

South Carolina Commission on Prosecution Coordination

Room 112
Blatt Building
Columbia, South Carolina
Friday, January 13, 2017



Prosecution CLE Series™

“Ethics for Government Attorneys”

SCCCLE No. 172009
*(up to 2.5 hours MCLE, including 2.0 hours of ethics of which
1.0 hour will satisfy the substance abuse/mental health requirement)*

For more information on the South Carolina Commission on Prosecution Coordination, please contact the Commission at:

**South Carolina Commission on Prosecution Coordination
Wade Hampton Building
1200 Senate Street, Suite B-03
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Columbia, South Carolina 29211-1561
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SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

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AGENDA

- 9:00 a.m. – 9:25 a.m. Registration
- 9:25 a.m. – 9:30 a.m. Welcome and Program Overview
- 9:30 a.m. – 10:00 a.m. The South Carolina Ethics Act: Who It Applies to and What It Requires
*Michael R. Burchstead, General Counsel
South Carolina State Ethics Commission
Columbia, South Carolina*
- 10:00 a.m. – 11:00 a.m. Current Issues in Attorney Ethics for Government Attorneys
- A. Issues for Non-Prosecutors
*C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel
Office of Disciplinary Counsel, Supreme Court of South
Carolina
Columbia, South Carolina*
- B. Issues for Prosecutors
*Amie L. Clifford, Education Coordinator
South Carolina Commission on Prosecution Coordination
Columbia, South Carolina*
- 11:00 a.m. – 11:15 a.m. Break
- 11:15 a.m. – 12:15 p.m. Substance Misuse
*Julie S. Cole, LMSW, CACII, MAC, Recovery/SBIRT Project
Coordinator
DAODAS
Columbia, South Carolina*
- 12:15 p.m. Adjourn



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FACULTY ROSTER

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SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

MICHAEL R. BURCHSTEAD

General Counsel
State Ethics Commission
5000 Thurmond Mall, Ste. 250
Columbia, South Carolina 29201

EDUCATION:

B.A., College of Charleston, Charleston, South Carolina (1999).
J.D., University of South Carolina School of Law, Columbia, South Carolina (2005).

BAR ADMISSION:

South Carolina (2005); U.S. District Court for the District of South Carolina (2008).

PROFESSIONAL EXPERIENCE:

Staff Attorney, Constantine Cannon, Washington, D.C (2006 – 2008); Associate, Willoughby & Hoefler, Columbia, South Carolina (2008 – 2011); Assistant Attorney General, South Carolina Attorney General's Office, Columbia, South Carolina (2011 – 2015); General Counsel, State Ethics Commission, Columbia, South Carolina (2015 – Present).

TEACHING EXPERIENCE:

Has presented state-wide on the South Carolina Ethics Act to numerous associations, elected officials, lobbyists, and governmental entities.



SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

AMIE L. CLIFFORD

Education Coordinator

South Carolina Commission on Prosecution Coordination

Post Office Box 11561

Columbia, South Carolina 29211-1561

EDUCATION:

B.A. (French), Northwestern State Univ. of Louisiana, Natchitoches, Louisiana (1979).
J.D., University of South Carolina School of Law, Columbia, South Carolina (1982).

BAR ADMISSIONS:

South Carolina (1982); U.S. Court of Appeals for the Fourth Circuit (1982); U.S. District Court for the District of South Carolina (1983); and United States Supreme Court (1986).

PROFESSIONAL EXPERIENCE:

Staff Attorney, Piedmont Legal Services, Inc., Spartanburg, South Carolina (1983 – 1984); Assistant Attorney General, Criminal Appeals Section, South Carolina Attorney General’s Office (1984 – 1991); Assistant Solicitor, Charleston County Solicitor’s Office, Charleston, South Carolina (1991 – 1999); Supreme Court Fellow, U.S. Sentencing Commission, Washington, D.C. (1999 – 2000); National District Attorneys Association, Columbia, South Carolina: Assistant Director, National College of District Attorneys, (2000 – 2007), and Director, National Center for Prosecution Ethics (2003 – 2007); and Education Coordinator, S.C. Commission on Prosecution Coordination (2007 – Present).

HONORS:

Fellow of the National Institute for the Teaching of Ethics and Professionalism (Inaugural Group) (2005); Tom C. Clark Fellow Award (U.S. Supreme Court Fellows Program June 2000); and Service Award, Fraternal Order of Police Charleston Metro Lodge #5 (1999).

PUBLICATIONS:

Author of materials for over 75 CLE programs (conducted by national, state and local bar organizations as well as governmental and private offices) (1985 – Present); and contributing author for numerous publications and editor or co-editor for two publications (South Carolina Bar, ABA, and National District Attorneys Association).

TEACHING EXPERIENCE:

Faculty member for over 100 CLE programs (programs conducted by national, state and local bar organizations as well as governmental and private offices) (1985 – Present).

CURRENT PROFESSIONAL ACTIVITIES:

Member, South Carolina Bar House of Delegates (1992 – 1999; 2002 – 2007; 2008 – Present); Member, South Carolina Bar Ethics Advisory Committee (1997 – 1998; 2013 – Present); Board Member, South Carolina Women Lawyers Association (2008 – Present); and Special Assistant Attorney General (*pro bono*), South Carolina Attorney General’s Office (2006 – 2010; 2013 – Present).



SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

JULIE S. COLE, LMSW, CACII, MAC
Recovery/SBIRT Project Coordinator
South Carolina Department of Alcohol and Other Drug Abuse Services (DAODAS)
1801 Main Street, 4th Floor
Columbia, South Carolina 29201

EDUCATION:

Master of Social Work (MSW), University of South Carolina College of Social Work, Columbia, South Carolina (2005).
Bachelor of Social Work, Limestone College, Gaffney, South Carolina (2004).

PROFESSIONAL CERTIFICATIONS:

Licensed Master Social Worker (LMSW), License #8452, South Carolina Board of SW Examiners; Certified Addictions Counselor II (CACII), Certification #1003313, South Carolina Association of Alcoholism and Drug Abuse Counselors (SCAADAC); and Master Addiction Counselor (MAC), National Association of Alcoholism and Drug Abuse Counselors (NAADAC).

PROFESSIONAL EXPERIENCE:

Clinical Counselor, LRADAC (2004 – 2006); Recovery Specialist, SC Recovering Professional Program (2006 – 2014); and Project Coordinator, South Carolina DAODAS (2014 – Present).

TEACHING EXPERIENCE:

Conducts trainings and presentations on local, regional and state levels on a variety of topics related to substance use disorders, addiction and recovery. Service as a Trainer, FAVOR (Faces and Voices of Recovery) South Carolina Training Academy; and Adjunct Professor, University of South Carolina, College of Social Work (Social Work Interventions in Substance Abuse, and Advance Practice with Groups).



SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

C. TEX DAVIS, JR.
Senior Assistant Disciplinary Counsel
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Post Office Box 12159
Columbia, South Carolina 29211

EDUCATION:

B.A. (Political Science), University of South Carolina, Columbia, South Carolina (1991).
J.D., University of South Carolina School of Law, Columbia, South Carolina (1994).

BAR ADMISSIONS:

South Carolina (1998).

PROFESSIONAL EXPERIENCE:

Staff Attorney, Richland County Department of Social Services (1998 – 2002);
and Assistant Disciplinary Counsel, Office of Disciplinary Counsel (2002 – Present).

TEACHING EXPERIENCE:

Presented to numerous groups, including law firms, state agencies, and South Carolina Bar organizations on the topics of ethics and professional responsibilities.

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“The South Carolina Ethics Act: Who It Applies to and What It Requires”

Michael R. Burchstead

General Counsel

South Carolina State Ethics Commission

Columbia, South Carolina

State Ethics Act: Issues for Public Employees

Michael R. Burchstead
General Counsel, S.C. State Ethics Commission
January 13, 2017

The Ethics Act

The Ethics Commission

- The Ethics Commission itself – came into being in 1976
- The relevant law is the Ethics, Government Accountability, and Campaign Reform Act of 1991, which was passed in the wake of Operation Lost Trust.
 - Lost Trust: Federal sting at the South Carolina State House. Ended with 27 convictions or guilty pleas -- 17 of them from state legislators, one of whom had become a judge.
- Ethics Act of 1991 amended in 1995, 2003, 2008, 2011, and 2016. Regulations went into effect in 1997.

Ethics Commission Jurisdiction

- Four subject areas of Ethics Act
 - **Rules of Conduct (§ 8-13-700 through 8-13-795)**
 - **Financial Disclosure (§ 8-13-1110 through 8-13-1180)**
 - Campaign practices (§ 8-13-1300 through 8-13-1374)
 - Lobbyist/Lobbyist's Principals (§ 2-17-5 through 2-17-150)

Recent Legislation

H.3184

- Key provisions:
 - Ethics Commission now investigates allegations of misconduct against members of the General Assembly
 - Ethics Commission makes probable cause finding.
 - Six votes needed for probable cause.
 - The House or Senate Ethics Committees can still reject the findings.
 - Hearings now open to the public.
 - The Commission is reconstituted as of April 1, 2017.
 - Current Commission makeup: 9 members, all appointed by the Governor.
 - New Commission: 8 members, 4 by the Governor, 2 by the House (majority and minority), 2 by the Senate (majority and minority).

H.3186

- **Contents of statement of economic interests**
- SECTION 1. Section [8-13-1120](#)(A) of the 1976 Code, as last amended by Act 6 of 1995, is further amended by adding:
- "(10) a listing of the private source and type of any income received in the previous year by the filer or a member of his immediate family. This item does not include income received pursuant to:
 - (a) a court order;
 - (b) a savings, checking, or brokerage account with a bank, savings and loan, or other licensed financial institution which offers savings, checking, or brokerage accounts in the ordinary course of its business and on terms and interest rates generally available to a member of the general public without regard to status as a public official, public member, or public employee;
 - (c) a mutual fund or similar fund in which an investment company invests its shareholders' money in a diversified selection of securities."
- **Income defined, exclusions**
- SECTION 2. Section [8-13-1120](#) of the 1976 Code, as last amended by Act 6 of 1995, is further amended by adding:
- "(C) For purposes of this section, income means anything of value received, which must be reported on a form used by the Internal Revenue Service for the reporting or disclosure of income received by an individual or a business. Income does not include retirement, annuity, pension, IRA, disability, or deferred compensation payments received by the filer or filer's immediate family member."

Financial Disclosure

Statements of Economic Interests

- Section 8-13-1110
 - Statement of Economic Interests to be filed upon entering official responsibilities and then on or before March 30th by noon of each year of service.
- Section 8-13-1120
 - In general, income received from the government is required – not income received from private sources.
 - (2) “the source, type, and amount of value of income, not to include tax refunds, of substantial monetary value received from a governmental entity by the filer or a member of the filer’s immediate family...”
 - (7) Any associations with lobbyists
 - (8) “if a public official...receives compensation from an individual or business which contracts with the governmental entity with which the public official...serves..., the public official must report the name and address of that individual or business and the amount of compensation paid to the public official...by that individual or business.”
 - (9) source and description of any gifts received during the previous calendar year (Note conflict with 710)

Rules of Conduct

Definitions

- **“Economic interest”** (Section 8-13-100(11))
 - Interest distinct from that of the general public.
 - Large class exception. If the only economic interest realized is that which would be realized as a member of a “profession, occupation, or large class,” then the public official, public member, or public employee may participate in the decision.
- **“Family member”** (Section 8-13-100(15))
 - Includes a member of the person's immediate family, also: spouse, parent, brother, sister, child, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, grandparent, or grandchild.
 - Amended in 2011 to include in-laws.
- **“Individual with whom he is associated.”** (Section 8-13-100(21))
 - “Individual with whom the person or a member of his immediate family mutually has an interest in any business of which the person or a member of his immediate family is a director, officer, owner, employee, compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.”
- **“Business with which he is associated.”** Section 8-13-100(4)
 - “Business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.”
 - If you or your spouse is employed by a company, that is a business with which you are associated.
 - “Governmental entity” not a business.

