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DOE V. CONDON: LAWYERS BEWARE—THIS UNAUTHORIZED-PRACTICE-OF-LAW CASE MAY AFFECT YOU!

I. INTRODUCTION

In the recent case *Doe v. Condon*,¹ the South Carolina Supreme Court broadened its definition of the practice of law to include offering “legal presentations for the [general] public.”² This ruling directly addressed nonlawyers’ activities.³ However, *Doe v. Condon* raises the specter that lawyers giving seminars for the purpose of soliciting new clients, or lawyers soliciting clients by providing advice over the Internet, may be engaging in the practice of law; additionally, these lawyers may form client relationships with those to whom they give advice. If the court’s rationale is applied this broadly, a lawyer may be exposed to unanticipated ethical obligations as well as to claims of malpractice. Further, an attorney not licensed in South Carolina who presents such a seminar could unwittingly engage in the unauthorized practice of law.

In *Doe v. Condon*, a paralegal sought a declaratory judgment from the South Carolina Supreme Court to determine whether his activities constituted the unauthorized practice of law.⁴ The paralegal presented the court with three issues. First, he asked whether a nonlawyer who conducts legal education seminars for the general public without an attorney present engages in the unauthorized practice of law.⁵ Second, he inquired as to whether a nonlawyer who meets privately with clients in a law office and who answers questions without an attorney illegally practices law.⁶ Finally, he asked whether a law firm can share profits with a paralegal based on the volume and types of cases handled.⁷ The court determined that the first two scenarios constituted the practice of law in South Carolina and that nonlawyers could not perform these tasks unless a supervising attorney was present.⁸ Further, the court held that the third scenario constituted prohibited fee splitting between a lawyer and a nonlawyer.⁹

1. 341 S.C. 22, 532 S.E.2d 879 (2000).

2. *Id.* at 24, 532 S.E.2d at 881.

3. *Id.*

4. *Id.* at 24-25, 532 S.E.2d at 880-81.

5. *Id.* at 25, 532 S.E.2d at 881.

6. *Id.*

7. *Doe v. Condon*, 341 S.C. at 25, 532 S.E.2d at 881.

8. *Id.* at 27-28, 532 S.E.2d at 882-83.

9. *Id.* at 29, 532 S.E.2d at 883 (citing S.C. APP. CT. R. 407, R. 5.4(a)(3)). This Comment does not address the implications of the apparent inconsistency between the court’s holding that “[t]his fee arrangement directly violates Rule 5.4 of the Rules of Professional [C]onduct” and its simultaneous assertion that “[n]onlawyer employees may certainly participate ‘in a compensation or retirement plan, even though the plan is based in whole or in part on a profit sharing arrangement.’” *Id.* at 29 & n.3, 532 S.E.2d at 883 & n.3 (quoting S.C. APP. CT. R. 407, R. 5.4(a)(3)). For a further discussion of this

The court held that the presentation of a legal seminar of the nature proposed constituted the practice of law because the topic was extremely complex and would undoubtedly elicit specific questions from the audience.¹⁰ A review of previous practice-of-law cases reveals the courts' struggle with competing policy rationales—protection of the public balanced by the desire both for judicial efficiency and for reasonable public access to the judicial system.¹¹ First, courts are concerned about solicitations for the provision of legal services directed to a naive public that may incorrectly perceive an attorney-client relationship.¹² This concern is heightened when a nonlawyer conducts the solicitation because a layperson may not understand that the services bargained for are those of a nonlawyer, not a licensed attorney.¹³ Alternatively, when an attorney conducts the solicitation, a citizen may believe that an attorney-client relationship has been formed and that the attorney now acts as his lawyer.¹⁴ However, courts have allowed nonlawyers to perform certain legal acts when there is little chance of public misunderstanding and when the legal issues at stakes are neither important nor complex.¹⁵

Part II of this Comment provides the modern history of practice-of-law cases and explores the competing policy concerns underlying practice-of-law cases. Part III discusses the application of these cases' reasoning in addressing the issues raised by public legal presentations and by forums open to the public, including the provision of legal advice via the Internet. Part IV concludes by asserting that *Doe v. Condon*'s definition of the "practice of law" should be interpreted consistently with the courts' mission to limit undesirable legal-services solicitation practices in South Carolina.

