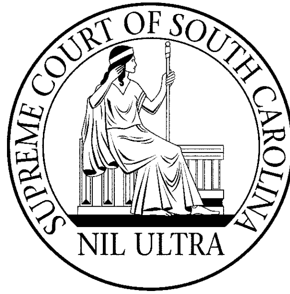

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
August 30, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Ashley Jordan, Respondent.

Appellate Case No. 2012-212593

Opinion No. 27734
Heard March 2, 2016 – Filed August 30, 2017

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara Marie Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

A. Camden Lewis and Ariail Elizabeth King, both of Lewis Babcock L.L.P., of Columbia, for Respondent.

PER CURIAM: This attorney disciplinary matter arises out of two separate sets of formal charges filed by the Office of Disciplinary Counsel against William Ashley Jordan. Disciplinary Counsel filed the first set of formal charges with the Commission on Lawyer Conduct on January 7, 2011. The first charges allege primarily that Mr. Jordan did not properly manage funds owed to clients or co-counsel or keep adequate records of those funds between 1999 and 2005. As to those charges, a hearing panel of the Commission recommended to this Court that Mr. Jordan receive a public reprimand, and Mr. Jordan agrees a public reprimand is an appropriate sanction.

In October 2012, while the panel's recommendation for the first set of charges was pending before this Court, Disciplinary Counsel received a new complaint alleging Mr. Jordan committed more serious misconduct between 2009 and 2012. The crux of the new complaint was—in seven different cases—Mr. Jordan entered into a fee-

sharing arrangement with another attorney, did not disclose the arrangement to the client, collected a fee for the case, and deposited the entire fee in his law firm's accounts instead of paying co-counsel's share of the fee. After considering the second set of charges, the panel recommended to this Court that Mr. Jordan be disbarred.

Disciplinary Counsel requested we stay our decision on the first set of charges pending an investigation of the second set. Because we granted the stay, we have not previously addressed the first set of charges. Therefore, although the sanction we ultimately impose is based on the misconduct in the second set of charges, we have necessarily included in this opinion the details of the misconduct in the first set of charges.

I. Facts and Procedural History

Disciplinary Counsel filed the first set of formal charges on January 7, 2011. On March 1, 2011, Mr. Jordan filed his response to the charges, and on March 17, 2011, he filed a corrected response. On December 5, 2011, Mr. Jordan appeared before the hearing panel for a full evidentiary hearing on the first set of charges.[1] On July 12, 2012, the hearing panel issued its report recommending a public reprimand based on the following misconduct.

In the Client A case, the panel found Mr. Jordan paid himself more attorney's fees than he was entitled to receive pursuant to his fee-sharing arrangement with two attorneys, improperly negotiated a check for attorney's fees from his trust account to his firm account before the funds had been collected by his bank, failed to pay his co-counsel's shares of the fee from a settlement installment for approximately two years, and—after finally paying his co-counsel—disbursed $49,333.32 more from his trust account than he received on behalf of the client. The panel found this conduct violated Rule 1.15, RPC, Rule 407, SCACR, and Rule 417, SCACR. The panel also found Mr. Jordan failed to supervise a nonlawyer assistant in violation of Rule 5.3, RPC, Rule 407, SCACR. Although Disciplinary Counsel charged Mr. Jordan with violating Rule 8.4(d), RPC, Rule 407, SCACR, the panel found Mr. Jordan did not engage in dishonest or fraudulent conduct.

[1] These dates are important in our consideration of the second set of charges.

In the Client B case, the panel found Mr. Jordan—while holding funds in trust for a deceased client—failed to ensure his associate opened an estate for the disbursement of the funds. Mr. Jordan transferred the funds through several trust accounts over the course of four years but could not produce an accounting of the transfers. Mr. Jordan's bookkeeper "mistakenly transferred" some of the client's funds to cover a shortage of funds held in trust for another client, and Mr. Jordan could not account for the remaining funds at the time his law firm dissolved. After improperly holding the funds for over six years, Mr. Jordan restored the funds to his trust account and paid the funds to the Lawyers' Fund for Client Protection. The panel found Mr. Jordan violated Rules 1.1, 1.3, 1.15, and 5.1, RPC, Rule 407, SCACR, and Rule 417, SCACR. The panel also found Mr. Jordan failed to properly supervise his bookkeeper in violation of Rule 5.3, RPC.

In the Client C case, the panel found Mr. Jordan paid himself more attorney's fees than he was entitled to receive pursuant to his fee-sharing arrangement with co-counsel, transferred funds held in trust for his client but failed to account for $382.21 of those funds, and disbursed more funds to the client than he deposited in the trust account. Mr. Jordan's bookkeeper covered the overpayment using another client's funds. The panel found Mr. Jordan violated Rules 1.1 and 1.15, RPC, and Rule 417, SCACR.

In the Client D case, the panel found Mr. Jordan and his co-counsel agreed to reduce their fee from forty percent to approximately thirty-six percent for settling the case. After receiving the settlement money, Mr. Jordan issued a check for the full attorney's fee to his firm, despite his agreement to split the fees evenly with co-counsel. Mr. Jordan later overpaid his co-counsel by paying her half of a forty-percent fee, rather than the agreed-upon thirty-six percent fee. Mr. Jordan transferred funds from Client E's account ledger in his trust account to make up for the overpayment. The panel found Mr. Jordan violated Rules 1.3 and 1.15, RPC, and Rule 417, SCACR. The panel also found Mr. Jordan failed to properly supervise a nonlawyer assistant in violation of Rule 5.3, RPC.

In the Client E case, the panel found Mr. Jordan agreed to share fees equally with his co-counsel. After settling the case, Mr. Jordan deposited his half of the $18,000 attorney's fee in his trust account and used the money to cover his overpayment in the Client D case. Mr. Jordan then paid co-counsel's share of the fee to himself because he believed co-counsel owed him money in another case. He subsequently

paid himself a one-half share of the fee a third time—which resulted in Mr. Jordan receiving 150% of the total attorney's fee—but he could not identify the source of the funds. The panel found Mr. Jordan violated Rule 1.15, RPC, and Rule 417, SCACR.

In the Client F case, the panel found Mr. Jordan settled claims on behalf of two clients for $15,000 each and deposited the settlement funds in his law firm's trust account. After making several disbursements, Mr. Jordan held $7,800 in trust for the clients to pay medical expenses or liens. Mr. Jordan transferred the funds through several trust accounts but failed to accurately record the transfers. Five years later, during Disciplinary Counsel's investigation, Mr. Jordan discovered he owed no liens or bills on behalf of the clients. However, Mr. Jordan could no longer account for the funds in his trust account and paid the clients from his personal funds. The panel found Mr. Jordan violated Rules 1.3 and 1.15, RPC, and Rule 417, SCACR.

In the Client G case, the panel found Mr. Jordan received $31,000 on behalf of his client and deposited the funds into his trust account pending the outcome of the client's case. Less than two weeks later—while the case was still pending—Mr. Jordan wrote the client a trust account check for $31,000, received a loan from the client for the same amount, deposited the funds into a personal account, and wrote a check for $22,000 of the funds to his law firm's operating account. Eight months later, Mr. Jordan repaid his client without paying interest. Mr. Jordan did not reduce the terms of the loan to writing, did not advise the client to seek advice from independent counsel, accepted the loan without disclosing his conflict of interest, and did not obtain the client's consent to the conflict. The panel found Mr. Jordan's "acceptance of a loan from funds obtained on behalf of a client in a legal matter without payment of interest, terms of repayment, written note or other guaranty of repayment, or contingency for failure to pay was not fair or reasonable to the client." Therefore, the panel found Mr. Jordan violated Rule 1.8(a), RPC, Rule 407, SCACR.

In the Client H case, the panel found Mr. Jordan received $55,200 in funds to be held in trust on a client's behalf and—at her instruction—disbursed the funds to pay the client's obligations. Mr. Jordan's records identified $51,755.28 disbursed on the client's behalf. In March 2003, Mr. Jordan issued a check for $6,105.10 to a mortgage company. According to the panel, Mr. Jordan's records "do not identify the purpose of this check or the client on whose behalf it was paid," but Mr. Jordan

believes he wrote the check on behalf of Client H. Therefore, Mr. Jordan paid on Client H's behalf $2,660.38 more than he received. The panel found Mr. Jordan violated Rule 1.15, RPC, and Rule 417, SCACR.

In the Client I case, the panel found that in May 2003, Mr. Jordan deposited settlement funds into a client trust account and improperly used the funds to pay attorney's fees and costs to his law firm before his bank collected the funds, in violation of Rule 1.15(f), RPC. Between May 2003 and February 2004, Mr. Jordan made a series of payments to the client while he negotiated a lien held by a workers' compensation carrier. In July 2005—before Mr. Jordan settled the lien—he dissolved his law firm without an accurate accounting of the funds held in trust for the client and claims he left the funds in a trust account under the control of his former partner. Mr. Jordan ultimately paid the client with his personal funds after learning from the former partner's bookkeeper "that no funds remained in trust for his clients." The panel found Mr. Jordan violated Rule 1.15, RPC, and Rule 417, SCACR. The panel also found Mr. Jordan failed to supervise a nonlawyer assistant in violation of Rule 5.3, RPC.

In the Client J case, the panel found Mr. Jordan collected a class action settlement in three installments. When he transferred the first settlement installment from one trust account into a second trust account, he failed to account for $10,000 of the settlement funds. He also erroneously paid himself an additional $10,000 for partial reimbursement of costs. Six years after receiving the final settlement installment, approximately $12,000 of the settlement remained unclaimed, but Mr. Jordan could not locate the funds. The panel found Mr. Jordan violated Rules 1.1, 1.3, 1.5, and 1.15, RPC, Rule 407, SCACR, and Rule 417, SCACR. The panel also found Mr. Jordan failed to supervise a nonlawyer assistant in violation of Rule 5.3, RPC.

In the Client K case, the panel found Mr. Jordan transferred approximately $42,000 held in trust for a client through several trust accounts. Mr. Jordan then dissolved his law firm without an accurate accounting of the Client K funds remaining in the firm's trust account. When he requested the trust balance from his former partner's bookkeeper, he "was informed by [the] bookkeeper that there were no funds remaining in the [Client K] matter." He paid the client using earned fees from another client's case and funds from a check he received from an associate. The panel found Mr. Jordan violated Rule 1.15, RPC, and Rule 417, SCACR.