700 violations

- Section 8-13-700(A)
 - “No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a family member, an individual with whom he is associated, or a business with which he is associated.”
 - Exception for incidental use not resulting in additional public expense.
- Section 8-13-700(B)
 - “No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a family member, an individual with whom he is associated, or a business with which he is associated has an economic interest.” “

Recusal provision of 700(B)

- Section 8-13-700(B)(continued)
 - "A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a family member, an individual with whom he is associated, or a business with which he is associated shall:
 - (1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;
 - ...
 - (3) if he is a public employee, he shall furnish a copy of the statement to his superior, if any, who shall assign the matter to another employee who does not have a potential conflict of interest. If he has no immediate superior, he shall take the action prescribed by the State Ethics Commission;
 - (4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of an agency, commission, board, or of a county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes;

Other Rules of Conduct provisions

- **Section 8-13-705**
 - May not receive or give anything of value with intent to influence.
 - "Anything of value is defined in Section 8-13-100(1) (laundry list)
- **Section 8-13-100:**
 - (b) "Anything of value" or "thing of value" does not mean:
 - (i) printed informational or promotional material, not to exceed ten dollars in monetary value;
 - (ii) items of nominal value, not to exceed ten dollars, containing or displaying promotional material;
 - (iii) a personalized plaque or trophy with a value that does not exceed one hundred fifty dollars;
 - (iv) educational material of a nominal value directly related to the public official's, public member's, or public employee's official responsibilities;
 - (v) an honorary degree bestowed upon a public official, public member, or public employee by a public or private university or college;
 - (vi) promotional or marketing items offered to the general public on the same terms and conditions without regard to status as a public official or public employee; or
 - (vii) a campaign contribution properly received and reported under the provisions of this chapter.

Other Rules of Conduct provisions

- **Section 8-13-715**
 - May not accept an honorarium for speaking engagements in one's official capacity. May accept payment for actual expenses.
- **Section 8-13-720**
 - May not accept additional money for assistance given while performing one's duty.
- **Section 8-13-725**
 - May not use confidential information gained through employment for personal gain.
- **Section 8-13-740**
 - Prohibition on representation
- **Section 8-13-750**
 - May not cause the employment, promotion, or transfer of a family member to a position in which one supervises. Prohibits discipline of one's family member.
- **Section 8-13-755 and 760**
 - Post employment restrictions

Campaign Practices

Public Resources and Elections

- Public employees or officials may not engage in any activity on public time or using public resources to promote or oppose a certain vote.
- Section 8-13-1346
 - (A) A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election.
 - (B) This section does not prohibit the incidental use of time and materials for preparation of a newsletter reporting activities of the body of which a public official is a member.
 - (C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.
- See also: Section 8-13-765
 - (A) No person may use government personnel, equipment, materials, or an office building in an election campaign. The provisions of this subsection do not apply to a public official's use of an official residence.

Confidentiality

Confidentiality

- S.C. Code Ann. 8-13-320(10)(g):
 - All investigations, inquiries, hearings, and accompanying documents must remain confidential until a finding of probable cause or dismissal unless the respondent waives the right to confidentiality. The wilful release of confidential information is a misdemeanor, and any person releasing confidential information, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year.
- S.C. Code Ann. Regs. 52-718
 - (A) No person associated with a complaint...shall mention the existence of the proceedings or disclose any information pertaining thereto except to persons directly involved including witness and potential witnesses, and then only to the extent necessary for investigation and disposition of the complaint. Witnesses and potential witnesses shall be bound by these confidentiality provisions.
 - (B)The Respondent may waive the confidentiality of the proceeding in writing filed with the Commission.

Penalties

Penalties for Violation of Ethics Act

- Late filing penalties for Statements of Economic Interests and Campaign Disclosure forms set by statute. Section 8-13-1510
 - Penalties are per late form – penalties can build up quickly
 - \$100 if not filed within five days.
 - If compliance not met, after the Ethics Commission provides notice by certified mail:
 - \$10 a day for 10 days
 - \$100 a day after that until compliance met or maximum penalty of \$5,000 reached.
 - Previously there was no maximum
- Penalty set at \$2,000 for violations that are not categorized as non-compliance.
- In addition to penalties set by statute, the Commission may levy fines and administrative fees, and may issue a public reprimand

Conclusion

- If you have any doubt as to whether a course of conduct will be a problem, you may seek an advisory opinion from the Commission.
- Anyone subject to the Act may request the opinion
- Email: mburchstead@ethics.sc.gov
- Direct line: (803) 929-2503

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January 13, 2017



“Current Issues in Attorney Ethics for Government Attorneys”

Amie L. Clifford
Education Coordinator
S.C. Commission on Prosecution Coordination
Columbia, South Carolina

C. Tex Davis, Jr.
Senior Assistant Disciplinary Counsel
Office of Disciplinary Counsel
Columbia, South Carolina

2016 Ethics and Discipline Update
Barbara M. Seymour
Jaclyn Nichols
Office of Disciplinary Counsel

- I. Opinion Summaries**
 - II. Recent Rule Revisions & Proposals**
 - III. 2015-2016 Annual Report on Lawyer Discipline**
-

I. Opinion Summaries

Criminal Conduct

- (1) Matter of Breibart. Lawyer pled guilty to mail fraud in connection with a scheme to steal money from clients by falsely stating that they were subject to ongoing criminal investigations and inducing them into liquidating their assets and depositing their money with him. Lawyer was sentenced to 63 months in federal prison, three years of supervised release, and restitution of \$2.4 million dollars. Lawyer also bilked 33 clients of hundreds of thousands of dollars by accepting retainers, failing to do the work, then spending the money. The Lawyers' Fund for Client Protection received more than \$5.6 million in claims. The Fund paid its cap of a total of \$200,000.00. Disbarred, plus restitution, by agreement. (Op.#27592, November 25, 2015)
- (2) Matter of Hammer. A process server was attempting to serve documents on Lawyer in connection with Lawyer's personal domestic case. Lawyer struck the process server's vehicle, twice, while backing out of a parking space. Lawyer's two sons were in his vehicle. Lawyer was charged with first degree assault and battery, malicious injury to property, hit and run/leaving the scene, and unlawful conduct towards a child. Lawyer pled guilty to leaving the scene with property damage and was sentenced to 364 days in prison, suspended on six months' probation. Definite suspension for one year, plus costs, and LEAPP Ethics School, by agreement. (Op.#27618, March 30, 2016)
- (3) Matter of Viers. Lawyer pled guilty to Harassment 2nd degree involving his conduct and interactions with his ex-girlfriend. Lawyer was sentenced to 60 days in jail (to be served on weekends), one year of probation, required mental health counseling, fees/fines in the amount of \$133.90. Lawyer also pled guilty to engaging in a monetary transaction in property derived from unlawful activity, which had some effect on interstate or foreign commerce, that Lawyer knew were proceeds of mail fraud. Lawyer was sentenced to 37 months in prison, three years' probation, and restitution of \$875,000. Disbarred, by agreement. (Op.#27651, July 20, 2016)
- (4) Matter of Chaplin. While under federal investigation for money laundering for criminal defense clients, Lawyer gave false statements regarding his receipt of cash payments in excess of \$10,000 and failing to file required forms. Lawyer was sentenced to three years of probation after pleading guilty to willfully making a material false statement to the federal government. In two client matters, Lawyer included language in his fee agreement providing that he could garnish the clients' wages or tax refunds if the fee was not paid. Lawyer had no legal authority to garnish wages or tax refunds. Definite suspension for one year (retroactive) plus costs, LEAPP Ethics School, Trust Account School, and Law Office Management School, by agreement. (Op.#27658, August 24, 2016)

Neglect of Client Matters

- (5) Matter of Fitzharris. Lawyer represented client in negligence action and failed to reach a settlement agreement with the insurance carrier. Lawyer misrepresented to the client that

- the case had settled and delivered an advanced check from the operating account. Lawyer neglected the file and later learned there was no settlement check or signed statement, the Medicare lien was outstanding, and that the case had been dismissed because the statute of limitations had expired. The Court considered Lawyer's issues related to physical disabilities and depression. Definite suspension for three months, LEAPP Ethics School, Trust Account School, and Law Office Management School, by agreement. (Op.#27604, February 17, 2016)
- (6) Matter of Sample. Lawyer neglected five separate client matters by failing to respond to communications, failing to keep clients reasonably informed, and failing take further steps to protect clients' interests. Lawyer's misconduct also included: misrepresentations to clients that a meeting had been rescheduled when the meeting had never been scheduled; failure to timely refund unused retainer; failure to timely file briefs for an appeal resulting in dismissal; failure to keep funds separate until disputes over claimed interests had been resolved by disbursing an estate settlement to pay attorney's fees and personal representative's expenses; and, failure to pay three awards of the Resolution of Fee Disputes Board resulting in certificates of noncompliance. Lawyer failed to cooperate with the disciplinary investigation. Definite suspension for nine months, plus costs, LEAPP, and two years of medical treatment monitoring, by agreement. (Op.#27605, February 17, 2016)
- (7) Matter Of Davis. From December 2011 to May 2013, Lawyer was retained to represent ten different clients for whom she failed to timely file the appropriate motions, appeals, and pleadings; failed to communicate or keep clients reasonably informed; failed to withdraw from representation when her physical and/or mental condition materially impaired her ability to represent them; failed to refund or retain unearned fees in her trust account; and, failed to pay fee dispute awards. Lawyer failed to file respond to disciplinary inquiries. Definite suspension for two years, plus costs, restitution, and LEAPP Ethics School, by agreement. (Op.#27611, March 9, 2016)
- (8) Matter of Houston. Lawyer failed to timely file the initial brief and designation in a client's appeal, resulting dismissal. The client's appeal was reinstated twice, but dismissed a third time after the court granted all possible extensions. In unrelated cases, Lawyer failed to pay a videographer and a court reporting service for two years. Lawyer failed to cooperate with disciplinary investigations. Lawyer had extensive disciplinary history. Definite suspension for nine months, plus costs, LEAPP Ethics School and Law Office Management School. (Op.#27616, March 30, 2016)
- (9) Matter of Stockholm. Lawyer neglected client matters in three separate matters by failing to timely serve pleadings resulting in dismissal because the statute of limitations expired. Lawyer then misled those clients about settlements by fabricating documents. In two other cases, Lawyer failed to meet the deadlines for restoring cases to the docket. Disbarred, plus costs, by agreement. If seeking readmission, LEAPP Ethics School, Trust Account School, Law Office Management School, and law office management monitoring for two years. (Op.#27624, April 20, 2016)
- (10) Matter of Herlong. Lawyer was arrested on four separate occasions for shoplifting, possession of cocaine and multiple driving offenses, open container, and public disorderly conduct. Lawyer was also indicted for possession with intent to distribute crack cocaine, possession of cocaine, and contributing to the delinquency of a minor. Lawyer was incarcerated for 120 days for failure to pay court-ordered spousal support. Upon his release, the felony charges were resolved with a sentence of time served. Lawyer failed to notify Commission on Lawyer Conduct of his felony indictment. Lawyer also represented a client in court while on administrative suspension and he misrepresented to the judge that his Bar status was inactive (rather than suspended) and that he was in the process of

- reactivating (which was not true). Public reprimand, 2 year monitoring contract with Lawyers Helping Lawyers, by agreement. (Op.#27634, May 11, 2016)
- (11) Matter of Moak. Lawyer neglected several client matters. In a divorce case, Lawyer filed a complaint for the client, but failed to seek to have a hearing scheduled. He failed to respond to the client's requests for information or notify the client that the case was dismissed for failure to proceed. In a visitation case, Lawyer failed to take any action on the client's behalf after being paid his retainer in full. Lawyer did not place unearned fees into a trust account. After the grievance was filed, Lawyer refunded the retainer. In a PCR case, Lawyer failed to communicate with his client; appeared at the hearing notifying his client or securing his attendance; and, failed to present evidence in support of the client's primary complaint. Public reprimand, plus costs, and LEAPP Ethics School, Trust Account School, and Law Office Management School, by agreement. (Op.#27649, July 20, 2016)