issue, see *In re Anonymous Member of the South Carolina Bar*, 295 S.C. 25, 28, 367 S.E.2d 17, 18 (1988), which held that paying bonuses to investigators based on a percentage of legal fees generated by the cases on which they worked violated the Code's fee-splitting provisions; see also *In re Brown*, 319 S.C. 342, 345, 347, 461 S.E.2d 385, 386-87 (1995) (holding that a compensation system which provided bonuses to a paralegal based on the charges billed to a particular client was in essence a fee-splitting arrangement expressly prohibited under Rule 5.4(a)(3)). But see S.C. Bar Ethics Adv. Comm., Formal Op. 2 (1997) (stating that "[u]nder Rule 5.4(a)(3) of [t]he Rules of Professional Conduct, a lawyer or law firm may institute a paralegal bonus system that bases the amount of a bonus on the amount billed to clients, provided that the amounts billed to clients are reasonable under Rule 1.5").

10. *Doe v. Condon*, 341 S.C. at 27-28, 532 S.E.2d at 882.

11. See *infra* Part II.

12. *Doe v. Condon*, 341 S.C. at 26, 532 S.E.2d at 881 ("The line between what is and what is not permissible conduct by a non-attorney is oftentimes 'unclear' and is a potential trap for the unsuspecting client.").

13. *Id.* at 27, 532 S.E.2d at 882.

14. See *infra* Part II.

15. See *infra* Part II.

II. DEVELOPMENT OF AND RATIONALE UNDERLYING THE MODERN DEFINITION OF PRACTICE OF LAW IN SOUTH CAROLINA

A. *Introductory Observations*

South Carolina limits the practice of law to licensed attorneys.¹⁶ Courts enforce this limit because “[t]he protection of the public so demands.”¹⁷ However, “courts have been historically hesitant in defining broadly what constitutes the practice of law.”¹⁸ What actually comprises the practice of law is fact intensive and fluid depending on the individual circumstances in each case.¹⁹

Historically, the practice of law was not statutorily defined in South Carolina.²⁰ The South Carolina Supreme Court defined the concept in a 1909 case as follows:

[T]he practice of law is not limited to the conduct of cases in courts. . . . [I]t embraces the preparation of pleadings, and other papers incident to actions and special proceedings, . . . the management of such actions and proceedings on behalf of clients before judges and courts, . . . conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law.²¹

Decisions since 1909 have offered little more specificity. In defining the practice of law, the supreme court has essentially adopted a case-by-case approach, looking to the character of the acts performed in the context of individual cases.²²

Recognizing the often unclear line between proper and improper conduct by nonlawyers, the supreme court remains

convinced . . . that it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules. Instead, [the court believes] that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy.²³

16. S.C. CODE ANN. § 40-5-310 (Law. Co-op. 1976 & West Supp. 1999).

17. *In re Lexington County Transfer Court*, 334 S.C. 47, 50, 512 S.E.2d 791, 792 (1999).

18. *Id.* at 50-51, 512 S.E.2d at 792.

19. *Id.* at 51, 512 S.E.2d at 792-93.

20. *State ex rel. Daniel v. Wells*, 191 S.C. 468, 473, 5 S.E.2d 181, 183 (1939).

21. *In re Duncan*, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909).

22. *Wells*, 191 S.C. at 475, 5 S.E.2d at 184.

23. *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

However, the supreme court's ongoing struggle to define this amorphous concept has led to the emergence of a two-fold rationale that enables the court to weigh the competing policy concerns implicated in unauthorized-practice-of-law cases.

B. Protection of a Naïve Public

A review of unauthorized-practice-of-law cases reveals the South Carolina Supreme Court's focus on the public's welfare. In *State v. Buyers Service Co.*, the court sent a clear message to nonlawyers, including nonlawyer corporations, that the closing of real estate transactions constituted the practice of law.²⁴ Buyers Service was a commercial title service corporation which "assist[ed] homeowners in purchasing residential real estate."²⁵ The State alleged that Buyers Service

engaged in the unauthorized practice of law by: (1) providing reports, opinions or certificates as to the status of titles to real estate and mortgage liens; (2) preparing documents affecting title to real property; (3) handling real estate closings; (4) recording legal documents at the courthouse; and (5) advertising to the public that it [could] handle conveyancing and real estate closings.²⁶

The court held that each of these activities constituted the practice of law.²⁷ Though it did not specifically focus on the advertisement angle, the court noted its concern for the public's protection at least four separate times within the opinion.²⁸

