

# South Carolina Law Review

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Volume 44  
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA  
LAW*

Article 11

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Fall 1992

## Ethics

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### Recommended Citation

James E. Bradley, et. al., Ethics, 44 S. C. L. Rev. 98 (1992).

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## ETHICS

### I. COURT CAUTIONS ATTORNEYS AGAINST REPRESENTING CLIENTS WITH COMPETING INTERESTS AND AGAINST ENTERING INTO BUSINESS RELATIONSHIPS WITH CLIENTS

In *In re Solomon*<sup>1</sup> and *In re Conway*<sup>2</sup> the South Carolina Supreme Court clarified the limits of several common ethical dilemmas that occur within the attorney-client relationship. In *Solomon* the court outlined the dangers of an attorney representing parties on both sides of a transaction.<sup>3</sup> In *Conway* the court addressed the potential impropriety of an attorney entering into business transactions with clients.<sup>4</sup> The attorneys in both *Solomon* and *Conway* clearly committed ethical violations,<sup>5</sup> and these decisions reiterate the South Carolina Supreme Court's stern view of attorney misbehavior and the court's willingness to impose harsh sanctions when appropriate.<sup>6</sup>

In *Solomon* the attorney was disciplined for representing parties with adverse interests in a real estate transaction.<sup>7</sup> *Solomon* continued to represent both parties even after a dispute arose between the two parties as to the validity of the transaction.<sup>8</sup> *Solomon* never suggested to either client that the dual representation might impair the effective protection of their individual interests. When the clients' interests in fact clashed, *Solomon* actually accepted a retainer to represent one client against the other.<sup>9</sup>

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1. 413 S.E.2d 808 (S.C. 1992) (per curiam).

2. 305 S.C. 388, 409 S.E.2d 357 (1991) (per curiam).

3. *Solomon*, 413 S.E.2d at 809-10.

4. *Conway*, 305 S.C. at 392-93, 409 S.E.2d at 359-60.

5. Both attorneys' violations occurred before September 1, 1990, the effective date of S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT. Therefore, prior S.C. Sup. Ct. R. 32, Code of Professional Responsibility, applied. *Solomon*, 413 S.E.2d at 808 n.1; *Conway*, 305 S.C. at 391 n.2, 409 S.E.2d at 359 n.2.

6. See generally Harry J. Haynsworth IV, *Disciplinary Actions by the South Carolina Supreme Court and the Board of Commissioners on Grievances and Discipline: Lawyers Beware*, 36 S.C. L. REV. 309 (1985) (discussing supreme court's treatment of attorneys' ethical violations).

7. The allegations of *Solomon*'s misconduct also included assessing an improper fee for handling a workers' compensation claim and failing to answer opposing counsel's requests to admit. *Solomon*, 413 S.E.2d at 808-09.

8. *Id.* at 809.

9. *Id.* *Solomon* returned the retainer one day after accepting it when he realized that he could not represent one client against the other. *Id.*

Solomon tried to avoid responsibility for the conflict of interest by claiming that he “did not provide legal counsel to either [client], but acted merely as a scrivener.”<sup>10</sup> The supreme court rejected Solomon’s argument, refusing “to countenance [Solomon’s] evident belief he could evade sanctions by claiming to be a mere scrivener of the . . . transactions.”<sup>11</sup> In response to Solomon’s “mere scrivener” defense, the court also issued a harsh rebuke: “This court will not tolerate an attorney’s deliberate avoidance of his ethical responsibilities.”<sup>12</sup>

Although in some situations an attorney may represent clients with adverse interests,<sup>13</sup> Solomon’s conduct fell outside of these permissible situations.<sup>14</sup> The Hearing Panel recommended a private reprimand for Solomon, but the Executive Committee recommended a public reprimand.<sup>15</sup> After finding Solomon guilty of numerous ethical violations, the supreme court suspended Solomon from the practice of law for thirty days.<sup>16</sup>

10. *Id.*

11. *Id.* at 810; *cf.* *State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987) (per curiam) (holding that the drafting of legal documents is work for lawyers rather than scriveners because of the “potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law”). *But cf.* *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991) (holding that there was no actionable claim against a law firm for knowingly conveying false representations because the firm acted only as a “scrivener” and “merely ‘papered the deal’” by putting into writing the terms on which the parties had agreed), *cert. denied*, 112 S. Ct. 1475 (1992). For an extensive discussion of *Schatz*, see John P. Freeman & Nathan M. Crystal, *Scienter in Professional Liability Cases*, 42 S.C. L. REV. 783, 805-18 (1991).