In the Client L case, the panel found Mr. Jordan disbursed settlement funds to and on behalf of the client, including a $2,600 check to pay a doctor bill. According to the panel report, the payee never negotiated the check, and Mr. Jordan did not discover the outstanding check until approximately four years after the settlement "when his accountant identified it as unpaid." However, he was unable to locate the funds in his trust accounts. The panel found Mr. Jordan violated Rules 1.3 and 1.15, RPC, and Rule 417, SCACR. The panel also found Mr. Jordan failed to supervise a nonlawyer assistant in violation of Rule 5.3, RPC.

In the Client M case, the panel found Mr. Jordan—after paying fees and expenses—consolidated into a single trust account funds held in trust for the estate of his client. In doing so, he included almost $18,000 more in the account than he actually held in trust for the estate. After disbursing the correct amount of funds to the estate, he could not identify who was entitled to the additional $18,000 remaining in the trust account. Although Mr. Jordan denied committing any misconduct in this case, the panel found clear and convincing evidence that Mr. Jordan violated Rule 1.15, RPC, and Rule 417, SCACR.

In the Client N case, the panel found Mr. Jordan deposited a settlement check into a trust account, improperly disbursed the settlement funds before his bank collected the check, and paid himself the full fee and reimbursement of his expenses despite his agreement to share the fee equally with co-counsel. Mr. Jordan paid his co-counsel six months later after co-counsel brought the issue to his attention. The panel found Mr. Jordan violated Rule 1.15, RPC.

In the Client O case, the panel found Mr. Jordan improperly disbursed settlement funds to himself before his bank collected the funds, paid himself fees on portions of a settlement he had not yet collected, did not maintain separate client ledgers for two clients, and treated the clients' settlements as one fund from which he could collect his fees. The panel found Mr. Jordan violated Rule 1.15, RPC, and Rule 417, SCACR.

As to the first set of formal charges, Mr. Jordan contested the allegation that he violated Rule 8.4(d), RPC, an allegation that he violated Rule 8.4(e), RPC, Rule 407, SCACR, one of the allegations that he violated Rule 1.15, RPC, and one of the allegations that he violated Rule 417, SCACR. He admitted the remaining violations. The panel made a factual finding that Mr. Jordan did not act with a

dishonest or selfish motive in violation of Rule 8.4(d), RPC. The panel explained "no evidence was offered by [Disciplinary Counsel] that would establish or suggest that [Mr. Jordan] was dishonest in handling [his] trust account at any time" and stated, "While there was a pattern of accounting errors made by [Mr. Jordan], none amounted to dishonest or fraudulent conduct." However, the panel found by clear and convincing evidence Mr. Jordan violated Rule 1.15, RPC, and Rule 417, SCACR, in the case in which he denied violating those rules. The panel did not address the allegation that Mr. Jordan violated Rule 8.4(e), RPC.

In its report, the panel considered several mitigating factors, including Mr. Jordan's chemical dependency. According to a physician who testified at the December 5, 2011 hearing, Mr. Jordan was addicted to prescription drugs from 1997 to 2004, and his addiction caused memory loss and other serious side effects. Mr. Jordan blamed the addiction for causing his failure to account for client funds and keep accurate records. The panel considered several other mitigating factors, including Mr. Jordan's personal and emotional problems, his cooperation in disciplinary proceedings, his timely good faith effort to make restitution or rectify the consequences of his misconduct, and the remoteness in time of his offenses. The panel also considered several aggravating factors—including multiple disciplinary offenses, a pattern of misconduct, and prior offenses[2]—and recommended Mr. Jordan be publicly reprimanded.

On October 9, 2012—while the panel's initial recommendation was pending before this Court—Disciplinary Counsel received a complaint from an attorney who referred several cases to Mr. Jordan between 2009 and 2012. This Court stayed the first set of charges pending an investigation into the new complaint. On May 8, 2015, Disciplinary Counsel informed the Commission the parties agreed to waive

[2] Mr. Jordan has received two letters of caution for misconduct in other situations. In 2001, he received a letter of caution for misplacing client records in violation of Rules 1.3 and 1.15, RPC. In 2007, he received a letter of caution for refusing to pay for mediation services. The panel considered "the fact that [Mr. Jordan] has been cautioned before for concerns about Rule 1.15" as an aggravating factor in its panel report as to the first set of charges. *See* Rule 2(r), RLDE, Rule 413, SCACR ("The fact that a letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against the lawyer unless the caution or warning contained in the letter of caution is relevant to the misconduct alleged in the proceedings.").

the filing of the second set of charges and submit stipulations of fact and proposed amended panel reports without an evidentiary hearing. On June 3, 2015, the Commission accepted the waiver of a hearing but directed Disciplinary Counsel to file formal charges, and on June 4, 2015, Disciplinary Counsel filed a second set of formal charges. On September 8, 2015, the panel issued an addendum to its original report, in which it found the stipulated facts constituted an admission by Mr. Jordan of misconduct in seven cases.

In each of the seven cases, the attorney referred a client to Mr. Jordan, the two attorneys agreed to evenly split Mr. Jordan's fee from the client's claim, Mr. Jordan did not inform the client of the fee-sharing arrangement or obtain the client's consent to the arrangement, and in at least six of the cases, Mr. Jordan did not promptly pay his co-counsel's share of the fee. The hearing panel did not address the propriety of Mr. Jordan's agreement to evenly split the fee Mr. Jordan earned from each of the cases, other than noting its general finding that the

> division of the fee was not based on the proportion of the work done by each lawyer, but rather based on an understanding that both lawyers would be accountable for the representation and that [the referring attorney] . . . and his staff would be generally available to [Mr. Jordan] if he required assistance.

To place the second set of charges in context, it is important to note the timing of Mr. Jordan's misconduct in relation to the proceedings for the first set of charges. Disciplinary Counsel filed the first set of charges on January 7, 2011, and Mr. Jordan filed his responses to those charges in March 2011. Mr. Jordan appeared at a full hearing on the first set of charges on December 5, 2011. We describe each of the cases in the second set of charges below.

In the Client P case, Mr. Jordan entered into a forty-percent fee agreement with a client on May 5, 2009, and agreed to pay the referring attorney half the fee. In September 2010, Mr. Jordan settled the claim for $100,000 and presented to the client a settlement disbursement statement showing $40,000 in fees and $5,792.43 in costs payable to Mr. Jordan. The second set of charges and stipulations of fact stated Mr. Jordan claimed he paid the referring attorney's share of the fee, but he could not produce any document or record to support his assertion and failed to maintain records of the settlement check, deposit of settlement funds, or canceled

disbursement checks. However, in an August 2015 filing, Mr. Jordan submitted documents to the panel showing he paid the referring attorney's fee and reimbursement of costs in January 2011—four months after the payment was due and contemporaneous with the filing of the first set of formal charges.

In the Client Q case, Mr. Jordan settled a case in the fall of 2010 for $52,500. He issued the client a settlement disbursement statement showing $21,000 in fees and $3,852.24 in costs payable to Mr. Jordan and $758 in costs payable to the referring attorney. The addendum and stipulations of fact stated Mr. Jordan claimed he paid the referring attorney's share of the fee but could not produce documents proving his assertion. The record shows Mr. Jordan did not pay the referring attorney's share of the fee until March 2011.

In the Client R case, Mr. Jordan settled the client's case in January 2011 but did not hold the referring attorney's share of the fee separately. Mr. Jordan also did not promptly deliver the share to the attorney or notify him of the settlement. Instead, according to the addendum, he "deposited two trust account checks into his operating account" for the entire amount of the fee and costs. In June 2011, the referring attorney sent Mr. Jordan a list of referred cases and asked Mr. Jordan about the status of the cases. The list incorrectly showed the Client R case as pending, and Mr. Jordan informed the attorney the listed status was correct—despite settling the case several months prior. Approximately a week later, Mr. Jordan sent the attorney a list of referred cases that incorrectly showed the Client R case as "Filed/Litigating." In December 2011, the attorney sent Mr. Jordan another list of cases—which still listed the Client R case as pending—and Mr. Jordan again incorrectly confirmed the Client R case was still pending. Mr. Jordan incorrectly confirmed the case was still pending a fourth time in January 2012. During a telephone conversation in September 2012, Mr. Jordan again incorrectly informed the referring attorney the case was still pending. After the attorney's assistant checked the court docket and learned the case settled in January 2011, Mr. Jordan "issued operating account checks to [the referring attorney] for one half of the fee and reimbursement of costs." Mr. Jordan "had to deposit funds into his operating account from an equity line of credit" to cover the checks. Mr. Jordan claimed he incorrectly stated the status of the case because he confused it with a similar case. Mr. Jordan also claimed he did not pay the referring attorney his share of the fees and costs because the case did not appear on Mr. Jordan's "master list of cases with associated counsel." However, Mr. Jordan could not produce the alleged master list to Disciplinary Counsel.

In the Client S case, Mr. Jordan settled the case in May 2011 for $80,000. On four occasions—the two June 2011 lists, the December 2011 list, and the January 2012 list described in the Client R case—Mr. Jordan misrepresented to the referring attorney the status of the Client S case as pending or "Filed/Litigating." He paid the referring attorney's share of the fee in September 2012 after the attorney contacted him by telephone and informed him the court's online docket showed the Client S case had been resolved.

In the Client T case, Mr. Jordan settled the case in October 2011 and deposited the settlement check into his trust account. On October 31, 2011, he "deposited trust account checks into his operating account" for the entire fee and costs. Mr. Jordan did not hold the referring attorney's share of the fee in trust and did not inform the attorney he settled the case. On December 27, 2011, when the attorney sent Mr. Jordan the list of cases described in the Client R and Client S cases and asked about their status, Mr. Jordan misrepresented that the Client T case was still pending. Disciplinary Counsel discovered Mr. Jordan's failure to pay the referring attorney's share of the fee during this disciplinary investigation. At the time the panel issued the addendum—September 8, 2015—Mr. Jordan still had not paid the referring attorney's share of the fee because he claimed he "believe[d] that [the attorney] owe[d] him $20,000.00 in connection with" another case.

In the Client U case, the parties stipulated similar events occurred as in the Client T case. On December 14, 2011, Mr. Jordan deposited a settlement check into his trust account, then "deposited trust account checks into his operating account" for the entire fee and costs. He incorrectly confirmed the status of the Client U case on the referring attorney's December 27, 2011 list, which showed the case was pending. In January 2012, Mr. Jordan again misrepresented that the case was pending. At the time of the addendum, Mr. Jordan still had not paid the referring attorney's share of the fee for the same reason he asserted in the Client T case.

