responsibility commences upon entry into the profession.

Tammie E. White

III. LIMITATION ON ATTORNEY'S BUSINESS TRANSACTIONS THAT MAY ADVERSELY AFFECT CLIENTS

The South Carolina Supreme Court held in *In re Pyatt*[33] that absent consent after full disclosure, an attorney should not engage in business transactions with a client if his own interests differ from those of the client.[34] Moreover, if he does not intend to act as counsel for clients who consult him regarding matters in which he has an adverse interest, the attorney must adequately explain to the clients that he does not represent their interests in the transaction.[35] The court publicly reprimanded the respondent after finding that Pyatt had violated these rules

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31. *Id.* at ___, 331 S.E.2d at 333.

32. First, S.C. SUP. CT. R. 32, DR 7-108 (Supp. 1984) explicitly prohibits communication with veniremen. For the text of relevant portions of DR 7-108, see *supra* note 17. Second, in 1982 the South Carolina Supreme Court interpreted DR 7-108 in *In re* Two Anonymous Members of the South Carolina Bar, 278 S.C. 477, 298 S.E.2d 450 (1982). The court later held in *In re* Holman, 277 S.C. 293, 286 S.E.2d 148 (1982), that an attorney's communication with jury members warranted disbarment. Communication with jurors is also prohibited during trial and limited after trial. *See, e.g., In re* Delgado, 279 S.C. 293, 306 S.E.2d 591 (1983), *cert. denied*, 104 S. Ct. 740 (1984). For a discussion of *Two Anonymous Members* and *Delgado*, see *Professional Responsibility, Annual Survey of South Carolina Law*, 36 S.C.L. REV. 231, 238 (1984). *See also* Annot., 62 A.L.R.2D 298 (1958)(communication prohibited during trial); Annot., 19 A.L.R.4TH 1209 (1983)(communication prohibited after trial).

33. 280 S.C. 302, 312 S.E.2d 553 (1984).

34. *Id.* at 304, 312 S.E.2d at 554.

35. *Id.* at 303, 312 S.E.2d at 554.

by engaging in a real estate transaction in which members of his family purchased property from a client without prior disclosure.[36]

The Marvins contacted Pyatt for advice on avoiding a threatened mortgage foreclosure. Among other alternatives, Pyatt suggested that the Marvins sell the property to a group of investors who would assume the mortgage, lease the property to the Marvins, and grant them an option to repurchase at a later date. The Marvins found this option attractive because it allowed them to retain their property and, accepting Pyatt's advice, agreed to sell. Pyatt then prepared a deed and other documents necessary to transfer the property to an investor group comprised of his wife and a business associate. Because Mrs. Pyatt used money from a joint account shared with her husband to make the purchase, Mr. Pyatt acquired a pecuniary interest in the transaction.[37] The Marvins did not discover until after the closing that Mrs. Pyatt was one of the investors.[38] Later, when the property was transferred to Pyatt's brother, Pyatt prepared the lease agreement.[39] Although the leasing contract granted the Marvins the promised right to repurchase, the lease payments were unfavorable to them.[40]

When the Marvins later attempted to reacquire the property, Pyatt explained to them that the repurchase price was $45,700, the fair market value of the real estate.[41] The term "fair market value," although embodied in the contractual repurchase option, had not previously been explained to the Marvins. The investors had paid the Marvins $2,000 and assumed the existing mortgage of $24,000. The Marvins, considering the quoted repurchase price unreasonable, refused to pay. When the Marvins became delinquent in their leasing payments, Pyatt initiated

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36. *Id.* at 304, 312 S.E.2d at 554.

37. *Id.* at 303, 312 S.E.2d at 554. For a discussion of disciplinary proceedings resulting from an attorney's direct or indirect purchase of a client's property, see Annot., 35 A.L.R.3D 674 (1971). *See also* Annot., 68 A.L.R.3D 967 (1976) (conflicts of interests in real estate closings).

38. Brief of Complainant at 1-6.

39. 280 S.C. at 303, 312 S.E.2d at 554.

40. The Marvins' monthly rental payments under the lease exceeded their previous mortgage payments by $76.00. *Id.*

41. The Marvins had been advised that the fair market value was $35,000. Brief of Complainant at 7.

ejectment proceedings against them on behalf of his brother.[42]

Throughout their business dealings, the Marvins and Pyatt had different perceptions of the nature of their relationship. Pyatt regarded himself as a middleman between the investors and the Marvins, not as the Marvins' attorney.[43] Pyatt contended that the Marvins knew of his role and shared his view of the relationship.[44] Thus, he claimed, no attorney-client relationship existed, and no ethical violation had occurred.[45] Conversely, the Marvins alleged that they believed Pyatt was their attorney and was acting in their best interests until Pyatt revealed the repurchase price and commenced ejectment proceedings against them.[46] Commenting upon these conflicting perceptions, the supreme court admonished: "Regardless of how the respondent regarded the relationship, he failed to exercise proper care and judgment in explaining to the Marvins that he did not represent

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42. 280 S.C. at 303, 312 S.E.2d at 554.