12. *Solomon*, 413 S.E.2d at 810.

13. See *In re Anonymous Member of the S.C. Bar*, 298 S.C. 163, 378 S.E.2d 821 (1989) (per curiam); see also S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 1.7 (an attorney must reasonably believe that dual representation will not adversely affect either client’s interest and must gain the consent of each client to the dual representation). However, S.C. Sup. Ct. R. 32, Code of Professional Responsibility DR 5-105, was in effect at the time of Solomon’s violations. See *supra* note 5. DR 5-105 differs slightly by permitting an attorney to represent dual clients if it is obvious that the attorney could have adequately represented both interests. S.C. Sup. Ct. R. 32, Code of Professional Responsibility DR 5-105.

14. Solomon apparently did not obtain consent from either client. *Solomon*, 413 S.E.2d at 809.

15. *Id.* at 809-10.

16. *Id.* at 810. The court found that Solomon violated the following Code sections: DR 2-106(A) (collecting an illegal or excessive fee), DR 6-101(A)(2) (handling a legal matter without adequate preparation), DR 6-101(A)(3) (neglecting a legal matter), see *supra* note 7, DR 5-105 (representing multiple clients without gaining their consent after full disclosure), and DR 7-101(A)(3) (prejudicing the

The court stated that it was “dismayed by [Solomon’s] lackadaisical attitude toward the interests of his clients.”<sup>17</sup> The court concluded with a warning to lawyers engaged in dual representation of clients with conflicting interests: “This Court will remove an unfit attorney from the practice of law not for the purpose of punishing the attorney, but in order to protect the courts and the public.”<sup>18</sup>

In *In re Conway*<sup>19</sup> the attorney formed a real estate development corporation with clients and served as both the president and attorney of the corporation. Disciplinary proceedings were brought against Conway because of three allegedly improper business transactions.<sup>20</sup> After making findings of fact, the Hearing Panel recommended indefinite suspension.<sup>21</sup> The Executive Committee agreed with the Panel’s findings of fact, but recommended disbarment of Conway, and the supreme court concluded that disbarment was the appropriate sanction.<sup>22</sup>

The court based its decision on Conway’s “abuse of the trust placed in him as an attorney and as a corporate officer.”<sup>23</sup> Attorneys must take every possible precaution to ensure that clients are aware of the risks involved in such transactions and of the need for independent legal

interest of a client during a professional relationship). *Solomon*, 413 S.E.2d at 810.

17. *Solomon*, 413 S.E.2d at 810.

18. *Id.* (citing *In re Galloway*, 278 S.C. 615, 300 S.E.2d 479 (1983) (per curiam)).

19. 305 S.C. 388, 409 S.E.2d 357 (1991) (per curiam).

20. In the first transaction, Conway received a loan from the corporation on very favorable terms, but never repaid the loan. In the second transaction, Conway received kickbacks for contracts that he arranged on behalf of the corporation. In the third transaction, Conway received an improper payment for arranging a bond transaction. Conway did not fully disclose the details of any of these transactions to his co-owner clients. *Id.* at 390-91, 409 S.E.2d at 358-59.

21. *Id.* at 391, 409 S.E.2d at 359. The Hearing Panel and the Executive Committee found that Conway had violated the following provisions of the Code of Professional Responsibility: DR 1-102(A)(3) (conduct involving moral turpitude), DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and DR 1-102(A)(6) (conduct that adversely reflects on fitness to practice law). *Conway*, 305 S.C. at 391, 409 S.E.2d at 359. The corresponding provisions of the Rules of Professional Conduct are 8.4(a)-(d). *Id.* at 391 n.2, 409 S.E.2d at 359 n.2.

22. *Conway*, 305 S.C. at 392-93, 409 S.E.2d at 359. The *Conway* court held that, in addition to the violations the Hearing Panel and the Executive Committee found, Conway also violated DR 5-104(A), which limits business transactions between an attorney and client. *Id.* at 392, 409 S.E.2d at 359. The corresponding provision of the Rules of Professional Conduct is 1.8(a), which is more strict than its predecessor. *Id.* at 393 n.4, 409 S.E.2d at 360 n.4.