In the Client V case, the client suffered a back injury in a workplace accident and retained an attorney to represent him in a workers' compensation claim. After resolving the workers' compensation claim, the attorney referred the client's third-party claim to Mr. Jordan. Mr. Jordan also represented the client's wife on a claim for loss of consortium. The client signed a fee agreement and gave Mr. Jordan power of attorney, but his wife did not. In September 2012, Mr. Jordan settled the case for

$500,000 and signed a settlement agreement on behalf of both clients without showing the agreement to either. Because Mr. Jordan did not show them the agreement prior to signing it, the agreement contained a false statement that the clients had read the agreement. On September 13, 2012, Mr. Jordan "deposited the settlement proceeds into his trust account," then improperly "transferred $200,000 from his trust account to his operating account as attorney's fees" before his bank had collected the funds. The referring attorney was entitled to one half of the fee, but Mr. Jordan did not hold his share of the fee in trust and instead deposited the entire $200,000 fee into his law firm's operating account. The clients disputed the amount of the fee calculated by Mr. Jordan and asserted Mr. Jordan had agreed the attorney's fee "would be calculated as forty percent of the net proceeds after repayment of $100,000.00 in subrogation to the workers' compensation carrier." On September 25, 2012, Mr. Jordan transferred $100,000 back into his client trust account. He paid $80,000—the referring attorney's share according to the fee amount asserted by the client—to the referring attorney and added $40,000 to the client's net recovery. Mr. Jordan "fully disbursed" the settlement proceeds from his trust account on October 26, 2012.

Contrary to its findings regarding the first set of charges, the hearing panel found the stipulated facts in the second set of charges support a finding that Mr. Jordan violated Rule 8.4(d), RPC, by "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."

The panel reconsidered its findings of aggravating and mitigating factors in its original report. First, the panel explained it no longer considered the remoteness in time of the events as a mitigating factor because Mr. Jordan's "practices of not paying earned fees to co-counsel and not maintaining adequate financial records continued at least from September 2010 . . . through September 2012"—after the January 2011 first set of charges and even after the December 2011 hearing. Second, the panel found Mr. Jordan made "false statements" and committed "other deceptive practices during the discipline process," and the panel considered those as aggravating factors. According to the addendum, Mr. Jordan testified at the 2011 hearing that he resolved his accounting issues and made a "significant effort" to operate his law firm in accordance with the Rules of Professional Conduct. However, the panel found Mr. Jordan "was actively engaging in the very same professional misconduct at the time he was answering the first Formal Charges and appearing before this Panel at the disciplinary hearing."

Finally, the panel rejected a "lack of a dishonest or selfish motive" as a mitigating factor. The panel stated, "Because the instances of converting co-counsel's earned fees to his own use continued long after [Mr. Jordan] purportedly addressed his staffing and accounting issues, resolved his family problems, and successfully overcame his debilitating mental disorder and addiction, we can only attribute his ongoing misconduct to selfish and dishonest motives." The panel recommended Mr. Jordan be disbarred.

II. Analysis

This Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law. *In re Davidson*, 409 S.C. 321, 327, 762 S.E.2d 556, 559 (2014). However, "the findings and conclusions of the Panel are entitled much respect and consideration." 409 S.C. at 328, 762 S.E.2d at 559. "A disciplinary violation must be proven by clear and convincing evidence." *In re Samaha*, 399 S.C. 2, 10, 731 S.E.2d 277, 281 (2012) (quoting *In re Greene,* 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006)).

We accept the findings in the hearing panel report as to the first set of charges, Mr. Jordan's stipulation of the facts alleged in the second set of charges, and the findings in the addendum to the hearing panel report as to the second set of charges. Mr. Jordan's stipulations and the panel's findings demonstrate by clear and convincing evidence that Mr. Jordan violated numerous provisions of the Rules of Professional Conduct, including Rules 1.1, 1.3, 1.5(e), 5.1, and 5.3, and the financial recordkeeping requirements and client trust account safeguards of Rule 417, SCACR. We specifically discuss Mr. Jordan's violations of the following additional Rules of Professional Conduct.

A. Rule 1.5(c), RPC

Rule 1.5(c) establishes requirements for contingent fee agreements and disbursement of money received in contingent fee cases. The hearing panel found that in six cases from the second set of charges, Mr. Jordan "did not disclose the fee division between [himself] and [the referring attorney] as required by Rule 1.5(c)," and Mr. Jordan admitted the violation. We accept Mr. Jordan's admission that he violated Rule 1.5(c).

B. Rule 1.5(e), RPC

Rule 1.5(e)(1) states, "A division of a fee between lawyers who are not in the same firm may be made only if . . . the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation." Rule 1.5(e)(2) allows lawyers to divide a fee only if "the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing." We accept Mr. Jordan's admission that he violated Rule 1.5(e).

i. Rule 1.5(e)(2)—Written Confirmation

Mr. Jordan entered into fee-sharing arrangements in seven cases described in the second set of charges without obtaining his clients' written confirmation of their agreement to the fee division. Therefore, Mr. Jordan violated Rule 1.5(e)(2).

ii. Rule 1.5(e)(1)—Division of Work or Responsibility

The record reflects that as far as Mr. Jordan knew, the referring attorney performed no work on any of the cases. From Mr. Jordan's perspective, therefore, an even division of the fee was not "in proportion to the services performed by each lawyer." The hearing panel found Mr. Jordan split the fee "based on an understanding that both lawyers would be accountable for the representation and that [the referring attorney] and his staff would be generally available to [Mr. Jordan] if he required assistance." Because the hearing panel's finding does not satisfy the requirement that "each lawyer assumes joint responsibility for the representation," we disagree. The comments to Rule 1.5 explain,

> Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer who assumes joint responsibility should be available to both the client and the other fee-sharing lawyer as needed throughout the representation and should remain knowledgeable about the progress of the legal matter.

Rule 1.5, cmt. 7, RPC.

Mr. Jordan did not keep the referring attorney updated on the progress of the cases. If anything, the record indicates Mr. Jordan concealed the progress of the cases from the referring attorney—for as long as twenty months in one case. Mr. Jordan could not have considered the referring attorney to have assumed joint responsibility for the case after he intentionally kept the lawyer unaware for twenty months that their case had settled. When Mr. Jordan then shared the fee with him on an even division, he did so in violation of Rule 1.5(e)(1). *See also In re Hart*, 361 S.C. 392, 395, 605 S.E.2d 532, 534 (2004) ("Respondent acknowledges . . . a written agreement with the client in which both attorneys acknowledged full responsibility for the matter was required."). Therefore, Mr. Jordan violated Rule 1.5(e)(1).

C. Rule 1.8(a), RPC

Rule 1.8(a)(1) provides,

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

Mr. Jordan admitted he accepted a loan from a client without complying with the requirements of Rule 1.8(a)(1). Mr. Jordan committed three separate violations. First, the transaction was not fair or reasonable to his client because Mr. Jordan did not agree to pay any interest or otherwise promise to compensate his client for the time value of the client's money. While it is also true that Mr. Jordan did not actually pay any interest upon repayment of the principal, the violation was complete at the time he took the loan because his failure to promise to pay interest gave him the benefit of the client's money without any obligation to pay for that benefit. Second, the transaction was not fair or reasonable to his client because Mr. Jordan admitted he "did not provide for any timetable for repayment," and thus, he gave the client no contractual right to demand repayment. Third, Mr. Jordan admitted in his response that he did not transmit the terms of the loan to the client in writing.

As to Rule 1.8(a)(2), Mr. Jordan admitted he did not advise the client to seek the advice of independent counsel prior to making the loan. Mr. Jordan also violated Rule 1.8(a)(3) because he accepted the loan from his client without obtaining her written informed consent to the essential terms of the transaction or to his conflict of interest.

D. Rule 1.15(a), RPC

Rule 1.15(a) requires lawyers to hold property belonging to other people in trust:

> A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.
> . . . Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation. A lawyer shall comply with Rule 417, SCACR (Financial Recordkeeping).

We accept Mr. Jordan's admission that he violated Rule 1.15(a). First, he failed to hold money belonging to co-counsel separate from his own funds. In these instances, Mr. Jordan paid fees belonging to co-counsel pursuant to fee-sharing agreements into his own account instead of paying the fees directly to co-counsel from his trust account. A lawyer holding funds owed to his co-counsel pursuant to a fee-sharing agreement is subject to the requirements of Rule 1.15 as to those funds. *See Hamilton v. Ky. Bar Ass'n*, 180 S.W.3d 470, 473 (Ky. 2005) (finding a lawyer who took clients from his former law firm and agreed to pay the former firm a portion of any settlement he obtained for those clients violated Kentucky's Rule 1.15—which is similar to our Rule 1.15—"by failing to promptly notify a third party claimant[—his former law firm—]of the receipt of settlement proceeds in which the third party had an interest; failing to promptly deliver to that third party funds that it was entitled to receive; and failing to keep the funds in a separate bank account"); *see also* ANN. MODEL RULES OF PROF'L CONDUCT r. 1.15 annot. (AM. BAR ASS'N 2015) (Conversion and Misappropriation) ("A court may apply Rule 1.15 . . . to a lawyer who misuses money that belongs to a law firm.").

Second, Mr. Jordan violated Rule 1.15(a) by overpaying himself or his co-counsel using client funds. In the Client A case, Mr. Jordan settled the case and overpaid himself by $666.67. In the Client C case, Mr. Jordan settled the case and paid himself a forty-percent fee despite agreeing to a one-third fee. He then transferred the funds held in trust for the client—minus $382.21—into a certificate of deposit account but could not locate the additional $382.21 he failed to transfer. Because he overpaid himself and lost a portion of the funds, he failed to hold the client's money in trust as required by Rule 1.15(a).

As noted above, in the Client E case, Mr. Jordan agreed to evenly share the fee with another attorney, used his half of the fee to cover a shortage in another client's account ledger, paid himself co-counsel's share of the fee, then paid himself half the fee again. This overpayment to himself came out of client funds in violation of Rule 1.15(a). In the Client J class action case, Mr. Jordan deposited a settlement installment into a trust account. He then transferred the settlement installment—minus approximately $10,000—into a different trust account. Mr. Jordan could not account for the missing $10,000. Mr. Jordan later erroneously paid himself $10,000 more than he was entitled to receive for reimbursement of expenses. Therefore, he did not properly hold his clients' funds separate from his own. In the same case, Mr. Jordan also could not locate approximately $12,000 that had not been claimed and therefore should have remained in a trust account.