Misappropriation and Other Trust Account Violations

- (12) Matter of Carter. Lawyer received \$250,000.00 to hold in escrow as an earnest money deposit for a business transaction between his client and another party. Lawyer properly disbursed \$150,000.00 to the client. He then misappropriated the remaining funds over the next nine months. A dispute arose between the parties and litigation ensued. Lawyer was ordered to deliver the escrowed funds to the clerk of court. Lawyer did not comply and was held in contempt of court. Lawyer had been the subject of a previous disciplinary investigation in which he neglected litigation in a civil case. That matter resulted in a deferred discipline agreement in which Lawyer consented to attending Ethics School and Law Office Management School, seeking psychological treatment, and entering into a Lawyers Helping Lawyers. Lawyer did not comply and the DDA was revoked. Lawyer also self-reported failing to act with diligence and competence in two other litigation matters. Disbarred, plus costs, restitution, and LEAPP, by agreement. (Op.#27589, November 12, 2015)
- (13) Matter of Breckenridge. Lawyer was hired by a nonlawyer closing company to conduct a residential real estate refinance transaction in 2012. The closing company was contracted by a title company, which prepared the documents and processed the funds. The title company disbursed the loan proceeds prior to deposit of funds for that purpose, resulting in an overdraft that was reported to the Commission on Lawyer Conduct. The ensuing ODC investigation revealed that Lawyer failed to disclose to the clients the disbursement of their loan proceeds including his sharing of legal fees with the nonlawyer closing company. Further, Lawyer failed to properly supervise the disbursement of funds and ensure that the HUD-1 settlement statement matched the actual disbursements of loan proceeds. Lawyer also failed to maintain proper records of the transaction. The majority held that a closing attorney's duty to oversee the disbursement of loan proceeds requires that he has control over the disbursement or, if a third party disburses the proceeds, the attorney receives detailed verification that the disbursement was done correctly. Public reprimand, plus costs, LEAPP Ethics School and Trust Account School. (Op.#27625, April 20, 2016) (motion for reconsideration denied)
- (14) Matter of Moses. Lawyer was employed by a law firm. Lawyer billed a client directly and sought the payment for himself rather than the firm. When the firm found out, Lawyer agreed to repay the money. The firm's ensuing investigation revealed that, from August 2009 through September 2011, Lawyer misappropriated approximately \$77,000 by invoicing clients directly. Ultimately, Lawyer admitted to the theft and repaid the firm the amount of improper invoices and the cost of the computer forensics expert hired by the firm to conduct the investigation. Disbarred, plus costs. (Op.#27626, April 20, 2016)

- (15) Matter of Cox. Lawyer failed to make reasonable efforts to ensure that nonlawyer employee conduct was compatible with professional obligations of a lawyer when a paralegal under his supervision was found misappropriating \$349,227.34 through issuing and negotiating checks. Also, Lawyer failed to pay a court reporter after five invoices were received for the same service and paid only after a complaint was filed. In an estate representation and a custody representation, Lawyer failed to keep his clients informed of the status of their matters. In the custody case, Lawyer failed to establish the scope of representation or pursue the goals of the client to secure visitation with the client's children. Lawyer represented another client seeking custody and failed to seek a court order for temporary or permanent change of custody after the relative with custody agreed to allow the child to live with the client. Public Reprimand, plus costs, LEAPP Ethics School, Trust Account School, and Law Office Management School, by agreement. (Op.#27642, June 22, 2016)
- (16) Matter of Warren. Lawyer misappropriated over \$171,392.00 from three trust funds while serving as trustee. In another case, Lawyer was paid \$40,000.00 in fees for a client, but failed to perform work or reimburse unearned fees. In a third matter, Lawyer mismanaged and failed to perform work after accepting \$20,000.00 in fees for estate planning and corporate work, resulting in the client incurring \$1,700.00 in penalties and \$13,000.00 in attorney's fees for new counsel to reinstate his corporate charter and correct the estate plan. After his interim suspension, the court-appointed receiver reported three additional client matters in which Lawyer converted \$18,000.00 of client funds that were to be held in trust and failed to file numerous original documents, mostly deeds, after collecting fees. Lawyer failed to respond to disciplinary investigation. Disbarred, by default, plus costs and restitution. (Op.#27643, June 29, 2016)
- (17) Matter of Kerestes. Lawyer commingled funds by leaving earned fees in his trust account. Upon receipt of a notice of an overdraft on his trust account, Lawyer discovered that an employee had misappropriated in excess of \$23,000 by transferring funds to a personal account over a two-year period. Lawyer failed to discover the theft because he was not conducting required monthly reconciliations. Public Reprimand, by agreement. (Op.#27656, August 24, 2016)
- (18) Matter of Lester. Lawyer was disbarred in North Carolina for misappropriation of client funds. The Supreme Court of South Carolina imposed reciprocal discipline, uncontested by Lawyer. Disbarment. (Op.#27661, August 24, 2016)

Litigation Misconduct

- (19) Matter of Schmidt. Lawyer represented clients in claims against Norfolk Southern following the deadly derailment in January 2005. More than one hundred of his client had signed releases in exchange for payment from the railroad prior to his representation. Lawyer opted his clients out of the class settlement and filed individual lawsuits. The railroad moved for summary judgment based on the releases. Upon learning of the existence of the releases from the answers and discovery, Lawyer failed to advise the clients that tender of the funds was required until after the summary judgment hearing. In a letter to the clients, Lawyer gave them five days to deliver the funds received from the railroad years earlier. The letter falsely stated that by returning the funds the clients would be able to negotiate higher settlements. A client sent a copy of the letter to the media. Lawyer gave an interview to a television station and addressed the merits of the case, stating that the releases had been signed under duress. He also falsely asserted that the railroad had asked for the return of the money. The judge had previously admonished Lawyer for speaking to the press and Lawyer had agreed to refrain. As a result of the media interview about the releases, Lawyer was ordered to pay the railroad's fees and costs

and to refrain from future public comments. Public reprimand, by agreement. (Op. # 27582, October 14, 2015).

- (20) Matter of Owen. Lawyer was sanctioned and assessed a fine of \$5,000 as a result of conduct in a Bankruptcy Court hearing in which he improperly raised an argument that had been presented and was pending in binding arbitration proceedings. As a result of Lawyer's improper filing, the Court and the opposing party had to deal with groundless and unnecessary proceedings. Lawyer misrepresented to the Court that he was proceeding at the direction of the Bankruptcy Trustee, when Lawyer was actually responsible for the argument. Lawyer later wrote a letter to the Court calling attention to his misstatement and apologized to all concerned. Public reprimand, plus costs, and LEAPP Ethics School, by agreement. (Op.#27650, July 20, 2016)

Dishonesty and False Swearing

- (21) Matter of Samaha. Lawyer signed as witness and notary to a false signature on an assignment of a mortgage. The signature was purportedly that of Lawyer's client's wife, who had been dead for seven years. In another case, Lawyer prepared, witnessed, and notarized a revocation of a power of attorney for a cognitively impaired client. Additionally, Lawyer's staff forged and altered insured closing protection letters, title insurance binders, and title insurance policies and provided them to lenders in connection with Lawyer's real estate closings. Prior to being suspended in an unrelated disciplinary investigation, Lawyer failed to payoff prior mortgages in four closings. His trust account was approximately \$239,000 short. Disbarment, plus costs, by agreement, (Op.#27660, August 24, 2016)
- (22) Matter of Fosmire. Lawyer represented the insured in a car wreck case. He neglected the matter for about a year and failed to communicate with the insurance company. He settled the claim for \$200,000 without the insurance company's knowledge or consent. When no settlement check was produced, Lawyer gave false information to opposing counsel to cover for the fact that he had no authority to make the offer. The insurance company did not learn about the settlement until they were served with pleadings in a lawsuit filed by opposing counsel to enforce it. Public Reprimand, plus LEAPP Ethics School, by agreement. (Op.#27657, August 24, 2016)

Advertising and Solicitation

- (23) Matter of Naert. Lawyer represented clients in lawsuits against a timeshare company. In the firm's Internet marketing campaign, Lawyer bid on keywords including the name of the timeshare company and the names of the company's attorneys. This resulted in Lawyer's firm's advertisement appearing prominently in search results generated by those names. Lawyer's ads associated with searches of those names included language such as "Timeshare Attorney in SC - Ripped Off? Lied to? Scammed?" Further, the ad included a link to the law firm website, but did not contain the firm's name or the name of a lawyer responsible for the advertisement's content. Public reprimand, by agreement, plus costs, Advertising School. (Op. # 27574, September 30, 2015).

Unauthorized Practice of Law

- (24) Matter of Allocco. About seven years ago, Lawyer received a letter of caution from the North Carolina State Bar for practicing law in that state without a license. She received reciprocal discipline in South Carolina in the form of a confidential admonition. In 2014, Lawyer conducted a real estate loan closing in North Carolina. During the course of that representation, Lawyer held herself out as licensed in North Carolina. The client filed grievances in both states when Lawyer failed to obtain title insurance as required. Lawyer

did not respond to the ensuing investigation by the North Carolina State Bar. Definite suspension of nine months, by agreement, plus costs and LEAPP Law Office Management School, by agreement. (Op.#27659, August 24, 2016)

II. Recent Rule Revisions & Proposals

1. Duty of Partners, Managers, and Judges to Take Action on Suspicion of Impairment of a Colleague - Rule 5.1, RPC; Canon 3, CJC; and Rule 428, SCACR (8/24/15)

The Supreme Court has amended RPC Rule 5.1 to include additional duties of partners and managers in law firms to take action when impairment of a lawyer in the firm is suspected. CJC Canon 3 has also been amended to impose a similar duty on a judge who believes that a lawyer or another judge is impaired. The duty to take action is mandatory, but not specified. One option is to seek assistance of the South Carolina Bar through a new process set forth in Rule 428, SCACR. That process requires the Bar to appoint an Attorney to Intervene when a lawyer or judge elects to report the cognitive impairment of another lawyer. This rule is designed to create a system similar to Lawyers Helping Lawyers in order protect an impaired lawyer or judge from the disciplinary process in cases where misconduct has not occurred.

3. Expansion of permissible use of "certified" in advertising - Rule 7.4, RPC (10/28/15)

The Supreme Court has amended RPC Rule 7.4 to expand circumstances under which lawyers can refer to themselves as "certified" "specialist" "expert" or "authority." Previously, only lawyers certified by the Commission on CLE and Specialization could use such designations. Under the new version of the Rule, lawyers certified by an independent certifying organization (ICO) that is approved by the Commission may also use those designations, as long as the ICO is clearly identified. The new version of the Rule also permits a lawyer who is certified by the SC Supreme Court Board of Arbitrator and Mediator Certification to designate himself as a "certified arbitrator" or "certified mediator." For more information about certified specialties in South Carolina or for a list of approved ICO's, go to www.commcle.org or call the Commission at (803) 799-5578.

4. Certification of Paralegals - NEW Rule 429, SCACR (11/12/15)

The Supreme Court has adopted a recommendation from the Commission on the Profession to create a program for the voluntary certification of paralegals who meet minimum standards and qualifications. The paralegal certification program will be governed by the newly created Board of Paralegal Certification and administered with the assistance of staff at the South Carolina Bar. Paralegals may still work in South Carolina without certification. The work of paralegals remains restricted to that which is directly supervised by a licensed attorney.