23. *Id.* at 392, 409 S.E.2d at 359.

advice.<sup>24</sup> Although the court did not forbid attorney-client transactions, the court warned “members of the bar to exercise utmost care when pursuing business relationships with clients.”<sup>25</sup> The *Conway* court reiterated its long-standing admonition to lawyers about mixing personal and professional business: “[A] lawyer runs a high risk in mixing [sic] personal business with his professional business, and [sic] when he does so he is held to high standards.”<sup>26</sup>

*Solomon* and *Conway* demonstrate the South Carolina Supreme Court’s harsh stance toward attorneys’ ethical violations. South Carolina’s disciplinary system is one of the most aggressive in the nation as measured by the number of sanctions imposed.<sup>27</sup> This state’s system may be most distinctive because of the “willingness of the supreme court to impose public sanctions in cases which, in many states, would be dismissed or would result at most in a private reprimand.”<sup>28</sup> South Carolina attorneys should take note of the attorneys’ fates in these two cases and exercise care to represent adequately their clients’ interests and to uphold the standards of the bar. “The scars of others should teach us caution.”<sup>29</sup>

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## II. AWARDS OF ATTORNEY’S FEES IN DIVORCE CASES MUST BE CALCULATED FROM REASONABLE HOURLY RATES

In *Glasscock v. Glasscock*<sup>30</sup> the South Carolina Supreme Court expressly prohibited agreements for attorney’s fees contingent upon the

24. *Id.* at 392, 409 S.E.2d at 360 (citing *In re Smyzer*, 527 A.2d 857 (N.J. 1987)).

25. *Id.* at 393, 409 S.E.2d at 360.

26. *Id.* (quoting *In re Belser*, 269 S.C. 682, 687, 239 S.E.2d 492, 494 (1977) (per curiam)); see also *In re Rollins*, 281 S.C. 467, 316 S.E.2d 670 (1984) (per curiam) (disciplining lawyer for mixing personal and professional business); *In re Pyatt*, 280 S.C. 302, 312 S.E.2d 553 (1984) (warning lawyers not to mix personal and professional business); *In re Vaught*, 268 S.C. 530, 235 S.E.2d 115 (1977) (per curiam) (disciplining lawyer because he put his personal interests ahead of his client’s); *In re Felder*, 265 S.C. 192, 217 S.E.2d 225 (1975) (per curiam) (disbarring attorney for misappropriating client funds).

27. See Haynsworth, *supra* note 6, at 373.

28. *Id.* at 375.

29. Saint Jerome, Letter 54, in BARTLETT’S FAMILIAR QUOTATIONS 128 (Emily M. Beck ed., 15th ed. 1980).

30. 304 S.C. 158, 403 S.E.2d 313 (1991).  
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amount of the settlement in a domestic case.<sup>31</sup> The court held that any award of attorney's fees in a domestic case must be based upon reasonable hourly rates.<sup>32</sup> In so holding, the court clarified the proper application of the traditional factors that family courts should consider in determining a reasonable attorney's fee.<sup>33</sup>

After Linda S. Glasscock obtained a divorce from her husband, James T. Glasscock, the family court held a hearing to evaluate the reasonableness of the fees of Ms. Glasscock's attorney.<sup>34</sup> The wife's attorney, Mr. McDougall, testified that he orally disclosed his hourly rate schedule to Ms. Glasscock when she retained him<sup>35</sup> and that he informed her that "at the conclusion of her case . . . [he] would adjust [his] fee based upon the results accomplished."<sup>36</sup>

Although the total fee calculated from Mr. McDougall's hourly rate schedule was \$51,998.75, he adjusted this fee to \$150,000 because of the beneficial results he obtained for Ms. Glasscock.<sup>37</sup> The family court considered the traditional factors for determining the reasonableness of attorney's fees and concluded that the adjusted fee was reasonable.<sup>38</sup> The husband appealed the court's order on the ground that the adjusted fee was in excess of the attorney's hourly rate and, in effect, constituted a contingency fee.<sup>39</sup>

31. *Id.* at 160-61, 403 S.E.2d at 315.

32. *Id.* at 161, 403 S.E.2d at 315.