The third way Mr. Jordan violated Rule 1.15(a) is he failed to maintain adequate records of money held in trust for clients and co-counsel. In three cases, Mr. Jordan transferred funds held in trust for a client through several trust accounts but did not keep records of the transfers. In two cases, Mr. Jordan overdrew a client's trust account ledger when he paid his co-counsel because he had already paid himself the full fee, did not keep a record of the payment to himself, and therefore claims he did not realize he had already paid himself the full fee when he paid his co-counsel. Additionally, in two cases, Mr. Jordan claims he left funds in trust for his clients when he dissolved his law firm. However, when he asked his former partner to disburse the funds he claimed were still in a trust account, his former partner informed him there were no funds held in trust for those clients.

Despite his agreement to stipulate to the facts alleged and waive an evidentiary hearing, Mr. Jordan portrays his Rule 1.15(a) violations as simple mistakes by

arguing he did not realize he had already paid himself his share of the fee. We find Mr. Jordan violated the rule in each of the instances described above, and none of the violations were merely technical. The recordkeeping provision of Rule 1.15(a) protects lawyers who obey the rule because they always have detailed records to show how client funds and the funds of others were maintained and distributed. The recordkeeping provision also prevents lawyers who disobey the rule from claiming they made a simple mistake. In Mr. Jordan's case, he admitted violating the recordkeeping provision of Rule 1.15 in several cases in the first set of formal charges. At the same time he claimed to the hearing panel he was making a "serious effort" to comply with the Rules of Professional Conduct, he not only continued to commingle client and co-counsel funds with his own in violation of Rule 1.15(a), he also continued to conceal that misconduct by failing to keep adequate records. These violations were not simple mistakes—they were intentional.[3]

E. Rule 1.15(d), RPC

When a lawyer receives funds in which a client or third person has an interest, the lawyer "shall promptly notify the client or third person." Rule 1.15(d), RPC. Additionally, the lawyer must "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property." *Id.* As we noted in our analysis of Rule 1.15(a), a "third person" under this rule includes co-counsel.

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[3] Rule 1.15 does not include an element of intent. *See Attorney Grievance Comm'n v. Stolarz*, 842 A.2d 42, 49 (Md. 2004) (applying a rule similar to our Rule 1.15 and stating, "This Court has explained on numerous occasions that with regard to Rule 1.15 'an unintentional violation of this rule . . . is still a violation of the attorney's affirmative duties imposed by the rule'" (alteration in original) (quoting *Attorney Grievance Comm'n v. Sheridan*, 741 A.2d 1143, 1154 (Md. 1999)); *In re Mayeux*, 762 So. 2d 1072, 1075 (La. 2000) (applying a rule similar to our Rule 1.15 and stating, "The lawyer's mistake, good faith, or lack of conscious wrongdoing does not negate an infraction of the rule, but bears only on the penalty to be imposed." (citation omitted)). Thus, our finding that Mr. Jordan acted intentionally is not necessary to find he violated Rule 1.15, but does factor into whether he violated Rule 8.4(d) and our decision regarding the appropriate sanction.

In four cases described in the first set of formal charges—the Client A, D, E, and N cases—Mr. Jordan agreed to share a fee with co-counsel but did not promptly notify co-counsel or promptly deliver co-counsel's share of the fee. The amount of time between settlement and payment to co-counsel in these cases ranged from six months to two and a half years.

Mr. Jordan also failed to comply with Rule 1.15(d) in at least six cases described in the second set of charges. In those cases, Mr. Jordan and the referring attorney agreed to evenly share the fee Mr. Jordan received when he resolved the case. When Mr. Jordan settled each case, he collected the fee but did not notify the referring attorney he had received the fee. He also misrepresented to the referring attorney that several of the cases were still pending months after settling the cases, thereby concealing from the referring attorney that he was holding funds in which he knew the referring attorney claimed an interest. Moreover, Mr. Jordan did not promptly deliver the referring attorney's share of the fee in those six cases, and in two cases, Mr. Jordan still has not delivered the referring attorney's share. Because Mr. Jordan did not promptly notify his co-counsel or promptly deliver co-counsel's funds, he violated Rule 1.15(d).

F. Rule 1.15(f), RPC

Rule 1.15(f)(1) prohibits lawyers from disbursing trust account funds "unless the funds to be disbursed have been deposited in the account and are collected funds." The comments to Rule 1.15 explain the "requirement in Rule 1.15(f)(1) that funds be deposited and collected in the lawyer's trust account prior to disbursement is fundamental to proper trust accounting." Rule 1.15, cmt. 5, RPC. To comply with Rule 1.15(f)(1), a lawyer must wait until a check deposited in a trust account has cleared the bank before disbursing the funds from the check. Rule 1.15(f)(2) provides exceptions to the Rule 1.15(f)(1) requirements. *See, e.g.*, Rule 1.15(f)(2)(iii), RPC (providing an exception for a "properly endorsed government check"); Rule 1.15(f)(2)(iv), RPC (providing an exception for checks from insurance companies that do not exceed $50,000).

Mr. Jordan violated Rule 1.15(f)(1) in six cases—four cases described in the first set of formal charges and two cases described in the second set of charges. In each of those cases, Mr. Jordan received settlement checks and deposited the checks in a trust account. On the day of the initial deposit or the day after the deposit, Mr. Jordan

wrote checks for the funds from the trust account to his law firm's accounts—before his bank collected the money. The Rule 1.15(f)(2) exceptions do not apply to any of these cases. Therefore, Mr. Jordan's disbursement of funds in each of the six cases violated Rule 1.15(f)(1). *See* Rule 1.15, cmt. 8, RPC ("A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than Subsections (i) through (vi) of Rule 1.15(f)(2) may be grounds for a finding of professional misconduct.").

G. Rule 8.4(d), RPC

Rule 8.4(d) states, "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

When the panel reevaluated its recommendation after considering the second set of charges, it found Mr. Jordan had "dishonest and selfish motives" and engaged in "deceit and misrepresentation in the disciplinary investigation" in violation of Rule 8.4(d). The panel placed particular reliance on the timing of Mr. Jordan's misconduct—many of his acts of misconduct in the second set of charges occurred after Disciplinary Counsel filed the first set of formal charges on January 7, 2011, and some of the misconduct occurred even after the December 5, 2011 hearing on the first set of charges. The panel found, "Because the instances of converting co-counsel's earned fees to his own use continued long after [Mr. Jordan] purportedly addressed his staffing and accounting issues, resolved his family problems, and successfully overcame a debilitating mental disorder and addiction, we can only attribute his ongoing misconduct to selfish and dishonest motives." For example, in May 2011—approximately four months after the first set of charges—Mr. Jordan settled the Client S case, did not hold his co-counsel's share of the fee in trust or inform co-counsel of the settlement, and deposited the entire fee into his operating account. In June 2011, December 2011, and January 2012, Mr. Jordan informed his co-counsel that two cases were still pending, despite settling the cases months earlier. Similarly, the majority of the misconduct in the three other cases occurred after Disciplinary Counsel filed the first set of formal charges covering the same misconduct.

The panel found Mr. Jordan engaged in "false statements and other deceptive practices during the discipline process," such as misrepresenting that he had resolved the "bookkeeping" issues that he blamed at the December 2011 hearing for his failure

to maintain adequate records of his trust accounts. The timing supports the panel's conclusion. Mr. Jordan was engaging in misconduct at the same time he asserted to the panel he had fixed the issues he blamed for identical misconduct in the first set of charges. In his March 2011 response to the first set of charges, Mr. Jordan asserted he "demonstrated he can ethically run a law practice for the last half a decade and he has put in place the appropriate safeguards to ensure that this issue never recreates itself." Contrary to that assertion, Mr. Jordan committed much of the misconduct in the second set of charges within several months of his response, and he lied to his co-counsel about the status of two cases within weeks of appearing at the hearing. The panel responded in the following manner to Mr. Jordan's claim that he had "turn[ed] his practice into a model of how to practice law in an appropriate way":

> Yet, less than two months before the hearing, [Mr. Jordan] had misappropriated [the referring attorney's] earned fees of $2,500.00 in the [Client T] matter. . . . Just about a week after the hearing, [Mr. Jordan] misappropriated [the referring attorney's] earned fees of $1,800.00 in the [Client U] matter. And, on January 10, 2012, [Mr. Jordan] was assuring [the referring attorney] that these cases were still pending.

Mr. Jordan also claimed he discontinued his practice of disbursing attorney's fees and costs before his bank collected the funds—in violation of Rule 1.15(f)—by asserting at the December 2011 hearing, "That's no longer the practice we do at all." The panel again rejected Mr. Jordan's claim and stated, "To the contrary, . . . that is exactly what [Mr. Jordan] continues to do. In May 2011, he paid himself over $34,000.00 in attorney's fees and costs in the [Client S] matter the day after deposit. In September 2012, he paid himself $200,000.00 in attorney's fees in the [Client V] matter the day after deposit."

Mr. Jordan has demonstrated he is a highly intelligent individual who has successfully represented many clients during his career. Throughout these proceedings, he has claimed he made honest mistakes regarding the distribution of money and never intended to take his co-counsels' money. Given the timing of his misconduct in relation to these disciplinary proceedings, however, we cannot accept Mr. Jordan's claim. It is difficult to believe a lawyer of Mr. Jordan's intelligence and experience who has been formally charged with taking money owed to co-counsel

could be so careless as to settle a case and not check to see if any co-counsel was entitled to a portion of the fee or verify whether he had settled the case before telling co-counsel the case was still pending. As the panel noted, "it defies logic that he would be so careless given the serious nature of the disciplinary proceedings against him at the time." We find this misconduct was not careless—it was intentional.

Thus, we agree with the hearing panel and find Mr. Jordan committed professional misconduct on multiple occasions by "engag[ing] in conduct involving dishonesty, fraud, deceit [and] misrepresentation" in violation of Rule 8.4(d).

III. Sanction

Mr. Jordan argues his misconduct was unintentional and the panel's original recommendation of a public reprimand is the appropriate sanction. He admits failing to keep required records, but he contends this lack of records caused him to make innocent mistakes when he misrepresented the status of his cases to co-counsel. Additionally, Mr. Jordan argues this case arose from a civil dispute with the referring attorney over fees and is therefore inappropriate for a disciplinary proceeding. In support of that argument, Mr. Jordan cites twenty-seven cases over the last three years in which this Court has disbarred a lawyer. In those twenty-seven cases, Mr. Jordan contends, no lawyer has been disbarred for a fee dispute with another lawyer or for failing to obtain a client's consent to a fee-sharing arrangement. Finally, Mr. Jordan argues his personal problems—particularly a battle with lymphoma—mitigate the severity of his misconduct. Accordingly, Mr. Jordan argues the appropriate sanction is a public reprimand.