5. Adoption of the Uniform Bar Examination (UBE) (01/21/16)

The Supreme Court will replace the South Carolina Bar Examination with the Uniform Bar Examination (UBE) as of February 2017. Information about the UBE can be found at the National Conference of Bar Examiners website at www.ncbex.org.

ANNUAL REPORT OF LAWYER DISCIPLINE IN SOUTH CAROLINA 2015- 2016

COMPLAINTS PENDING & RECEIVED:

Complaints Pending June 30, 2015	1019	
Complaints Received July 1, 2015 - June 30, 2016	<u>1542</u>	
Total Complaints Pending and Received		<u>2561</u>

DISPOSITION OF COMPLAINTS:

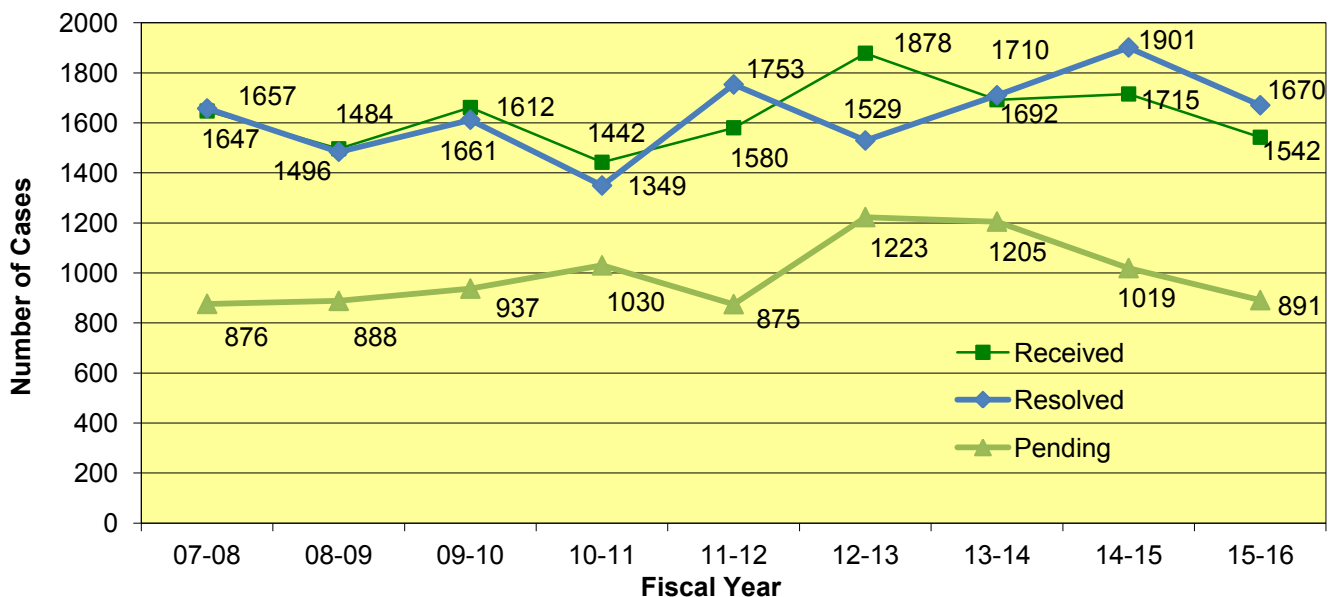
Dismissed:

By Disciplinary Counsel after initial review	413	
By Disciplinary Counsel after investigation	918	
By Investigative Panel	43	
By Supreme Court	<u>1</u>	
Total Dismissed		<u>1375</u>

Not Dismissed:

Referred to Other Agency	8	
Closed But Not Dismissed	3	
Closed Due to Death of Lawyer	18	
Deferred Discipline Agreement	0	
Letter of Caution	151	
Admonition	15	
Public Reprimand	10	
Suspension	33	
Disbarment	55	
Bar to Future Admission (out-of-state lawyer)	0	
Permanent Resignation in Lieu of Discipline	<u>2</u>	
Total Not Dismissed		<u>295</u>

Total Complaints Resolved (1670)
Total Complaints Pending as of June 30, 2016 891



Practice Type

Law firm	48.19%	Less than 1%:
Solo practice	23.52%	Corporate/general counsel
Public defender	19.48%	Guardian <i>ad litem</i>
Prosecutor	5.54%	Mediator/arbitrator/commissioner
Other government	2.05%	Not practicing

Sources of Complaints

Client	58.92%	Less than 1%:
Opposing Party	18.58%	Public Official/Agency/Law Enforcement
Bank	4.87%	Fee Disputes Board
Attorney	4.81%	Litigation Witness/Victim/Ward
Family/Friend of Client	3.00%	Family/Friend of Witness/Victim/Ward
Court Rptr./Med.Prov./3d Party Payee	1.62%	Disciplinary Counsel
Citizen	1.32%	Anonymous
Judge	1.20%	Family/Friend of Opposing Party
Self-Report	1.02%	Family/Friend/Business Assoc. of Lawyer
		Employee of Lawyer

Case Type

Criminal	39.93%	Less than 1%:
Domestic	14.32%	Professional Malpractice
Real Estate	7.49%	Corporate/Commercial/Business
Personal Injury	6.23%	Immigration
Probate	5.87%	Homeowners' Assn Dispute
General Civil	5.40%	Landlord/Tenant
Post-Conviction Relief	3.90%	Regulatory/Zoning/Licensing
Debt Collection/Foreclosure	3.42%	Tax
Not Client Related	3.18%	Intellectual Property
Workers Compensation	2.16%	Social Security/Federal Benefits
Bankruptcy	2.04%	
Employment	1.14%	
Property/Contract Dispute	1.02%	

Alleged Misconduct

Neglect/Lack of Diligence	27.31%	Less than 1%:
Dishonesty/Deceit/Misrepresentation	25.57%	Scope of Representation
Inadequate Communication	14.44%	Inadequate Nonlawyer Supervision
Trust Account Misconduct	7.88%	Failure to Pay Fee Dispute
Conflict of Interest	3.31%	Personal Conduct (not client-related):
Improper Fees	3.00%	Real Estate Misconduct
Lack of Competence	2.88%	
Failure to Deliver Client File	2.82%	
Discovery Abuse/Litigation	1.81%	
Misconduct		
Incivility	1.62%	Probate Misconduct
Failure to Pay Third Party	1.62%	Business Transaction Misconduct
Advertising Misconduct	1.38%	Bar Admissions/Disciplinary Matter
Unauthorized Practice	1.26%	
Criminal Conduct (personal)	1.08%	
Declining/Terminating Representation	1.08%	

SUBSTANCE ABUSE/MENTAL HEALTH:

In the 2015-2016 fiscal year, ODC concluded 81 complaints in which substance abuse or mental health issues were brought to the attention of ODC. This represents a 311.54% increase from the previous year. However, those complaints represented a total of 18 lawyers (compared to 16 in 2014-2015). Of the complaints concluded that involved substance abuse or mental health issues, 87.5% resulted in some form of discipline against the lawyer. This is compared to an overall discipline rate of 15.93%. Issues included:

Depression:	13 lawyers
Alcohol Addiction:	3 lawyers
Aging/Dementia:	1 lawyer
Illegal Drug Addiction:	1 lawyer

YEARS IN PRACTICE*:

In the 2015-2016 fiscal year, complaints were filed against 1066 lawyers. Of those lawyers, 15.48% were in their first six years of practice. A total of 32.27% of lawyers complained about were in their first twelve years of practice.

<u>Years in Practice</u>	<u>Number of Lawyers</u>
up to 6:	165
7 - 12:	179
13 - 18:	168
19 - 24:	155
25 - 30:	137
31 - 36:	107
37 - 42:	97
43 - 48:	37
49 - 54:	15
55 - 60:	4
61 and up:	2

*The statistical significance of this data is dependent on the number of lawyers in active practice in each category. Information about the demographics of practicing lawyers can be obtained from the South Carolina Bar.

PRIOR DISCIPLINE

In the 2015-2016 fiscal year, 41.17% of concluded complaints involved lawyers who had some form of previous disciplinary caution or sanction. Of those complaints involving lawyers with prior discipline, 32.19% resulted in subsequent discipline.

UNLICENSED* LAWYER COMPLAINTS

In the 2015-2016 fiscal year, ODC concluded 18 complaints against unlicensed lawyers. This equivalent to the previous year. Of the complaints concluded involving unlicensed lawyers, 33.33% resulted in some form of discipline against the lawyer. This is compared to an overall discipline rate of 15.93%. Home jurisdictions of unlicensed lawyers included:

Georgia	4	Kentucky	1	Pennsylvania	1
Florida	3	Minnesota	1	Texas	1
North Carolina	2	Mississippi	1	Virginia	1
Arizona	1	New York	1	Washington	1

*An unlicensed lawyer is a lawyer who is not licensed in South Carolina, but is admitted in another jurisdiction.

OFFICE OF DISCIPLINARY COUNSEL

ATTORNEY TO ASSIST ASSIGNMENTS:

Complaints Assigned to ATAs	8
Reports Filed by ATAs	3
Outstanding ATA Reports	2

COMMISSION ON LAWYER CONDUCT

COMMISSION PROCEEDINGS:

Meetings of Investigative Panels	6
Formal Charges Filed	10
Formal Charges Hearings	4
Incapacity Proceedings	0
Meetings of Full Commission	1

REQUESTS FOR DISMISSAL REVIEW:

Requests for Review by Complainant	89
Dismissal Affirmed by Panel	(83)
Letters of Caution Issued by Panel	(0)
Case Remanded for Further Investigation	<u>(1)</u>
Dismissal Review Pending	<u><u>5</u></u>

RECEIVER APPOINTMENTS:

Pending as of June 30, 2015	22
New Appointments	+ 15
Appointments Terminated	<u>(22)</u>
Pending as of June 30, 2016	<u><u>15</u></u>

ATTORNEYS TO PROTECT CLIENTS' INTERESTS:

Serving as of June 30, 2015	2
Appointed	+ 1
Discharged	<u>(2)</u>
Serving as of June 30, 2016	<u><u>1</u></u>

LAWYERS BEING MONITORED:

New Monitor Files Opened	45*
Lawyers Currently Monitored	113

*includes 7 conditional admissions

SUPREME COURT OF SOUTH CAROLINA

DISCIPLINARY ORDERS*:

Dismissal	1
Letter of Caution	3
Admonition	2
Public Reprimand	5
Definite Suspension	6
Disbarment	9
Bar to Future Admission	0
Transfer to Incapacity Inactive	4
Interim Suspension	10

*These figures represent the number of orders issued by the Supreme Court, not the number of complaints. Some orders conclude multiple complaints.

COMPLAINTS REFERRED TO SUPREME COURT:

Complaints resolved	106
Pending as of June 30, 2016	19

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SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

Presentation on

“The Ongoing Issue with Criminal Discovery: The Prosecution’s Duty of Disclosure under the South Carolina Rules of Professional Conduct”

Outline and Presentation by

Amie L. Clifford
Education Coordinator
South Carolina Commission on Prosecution Coordination
Columbia, South Carolina

DISCUSSION NOTES AND DETAILED OUTLINE

This outline addresses the discovery obligations of the prosecution under the South Carolina Rules of Professional Conduct, and discuss the differences from and relation to the obligations imposed by the Constitution and South Carolina Rules of Criminal Procedure.

I. GENERAL

A. Role of the Prosecutor

1. South Carolina Rules of Professional Conduct, Rule 3.8, Comment [1]:

“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”

2. ABA Standards for Criminal Justice, Standard 3-1.2 (b) and (c):

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

3. NDAA National Prosecution Standards, 3rd ed.,¹ 1-1.1:

¹ The third edition of the National District Attorney’s National Prosecution Standards may be found online at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

“The prosecutor is an independent administrator of justice in the criminal justice system, which can only be accomplished through the representation and presentation of the truth. The primary responsibility of a prosecutor is to seek justice.”