33. *Id.* (citing *Donahue v. Donahue*, 299 S.C. 353, 384 S.E.2d 741 (1989)). These factors include: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." *Id.*

34. *Id.* at 160, 403 S.E.2d at 314.

35. Record at 236. Mr. McDougall's hourly fee rates were based on \$125 per hour for his services, \$75 per hour for an associate's services, \$150 per hour combined rate for Mr. McDougall and an associate working together, and \$25 per hour for paralegal time. *Id.* Oral fee agreements are undesirable and should be put into writing to avoid fee disputes. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 cmt. 1 (1984); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1981).

36. Record at 236. Mr. McDougall also told his client that any adjustment for results accomplished normally would not exceed 15% of the equitable division. *Id.* at 252.

37. *Glasscock*, 304 S.C. at 160, 403 S.E.2d at 314. In its final decree, the family court awarded Ms. Glasscock approximately \$1.6 million of a total marital estate worth nearly \$2.8 million. *Id.*

38. *Id.* at 160, 403 S.E.2d at 315. The traditional factors for considering the reasonableness of attorney's fees are discussed *supra* note 33.

39. *Glasscock*, 304 S.C. at 160, 403 S.E.2d at 315.

However, the wife's attorney argued that the upward adjustment in his fee was not really a contingent fee because his client was obligated to pay the hourly rate regardless of the outcome of the case.<sup>40</sup> The attorney relied on *Darden v. Witham* to support his assertion that beneficial results permit an increase of attorney's fees beyond a reasonable hourly rate in divorce cases.<sup>41</sup>

The *Glasscock* court applied South Carolina Appellate Court Rule 407(1.5)(d)(1), which states that "[a] lawyer shall not enter into an arrangement for, charge, or collect . . . [a]ny fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof."<sup>42</sup> The court strictly interpreted this rule to "expressly forbid[ ] a fee made proportionate to the amount recovered for the client."<sup>43</sup> In order to clarify its interpretation of the rule, the court discussed the proper application of each of the traditional factors used to examine the reasonableness of attorney's fees.<sup>44</sup>

The supreme court found that the "contingency of compensation" factor does not relate to whether the party seeking the award received a beneficial result, but "whether the party on whose behalf the services were rendered will be able to pay the attorney's fee if an award is not made."<sup>45</sup> Moreover, the "beneficial results obtained" factor merely aids in determining whether a party merits an award of attorney's fees.<sup>46</sup>

40. *Id.*

41. Brief of Respondent at 9-10 (citing *Darden v. Witham*, 263 S.C. 183, 209 S.E.2d 42 (1974), *overruled in part by Glasscock*, 304 S.C. 158, 403 S.E.2d 313). In *Darden* the South Carolina Supreme Court affirmed a \$175,000 fee in an action to enforce an already final divorce settlement agreement. *Darden*, 263 S.C. at 183, 209 S.E.2d at 42. However, unlike *Darden*, which concerned the validity of a pre-existing divorce settlement, *Glasscock* was an action to obtain a divorce with corresponding alimony and property awards. South Carolina Appellate Court Rule 407(1.5)(d)(1) arguably allows contingent fees in situations like that in *Darden*. See *infra* note 53.

42. S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 1.5(d)(1), *construed in Glasscock*, 304 S.C. at 160, 403 S.E.2d at 315. This rule differs from Rule 1.5(d)(1) of the Model Rules of Professional Conduct only in that the South Carolina rule specifically approves of contingency fees in the collection of arrearage in domestic relations matters. S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 1.5 cmt.; cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(1) (1984) (stating rule upon which South Carolina rule is based).

43. *Glasscock*, 304 S.C. at 160, 403 S.E.2d at 315.

44. See *supra* note 33.

45. *Glasscock*, 304 S.C. at 161, 403 S.E.2d at 315.