We acknowledge much of Mr. Jordan's misconduct, such as that described in the first set of formal charges, warrants only a public reprimand. However, considering his pattern of misconduct as a whole—including the timing of the allegations—we agree with the panel that Mr. Jordan's misconduct was the product of "selfish and dishonest motives" rather than "a series of simple oversights and accounting errors." Thus, a public reprimand is inadequate and a more severe sanction is warranted.

First, in its report on the first set of charges, the panel considered "the fact that [Mr. Jordan] has been cautioned before for concerns about Rule 1.15" as an aggravating factor. In its report on the second set of charges, the panel found "a continuation of this pattern of misconduct during the time period leading up to—and continuing for

some time after—the disciplinary hearing held on December 5, 2011." For example, Mr. Jordan's repeated failure to keep required records—particularly as to the second set of charges—allowed him to deny intentional misconduct throughout Disciplinary Counsel's investigation into both the first set of charges and the second set of charges. The hearing panel noted Mr. Jordan's claim "that his misconduct was 'simply a failure to keep adequate records' and 'at worst negligent.'" Like the hearing panel, we are unpersuaded by Mr. Jordan's argument that his lack of records caused him to make innocent mistakes.

Second, we have considered Mr. Jordan's arguments that this is a civil fee dispute and no lawyer has been disbarred for failing to disclose a fee-sharing arrangement to a client. Mr. Jordan and his co-counsel do have a civil dispute over some of their fee-sharing arrangements, but within that dispute arose allegations—and now findings—of professional misconduct. We are not imposing—and the panel is not recommending—a sanction on Mr. Jordan solely for his civil fee dispute or his failure to obtain his clients' consent to fee-sharing arrangements. Rather, the sanction is based on a pattern of intentional misconduct over many years, including multiple instances of Mr. Jordan deliberately using shoddy recordkeeping to cover up his attempts to steal fees from his co-counsel.

Third, we are highly sensitive to Mr. Jordan's personal problems, including his prescription drug addiction, his family issues, and his assertion that his struggle with lymphoma caused him to make careless mistakes. As to the prescription drug issues, Mr. Jordan explained he was addicted to benzodiazepines from 1997 through 2004. Although he overcame his addiction in 2004, he argues such an addiction can have long-term cognitive effects, including memory loss. As to his health issues, Mr. Jordan filed affidavits prior to oral argument from two doctors explaining he may have been suffering from symptoms of lymphoma as early as March or April 2011. In one of the affidavits, a doctor stated, "Lymphoma can affect a patient's ability to complete normal activities of daily living and it was clearly impacting his ability to function." Mr. Jordan cites Standard 9.3 of the American Bar Association's Annotated Standards for Imposing Lawyer Sanctions to support his argument that this Court must consider his mitigating factors. Standard 9.32 does include mental disability and chemical dependency as factors that *may* be considered in mitigation. However, the timing of Mr. Jordan's misconduct in the second set of charges undermines his arguments. That misconduct began around September 2010 when Mr. Jordan accepted a fee and failed to pay co-counsel's share in the Client P case.

Standard 9.32(i) provides the factors serve as mitigation "*when* . . . the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and *recurrence of that misconduct is unlikely*." ANN. STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32(i) (AM. BAR ASS'N 2015) (emphasis added). Mr. Jordan engaged in a pattern of misconduct prior to the earliest possible beginning of his cancer symptoms and well after he overcame his prescription drug problems, and he continued that pattern for several years. In fact, Mr. Jordan stipulated his "medical conditions arose after the conduct set forth in [the second set of charges] and [he] does not assert that those conditions had any causative effect on that conduct." Therefore, his personal problems and health problems do not mitigate the need for a severe sanction.

Finally, the timing of Mr. Jordan's misconduct cannot be reconciled with his assertion that the misconduct was accidental. As we noted in our analysis of Rule 8.4(d), RPC, Mr. Jordan is a highly intelligent person. It makes no sense that a person of Mr. Jordan's intelligence and experience could "accidentally" fail to pay his co-counsel, then—while under investigation by Disciplinary Counsel for doing so—continue to accidentally do the same thing. As the panel noted in its report on the second set of charges, "Even if we were to give [Mr. Jordan] the benefit of the doubt and attribute his repeated misrepresentations to [the referring attorney] to inadvertence or poor recollection, it defies logic that he would be so careless given the serious nature of the disciplinary proceedings pending against him at the time." Standing alone, the failure to pay co-counsel in the first set of charges would not support a finding of dishonesty, fraud, deceit, or misrepresentation. The second set of charges, however, in which Mr. Jordan committed the misconduct at the same point in time he was claiming the previous conduct was accidental and he had taken steps in the management of his firm to prevent it, leave no room for any finding other than intentional misconduct. As we have stated, much of Mr. Jordan's misconduct does not warrant more than a public reprimand. We agree with the panel, however, that Mr. Jordan's conduct in the second set of charges was "selfish and dishonest" and therefore violated the Rule 8.4(d) prohibition against "conduct involving dishonesty, fraud, deceit or misrepresentation."

"This Court has recognized that 'the primary purpose of disbarment . . . is the removal of an unfit person from the profession for the protection of the courts and the public, not punishment of the offending attorney.'" *Davidson*, 409 S.C. at 328,

762 S.E.2d at 559 (quoting *In re Pennington*, 393 S.C. 300, 304, 713 S.E.2d 261, 263 (2011)). We find the deliberate misconduct Mr. Jordan repeatedly committed over a long period of time places him squarely into the category of people for which disbarment is appropriate.

IV. Conclusion

Mr. Jordan is **DISBARRED**. Within fifteen (15) days of the date of this opinion, Mr. Jordan shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur. Acting Justice Pleicones not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert Clenten Campbell, Respondent.

Appellate Case No. 2016-002528

Opinion No. 27735
Heard May 24, 2017 – Filed August 30, 2017

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara Marie Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Paul Thomas Collins, Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for Respondent.

PER CURIAM: This attorney disciplinary matter arises out of formal charges filed by the Office of Disciplinary Counsel against Robert Clenten Campbell of Walterboro. Because Campbell did not respond to the charges, the factual allegations are deemed admitted under Rule 24(a) of the Rules of Lawyer Discipline. Rule 413, SCACR. Thus, the sole issue before the Court is the appropriate sanction. A hearing panel of the Commission on Lawyer Conduct recommends we suspend Campbell for three years, order him to pay restitution and the costs of the proceedings, and order him to complete ethics training. Neither Campbell nor the Office of Disciplinary Counsel disagrees with the panel's recommendation, and neither party has filed a brief to this Court. We accept the panel's recommendation.

I. Factual Background

The charges against Campbell are based on his representation in three separate matters between December 2011 and June 2014.

Client A Matter

In May 2011, Client A paid Campbell $800 to assist him with a property damage claim, which arose in September 2010. Prior to hiring Campbell, Client A received an offer to settle the claim for $3,400. Campbell prepared a summons and complaint, and assumed his assistant would file and serve them. In late 2012, Campbell realized the summons and complaint had not been filed. Without telling Client A, Campbell prepared a new summons and complaint, and again assumed his assistant would file and serve them. In September 2013, the statute of limitations expired without the summons and complaint ever being filed. Rather than communicating this fact to Client A, Campbell prepared a document purporting to release the defendant in exchange for $3,400. Campbell advised Client A to sign the release, and then mailed the release and a letter requesting a settlement check to an insurance adjuster. However, Campbell had not communicated with the adjuster, much less negotiated a settlement agreement. The mail was returned marked "undeliverable." Campbell took no further action and did not communicate with Client A again. Client A eventually discovered the summons and complaint were never filed after he personally contacted the clerk of court to ask for information about his case. Client A never received any money on his claim, even the $3,400 he was offered before retaining Campbell.

Client B Matter

In June 2013, Client B hired Campbell to assist in the adoption of Client B's grandchild. Client B was unable to afford a retainer, but Campbell quoted a fee and agreed to begin representation without any upfront payment. In November 2013, Campbell filed an adoption petition on behalf of Client B, with Campbell's law firm paying the $175 filing fee in advance. Several months after Campbell left the firm, Client B paid Campbell $1,550 for his work. Campbell did not pay the fees over to the firm, nor did he reimburse the firm for the filing fee. Also, he did not maintain the fees in trust. Campbell did draft a voluntary relinquishment of parental rights for the child's parents to sign, but did nothing else. One year after Campbell filed the petition, the clerk of court informed Campbell the adoption action would be dismissed if he did not request a hearing within thirty days. He did not request a hearing and the action was dismissed. Campbell did not account for or reimburse any unearned fees related to this matter.

Client C Matter

In 2013, Client C contacted Campbell about representing him in his divorce action. Campbell told Client C he would represent him if he paid a retainer of $5,000. At the time, Client C, who is a medical professional, was treating one of the partners at Campbell's law firm. During a doctor's appointment, Client C asked the partner if the retainer price could be negotiated. The partner said he would discuss it with the other partners. Sometime later, Client C came to the law firm with a cashier's check for $5,000, and told the partner he had decided to pay the quoted retainer. The partner instructed Campbell to deposit the check in the law firm's trust account. Campbell took the check to the bank, but the teller would not accept it because it was not properly filled out. Campbell went to the issuing bank to get a replacement, but rather than making the check payable to the law firm, Campbell had the check made payable to himself and deposited it into his personal account. When the partners discovered what Campbell did and confronted him, Campbell falsely stated the issuing bank would not give him a replacement check and claimed he did not know what happened to Client C's $5,000. After hearing this, the partners decided to fire him. Campbell did, however, complete the work for Client C as a sole practitioner.

II. Procedural History

After learning of Campbell's actions, Disciplinary Counsel sent Campbell notices of investigation and subpoenas for the Client A, Client B, and Client C files. Although Campbell cooperated with Disciplinary Counsel's preliminary investigation, he did not respond to supplemental investigations and did not comply with any of the disciplinary subpoenas. We placed Campbell on interim suspension on October 29, 2015. Disciplinary Counsel then filed formal charges against Campbell, alleging he violated the following Rules of Professional Conduct: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.5 (Fees); Rule 1.15 (Safekeeping Property); Rule 1.16 (Declining or Terminating Representation); Rule 8.1(b) (failing to respond to a demand for information by disciplinary authority); Rule 8.4(d) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (conduct prejudicial to the administration of justice). Rule 407, SCACR. When Campbell failed to answer the formal charges, the panel issued an order of default.