The supreme court's next attempt to define the practice of law came in 1995 with the case of *State v. Despain*.²⁹ Lovella Despain, a nonlawyer, used a computer program to assist individuals in preparing family court documents.³⁰ However, instead of simply providing the program or blank legal forms, Despain completed the forms for the individuals.³¹ As in *Buyers Service Co.*, the court reasoned that prohibiting Despain's actions would protect the public.³² Furthermore, the court was concerned by Despain's advertisement in the newspaper under the "Legal Services" category.³³

24. *State v. Buyers Serv. Co.*, 292 S.C. 426, 434, 357 S.E.2d 15, 19 (1987).

25. *Id.* at 428, 357 S.E.2d at 16.

26. *Id.*

27. *Id.* at 430-34, 357 S.E.2d at 17-19.

28. *Id.* at 431-34, 357 S.E.2d at 18-19.

29. 319 S.C. 317, 460 S.E.2d 576 (1995).

30. *Id.* at 319, 460 S.E.2d at 577.

31. *Id.* The court noted that "the sale or lease of books or computer software simply containing blank legal forms is not the practice of law." *Id.* at 320 n.2, 460 S.E.2d at 578 n.2.

32. *Id.* at 320, 460 S.E.2d at 578.

33. *Id.* at 319 n.1, 460 S.E.2d at 577 n.1.

In *State v. Robinson*, a 1996 case, the court again addressed the advertisement and provision of legal services by a nonlawyer.³⁴ Robinson was a paralegal and a civil rights activist who lived in Anderson, South Carolina.³⁵ He maintained an ad in the local yellow pages under the heading of "Paralegals" that read: "Robinson Melvin J.: 'IF YOUR CIVIL RIGHTS HAVE BEEN VIOLATED—CALL ME.'"³⁶ Robinson relied on a state law, South Carolina Code § 40-5-80, which allows nonlawyers to prosecute the cause of another with leave of the court.³⁷ However, the court found that Robinson prepared pleadings and gave advice to individuals before obtaining the requisite permission; thus, it enjoined Robinson "from preparing and filing legal documents and giving legal advice unless he first obtain[ed] leave of court pursuant to § 40-5-80."³⁸ Additionally, the court held that Robinson's yellow page advertisement, business cards, and letterhead were misleading "since his work product [was] admittedly not subject to the supervision of a licensed attorney."³⁹

As the South Carolina Supreme Court took an increasingly critical view of the unauthorized practice of law, the legislature responded by increasing the statutory penalty for such practice from a five hundred dollar fine per case solicited⁴⁰ to a felony which entails a fine of not more than five thousand dollars or imprisonment of not more than five years, or both.⁴¹ Thus, the trend in both common and statutory law is toward a heightened scrutiny of solicitation for legal services. Because the public is ignorant of the differences between licensed legal practitioners, paralegals, and corporations that offer legal services, the court has held that

[t]he practice of law is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability. Often, the line between such activities and permissible business conduct by non-attorneys is unclear. . . .

. . . .

The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and

34. *State v. Robinson*, 321 S.C. 286, 468 S.E.2d 290 (1996).

35. *Id.* at 288, 468 S.E.2d at 290.

36. *Id.* at 288, 468 S.E.2d at 291.

37. *Id.* at 288, 468 S.E.2d at 290 (citing S.C. CODE ANN. § 40-5-80 (Law. Co-op. 1976), which provides that a citizen may prosecute or defend the cause of another if he first obtains leave of the court, provided that he gives an oath affirming that he has not and will not take any fee, gratuity, or reward relating to the representation.).

38. *Id.* at 290, 468 S.E.2d at 292.

39. *Id.* at 289, 468 S.E.2d at 291.