4. *Berger v. U.S.*, 295 U.S. 78, 88 (1935).

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

5. *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746, 758-759 (1943).

Quoting from 23 C.J.S. 519 §1081, the Supreme Court of South Carolina stated that,

with reference to the conduct of the prosecuting attorney:
 "...he should bear in mind that he is an officer of the court, who represents all the people, including accused, and occupies a quasi-judicial position, whose sanctions and traditions he should preserve. It is his duty to see that justice is done. He must see that no conviction takes place except in strict conformity with the law, and that accused is not deprived of any constitutional rights or privileges. However strong the prosecuting attorney's belief may be of the prisoner's guilt, it is his duty to conduct the trial in such a manner as will be fair and impartial to the rights of accused, ...and not say or do anything which might improperly affect or influence the jury or accused's counsel. He should not abuse or make any unseemly demonstration toward accused; abuse or make baseless insinuations against his witnesses; make remarks or insinuations calculated to impress the jury against accused...."

II. Discovery Obligations

A. Constitution

1. United States Constitution – *Brady v. Maryland*

a. Applicable to the States

The federal constitutional disclosure obligation – the *Brady* disclosure rule – is grounded in the Fifth Amendment’s Due Process Clause and made applicable to the states through the Fourteenth Amendment. *State v. Kennerly*, 331 S.C. 442, 503 S.E.2d 442 (Ct. App. 1998).

b. What is the Duty?

(1) The prosecution’s obligation to disclose evidence under the federal constitution is to disclose evidence that is material to either guilt or punishment, including impeachment evidence. See *U.S. v. Bagley*, 473 U.S. 667 (1985); *U.S. v. Agurs*, 427 U.S. 97 (1976); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

- “[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *U.S. v. Bagley*, 473 U.S. at 682.
 - “[T]he mere possibility that an item of undisclosed information might have helped the defense... does not establish ‘materiality’ in the constitutional sense.” *United States v. Agurs*, 427 U.S. at 109–110.
- Because it is not always “easy” to determine materiality until after the fact, prosecutors **should always err on the side of disclosure**. See *U.S. v. Agurs*, 427 U.S. 97, 108 (“because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.”)

(2) Prosecution's duty to disclose is not limited to evidence within the actual knowledge or possession of the prosecutor. *Kyles v. Whitley*, 514 U.S. 419 (1995).

- A prosecutor has a duty to learn of and disclose

information known to the others acting on the government's behalf. *Kyles v. Whitley*, 514 U.S. at 437.

- c. A reversal is required if the prosecution violates *Brady* if the failure to disclose deprived the defendant of a fair trial, *i.e.*, nondisclosed information puts the whole case in such a different light as to undermine confidence in the verdict. *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006); *U.S. v. Bagley, supra*; *State v. Gathers*, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988).

B. Rules

1. South Carolina Rules of Criminal Procedure

The prosecution's obligation to disclose information and evidence under the South Carolina Rules of Criminal Procedure is found in Rule 5.

(a) Disclosure of Evidence by the Prosecution.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution; the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent.

(B) Defendant's Prior Record. Upon request of the defendant, the prosecution shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution.

(C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case, or of statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon a sufficient showing require the production of any statement of any prospective witness prior to the

time such witness testifies.

(3) Time for Disclosure. The prosecution shall respond to the defendant's request for disclosure no later than thirty (30) days after the request is made, or within such other time as may be ordered by the court.

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the prosecution, the defendant, on request of the prosecution, shall permit the prosecution to inspect and copy books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the prosecution, the defendant, on request of the prosecution, shall permit the prosecution to inspect and copy any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to his testimony.

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the

defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, his agents or attorneys.

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure to Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Notice of Alibi.

(1) Notice of Alibi by Defendant. Upon written request of the prosecution stating the time, date and place at which the alleged offense occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to

offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(2) Disclosure by Prosecution. Within ten days after defendant serves his notice, but in no event less than ten days before trial, or as the court may otherwise direct, the prosecution shall serve upon the defendant or his attorney the names and addresses of witnesses upon whom the State intends to rely to establish defendant's presence at the scene of the alleged crime.

(3) Continuing Duty to Disclose. Both parties shall be under a continuing duty to promptly disclose Insanity under subdivisions (1) or (2).

(4) Failure to Disclose. If either party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by either party. Nothing in this rule shall limit the right of the defendant to testify on his own behalf.

(f) Notice of Insanity Defense or Plea of Guilty but Mentally Ill. Upon written request of the prosecution, the defendant shall within ten days or at such time as the court may direct, notify the prosecution in writing of the defendant's intention to rely upon the defense of insanity at the time of the crime or to enter a plea of guilty but mentally ill. If the defendant fails to comply with the requirements of the subdivision, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state. The court may, for good cause shown, allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as is appropriate.

(g) Waiver. The court may, for good cause shown, waive the requirements of this rule.

2. South Carolina Rules of Professional Conduct

There are several rules in the South Carolina Rules of Professional Conduct (a/k/a the ethics rules) that either address or relate to a

prosecutor's obligation in regard to discovery.

a. Rule 3.4

Rule 3.4, which applies to all lawyers, requires that lawyers should be fair to both the opposing party and the opposing lawyer(s). It provides as follows.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client² to

² It is important to understand that the prosecutor's client is the state. Law enforcement officers and other witnesses, including retained experts, are not clients of the prosecutor and no attorney-client privilege exists between them. See *Smith v. State*, 465 N.E.2d 1105, 1119 (Ind. 1984). Therefore, Rule 3.4(f) does not allow a prosecutor to tell a witness not to talk to the defense. See also S.C. Eth. Adv. Op. 99-14 (In criminal matters,

refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purposes of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. A lawyer may take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence or in any other manner alter or destroy the value of

the city prosecutor represents the city and the people of the city, not the law enforcement officers *per se*. Rule 3.4 does not authorize a prosecutor to either direct law enforcement officers not to talk to the defense or direct a defense attorney not to talk to law enforcement officers.)

the evidence for possible use by the prosecution. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

b. Rule 3.8

Rule 3.8 only applies to lawyers who are prosecutors. In subsection (d) and the comments, it provides as follows in regard to disclosure of information and evidence.

The prosecutor in a criminal case shall

...(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal....

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the

prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

* * *

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest....

The obligation to disclose under Rule 3.8(d) is an ongoing obligation – it survives a conviction. *See Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25.

C. Other

The Differentiated Case Management Orders for each county also provide deadlines for the prosecution to turn evidence over to the defense.

D. Understanding the Difference between “Legal” and “Ethics” Discovery Requirements

It is important that prosecutors, as well as non-lawyers in the prosecutors’ office who assist with respondent to discovery requests, understand the differences between the constitutional, statutory/rule, and ethics obligations in regard to discovery.

1. Federal Constitution.

Under the U.S. Constitution (commonly referred to as the *Brady* obligation), the prosecution is required to disclose material, exculpatory evidence (including impeachment evidence). This

obligation is not dependent upon any request by the defense. It exists regardless of whether a request for exculpatory information is made. See *U.S. v. Bagley, supra*; *U.S. v. Agurs, supra*.

2. Rule 5, SCRCrimP

The prosecutor's obligation to disclose evidence under Rule 5, SCRCrimP, is defined by the language of the rule itself. (See Rule 5 set out at II.B above.) Rule 5 generally provides for the disclosure of exculpatory evidence and some other specific types of evidence such as scientific reports, the defendant's statements, witness statements, police reports, etc.

The obligation to disclose under Rule 5 (that is, that information not falling under *Brady* or Rule 3.8, SCRPC, *infra*) is dependent upon a request filed by the defense .

3. Ethics Obligation

- Prosecutor-Specific Obligation

The prosecutor-specific obligation to disclose evidence under the South Carolina Rules of Professional Conduct is governed by Rule 3.8 (d) (set forth under II.B.2.b. above). It requires that prosecutors turn over all evidence that is exculpatory, all evidence that tends to "mitigate the offense" and, in regard to sentencing, all unprivileged mitigating evidence known to the prosecutor. Because the obligation to disclose under the Rule extends beyond exculpatory evidence, the ethics obligation is broader than that under the Constitution/*Brady*. And because it extends beyond the parameters of Rule 5, the ethics obligation is also broader than that under the Rule.

Please note that Rule 3.8(d) requires "timely disclosure." While the Supreme Court of South Carolina has not defined this term, it has been defined elsewhere.

Rule 3.8(d) requires earlier disclosure than the *Brady* standard.... In general, "timely" is defined as "occurring at a suitable or opportune time" or "coming early or at the right time." Thus, a timely disclosure is one that is made as soon as practicable considering all the facts and circumstances of the case. On the other hand, the duty to make a timely disclosure is violated when a prosecutor intentionally delays making the disclosure without

lawful justification or good cause.

Va. Legal Eth. Op. 1862 (July 23, 2012). See also ABA Formal Op. 09-454 (hereafter at II.A.6.b.xiii).

Rule 3.8(d) only contains one exception to its disclosure requirement – *i.e.*, when the prosecutor is relieved of the responsibility by a protective order issued by a court.³ Therefore, prosecutors, who have *legitimate* concerns about the disclosure of information or material because of the privacy concerns of a third party (for example, with school or health records of a victim or personnel records of a law enforcement officer), should, with notice to the defense, ask the judge to conduct an *ex parte*, in camera review and rule upon disclosure. If there is a *legitimate* reason for a delay in disclosure (for example, when there is a reasonable basis for believing harm will befall someone if information is disclosed) prosecutors should seek a protective order from the judge allowing such delay.

South Carolina's Rule 3.8 (d) is based upon Rule 3.8(d) of the ABA Model Rules of Professional Conduct. Therefore, South Carolina prosecutors should take to heart the following comments about the Model Rule made by the United States Supreme Court.

We have never held that the Constitution demands an open file policy ...and the rule in *Bagley* (and, hence, in *Brady*) requires *less* of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984)...

(emphasis added). *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

³ While the Supreme Court of South Carolina has not addressed whether a prosecutors obligation to disclose under Rule 3.8(d) may be waived by a defendant, the ABA Standing Committee on Ethics and Professional Responsibility has issue an opinion that it **cannot** be. See ABA Formal Op. 09-454.

While this is clearly just *dictum*, it does provide insight to the United States Supreme Court’s assessment of the ethics obligation to disclose.

The above language in *Kyles v. Whitley, supra*, led those drafting the annotations to the ABA Model Rules of Professional Conduct to note as follows.

The prosecutor’s constitutional obligation has a materiality threshold; the ethics rules have an intent requirement but no materiality test. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (noting that *Brady* “requires less of the prosecution” than Rule 3.8(d) or the ABA Standards for Criminal Justice); *see also Mastracchio v. Vose*, No. CA 98-372T, 2000 WL 303307 (D.R.I. Nov. 20, 2000) (prosecution’s failure to disclose nonmaterial information about witness did not violate defendant’s Fourteenth Amendment rights, but came “exceedingly close to violating [Rule 3.8]”); Joy & McMunigal, *Disclosing Exculpatory Material in Plea Negotiations*, 16 *Crim. Just.* 41 (2001).

Annotated Model Rules of Professional Conduct (5th ed.) (ABA Center for Professional Responsibility 2003) at 400.

The ethics obligation to disclose under Rule 3.8(d) is **not** dependent upon any request by the defense.

- Non Prosecutor-Specific Obligation

The South Carolina Rules of Professional Conduct also contain another rule which imposes ethics duties in regard to discovery. It is Rule 3.4, but it applies to all lawyers. (See Rule 3.4 set out at II.B.2.a above.)

It is clear that Rule 3.4, *inter alia*, provides an ethics means of enforcing the obligation that exists under *Brady* and Rule 5.