The Panel's Findings and Recommendation

In September 2016, the panel held a hearing to consider evidence of aggravation and mitigation. At the hearing, Disciplinary Counsel presented no evidence, choosing to rest on the factual allegations and rule violations Campbell had admitted. Campbell testified in his own defense, and presented the testimony of five character witnesses.

After the hearing, the panel issued a report in which the panel found Campbell violated each of the Rules of Professional Conduct listed above. Also, the panel found Campbell was subject to discipline based on the following Rules of Lawyer Discipline: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(3) (willfully failing to comply with a disciplinary subpoena); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice and demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the oath of office). Rule 413, SCACR.

The panel found four aggravating factors and three mitigating factors were present. As to aggravating factors, the panel noted Campbell's multiple offenses and pattern of misconduct, Campbell's dishonesty and selfish motives, Campbell's failure to cooperate in the disciplinary investigation, and Campbell's prior disciplinary history.[1] As to mitigating factors, the panel noted Campbell's character and reputation, Campbell's remorse, and Campbell's willingness to make restitution.

Applying the aggravating and mitigating factors, the panel recommended the following sanction: (1) suspend Campbell for three years, not retroactive to the date of interim suspension; (2) order Campbell to pay the costs of the proceedings; (3) order Campbell to pay $4,200 to Client A, $1,550 to Client B, and $5,175 to his former law firm; and (4) order Campbell to complete Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School as a condition of reinstatement.

III. Standard of Review

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[1] According to the records of the Commission on Lawyer Conduct, Campbell received a Letter of Caution in September 2011 citing Rule 8.1(b) in connection with a prior disciplinary investigation.

When an attorney is in default in disciplinary proceedings, "the sole question before the Court is the appropriate sanction." *In re Brunty*, 411 S.C. 434, 436, 769 S.E.2d 426, 427 (2015). "The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations." Rule 27(a), RLDE; Rule 413, SCACR. However, the Court "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission." Rule 27(e)(2), RLDE; Rule 413, SCACR. "This Court is not bound by the subpanel's recommendation; rather, after a thorough review of the record, this Court may impose the sanction it deems appropriate." *In re McFarland*, 360 S.C. 101, 105, 600 S.E.2d 537, 539 (2004).

IV. Conclusion

After reviewing the record and conducting oral argument, we believe the panel's recommended sanction is appropriate. Therefore, we suspend Campbell for three years, not retroactive to the date of interim suspension. Campbell must pay $4,200 to Client A, $1,550 to Client B, and $5,175 to his former law firm. Campbell must also pay the costs of the proceedings. Finally, Campbell must complete Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School as a condition of reinstatement.

Within thirty days of the date of this opinion, ODC and Campbell shall enter into a restitution agreement specifying the terms upon which Campbell shall pay restitution to his former clients as ordered by this opinion.

Within thirty days of the date of this opinion, Campbell shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission.

Within fifteen days of the date of this opinion, Campbell shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of the Rules of Lawyer Discipline. Rule 413, SCACR.

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

The Supreme Court of South Carolina

Carolina Convenience Stores, Inc., Harry Lancaster, Jr., as Power of Attorney for Harry Lancaster, Sr. and Willard Oil Company, Petitioners,

v.

City of Spartanburg, Respondent.

Appellate Case No. 2012-212473
Lower Court Case No. 2007CP4203388

ORDER

This Court granted a writ of certiorari to review the South Carolina Court of Appeals' opinion in *Carolina Convenience Stores, Inc., v. City of Spartanburg*, 398 S.C. 27, 727 S.E.2d 28 (Ct. App. 2012). After the issuance of an opinion by this Court,[1] this Court granted a petition for rehearing.

Based on a settlement between the parties, the respondent moves to dismiss this matter, and to vacate the opinions of this Court and the Court of Appeals. The petitioners oppose the motion.

The motion to dismiss is granted, and the opinions of this Court and the Court of Appeals are vacated. The remittitur will be sent as provided by Rule 221 of the South Carolina Appellate Court Rules.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

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[1] *Carolina Convenience Stores, Inc., v. City of Spartanburg*, Op. No. 27663 (S.C. Sup. Ct. filed August 31, 2016).

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Acting Justice Thomas Russo not participating.

Columbia, South Carolina
August 23, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Lee Moore, Appellant.

Appellate Case No. 2014-001669

Appeal From Spartanburg County
R. Keith Kelly, Circuit Court Judge

Opinion No. 5512
Heard January 18, 2017 – Filed August 30, 2017

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Barry Joe Barnette, of Spartanburg, for Respondent.

MCDONALD, J.: Robert Lee Moore appeals his conviction for attempted murder, arguing the trial court erred when it (1) denied his motion to suppress evidence from a limited warrantless search identifying him as the owner of a cell phone found at the crime scene and (2) denied his motion to suppress evidence

obtained pursuant to a subsequent search warrant Moore contends was based on a conclusory affidavit. Although the panel majority affirms the circuit court's denial of Moore's motion to suppress the identification information obtained from the warrantless search of the cell phone, Chief Judge Lockemy, Judge Konduros, and I differ in our analyses of this Fourth Amendment challenge. The majority also affirms the circuit court's denial of Moore's motion to suppress the evidence obtained pursuant to the search warrant, as we find the supporting affidavit was sufficient to establish probable cause.

Facts and Procedural History

On the afternoon of February 25, 2013, Travis Hall (Victim) was found shot in the head in a Taco Bell parking lot. When police arrived at the scene, Victim was draped out of the driver's side door of his vehicle, and three cell phones were found in the car. The phone at issue here was an AT&T ZTE331 model flip phone (the flip phone) discovered "almost up under" the driver's side seat. The other two phones were iPhones belonging to the Victim. In addition to the three phones, money and drugs were found inside the vehicle.

Police photographed and collected the phones, took them to the Sheriff's Office, and gave them to Detective Lindsay McGraw. Detective McGraw performed limited forensic examinations to determine who owned each of the phones. Specifically, he pulled the flip phone's subscriber identity module card (SIM card) from the phone and obtained the telephone number associated with the phone. Detective McGraw provided the phone number to Investigator Tom Clark, who ran it through a database and determined the flip phone belonged to Moore. Investigator Clark then applied for a search warrant to examine the stored data on the phone. After obtaining the search warrant, Detective McGraw performed a full forensic examination of the flip phone during which he recovered stored contacts, images, call logs, and text messages.

Before trial, Moore moved to suppress any and all information derived from the search of his phone, citing *Riley v. California*, 134 S. Ct. 2473 (2014). Moore further argued the search warrant affidavit submitted to support the flip phone warrant application was conclusory and did not support the finding of probable cause necessary for issuance of the search warrant. The trial court denied the

motion to suppress the flip phone evidence, ruling the phone was abandoned property.

At trial, the State's evidence established Victim was at his mother's home prior to the shooting and received several phone calls from the same number. Records from the flip phone revealed five calls were made to Victim's phone between 1:03 p.m. and 2:06 p.m. on the day of the shooting.

After the shooting, witnesses observed a white Chrysler 300 rapidly fleeing the area. One witness who was on foot stated the car drove against the flow of traffic and had to slam on its brakes to avoid hitting her. Police later used surveillance footage to identify the vehicle at a gas station near the Taco Bell. The video showed that after the vehicle parked at the gas station, two men exited and threw a bag in the trash before entering the gas station. The two men were identified as Tevin Thomas and Moore. Inside, Moore bought potato chips and cigarettes, and was required to give his birthdate for the cigarette purchase. This footage showed Thomas wearing dark clothing and Moore wearing a red jacket. Other cameras at a Cracker Barrel and an automotive business recorded the vehicle after it left the gas station. The vehicle was eventually located in a neighborhood not far from the automotive business.

Thomas testified that he and Moore had planned to rob Victim during a drug deal. According to Thomas, Moore was given a revolver by a third man who did not go with them to the Taco Bell. Moore and Thomas rode to the Taco Bell in Moore's Chrysler. Once they arrived, Victim parked next to their car and Moore exited his car and got into Victim's car. Thomas stated he saw Moore pull the gun on Victim; a struggle then ensued and Thomas heard a gunshot. Thomas testified that he got out of Moore's car and tried to intervene when he saw the struggle, but the doors on Victim's car were locked. When Thomas later asked whether Moore shot Victim, Moore responded, "yeah, I seen blood coming out of his head."

A fingerprint expert testified Thomas left ten fingerprints on the exterior of the passenger side of Victim's car. None of Moore's fingerprints were found on Victim's car; however, both Thomas's and Moore's fingerprints were found on the white Chrysler 300.

Moore called eyewitness Chris Barnes, who testified he was at the Taco Bell, heard a shot, then saw a man emerge from the passenger side of Victim's car and jump into another car. He described the man as wearing a dark colored sweatshirt and a dark colored toboggan. Barnes was shown the gas station surveillance video with Moore wearing a red jacket, but Barnes insisted the man he "locked eyes with" at the Taco Bell was not wearing red.

The jury found Moore guilty of attempted murder, and the circuit court sentenced him to thirty years' imprisonment.

Standard of Review

"On appeals from a motion to suppress based on Fourth Amendment grounds, the appellate court] . . . reviews questions of law de novo." *State v. Bash*, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017). As to a circuit court's findings of fact, we must affirm "if there is any evidence to support" the factual findings and "may reverse only for clear error." *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012).

Law and Analysis

I. Warrantless Search of the Flip Phone

Moore argues the initial warrantless search of the flip phone violated the Fourth Amendment, and no exception to the warrant requirement applied to justify the search. Additionally, Moore disputes the circuit court's conclusion that he abandoned his phone. I disagree that the initial, limited search to determine ownership of the flip phone violated the Fourth Amendment.

The Fourth Amendment to the United States Constitution demands that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. South Carolina's constitution also recognizes the right of the people to be free from unreasonable searches and seizures. *See* S.C. Const. art. I, § 10 (containing language nearly identical to that of the Fourth Amendment). But not every search implicates the Fourth Amendment. "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). "[A] Fourth

Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). However, "a Fourth Amendment search does *not* occur . . . unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.'" *Id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 211 (1986)). In cases claiming an unreasonable search and seizure, the burden is on the defendant to prove not only that the search of an item was illegal, but also that he had a legitimate expectation of privacy in the item searched. *Rawlings v. Kentucky*, 448 U.S. 98, 104–05 (1980) (holding petitioner did not make a sufficient showing that his legitimate or reasonable expectations of privacy were violated by a search of his female companion's purse).