40. S.C. CODE ANN. § 40-5-310 (Law. Co-op. 1976).

41. *Id.* § 40-5-310 (West Supp. 1999).

emotional consequences which may flow from erroneous advice given by persons untrained in the law.⁴²

C. Promotion of Efficiency and Public Access to the Courts

When there is no chance of public misunderstanding about the nature of the services provided, and the legal issues at stake are neither important or complex, the South Carolina Supreme Court has indicated a willingness to permit nonlawyers to perform certain law-related activities. In 1972, the court held that Highway Patrol Officers could represent the State in the prosecution of misdemeanor traffic violations.⁴³ In 1978, the court expanded its holding to allow supervisory Highway Patrol officers to assist an arresting officer in prosecuting these misdemeanor violations.⁴⁴ The court reasoned as follows:

When the officers of the Highway Patrol present misdemeanor traffic violations in the magistrates' courts, whether as the arresting officer or a supervisory officer assisting the arresting officer, they do so in their official capacities as law enforcement officers and employees of the State. These officers do not hold themselves out to the public as attorneys, and their activity in the magistrates' courts does not jeopardize the public by placing "incompetent and unlearned individuals in the practice of law." To the contrary, this activity renders an important service to the public by promoting the prompt and efficient administration of justice.⁴⁵

In 1991, the South Carolina Bar, via a special Unauthorized Practice of Law subcommittee, submitted a set of proposed rules governing the unauthorized practice of law to the South Carolina Supreme Court.⁴⁶ The subcommittee developed this detailed and comprehensive set of rules after thirteen years of collecting information and an entire year of drafting the rules.⁴⁷ With these rules, the subcommittee "attempt[ed] to define and delineate the practice of law, and to establish clear guidelines so that professionals other than attorneys [could] ensure they [did] not inadvertently engage in the practice of law."⁴⁸ Ultimately, although

42. *State v. Buyers Serv. Co.*, 292 S.C. 426, 430-31, 357 S.E.2d 14, 17-18 (1987).

43. *State v. Messervy*, 258 S.C. 110, 113, 187 S.E.2d 524, 525 (1972).

44. *State ex rel. McLeod v. Seaborn*, 270 S.C. 696, 699, 244 S.E.2d 317, 319 (1978).

45. *Id.* at 698-99, 244 S.E.2d at 319 (quoting *State ex rel. Daniel v. Wells*, 191 S.C. 468, 481, S.E.2d 181, 186 (1939)) (citation omitted). However, *Seaborn's* rationale does not spill over into criminal cases prosecuted in magistrates' and municipal courts. *See, e.g., In re Lexington County Transfer Court*, 334 S.C. 47, 52-53, 512 S.E.2d 791, 793-94 (1999) (holding that nonlawyers may not represent the State in criminal plea negotiations or in transfer-court guilty plea proceedings).

46. *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

47. *Id.*

48. *Id.*

the court “commend[ed] the subcommittee for its Herculean efforts to define the practice of law,” it rejected the detailed guidelines.⁴⁹

Despite its refusal to adopt the proposed rules, the court chose “to clarify certain practices which . . . [did] not constitute the unauthorized practice of law.”⁵⁰ In clarifying its position, the court made two new declarations regarding nonlawyers’ ability to provide law-related services for monetary compensation. First, the Court overruled *State ex rel. Daniel v. Wells* to the extent that it prohibited nonlawyers from representing business entities.⁵¹ In modifying the rule of *Wells*, the court chose to “allow a business to be represented by a nonlawyer officer, agent or employee, including attorneys licensed in other jurisdictions . . . , in civil magistrate’s court proceedings.”⁵² The second, more notable change was the court’s creation of a special exception for Certified Public Accountants.⁵³ The Court noted that

our respect for the rigorous professional training, certification and licensing procedures, continuing education requirements, and ethical code required of Certified Public Accountants (CPAs) convinces us that they are entitled to recognition of their unique status. . . . We are confident that allowing CPAs to practice in their areas of expertise, subject to their own professional regulation, will best serve to both protect and promote the public interest.⁵⁴

○

However, the court later limited the extent to which it was willing to relax the rules regarding nonlawyers’ representation of business entities. In 1999, the court addressed the issue of whether a corporate officer could represent the entity in a circuit court or a court of appeals; the supreme court was unwilling to allow such representation in courts of record, where the stakes were much higher than in magistrates’ courts.⁵⁵ This holding appears to reflect the court’s view that the value of allowing limited representation in magistrates’ courts exceeds the potential costs to the client if errors should occur.⁵⁶ By contrast, where the costs of incompetent or unethical representation might be substantially higher, such as in circuit courts or courts of appeals, the court will not permit nonlawyers to act as legal representatives for business entities.⁵⁷

49. *Id.*

50. *Id.*

51. *In re Unauthorized Practice of Law Rules*, 309 S.C. at 305-06, 422 S.E.2d at 124.