III. Responsibilities of and for Non-Lawyers Working with the Prosecution

Under Rule 5.1, prosecutors who – either individually or collectively with others – have managerial authority in the office are *required to make reasonable efforts* to ensure the office has in place measures to ensure that all lawyers in the office conform to the Rules of Professional Conduct. In addition, a prosecutor who has direct supervisory authority over a lawyer *is required to make reasonable efforts* to ensure that that lawyer complies with the Rules of Professional Conduct.

Rule 5.1 (a) and (b) provides that

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

The comments to Rule 5.1 provide, in part, as follows.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

Rule 5.3 imposes similar obligations upon prosecutors for the conduct of nonlawyers employed by, retained by, or associated with the Solicitor's Office.

Rule 5.1(c) and 5.3(c) make a lawyer responsible for another lawyer's or nonlawyer's conduct that violates the Rules of Professional Conduct if the lawyer either

- orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The Supreme Court of South Carolina has held that, for purposes of Rule 5.1, a prosecutor's office is a law office where complex ethical questions arise. *In the Matter of Myers*, 355 at 8, 584 S.E.2d at 361. That means that informal supervision and occasional admonition will not satisfy the obligations imposed by Rule 5.1 (a) and (b). Instead, the elected Solicitor and other lawyers within the office who manage or supervise are required to do more. A prosecutor's office *must* have in place a more elaborate system, *i.e.*, must establish internal policies and procedures to ensure that:

- all employees are aware of the Rules and conform their conduct to comply with them;
- any conduct that violates the Rules will be known by or brought to the attention of the managing and supervising attorneys;
- any conduct that violates the Rules is addressed immediately and appropriately; and,
- if necessary, remedial action is taken to avoid or mitigate the consequences of the conduct resulting in the violation.

See In the Matter of Myers, supra. See also ABA Formal Op. 14-467 (2014) ("Prosecutors with managerial authority and supervisory lawyers must make 'reasonable efforts to ensure' that all lawyers and nonlawyers in their offices conform to the Rules of Professional Conduct. Prosecutors with managerial authority must adopt reasonable policies and procedures to achieve these goals. Prosecutors with direct supervisory authority must make reasonable efforts to insure that the lawyers and nonlawyers they supervise comply with the Rules. Where prosecutors have both managerial and direct supervisory authority, they may, depending on the circumstances, be required to fulfill both sets of obligations. The particular measures that managerial and supervisory prosecutors must implement to comply with these rules will depend on a variety of factors, including the size and structure of their offices, as set forth in this opinion.")

The ABA Standing Committee on Ethics and Professional Responsibility suggests that prosecutors' offices

- establish office-wide policies addressing ethics obligations, including discovery, conflicts of interest, confidentiality, dealing with the media, communication with defendants and witnesses, competence, and diligence;
- provide access to training on both ethical and legal obligations;
- require supervisors to keep themselves informed of the status and developments in cases;
- consider having supervising prosecutors participate in all major decisions in cases;
- establish a system of individual oversight of line prosecutors;
- pair new prosecutors with more experienced prosecutors;
- designate a specific prosecutor to oversee the review of files for Brady purposes;
- hold prosecutors with Rule 5.1 and 5.3 obligations accountable for the conduct of their subordinates;
- enforce the obligation to report conduct by other office employees that violates the Rules of Professional Conduct to supervisors or others within the office.

ABA Formal Op. 14-467 at 8-12.

A. Disclosure Obligation of a Prosecutor for the “Prosecution Team”

As a matter of constitutional law, knowledge and possession of evidence by members of the prosecution team are imputed to the prosecutor even if the prosecutor himself has no personal knowledge. *See Kyles v. Whitley, supra.*

1. Who is on the prosecution “team”?

a. Police and Other Non-lawyer investigators.

See Id.; U.S. v. Berryman, 322 Fed. Appx. 216, 222 (3rd Cir. 2009) (The prosecution violates *Brady* where it suppresses evidence that is favorable to the defendant and material to the outcome of the case. Evidence is deemed ‘suppressed’ if the prosecution actually knows about it but does not disclose it, but evidence is also deemed ‘suppressed’ if the prosecution constructively knows about it — for example, if a member of the wider ‘prosecution team,’ including non-lawyer investigators, knows about it — but does not disclose it.”)

b. Prosecution victim advocates.

See State v. Blackmer, 137 N.M. 258, 263, 110 P.3d 66, 71 (2005) (“[G]iven that the victim advocate is employed by the district attorney, and works with prosecutors, it seems reasonable that the victim advocate would communicate details and opinions to prosecutors. Because victim advocates perform many tasks similar to those of other members of the prosecution team, even if some of their duties differ, we conclude that victim advocates are part of the prosecution team and that the relevant rules of attorney-client confidentiality and State disclosure are applicable.”).

c. Prosecution paralegals and other non-lawyer assistants.

U.S. v. Bin Laden, 397 F. Supp. 2d 465, 484 n. 22 (S.D. N.Y. 2005) (“I have no doubt that a paralegal, translator, or other non-lawyer assistant facilitating the prosecutors' work would be a member of the prosecution team, regardless of the fact that they were not investigating the case or making charging decisions.”).

IV. South Carolina Opinions on Ethics Violations related to Discovery

- A. *In Matter of Humphries*, 354 S.C. 567, 582 S.E.2d 728 (2003). Prosecutor walked in as police officers were, unbeknownst to either the defendant in a capital case or his lawyer, listening to a confidential conversation between the pair. Telling the police officers to stop, the prosecutor left without verifying that they did in fact stop listening to the conversation. Later the prosecutor heard that a tape had been made of the conversation. He received discovery request for statements made by the defendant. The prosecutor’s failure to respond to defense counsel's discovery requests by reporting the rumored existence of the videotape recording of the meeting of defendant and his former attorney, determining whether the rumored existence of the tape was correct, and promptly providing defense counsel with a copy of the tape once its existence was verified was found to have violated Rule 3.4(c)(lawyer shall not knowingly disobey obligation under rules of tribunal except for open refusal based on assertion that no valid obligation exists), Rule 3.4(d)(lawyer shall not, in pretrial procedure, fail to make reasonably diligent effort to comply with legally proper discovery request by opposing party), Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to administration of justice). The Court ordered that the prosecutor be suspended for one year.

See also In the Matter of Myers, 355 S.C. 1, 584 S.E.2d 357 (2003) (elected Solicitor disciplined for failure to supervise prosecutor in

Humphries to ensure that information was disclosed to defense counsel).

- B. *In re Grant*, 343 S.C. 528, 541 S.E.2d 540 (2001). Supreme Court held that a prosecutor's violation of the discovery requirements set out in *Brady v. Maryland*, 373 U.S. 83 (1963) – he failed to fully disclose exculpatory material and impeachment evidence regarding statements given by prosecution's key witness in murder case – violated Rules 3.4(d)(failing to make diligent effort to comply with discovery request of opposing party); Rule 3.8(d)(failing to make timely disclosure to defense of known evidence or information that tends to negate guilt of accused or mitigate offense); Rule 8.4(a)(violating Rules of Professional Conduct); and Rule 8.4(e)(engaging in conduct that is prejudicial to administration of justice).
 - C. S.C. Eth. Adv. Op. 03-1. Pursuant to Rule 3.8(d), the fact that a police officer has failed to disclose the truth to his superior officer during an official department investigation must be disclosed to the defense in unrelated criminal investigations involving the officer.
 - D. Opinions from Other States (will be discussed during presentation).
- V. Special Considerations for Privileged or Confidential Information, and Information related to Safety of a Witness

If a prosecutor has information that should be disclosed, but there is concern that disclosure may result in harm to or the death of a witness, the prosecutor should seek a protective order from the applicable court.

AMIE'S PRACTICE TIPS ON DISCOVERY

If you have or know of information or evidence and do not want to disclose such to the defense, you need to ask yourself why you do not want to disclose.

- If you think the information or evidence is not subject to disclosure, seek a ruling of the court. If the prosecution wants the court to pass upon it, the court *may* conduct *ex parte* review of the evidence and issue a ruling. If the defense “has established a basis for a claim that the information or evidence contains materials exculpatory or impeachment evidence,” the court *must* conduct an *in camera* review and make a ruling. *State v. Bryant*, 307 S.C. 458, 461-462, 415 S.E.2d 806, 808-809 (1992).
- If it is because you think – and such is reasonable under the particular circumstances of your case – disclosure will expose a witness to harm or death, you may seek a protective order from the court. Please be aware that, even if a protective order is issued, disclosure most likely will, *at some point*, be required.
- On the other hand, if you do not want to disclose because the information or evidence will hurt your case or help the defense, then it unquestionably should be disclosed.

Remember, just because you are required to disclose to the defense, it does not mean that the defense will be able to use the evidence at trial. You should be prepared to make any appropriate objections, including objections based on Rules 401 (relevancy) and 403 (danger of unfair prejudice substantially outweighing the probative value of the evidence) of the South Carolina Rules of Evidence.

In order to prevent the defense from mentioning potentially inadmissible evidence before the jury, you should move *in limine* to exclude or limit the evidence. Such motions are best made and ruled upon before jeopardy attaches (which is, in a case tried without a jury, when the first witness is sworn and, in a case tried by jury, when the jury is sworn).

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South Carolina Commission on Prosecution Coordination

Prosecution CLE Series™

“Ethics for Government Attorneys”

Columbia, South Carolina
January 13, 2017



“Substance Misuse”

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Alcohol Use Disorders

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SC DAODAS

Objectives

- Define standard drink
- Identify low risk guidelines
- Identify issues related to alcohol misuse
- Identify how to seek or offer assistance

Why do people use alcohol?

Why do people use alcohol?

- Create/Intensify:
 - Feelings
 - Sensations
 - Experiences

Why do people use alcohol?

- Remove/Lessen:
 - Anxiety
 - Stress
 - Fear
 - Isolation
 - Inhibition
 - Depression
 - Hopelessness

What is a standard drink?

12 fl oz of
regular beer



about 5%
alcohol

=

8–9 fl oz of
malt liquor
(shown in a
12 oz glass)



about 7%
alcohol

=

5 fl oz of
table wine



about 12%
alcohol

=

1.5 fl oz shot
of 80-proof
distilled spirits
(gin, rum, tequila,
vodka, whiskey, etc.)



40% alcohol

The percent of "pure" alcohol, expressed here as alcohol by volume (alc/vol), varies by beverage.

Source: National Institutes of Health

Beyond a standard drink...

How many drinks are in common containers?

Below is the approximate number of standard drinks in different sized containers of

regular beer	malt liquor	table wine	80-proof distilled spirits
12 fl oz = 1	12 fl oz = 1½	750 ml (a regular wine bottle) = 5	a shot (1.5 oz glass/50 ml bottle) = 1
16 fl oz = 1½	16 fl oz = 2		a mixed drink or cocktail = 1 or more
22 fl oz = 2	22 fl oz = 2½		200 ml (a "half pint") = 4½
40 fl oz = 3½	40 fl oz = 4½		375 ml (a "pint" or "half bottle") = 8½
			750 ml (a "fifth") = 17

Source: NIH







What's your drinking pattern?

On **any day** in the past year, have you ever had:

MEN: more than 4 drinks? Yes or No

WOMEN: more than 3 drinks? Yes or No

12 fl oz of regular beer	=	8-9 fl oz of malt liquor (shown in a 12 oz glass)	=	5 fl oz of table wine	=	1.5 fl oz shot of 80-proof distilled spirits (gin, rum, tequila, vodka, whiskey, etc.)
						
about 5% alcohol		about 7% alcohol		about 12% alcohol		40% alcohol
The percent of "pure" alcohol, expressed here as alcohol by volume (alc/vol), varies by beverage.						

Source: National Institutes of Health

What's your drinking pattern?

Think about a typical week:

On average, how many days a week do you drink alcohol?

On a typical day, how many drinks do you have?