Particularly illustrative here is a recent case from the Georgia Court of Appeals, *State v. Hill*, 789 S.E.2d 317 (Ga. Ct. App. 2016). In *Hill*, a police officer discovered a cell phone in the back seat of a taxi. *Id.* at 318. The taxi's driver told police that a man had fled his taxi without paying the fare. *Id.* The police officer turned on the phone but could not access any information because the phone was protected by a passcode. *Id.* However, the officer was able to use an emergency call feature on the phone to get in touch with a 911 dispatcher, who then provided the officer with the phone's number as well as the owner's name and date of birth. *Id.*

The Georgia Court of Appeals found no Fourth Amendment violation because the defendant had no reasonable expectation of privacy in his name, date of birth, or phone number. *Id.* To support its determination, the Georgia court cited the litany of state and federal cases that have concluded "a person lacks a legitimate expectation of privacy in identifying information such as name, address, or telephone number that is used to facilitate the routing of communications by methods such as physical mail, e-mail, landline telephone, or cellular telephone." *Id.* at 319. The court explained there was a "core distinction" between the content of a communication and the information necessary to get the communication from one point to another. *Id.* at 319 (citing *United States v. Carpenter*, 819 F.3d 880, 886 (6th Cir. 2016)); *see also United States v. Graham*, 824 F.3d 421, 427 (4th Cir. 2016) (en banc) (addressing historical cell-site location information and holding an individual can claim "no legitimate expectation of privacy" in information he voluntarily provided to a third party). Although the content of the communication

is private, the information related to its transmission is not. *Hill* at 319; *Graham* at 428.

The *Hill* court further recognized that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* (quoting *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979)); *see also Graham* at 428 (recognizing "the vast majority of federal district court judges" who have reached the same result). Therefore, the defendant's cellular phone number did not fall within the category of private information protected by the Fourth Amendment. *Hill* at 320. The police in *Hill* did not—and could not due to the presence of a passcode—access the files contained on the phone.[1, 2] *Id.*

Likewise in *Graham*, the Fourth Circuit, sitting *en banc*, considered information voluntarily provided to cell phone providers, albeit in a different, and perhaps more intrusive, context. In discussing its reasoning for finding a defendant had no legitimate expectation of privacy in historical cell-site location information, the court noted:

> Moreover, outside the context of phone records, we have held that third-party information relating to the sending and routing of electronic communications does not receive Fourth Amendment protection. *United States v. Bynum*, 604 F.3d 161, 164 (4th Cir. 2010). In *Bynum*, we explained that it "would not be objectively reasonable" for a defendant to expect privacy in his phone and Internet subscriber records, including "his name, email address, telephone number, and physical address." *Id*.

Graham at 432.

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[1] It is unclear whether Moore's phone was passcode-protected, although when an officer was asked to review Detective McGraw's report to see whether the report indicated the phone was passcode-protected, the officer stated, "I don't see that it was."

[2] Because the court found no Fourth Amendment violation, it did not reach the issue of abandonment. *Hill* at 321.

Like the *Hill* phone, Moore's flip phone was found at a crime scene and was examined by police before they obtained a warrant *solely* to obtain the telephone number and ownership identification. In the present case, police removed the phone's SIM card and processed it for the limited purpose of obtaining the telephone number. I recognize that even small manipulations of personal property have been held to be Fourth Amendment searches. *See Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (holding a search occurred when a police officer briefly moved stereo equipment inside a defendant's apartment in order to record the equipment's serial numbers). However, under the facts of this case, law enforcement's limited search of the SIM card to obtain the phone number did not constitute an unreasonable search under the Fourth Amendment because Moore had no reasonable expectation of privacy in the number itself.

Of significance here is the fact that police obtained a warrant before performing further analysis to examine the phone's contents. In *Riley*, the United States Supreme Court explained that the immense amount of personal information stored in modern cell phones makes cell phone searches inherently different from other searches conducted incident to a lawful arrest. 134 S. Ct. at 2482. The Court wrote:

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information . . . that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible . . . . Third, the data on a phone can date back to the purchase of the phone, or even earlier . . . .
>
> Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying

> a cell phone, with all that it contains, who is the exception . . . .

Id. at 2489–90. The Supreme Court ultimately held "that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id.* at 2493. The Court explained:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life[.]" The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Id. at 2494–95.

Unlike *Riley*, this case does not involve the warrantless search of a cell phone's stored contents. Accordingly, *Riley*'s concerns about modern cell phones operating as personal "minicomputers" are not implicated when, as here, police obtained a warrant before examining the flip phone's stored contents. *Id.* at 2489; *see also Hill*, 789 S.E.2d at 320 ("Although a law enforcement officer cannot access data stored within a cellular phone without a warrant or an exception to the warrant requirement . . . courts have held that the officer can take other action with a cellular phone lawfully in his or her possession to determine the phone's owner." (internal citation omitted)).[3]

I recognize our learned dissenting colleague's admonition in *State v. Brown* that "the lack of any exigency justifying a warrantless search and the ease with which law enforcement could have obtained a warrant demonstrates further the need to comply with the warrant requirement." 414 S.C. 14, 30, 776 S.E.2d 917, 926 (Ct.

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[3] Because I would find no Fourth Amendment violation, I have not addressed the issue of abandonment.

App. 2015) (Konduros, J., dissenting), *cert. granted* (S.C. Sup. Ct. Order dated August 8, 2017). I also acknowledge that the best policy in cases where Fourth Amendment concerns might be implicated is to obtain a warrant before conducting a search. *See Riley*, 134 S. Ct. at 2493 ("Recent technological advances . . . have . . . made the process of obtaining a warrant itself more efficient."); *State v. Cardwell*, 414 S.C. 416, 778 S.E.2d 483 (Ct. App. 2015), *cert. granted* (June 16, 2016) (stating a warrant is a necessary and "relatively simple step" when seeking to conduct a full search of files on a computer). Yet, I agree with the *Brown* majority that in *Riley*, "the Court did not require law enforcement officers to obtain a warrant to search every cell phone that falls into their possession[,]" in every situation. 414 S.C. 14, 23, 776 S.E.2d 917, 921–22. "[T]he Fourth Amendment is not triggered unless a person has an actual and reasonable expectation of privacy or unless the government commits a common-law trespass for the purpose of obtaining information." *State v. Robinson,* 410 S.C. 519, 527, 765 S.E.2d 564, 568 (2014) (citation omitted).

As an additional sustaining ground, I find the inevitable discovery doctrine applies to the question of ownership of the flip phone. *See State v. Spears*, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) ("The inevitable discovery doctrine, one exception to the exclusionary rule, states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained." (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984))). Detective McGraw testified he was asked to perform a forensic examination of all three phones found at the scene of the shooting. The undisputed evidence established five phone calls were made from the flip phone to one of Victim's phones shortly before the shooting occurred. Therefore, even without the use of the SIM card, Moore's telephone number would have been discovered through the examination of Victim's phones—in which Moore certainly had no reasonable expectation of privacy. *See Nix*, 467 U.S. at 449–50 (holding the inevitable discovery doctrine applied when searchers were approaching the location of a victim's body and would have discovered it without information obtained from the defendant's unlawful interrogation).

II. Validity of Search Warrant

Next, Moore argues the warrant to search the contents of the flip phone was impermissibly issued as the conclusory affidavit submitted to obtain the warrant did not establish the necessary probable cause. The panel majority disagrees.

A search warrant may issue only upon a finding of probable cause. *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. *Id.* at 50, 625 S.E.2d at 221. "The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Spears*, 393 S.C. 466, 483, 713 S.E.2d 324, 333 (Ct. App. 2011) (quoting *State v. Dunbar*, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004)). "A reviewing court should give great deference to a magistrate's determination of probable cause." *State v. Weston*, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997). "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* at 293, 494 S.E.2d at 804 (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)).

Here, the affidavit submitted with the search warrant request stated:

> On 2/25/2013 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriff's Office responded to 760 Warren H. Abernathy Hwy. In reference to a shooting. Upon arrival they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle an AT&T ZTE model Z331 cell phone serial number #22213371843 was found inside the victim's vehicle. Through further investigation it was found the phone number assigned to the phone is (864) 494-2573. Through further investigation it was found this phone did not belong to the Victim. Through further investigation it was found this phone belonged to Robert Lee Moore. This search warrant is needed for the furtherance of this investigation to obtain information from the phone that

> can either implicate, or clear Robert Lee Moore from any involvement in this incident.

This affidavit provided ample probable cause for the magistrate to issue the warrant. The affidavit explained *why* police believed the phone's contents would reveal evidence about the shooting and Moore's possible involvement; namely, because police discovered his phone in Victim's vehicle at the scene of the shooting. *Contra State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (finding an affidavit defective on its face when it set forth no facts as to *why* police believed a defendant committed a robbery and omitted the fact that some of the information in the affidavit was provided by an informant). As the affidavit provided the magistrate with a substantial basis to find probable cause existed to support the search and, thus, issue the warrant, the circuit court properly denied Moore's motion to suppress.

AFFIRMED.

LOCKEMY, C.J., concurring in part and dissenting in part in a separate opinion. KONDUROS, J., dissenting in a separate opinion.

LOCKEMY, C.J., concurring in part and dissenting in part: I agree with the dissent's Fourth Amendment analysis and would find Moore's constitutional rights were violated when officers searched his cell phone without a warrant. However, I would find the information used during trial–the identity of the owner of the cell phone–would have been inevitably discovered because officers obtained a valid search warrant prior to performing a full forensic search. Therefore, I concur in part and dissent in part.

As each of my colleagues recognize, the Fourth Amendment ensures "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Cost. amend. IV. Furthermore, as the lead opinion notes, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014).

The lead opinion indicates the officer's actions in removing the SIM card and processing the information contained therein was not a search under the Fourth Amendment because Moore had no reasonable expectation of privacy in the information recovered. I disagree that the Fourth Amendment analysis should focus on the information searched, and instead should focus on what information could have been searched. The SIM card contained more than simply the cell phone's number, and police could have accessed that information during their search. As Chief Justice Roberts noted in *Riley*,

> a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home, it also contains a broad array of private information never found in a home in any form–unless the phone is.

Id. at 2491.

I would find Moore had a reasonable expectation of privacy in the data contained on his cell phone, and any intrusion into that data constituted a search under the

Fourth Amendment. Furthermore, I disagree with the State that Moore's reasonable expectation of privacy was abandoned as the facts do not support such a finding in this case. *See State v. Dupree*, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) ("In the law of search and seizure, . . . the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure is reasonable within the limits of the Fourth Amendment." (quoting *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 370-71 (Minn. 1975))); *State v. Brown*, 414 S.C. 14, 23, 776 S.E.2d 917, 922 (Ct. App. 2015), *cert. granted*, (S.C. Sup. Ct. Order dated August 8, 2017) ("Whether such an expectation of privacy has been abandoned 'is determined on the basis of the objective facts available to the investigating officers, not on the basis of the owner's subjective intent." (quoting *United States v. Tugwell*, 125 F.3d 600, 602 (8th Cir. 1997))).