46. *Id.*

Additionally, the supreme court stated that, in considering whether to award attorney's fees, a court also should examine "the abilities of the parties to pay, their respective financial conditions, and the effect of the attorney's fees on each party's standard of living."<sup>47</sup> In determining the reasonableness of an attorney's hourly rate, a court should consider the professional standing of counsel and the customary legal fees for similar services as well as the nature, extent, and difficulty of the case.<sup>48</sup> Applying these factors, the supreme court held that Mr. McDougall's total hourly fee of \$51,998.75 was reasonable and that no upward adjustment was warranted.<sup>49</sup>

Other states permit fee adjustments similar to the one held impermissible in *Glasscock*.<sup>50</sup> The Pennsylvania court in *Eckell v. Wilson* found that fee agreements are not contingent agreements unless they "carr[y] the risk that an attorney will not be paid if the outcome of the litigation is unsuccessful."<sup>51</sup> Although the wife's attorney in *Glasscock* made this argument about the definition of "contingency fee," the supreme court rejected this argument, noting that "Rule 407(1.5)(d)(1) expressly forbids a fee made proportionate to the *amount* recovered for the client."<sup>52</sup>

The supreme court's interpretation of South Carolina Appellate Court Rule 407(1.5)(d)(1) in *Glasscock v. Glasscock* requires attorneys to base their fees in divorce cases on reasonable hourly schedules and prohibits any "adjustment for beneficial results obtained."<sup>53</sup>

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47. *Id.* at 161 n.1, 403 S.E.2d at 315 n.1 (citing *Mitchell v. Mitchell*, 283 S.C. 87, 320 S.E.2d 706 (1984)).

48. *Id.* at 161, 403 S.E.2d at 315.

49. *Id.*

50. *See, e.g.*, *Finley v. Finley*, 422 N.E.2d 289 (Ind. Ct. App. 1981); *Eckell v. Wilson*, 597 A.2d 696 (Pa. Super. Ct. 1991).

51. *Eckell*, 597 A.2d at 701.

52. *Glasscock*, 304 S.C. at 160, 403 S.E.2d at 315.

53. *Id.* at 161, 403 S.E.2d at 315 (citation omitted). South Carolina Appellate Court Rule 407(1.5)(d)(1) states that "a lawyer may charge a contingency fee in collection of past due alimony or child support." S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 1.5(d)(1). Therefore, if the goal of the underlying action were to attack or defend an existing settlement agreement or court order, the supreme court likely would uphold an award of fees like that in *Darden v. Witham*, 263 S.C. 183, 209 S.E.2d 42 (1974), *overruled in part by Glasscock*, 304 S.C. 158, 403 S.E.2d 313.

### III. COURT EXAMINES FIDUCIARY DUTIES IN THE ATTORNEY-CLIENT RELATIONSHIP

In *Hotz v. Minyard*<sup>54</sup> the South Carolina Supreme Court addressed the formation of the attorney-client relationship and the resulting fiduciary duties. The court examined the fiduciary relationship between the plaintiff and her attorney and held that a factual issue existed whether the attorney breached his fiduciary duty by misrepresenting to his client the terms of her father's will.<sup>55</sup> In rendering its brief opinion, the court warned that attorneys have an affirmative "duty to deal with [clients] in good faith and not actively misrepresent [legal matters]."<sup>56</sup>

Respondent, Tommy Minyard, and appellant, Judy Minyard, are siblings. Mr. Minyard, their father, owned two automobile dealerships in South Carolina, one in Greenville and the other in Anderson. Judy worked at the Anderson dealership beginning in 1983 and was a vice-president and minority shareholder. In a 1985 contract with General Motors, Mr. Minyard designated Judy the successor dealer of the Anderson dealership.<sup>57</sup>

Another respondent, Robert A. Dobson, III, is a lawyer practicing with the Greenville-based firm of Dobson & Dobson, P.A. Dobson performed legal work for the Minyard family and its businesses for many years. On October 24, 1984, Mr. Minyard went with his wife, secretary, and Tommy to Dobson's office to execute a will. Mr. Minyard's will left Tommy the Greenville dealership, gave other family members bequests totalling \$250,000, and divided the remainder of his estate equally between Tommy and a trust for Judy after his wife's death. Later that afternoon, however, Mr. Minyard returned to Dobson's office and executed a second will that gave the real estate upon which the Greenville dealership was located to Tommy outright. Mr. Minyard instructed Dobson not to disclose the existence of the second will, specifically directing that Judy not be told.<sup>58</sup>

In January 1985, Judy asked Dobson for a copy of her father's will. Either at Mr. Minyard's direction or with his express permission, Dobson showed Judy the first will and discussed with her the details of

54. 304 S.C. 225, 403 S.E.2d 634 (1991).