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday

Source: National Institutes of Health

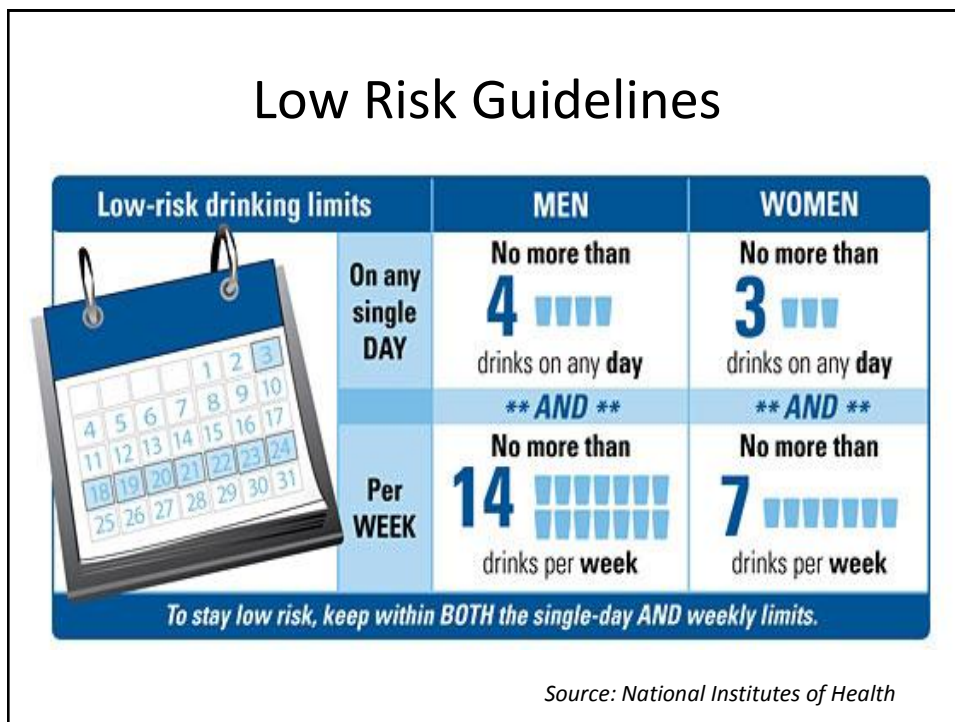
When is it not safe to use alcohol?

- When planning to drive
- When taking certain medications
- When managing a medical condition that can be worsened by consuming alcohol
- When pregnant or trying to become pregnant



Source: National Institutes of Health

Low Risk Guidelines



Heavy or At Risk Alcohol Use

Alcohol use above the low risk guidelines, including:

- Men: More than 4 drinks on any day or 14 per week
- Women: More than 3 drinks on any day or 7 per week

Source: National Institutes of Health

Short-Term Health Risks

Excessive alcohol use has immediate effects that increase the risk of many harmful health conditions. These are most often the result of binge drinking and include the following:

- Injuries, such as motor vehicle crashes, falls, drowning, and burns.
- Violence, including homicide, suicide, sexual assault, and intimate partner violence.
- Alcohol poisoning, a medical emergency that results from high blood alcohol levels.
- Risky sexual behaviors, including unprotected sex or sex with multiple partners. These behaviors can result in unintended pregnancy or sexually transmitted diseases, including HIV.
- Miscarriage and stillbirth or fetal alcohol spectrum disorders (FASDs) among pregnant women.

Source: CDC

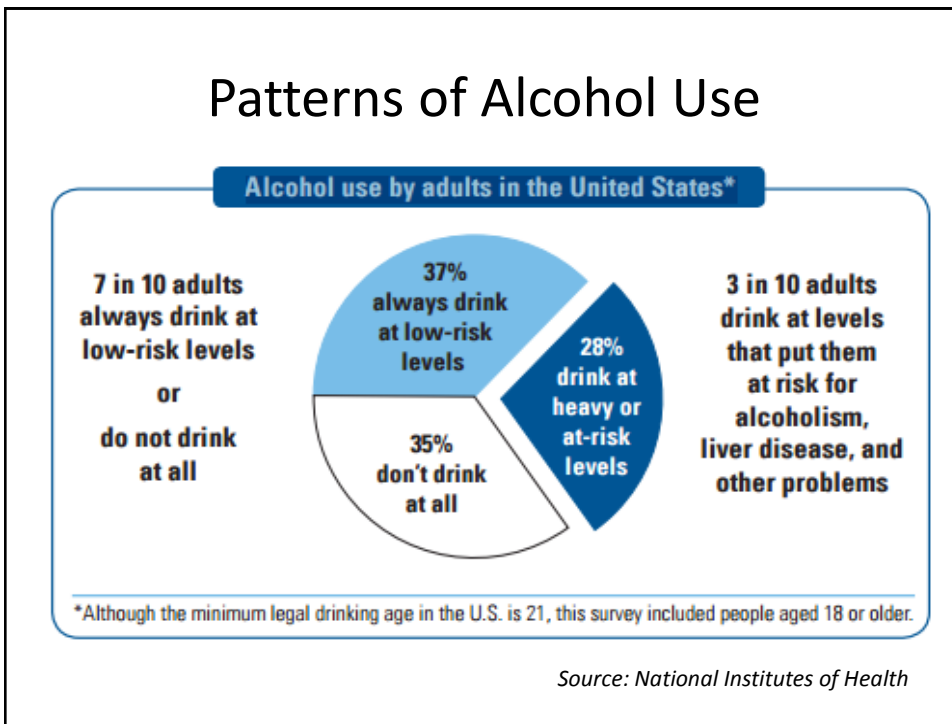
Long-Term Health Risks

Over time, excessive alcohol use can lead to the development of chronic diseases and other serious problems including:

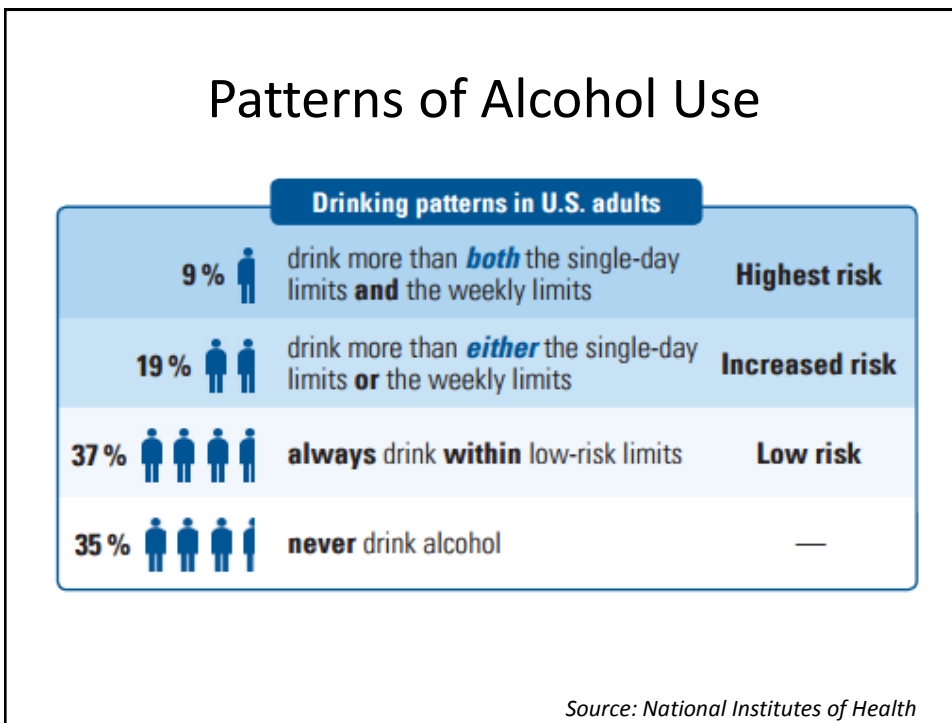
- High blood pressure, heart disease, stroke, liver disease, and digestive problems.
- Cancer of the breast, mouth, throat, esophagus, liver, and colon.
- Learning and memory problems, including dementia and poor school performance.
- Mental health problems, including depression and anxiety.
- Social problems, including lost productivity, family problems, and unemployment.
- Alcohol use disorder.

Source: CDC

Patterns of Alcohol Use



Patterns of Alcohol Use



Alcohol Use Disorder (AUD)

In the past year, have you:

- Had times when you ended up drinking more, or longer than you intended?
- More than once wanted to cut down or stop drinking, or tried to, but couldn't?
- Spent a lot of time drinking? Or being sick or getting over the aftereffects?
- Experienced craving — a strong need, or urge, to drink?

Source: National Institutes of Health

Alcohol Use Disorder (AUD)

- Found that drinking — or being sick from drinking — often interfered with taking care of your home or family? Or caused job troubles? Or school problems?
- Continued to drink even though it was causing trouble with your family or friends?
- Given up or cut back on activities that were important or interesting to you, or gave you pleasure, in order to drink?
- More than once gotten into situations while or after drinking that increased your chances of getting hurt (such as driving, swimming, using machinery, walking in a dangerous area, or having unsafe sex)?

Source: National Institutes of Health

Alcohol Use Disorder (AUD)

- Continued to drink even though it was making you feel depressed or anxious or adding to another health problem? Or after having had a memory blackout?
- Had to drink much more than you once did to get the effect you want? Or found that your usual number of drinks had much less effect than before?
- Found that when the effects of alcohol were wearing off, you had withdrawal symptoms, such as trouble sleeping, shakiness, irritability, anxiety, depression, restlessness, nausea, or sweating? Or sensed things that were not there?

Source: National Institutes of Health

Alcohol Use Disorder (AUD)

- Reviewing the criteria:
 - Presence of any of the criteria is cause for concern
 - Mild: Presence of 2-3 criteria
 - Moderate: Presence of 4-5 criteria
 - Severe: Presence of 6 or more

Thinking About Change?

- Whether to change drinking is a personal decision.
- For some, weighing pros and cons can help.
 - What are some of the reasons you may want to make a change?
 - What are some of the reasons you may not want to make a change?

Source: National Institutes of Health

Ambivalent?

If you're not sure you are ready to change yet, consider these suggestions in the meantime:

- Keep track of how often and how much you're drinking.
- Notice how drinking affects you.
- Make or re-make a list of pros and cons about changing.
- Deal with other priorities that may be in the way of changing.
- Ask for support from your doctor, a friend, or someone else you trust.

Source: National Institutes of Health

To cut down or to quit . . .

Strategies for cutting down:

- Keep track
- Count and measure
- Set goals
- Pace and space
- Include food
- Find alternatives
- Avoid “triggers.”
- Plan to handle urges
- Know your “no”

Source: National Institutes of Health

To cut down or to quit . . .

Quitting is strongly advised if you:

- try cutting down but cannot stay within the limits you set
- have had an alcohol use disorder or now have symptoms
- have a physical or mental condition that is caused or worsened by drinking
- are taking a medication that interacts with alcohol
- are or may become pregnant

To cut down or to quit . . .

Other factors to consider:

- family history of alcohol problems
- your age
- whether you've had drinking-related injuries
- symptoms such as sleep disorders and sexual dysfunction

To cut down or to quit . . .

AUD criteria showing loss of control:

- More than once wanted to cut down or stop drinking, or tried to, but couldn't?
- Experienced craving — a strong need, or urge, to drink.
- Found that drinking — or being sick from drinking — often interfered with taking care of your home or family? Or caused job troubles? Or school problems?
- Given up or cut back on activities that were important or interesting to you, or gave you pleasure, in order to drink?
- Found that when the effects of alcohol were wearing off, you had withdrawal symptoms, such as trouble sleeping, shakiness, irritability, anxiety, depression, restlessness, nausea, or sweating? Or sensed things that were not there?

Professional Concerns

“Self-Regulating Profession”

Important points:

- Do not diagnose.
- Document only that which you have first hand knowledge of.