52. *Id.* at 306, 422 S.E.2d at 124.

53. *Id.* at 306, 422 S.E.2d at 124-25.

54. *Id.*

55. *Renaissance Enters., Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 652-53, 515 S.E.2d 257, 258-59 (1999).

56. *See id.*

57. *Id.*

The common theme underlying these exceptions is that there are no solicitation issues and there is little chance of the public being misled as to the character or quality of the services provided. In such cases, the promotion of efficiency and increased public access to the court system overrides concerns that the public will be unduly harmed by nonlawyers' practicing law.

III. APPLYING *DOE V. CONDON* TO FUTURE CASES

A. *General Observations*

In *Doe v. Condon*, the court prohibited a paralegal from conducting a seminar for the public on the ground that he would be engaging in the unauthorized practice of law.⁵⁸ By doing so, the court not only set new, clear limits on the performance of law-related activities by nonlawyers, but it also may have implicitly expanded the responsibilities of lawyers who offer legal-education seminars or advice over the Internet. The court expressed its concern that given the high degree of specialized knowledge required to provide accurate answers regarding various types of trusts, questions which could not be answered without practicing law would arise in the course of the seminar.⁵⁹ However, if a nonlawyer giving a seminar constitutes the practice of law, does it follow that a lawyer who offers a similar presentation is also practicing law and creating attorney-client relationships with those in attendance?⁶⁰



58. *Doe v. Condon*, 341 S.C. 22, 24, 532 S.E.2d 879, 881 (2000).

59. *Id.* at 27-28, 531 S.E.2d at 882.

60. This question raises the concern that the court might follow other jurisdictions which focus on the potential client's intent when seeking advice from the attorney to determine whether an attorney-client relationship has been formed. See, e.g., Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 183 n.116 (1999) (discussing various authorities which support the notion that a putative client may rely on advice tailored to his particular question); see also *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978) (noting that the privileges of the attorney-client relationship are based on the client's intention to obtain legal advice and on his belief that he is consulting a lawyer for that purpose); *Keoseian v. Von Kaulbach*, 707 F. Supp. 150, 152 (S.D.N.Y. 1989) ("In every situation where an attorney-client relationship has been found, . . . the client's belief has some reasonable basis in fact in that he has some interest of his own or in common with others which he is seeking to advance by securing legal advice."); *Alexander v. Superior Court*, 685 P.2d 1309, 1314 (Ariz. 1984) (noting that a client's reasonable belief that an attorney-client relationship existed is an important factor in the court's evaluation of the relationship); *Foulke v. Knuck*, 784 P.2d 723, 726 (Ariz. Ct. App. 1989) (considering the client's belief that he is seeking and receiving legal advice regarding a specific matter); *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982) (considering the client's perception of an attorney as retained legal counsel as a factor in determining whether an attorney-client relationship exists); *George v. Caton*, 600 P.2d 822, 827 (N.M. Ct. App. 1979) (finding that an attorney-client relationship existed even absent a formal contract because the attorneys had failed in their responsibility to be clear enough to avoid the client's misunderstanding the relationship); *In re Galton*, 615 P.2d 317, 325 (Or. 1980) (holding that a lawyer who furnished legal advice free of charge to a corporation that occasionally called seeking advice could be considered an attorney for the corporation, because a lawyer not on retainer "[may] be considered an attorney for a client who, from time to time, calls that lawyer seeking legal advice and receives such advice as a matter of course");

In the past decade, the South Carolina Bar has issued several ethics advisory opinions addressing the offering of legal seminars⁶¹ and, more recently, the provision of legal advice over the Internet.⁶² In Advisory Opinion 90-37, the Ethics Committee opined that a lawyer could furnish general legal information to members of the public through educational seminars, provided the information furnished did not contain any false or misleading information.⁶³ Similarly, in Advisory Opinion 91-04, the committee stated that providing general legal information to the public did not constitute the practice of law.⁶⁴

B. Legal Presentation Perils

The implications of *Doe v. Condon* are significant for lawyers because they are often asked to present seminars to various groups about topics in their particular area of concentration.⁶⁵ For instance, a nationally-renowned civil rights attorney might be asked to address a local group about practices the attorney has challenged elsewhere. While making such a presentation, an attorney will likely be asked specific questions regarding suspect practices in that locale.⁶⁶ Would answering specific legal questions be considered the unauthorized practice of law if the presenter were not a member of the South Carolina Bar? Alternatively, if the presenter were a member of this Bar, would answering a fact-specific question form an attorney-client relationship with the questioner?