55. *Id.* at 230, 403 S.E.2d at 637. The *Hotz* court also held that, in a shareholder's derivative suit, a corporation may be named as a party defendant even if the complaint alleges no wrongdoing on the part of the corporate entity. *Id.* at 231, 403 S.E.2d at 637-38.

56. *Id.* at 230, 403 S.E.2d at 637.

57. *Id.* at 227, 403 S.E.2d at 635.

58. *Id.* at 228, 403 S.E.2d at 635-36.

the will. Judy testified that after her discussion with Dobson, she believed that she was to receive the Anderson dealership and share equally with her brother in her father's estate. Dobson maintained that he merely explained to Judy her father's intent to provide for her, as he had for Tommy, when she became able to handle her own dealership. Nevertheless, Judy claimed Dobson told her that the will he showed her was her father's last will and testament. Dobson admitted he never told Judy that the will they discussed had been revoked.<sup>59</sup>

In 1986, Mr. Minyard suffered a massive stroke. Subsequently, Tommy and Judy agreed that she would attend to their father's daily care and Tommy would temporarily run the dealerships until Judy could return. Later that year, Judy consulted another law firm about problems with her brother's financial dealings and his general operation of the Anderson dealership. Because of Judy's threatened litigation against her brother, Mr. Minyard executed a codicil to his will removing Judy and her children as beneficiaries. Thereafter, Judy met with Tommy, her mother, and Dobson at Dobson's office. Judy was told that if she dropped her prospective lawsuit against Tommy, her father would restore her in the will. Judy testified that she understood restoration under the "will" to mean the first will, whereby she would inherit the Anderson dealership and half of her father's estate, including the real estate. Sometime after Judy discharged her attorneys, however, Tommy terminated her position in the family enterprise, and this lawsuit ensued.<sup>60</sup>

Judy's complaint alleged that Dobson breached his fiduciary duty to her by misrepresenting her father's will during their January 1985 meeting. Judy claimed that she was deceived into dropping the claim against her brother, and that her failure to bring suit enabled Tommy to continue his mismanagement of the Anderson dealership.<sup>61</sup> In addition, Judy charged Dobson's law firm with vicarious liability for Dobson's acts.<sup>62</sup> The circuit court granted the defendants' motion for summary judgment on several causes of action, and Judy appealed.<sup>63</sup>

The trial court held that Dobson owed Judy no fiduciary duty because he was acting as Mr. Minyard's attorney in connection with her

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59. *Id.* at 228, 403 S.E.2d at 636.

60. *Id.* at 228-29, 403 S.E.2d at 636.

61. *Id.* at 229-30, 403 S.E.2d at 637.

62. *Id.* at 230, 403 S.E.2d at 637. Judy also asserted that the accounting firm with which Dobson had been associated should be vicariously liable for Dobson's acts. However, the court found no basis for vicarious liability against the accounting firm because Dobson was not acting in his capacity as an accountant. *Id.* at 230-31, 403 S.E.2d at 637.

63. *Id.* at 227, 403 S.E.2d at 635.

father's will.<sup>64</sup> However, the supreme court disagreed, stating that "[a] fiduciary relationship exists when one has a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith."<sup>65</sup> The court found evidence to support an ongoing attorney-client relationship between Judy and Dobson.<sup>66</sup> Accordingly, the court concluded that Dobson "owed Judy the duty to deal with her in good faith and not actively misrepresent the first will," and that the case presented a factual issue whether Dobson actually breached his fiduciary duty to Judy.<sup>67</sup>

Because the attorney-client relationship is inherently a fiduciary relationship,<sup>68</sup> the court's concise opinion in *Hotz* appears to be sound. The question remains in this case whether the facts established an attorney-client relationship on the date of the alleged misrepresentation.<sup>69</sup> The court's simple statement that a fiduciary relationship exists when one has a special confidence in another provides very little practical guidance. Generally, for an attorney-client relationship to exist, the parties need not have entered into a valid, binding contract for legal representation; "there need only be an undertaking by the attorney to act in a professional capacity on behalf of another with the other's consent or under circumstances in which injury to the other is foreseeable if the undertaking is performed negligently."<sup>70</sup>

64. *Id.* at 230, 403 S.E.2d at 637.