Documenting Issues

- Note changes in appearance, behavior and overall functioning.
- Document specific instances of misconduct.
- Focus on individual performance, rather than the perceived cause.
- Utilize resources, such as Lawyers Helping Lawyers

Other Important Points

- Do not have to observe substance use directly
- Warning signs can be attributable to other issues, such as mental health disorders, health issues, caretaker stress, etc. (i.e., avoid labeling)
- The pattern of behavior can emerge, disappear, and reemerge
- There is cause for concern if any pattern of behavior could lead to ethics violations and malpractice

Common Warning Signs

Attendance

- late to meetings, conferences, hearings or other court functions
- last-minute cancellations
- failure to appear
- taking “long lunches”
- not returning after lunch
- unable to be located
- improbable excuses for absences
- ill with vague ailments
- frequent restroom breaks

Common Warning Signs

Performance

- misses deadlines
- routinely requests continuances or rescheduling
- fails to follow local court rules, policies and procedures
- unprepared or poorly prepared disorganized
- lack of attention to details
- inadequate follow-through with assigned duties or tasks
- poor judgment
- inability to concentrate
- difficulty remembering details or directions
- general difficulty with recall
- blaming or making excuses for poor performance
- decreased efficiency
- decreased performance after long lunches

Common Warning Signs

Behavioral

- complaints from clients, lawyers, etc.
- problems with court personnel
- difficulty working with colleagues
- avoidance of others (isolating)
- irritable, impatient
- angry outbursts
- hostile attitude
- overreacts to criticism
- inconsistency or discrepancy in describing events
- unpredictable, rapid mood swings
- poor hygiene, disheveled or unkempt appearance

Common Warning Signs

Personal

- legal separation or divorce
- relationship problems
- credit problems, judgments, tax liens, bankruptcies
- frequent illnesses or accidents
- arrests or warnings
- isolating from friends, family and social activities
- objective indicators of a potential drug or alcohol or gambling problem

Common Warning Signs

Miscellaneous

- non-responsive to a judge's requests or orders
- non-responsive to a disciplinary agency's inquiry
- noncompliance with CLE requirements
- failure to renew law license
- lapsed insurance policies
- failure to file tax returns
- failure to pay taxes

Common Warning Signs

Trust Account

- checks not deposited
- debit card withdrawals
- incomplete or irregular records
- missing or altered bank statements
- pay office expenses from trust
- pay personal expenses from trust
- "borrowing" from trust
- failure to timely disburse client's funds or other payments
- incomplete accounting for receipts and disbursements

Deciding whether to help...

- What is at stake?
 - Individual life, marriage, family, career
 - The earlier the intervention, the better the outcome
- Personal and Professional Ethics
 - Moral obligation to individuals
 - Professional responsibility to protect profession & the public
- When in doubt, seek counsel.
 - Lawyers Helping Lawyers

How to help

- Have a person to person conversation
 - Be factual
 - Outline specific concerns
 - Do not shame, threaten
- If supervising, utilize supervision planning
 - Again, be factual
 - Outline specific concerns/Be clear about expectations
 - Again, focus on performance, not what you think is the cause for issues with performance
- Utilize professional help
 - For planning in addressing the issue
 - As referral for individual assistance

Lawyers Helping Lawyers

Rule 8.3 Reporting Professional Misconduct

(d) Inquiries or information received by the South Carolina Bar Lawyers Helping Lawyers Committee or an equivalent county bar association committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking the program assistance, shall not be disclosed to the disciplinary authority without written permission of the lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.

Resources to Help

- Natural Supports – family, friends
- Social Supports – faith community, social network, community groups
- Mutual Aid Groups – AA, Celebrate Recovery, SMART Recovery, etc.

Resources to Help

- Professional Support:
 - Recovery Support Services (ex: FAVOR Greenville)
 - Counseling (Community-based, not in a treatment center)
 - Specialized treatment services
 - Includes outpatient, intensive outpatient, residential, inpatient, withdrawal management
 - DAODAS Providers by County:
<http://www.daodas.state.sc.us/LocalResources.asp>
 - Medication Assistance – Vivitrol, Campral

Lawyers Helping Lawyers

- Helpline
 - Call to speak to LHL - 866-545-9590
- Free counseling services
 - Member of SC Bar are eligible for 5 free hours of intervention counseling through CorpCare
 - Contact CorpCare at 855-321-4384
 - Service is completely anonymous

As a recap...

- 7 out of 10 adults either do not drink at all or drink within the low-risk guidelines
- 3 of 10 adults drink at a level that puts them at risk for an alcohol use disorder (AUD)
- Many of those who drink at heavy levels will be able to moderate or discontinue use with minimal support

A change in perspective

- People benefit from a focus on developing recovery support
- Either way, the earlier the intervention, the less resources needed to initiate and sustain recovery, and better the success at sustaining long-term recovery
- The more criteria identify a loss of control, the more likely the need for additional and complex supports, and abstinence may be warranted to initiate and sustain recovery

What does “recovery” mean?

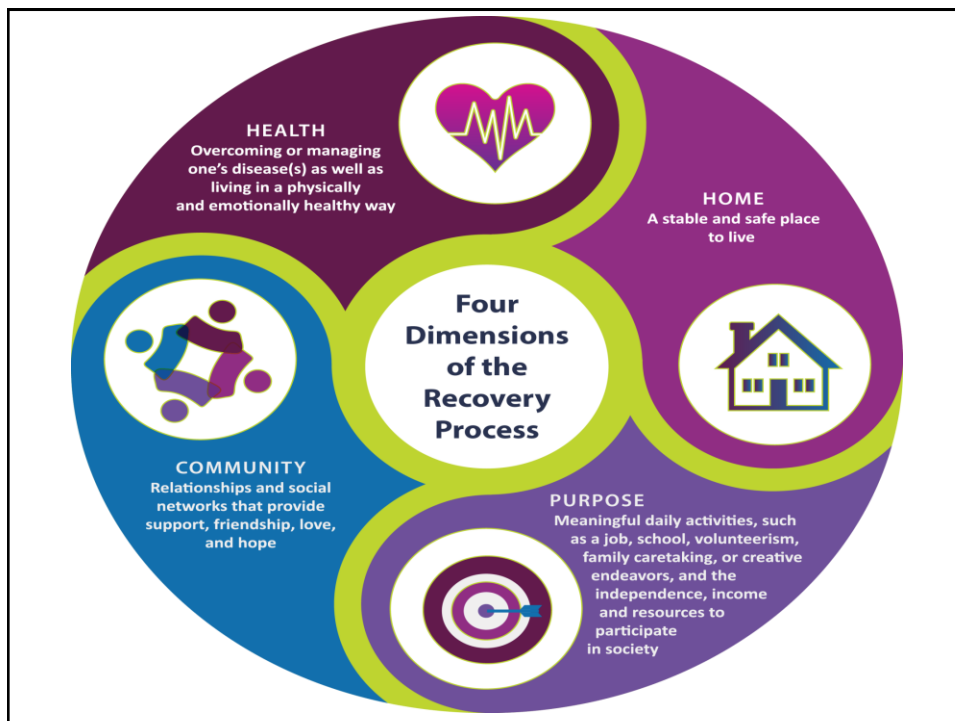
RECOVERY

“Recovery is a process of change whereby individuals improve their health and wellness, to live a self-directed life, and strive to reach their full potential.”

SAMHSA/CSAT 2011

Levels of Recovery

Levels of Recovery



Scope & Depth

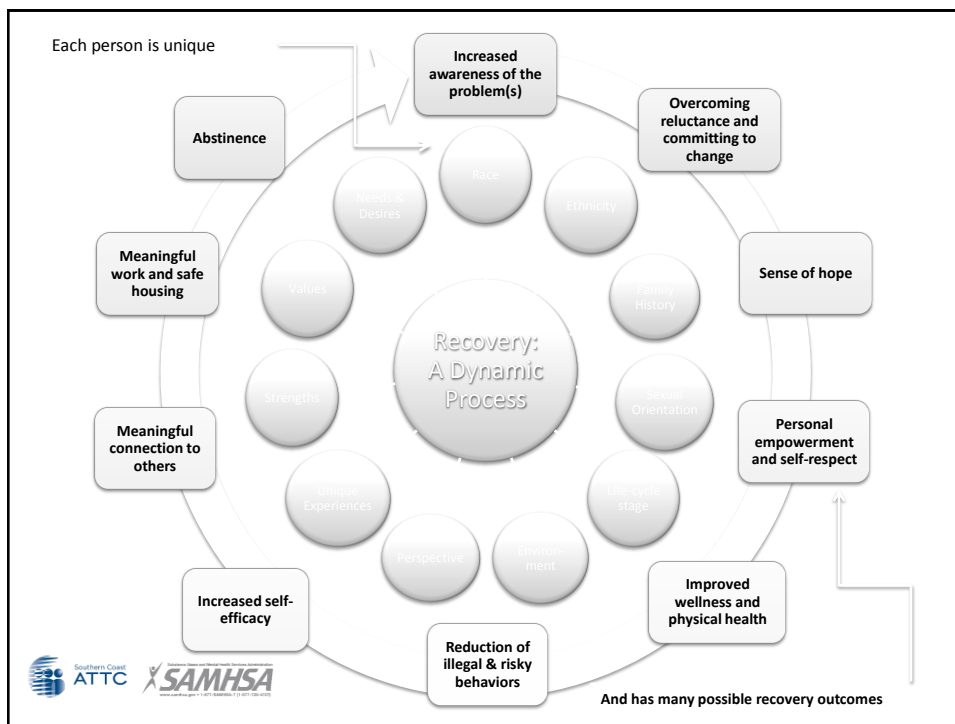
- It is important to note that recovery can differ in:
 - Scope – range of measurable changes
 - Depth – degree of change within a measured dimension

Guiding Principles of Recovery



- There are many pathways to recovery.
- Recovery is self-directed and empowering.
- Recovery involves a personal recognition of the need for change and transformation.
- Recovery is holistic.
- Recovery has cultural dimensions.
- Recovery exists on a continuum of improved health and wellness.
- Recovery is supported by peers and allies.
- Recovery emerges from hope and gratitude.
- Recovery involves a process of healing and self-redefinition.
- Recovery involves addressing discrimination and transcending shame and stigma.
- Recovery involves (re)joining and (re)building a life in the community.
- Recovery is a reality. It can, will, and does happen.

Source: CSAT White Paper: *Guiding Principles and Elements of Recovery-Oriented Systems of Care.*



Reality of Recovery

- 23.5 million people in recovery in the United States
- Estimated 480, 000 people in recovery in South Carolina

Resources – Specific to Law Profession

- South Carolina Lawyers Helping Lawyers
 - <https://www.scbar.org/lawyers/member-benefits-assistance/lawyers-helping-lawyers/>
- Pennsylvania Lawyers Concerned for Lawyers
 - <http://www.lclpa.org/>
- Texas Lawyer’s Assistance Program
 - https://www.texasbar.com/AM/Template.cfm?Section=Texas_Lawyers_Assistance_Program1&Template=/CM/HTMLDisplay.cfm&ContentID=35430

Additional Resources

- NIAAA: Rethinking Drinking
 - <https://www.rethinkingdrinking.niaaa.nih.gov/>
- DAODAS Treatment Provider Locator
 - <http://www.daodas.state.sc.us/LocalResources.asp>
- SAMHSA Treatment Locator
 - <https://findtreatment.samhsa.gov/>
- Faces and Voices of Recovery Guide to Mutual Aid Resources
 - <http://facesandvoicesofrecovery.org/resources/mutual-aid-resources/mutual-aid-resources.html>

Additional Resources

- Alcoholics Anonymous – South Carolina
– <http://area62.org/>
- Narcotics Anonymous – Central Region
– <http://www.crna.org/>
- Alanon/Alateen of South Carolina
– <http://www.al-anon-sc.org/>
- Celebrate Recovery
– <http://locator.crgroups.info/>
- SMART Recovery
– <http://www.smartrecovery.org/>

Questions??

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