Interpreting *Doe v. Condon* broadly to denominate such activities as the practice of law may not be appropriate or consistent with the South Carolina Supreme Court's rationale in previous cases.⁶⁷ The court clearly expressed its

Intercapital Corp. of Or. v. Intercapital Corp. of Wash., 700 P.2d 1213, 1215-16 (Wash. Ct. App. 1985) (holding that a consultation, coupled with the putative client's view that the attorney was being retained to represent him, was enough to establish an attorney-client relationship); *Developments in the Law-Conflicts of Interest in the Legal Profession*, 94 HARV.L.REV. 1244, 1322 (1981) ("The focus on the client's perspective, rather than on the sometimes misleading external indicia of the objective approach, safeguards an individual's belief and reliance.").

61. See, e.g., S.C. Bar Ethics Adv. Comm., Formal Op. 37 (1990) (discussing a law firm's advertising efforts conducted in conjunction with its provision of legal seminars); see also Formal Op. 4 (1991) (criticizing a plan which involved the formation of an organization comprised of both lawyers and nonlawyers to disseminate tax and estate planning information to the public for an annual fee).

62. See, e.g., S.C. Bar Ethics Adv. Comm., Formal Op. 27 (1994) (noting that the "practice of law via electronic media creates several issues that may violate the South Carolina Rules of Professional Conduct"); see also Formal Op. 8 (1997) (discussing the confidentiality of client communications transmitted via electronic mail).

63. S.C. Bar Ethics Adv. Comm., Formal Op. 37 (1990).

64. S.C. Bar Ethics Adv. Comm., Formal Op. 4 (1991); see also Formal Op. 27 (1994) (stating that "[o]ther jurisdictions have similarly recognized that the participation in educational seminars, newspaper columns, and radio shows for members of the public generally, which do not provide specific legal advice to individuals, [is] permissible).

65. See *supra* Part III.A.

66. See S.C. Bar Ethics Adv. Comm., Formal Op. 4 (1991).

67. See *supra* Part II.

concern that the purpose of the “educational seminar” at issue was to solicit business, and such solicitation may have been the crux of the court’s disapproval.⁶⁸ Consequently, the determination of whether an attorney-client relationship has been formed through advice given at a public presentation may turn on two factors. First, the court will likely evaluate whether the attorney was offering the seminar or presentation as an attempt to solicit business. Solicitation was a crucial element in many earlier unauthorized-practice-of-law cases.⁶⁹ Next, the court might analyze how specialized or personalized the advice given to the attendee was and what expectations the attendee had when receiving the advice.⁷⁰ If the lawyer’s purpose in making the presentation was to provide a public service by addressing a nonprofit group on a topic of political or community concern, the court might find that an attorney-client relationship was not formed with the attendees.⁷¹ However, if the attorney answered specific questions about an intricate or individualized set of facts, he might well be providing legal advice and engaging in the practice of law.⁷² Such practice could have malpractice and conflict of interest implications.⁷³

In making its determination, the court will likely focus on the presenter’s motives. If the presenter seeks to disseminate his political beliefs, rather than to derive a pecuniary gain, the court may find that the presentation does not constitute the practice of law.⁷⁴ However, after *Doe v. Condon*, attorneys risk forming an attorney-client relationship if a layperson asks them individualized questions and believes that they intend to give him specific legal advice.⁷⁵

C. Application to Internet Advice

Accompanying the growth of legal-education seminars is the ever-increasing proliferation of law firms on the Internet.⁷⁶ Since placing a law firm’s web page in “cyberspace” allows international access to the firm, many issues regarding the practice of law can arise. The effect of *Doe v. Condon* on the common practice of responding to legal questions from nonclients via e-mail or some other electronic forum has yet to be tested.⁷⁷

68. *Doe v. Condon*, 341 S.C. 22, 29, 532 S.E.2d 879, 883 (2000).

69. *See supra* notes 24-40 and accompanying text.

70. *See supra* note 62.

71. *See In re Primus*, 436 U.S. 412, 422 (1978) (determining that an attorney did not violate the disciplinary rules when “her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain”).