43. Brief of Respondent at 5. The respondent did not regard himself as the Marvins' attorney in part because he had advised them to seek advice from another attorney about their financial difficulties if they pursued bankruptcy remedies. Both Pyatt and the Marvins testified that the Marvins had sought advice from another attorney. *Id.*

44. Brief of Respondent at 3-6. The respondent alleged that the Marvins knew of his adverse interest because they gained concessions from him as representative of the investors. *Id.* at 4. Additionally, Pyatt stated that he told the Marvins that he was acting on behalf of the investors and that the Marvins were capable of understanding the transaction. Panel Report at 3. Therefore, he contended that the mere failure to put the disclaimer in writing did not create an ethical violation warranting the recommended sanction. Brief of Respondent at 6. As further support for his contention that no attorney-client relationship existed, the respondent pointed out that no written agreement or fee arrangement was made. *Id.* at 5. Citing 7A C.J.S. *Attorney and Client* § 169 (1980), the respondent conceded that a relationship may be implied from the conduct of the parties, but stated that a lack of formalities is some evidence that no attorney-client relationship was formed.

45. The respondent relied on *In re* Palmieri, 76 N.J. 51, 385 A.2d 856 (1978). In that case, Palmieri's former clients, who were business persons, agreed to make substantial loans to his corporation, which had been created to build a resort hotel. The court held that no attorney-client relationship existed and the transactions were merely part of a joint business venture. Therefore, no ethical violation existed. The court reasoned that the clients were sophisticated business persons who did not rely on Palmieri as an attorney in making the investment. *Id.* at 60, 385 A.2d at 860. The New Jersey Supreme Court summarized its conclusion: "Before a professional obligation is created, there must be some act, some word, some identifiable manifestation that the reliance on the attorney is in his professional capacity." *Id. But cf. In re* Hurd, 69 N.J. 316, 354 A.2d 78 (1976)(stating that even when the parties are not in the position of attorney and client, a member of the bar owes a fiduciary duty to those he knows or should know are relying on him for professional advice).

46. Brief of Complainant at 9.

their interests."[47]

The court concluded that Pyatt had violated DR 5-101(A)[48] and DR 5-104(A)[49] of the South Carolina Supreme Court Rules on Disciplinary Procedure which prohibit an attorney from engaging in business dealings with a client unless the client consents after full disclosure of any adverse interest. As a result, the court adopted the sanction recommended by the Hearing Panel: a public reprimand conditioned on reconveyance of the property to the Marvins.[50] Rejecting the defenses raised by Pyatt,[51] the court stated that the Marvins had been "looking to the respondent to represent their interests" and Pyatt had failed to explain adequately to them that he did not.[52]

This opinion indicates that the court will rely on the reasonable expectations of the potential client in deciding whether an attorney-client relationship exists.[53] While courts in other jurisdictions have held that once the relationship is established, the prohibition in DR 5-101(A) imposes a burden on the attorney to demonstrate that the resulting transaction is equitable to the client,[54] the South Carolina Supreme Court did not explicitly adopt this rule. The court did point out, however, that the Marvins' interests were not adequately protected by the agree-

47. 280 S.C. at 303, 312 S.E.2d at 554.

48. S.C. SUP. CT. R. 32, DR 5-101(A)(Supp. 1984) provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

49. S.C. SUP. CT. R. 32, DR 5-104(A)(Supp. 1984) provides: "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure."

50. 280 S.C. at 304, 312 S.E.2d at 554. The court stipulated that if the respondent failed to reconvey the property within thirty days of the order, he would be indefinitely suspended from the practice of law. *Id.*

51. *See supra* notes 44 & 45.

52. 280 S.C. at 303, 312 S.E.2d at 554.

53. See *supra* notes 44 & 45 for respondent's discussion on this issue. The attorney-client relationship is generally a matter of contract. *See, e.g.*, Board of Comm'rs of Alabama State Bar v. Jones, 291 Ala. 371, 377, 281 So. 2d 267, 273 (1973). The relationship may, however, be implied from the conduct of the parties. *See, e.g.*, Nicholson v. Shockey, 192 Va. 270, 277, 64 S.E.2d 813, 817 (1951).

54. *See Developments in the Law—Conflicts of Interests in the Legal Profession*, 94 HARV. L. REV. 1244, 1287 (1981). *See also* Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 815-20 (1977).

ments drafted by Pyatt.[55] As counsel for both the buyers and the sellers, Pyatt placed himself on both sides of the transaction. Some commentators have suggested that because such dual representation necessarily produces a conflict of interest, an attorney should never attempt to represent both parties.[56]

Pursuant to DR 5-101[57] and DR 5-105,[58] Pyatt should have refused the employment unless he had a reasonable basis for believing that neither his own interests nor the interests of third parties would adversely affect his representation of his clients. Both Pyatt's family ties with the investors and his probable awareness of the normal conflicts that arise between bargaining parties make it difficult to conclude that he reasonably believed representation was proper. In situations where the conflicts are less severe, an attorney may avoid problems by fully disclosing any adverse interest and obtaining the client's consent to the representation. As indicated in *Pyatt*, the nature of the conflicting interests and the attorney-client relationship must be adequately explained; the client's and the attorney's perceptions of the resulting relationship must coincide. Furthermore, the attorney should obtain some objective proof that disclosure was made. Absent proof of sufficient explanation by the attorney, the client's perception of the resulting relationship will determine whether disciplinary sanctions are appropriate.

Tammie E. White

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55. 280 S.C. at 303-04, 312 S.E.2d at 554.

56. *See generally* Comment, *Conflicts of Interest In Real Estate Transactions: Dual Representation - Lawyers Stretching the Rules*, 6 W. NEW ENG. L. REV. 73 (1983).

57. For text of DR 5-101, see *supra* note 48.

58. S.C. SUP. CT. R. 32, DR 5-105(A)(Supp. 1984) provides: "A lawyer shall decline proferred employment if the exercise of his independent judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under 5-105(C)."