65. *Id.* (citing *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)); accord *Chapman v. Citizens & S. Nat'l Bank*, 302 S.C. 469, 477, 395 S.E.2d 446, 451 (Ct. App. 1990) ("[A] confidential or fiduciary relationship exists when one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one reposing the confidence.") (citing *SSI Medical Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990)).

66. *Hotz*, 304 S.C. at 230, 403 S.E.2d at 637. The *Hotz* court noted that Dobson or his law firm had: (1) prepared Judy's tax returns for approximately twenty years until 1985, (2) prepared a will for her one week prior to the alleged misrepresentation, (3) been contacted by Judy about a suspected misappropriation of funds at one of the dealerships in 1984 or 1985, and (4) consulted with Judy as late as 1986 regarding problems with her brother. In addition, Judy claimed that she trusted Dobson because of her dealings with him over the years as her lawyer. *Id.*

67. *Id.*

68. See generally 7 AM. JUR. 2D *Attorneys at Law* § 119 (1980).

69. See, e.g., *Shropshire v. Freeman*, 510 S.W.2d 405, 406 (Tex. Ct. App. 1974) (noting that attorney and client relationship must exist at the time of the alleged transaction or wrong).

70. AMERICAN BAR ASSOCIATION & BUREAU OF NATIONAL AFFAIRS, *LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, Malpractice* § 301:111 (1984). See generally 7 AM. JUR. 2D *Attorneys at Law* § 118 (1980) (noting that the attorney-client <https://scholarcommons.sc.edu/sclr/vol44/iss1/11>

In determining whether an attorney-client relationship exists, the dispositive question is whether the attorney's conduct is such that an attorney-client relationship can reasonably be inferred.<sup>71</sup> Undoubtedly, Dobson's legal advice to Judy concerning the revoked will is strong evidence of an attorney-client relationship,<sup>72</sup> especially because he had represented Judy on other legal matters and had never told her that he could not discuss her father's last will and testament.

The *Hotz* court failed to address when an ongoing attorney-client relationship terminates. The Model Rules of Professional Conduct suggest the proper procedures lawyers should employ in terminating ongoing client relationships:

If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.<sup>73</sup>

Although Dobson clearly had the burden of clarifying the relationship in the instant case, the facts do not indicate that he met this burden.

Finally, the *Hotz* court's reversal was warranted if Dobson engaged in deceit or misrepresentation. The Model Code of Professional Responsibility expressly prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation."<sup>74</sup> The applicability of the rule does not hinge on the existence of an attorney-client relationship. Therefore, even if the court had found that Dobson

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relationship is proved by showing that the party sought and received advice and assistance from the attorney in matters pertinent to the legal profession).

71. See *North Carolina State Bar v. Sheffield*, 326 S.E.2d 320, 325 (N.C. Ct. App.) (noting that the existence of an express verbal agreement between the parties and the manner in which earlier relationships were formed are not dispositive), *cert. denied*, 332 S.E.2d 482 (N.C.), and *cert. denied*, 474 U.S. 981 (1985).

72. See generally 7 AM. JUR. 2D *Attorneys at Law* § 118 (1980).

73. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 3 (1983); see also S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 1.3 cmt. (containing identical language of Model Rules).

74. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1981); see also S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 8.4(d).

was not Judy's attorney when he misled her, he was ethically prevented from misrepresenting legal matters to third persons.<sup>75</sup>

*Hotz* demonstrates that the duty of confidentiality owed to one client does not permit a lawyer to mislead a second client.<sup>76</sup> Therefore, attorneys should protect themselves when representing multiple clients with potentially conflicting interests by fully disclosing all material information, including the limits of representation, to the parties involved. If a client asks a question that calls for a misleading response, the lawyer should decline to answer.

*Robin M. Johnson*

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75. See *Moody v. Stem*, 214 S.C. 45, 60, 51 S.E.2d 163, 169 (1948) (Oxner, J., concurring) (“[M]isrepresentation is actionable where one who himself knows the law deceives another by misrepresenting the law to him, or knowing such other to be ignorant of it, takes advantage of him through such ignorance.”) (quoting 23 AM. JUR. *Fraud and Deceit* § 48 (1939)).

76. See generally RESTATEMENT (SECOND) OF AGENCY § 381 cmt. e (1958) (“If the attorney cannot perform his duty to the second client without disclosing . . . [confidential] information or using it to the disadvantage of the first, he should decline to act.”).

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