72. *Doe v. Condon*, 341 S.C. at 27, 532 S.E.2d at 882.

73. *See supra* notes 60-64 and accompanying text.

74. *See supra* note 71 and accompanying text.

75. *See supra* notes 59-60 and accompanying text.

76. *See, e.g.*, Finkel & Altman, LLC, at <http://finkellaw.com> (last visited Mar. 7, 2002); Foster & Foster, L.L.P., at <http://www.fosterfoster.com> (last visited Mar. 7, 2002); Haynesworth Sinkler Boyd, P.A., at <http://www.sinklerboyd.com> (last visited Mar. 7, 2002); Nelson Mullins Riley & Scarborough, L.L.P., at <http://www.nmrs.com> (last visited Mar. 7, 2002); *see infra* note 79.

77. For a comprehensive analysis of the ethical and legal obligations of providing legal advice via the Internet and other media, see Lanctot, *supra* note 60, at 218-47.

The South Carolina Bar Association quickly recognized the potential perils awaiting lawyers who advertised on the Internet. In 1994, the Bar's Ethics Committee opined as follows:

Since a public advertisement on electronic media is necessarily available to a universal audience, the attorney will be placing advertising designed to reach potential clients in jurisdictions in which he is not admitted to practice. Under Rule 7.2(a), any notice or advertisement disseminated [in the] public media must clearly identify the geographic limitations of the lawyer's practice, so that it is clear that he may not practice law except in those states in which is he admitted to practice. Otherwise, the advertisement will "omit[] a fact necessary to make the statement considered as a whole not materially misleading" [in violation of] Rule 7.1(a).⁷⁸

The purpose of the attorney's web presence is likely much different than that of a public-interest legal presentation. Many firms now maintain a web site to attract new clients and to maintain current ones.⁷⁹ "To the extent that the attorney maintains a presence on electronic media solely for the purpose of discussing legal topics generally, without the giving of advice or the representation of any particular client, this practice [is permissible]."⁸⁰ However, if an attorney gives specific advice regarding a particular set of facts, he may be engaging in the practice of law and forming an attorney-client relationship with his questioner.⁸¹ In such a situation, heightened duties may attach, and the attorney may be exposed to claims of malpractice, conflict of interest, and breach of client confidentiality. For example, assume that "[t]here exists information that a prudent attorney would be hesitant to discuss by facsimile, telephone, or regular mail."⁸² Information this sensitive may require heightened Internet security, including "such options as encryption in order to safeguard against even inadvertent disclosure of [such] information when using e-mail."⁸³

78. S.C. Bar Ethics Adv. Comm., Formal Op. 27 (1994) (quoting S.C. APP. CT. R. 407, R. 7.1(a)) (alteration in original).

79. See Herman J. Russomanno, *The Florida Bar's Cutting Edge Technology to Help Florida Lawyers*, FLA. B.J. 6, 8 (2000) (reporting that "[a]ccording to surveys conducted by the Chicago-Kent College of Law, since 1992 Internet use in law firms has risen significantly, from five percent to 78 percent").

80. S.C. Bar Ethics Adv. Comm., Formal Op. 27 (1994).

81. See *supra* Part III.B.

82. S.C. Bar Ethics Adv. Comm., Formal Op. 8 (1997).

83. *Id.*

IV. CONCLUSION

The South Carolina Supreme Court's definition of what constitutes the practice of law in *Doe v. Condon* should not be interpreted literally so as to create an attorney-client relationship every time a lawyer presents a general-information seminar or posts generic legal information on an Internet forum or web site.⁸⁴ However, unless the court clarifies its holding, lawyers who provide highly specialized legal seminars or who offer specific information in response to particular legal questions may find that they have opened a "Pandora's Box" of legal and ethical obligations. Without further guidance from the court, lawyers would be wise not to address specific questions when presenting legal-education seminars or when posting legal information on the Internet. If the lawyer's intention is to solicit business through one of these mediums, then he should conduct the usual consultation with the potential client so the proper conflict of interest checks can be performed and appropriate records regarding the meeting can be created.

Candy M. Kern-Fuller

84. A wise jurist once opined that "[m]uch of the misunderstanding abroad in the world can be attributed to literal thinking." *Southern Bell v. S.C. Tax Comm'n*, 297 S.C. 492, 495, 377 S.E.2d 358, 360 (Ct. App. 1989) (Sanders, C.J.)