Because Moore had a reasonable expectation of privacy in the data contained on his cell phone and he did not abandon that expectation, I would find the State violated the Fourth Amendment by performing a warrantless search of that information. I concur in the result reached by the lead opinion because I believe the State would have inevitably discovered the same information using the valid warrant it later secured to continue its search of the phone. *See Nix v. Williams*, 467 U.S. 431, 447 (1984) ("If the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings.").

I recognize police included information gleaned from the warrantless search in their warrant affidavit. In *State v. Spears*, this court faced a similar issue regarding illegally obtained information used in a warrant. 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The court excised the offending information from the warrant affidavit, and analyzed the remaining portions of the affidavit to determine if probable cause still existed to support the magistrate's decision to issue the warrant. *Id*. at 483, 713 S.E.2d at 333.

Here, I would find any information about the owner of the phone should be removed from the warrant affidavit and the remaining language should be considered under our test for probable cause. The affidavit would thus read:

> On 2/25/2013 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriff's Office responded to 7680 Warren H. Abernathy Hwy. In reference to a shooting. Upon arrival they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle an AT&T ZTE Model Z331 cell phone serial number [Redacted] was found inside the Victim's vehicle. This search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate, or clear any individual from any involvement in this incident.

I agree with the lead opinion that this warrant affidavit would support a finding of probable cause. *See State v. Dunbar*, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004) ("The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."). Accordingly, I would find the evidence would have been inevitably found pursuant to the valid search warrant, regardless of the initially unlawful search.

Finally, I wish to echo the sentiments expressed in the lead opinion and the dissent cautioning officers about the practice of searching cell phones without warrants. Chief Justice Roberts stated well the importance with which courts must protect individual's rights to the "privacies of life" that are contained on cell phones. *Riley*, 134 S. Ct. at 2495. "The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." *Id*. There were no cell phones at Valley Forge. The principle of fighting and dying to make sure a soldier of the king is not allowed to kick in a citizen's door, however, is not very different than keeping a person's utmost personal information safe from unreasonable government intrusion. In the context of a search incident to an arrest, the Supreme Court created a bright line rule–"get a warrant." *Id*. While this case does not warrant the creation of such a rule in cases outside the search incident to an arrest exception, officers should tread lightly around digital information, and consider the implications of failing to obtain a warrant before searching an individual's cell phone.

KONDUROS, J., dissenting: I respectfully dissent and would reverse and remand Moore's case for a new trial. I conclude Officer McGraw's warrantless examination of the SIM card constituted a search that violated Moore's Fourth Amendment rights. As Officer McGraw explained in his testimony, the contents one can find on a SIM card include the stored phone number, call logs, a contact list, and "things of that nature." In this case, Officer McGraw testified he recovered the cell phone number, thirty-four contact entries, and three text messages. The minute Officer McGraw removed the SIM card, he had access to digital information in which our courts have recognized an expectation of privacy. *See Riley v. California*, 134 S. Ct. 2473 (2014) (explaining society is willing to recognize an expectation of privacy in the digital contents of one's cell phone as reasonable). Therefore, I would conclude the warrantless search of Moore's cell phone violated his Fourth Amendment rights and no exception to the warrant requirement applies to the facts of this case.[4] *Katz v. United States*, 389 U.S. 347, 357 (1967) (indicating searches without a warrant are per se unreasonable under the Fourth Amendment unless some exception applies).

The lead opinion cites to two cases—one from the Georgia Court of Appeals and one from the Fourth Circuit Court of Appeals—both of which are distinguishable from the facts in this case. In *State v. Hill*, the police used a locked cell phone to call 911 and obtain the owner's phone number, name, and date of birth. 789 S.E.2d 317, 318 (Ga. Ct. App. 2016). Such limited identifying information is not all Officer McGraw had access to in Moore's SIM card. The 911 dispatcher in Georgia did not provide the police with the owner's contact list, text messages, or call logs. The Fourth Circuit's opinion in *United States v. Graham*, 824 F.3d 421, 427 (4th Cir. 2016) (en banc), addressed an individual's expectation of privacy in historical cell-site location information. Again, this is distinguishable from the information available on a SIM card.

Additionally, I respectfully disagree with both of my learned colleagues that this warrantless search of Moore's cell phone can be cured through inevitable

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[4] I agree with Chief Judge Lockemy that the facts of this case do not support a finding Moore abandoned his expectation of privacy in the contents of the cell phone.

discovery. The holding in *Riley* "is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, *even* when a cell phone is seized incident to arrest." 134 S. Ct. at 2493 (emphasis added). As I noted in my dissent in *State v. Brown*, 414 S.C. 14, 32, 776 S.E.2d 917, 927 (Ct. App. 2015) (Konduros, J., dissenting), *cert. granted* (S.C. Sup. Ct. Order dated August 8, 2017), I believe this language from *Riley* indicates an officer must obtain a warrant prior to searching a cell phone absent an applicable exception, even when one's expectation of privacy is diminished. Allowing officers to search the digital content of a cell phone prior to obtaining a warrant, yet cure such an invasion by arguing they could have inevitably obtained the information, circumvents the spirit of the warrant requirement. In keeping with my previous dissent and adhering to what I believe is the Court's holding in *Riley*, I would find the search of the digital contents of Moore's cell phone violated his rights under the Fourth Amendment and the case should be reversed and remanded.[5]

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[5] Because my resolution of Moore's issue regarding the warrantless search of the cell phone would be dispositive, I decline to address his second issue on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issue when disposition of prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

DIRECTV, Inc. & Subsidiaries, Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2015-001509

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. Op. 5513
Heard March 14, 2017 – Filed August 30, 2017

AFFIRMED

John C. von Lehe, Jr. and Bryson M. Geer, both of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for Appellant.

Nicole M. Wooten, William J. Condon, Jr., and Milton G. Kimpson, all of the South Carolina Department of Revenue, of Columbia, for Respondent.

WILLIAMS, J.: In this appeal from the administrative law court (ALC), DIRECTV, Inc. & Subsidiaries (DIRECTV) argue the ALC erred in (1) applying an improper burden of proof, (2) holding DIRECTV's income-producing activities (IPA) consisted solely of signal delivery into its customers' homes, (3) finding DIRECTV failed to establish the portion of its IPA occurring in South Carolina,

and (4) finding the South Carolina Department of Revenue (the DOR) properly imposed substantial understatement penalties. We affirm.

FACTS/PROCEDURAL HISTORY

This case involves the DOR's denial of DIRECTV's claims for refunds of South Carolina corporate income and license fee taxes for the tax years 2006 through 2008 and the assessment of South Carolina corporate income and license fee taxes, interest, and penalties for the tax years 2009 through 2011. To properly determine DIRECTV's IPAs, we find it instructive to briefly detail DIRECTV's business operations and its methods for soliciting and securing customers and deriving its revenue.

DIRECTV's Business Operations

DIRECTV—a California corporation with its headquarters and principal place of business located in Los Angeles, California—provides access to direct-to-home digital television entertainment via satellite to residential and commercial customers across the United States in exchange for a subscription fee. DIRECTV has four principal "value drivers" for its business: development and acquisition of content; broadcast operations and distribution; marketing and sales; and customer care.

DIRECTV targets customers through high-quality, national advertisements designed to encourage existing and potential customers to call a toll-free number, which directs customers to DIRECTV's customer service call centers, to place an order for DIRECTV's television services. The call centers—located entirely outside of South Carolina and owned and operated by DIRECTV and third parties—facilitate the installation of set-top boxes and dishes in subscribers' homes and businesses by a third-party home service provider hired by DIRECTV.[1] DIRECTV delivers programming to a subscriber only after the subscriber signs a

[1] Customers are required to lease the set-top boxes from DIRECTV, and both parties agreed all income generated by South Carolina customers leasing the set-top boxes and purchasing tangible personal property, such as remote controls, should be included in the numerator of the gross receipts ratio.

customer agreement and installation of DIRECTV's equipment is completed. For a monthly subscription fee, DIRECTV provides its subscribers access to original and acquired television programming.

DIRECTV produces several types of original programming and sporting events. Additionally, it acquires programming from third-party providers such as movie studios, broadcast television networks like NBC, local broadcast stations, and providers of cable programming like HBO and ESPN.[2] DIRECTV receives third-party programming content through satellite, fiber-optic cables, and over-the-air broadcasts. DIRECTV's national broadcast centers in California and Colorado receive, process, collect, and transmit these signals to one of eleven satellites in geo-stationary orbit above the earth, which then sends a wide beam of energy covering the United States. Programming from local broadcast television stations is collected at unmanned, local collecting facilities maintained by DIRECTV and located throughout the country in correspondence with each of the 210 Nielsen assigned designated market areas.[3] Each of the local collecting facilities transmits signals to one of DIRECTV's six up-link facilities, located throughout the country but not in South Carolina. The up-link facilities transmit the content to one of the eleven geo-stationary satellites, which then transmits a narrow spot beam, containing only the local programming, to the designated market area from which it originated. DIRECTV's subscribers receive national and local programming from these signal beams via mounted satellite dishes on or near their homes or businesses. The signal then relays from the mounted satellite dishes to the subscribers' set-top boxes, which delivers the signal onto the subscribers' television sets.

Although DIRECTV established its four primary value drivers through testimony, DIRECTV primarily derives its revenue from "fees paid by its [approximately 20 million] customers for rentals of set-top boxes and subscriptions to its programming services." According to DIRECTV, this includes monthly fees from subscriptions to one or more video programming packages; revenue from pay-per-

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[2] DIRECTV's employees in California are responsible for the acquisition and negotiation of its third-party programming and for the development of its original programming.

[3] During the tax periods at issue, four local collection facilities were located in South Carolina.

view programming; revenue from the sale or lease of DIRECTV's equipment; revenue from optional warranties on the leased set-top boxes; and revenue from fees associated with DVR set-top boxes, high-definition set-top boxes, and multiroom viewing charges. Other than DIRECTV's local collection facilities in South Carolina, its equipment rental and sale to subscribers in South Carolina, and the one or two employees located in South Carolina during the tax periods at issue, nearly all of DIRECTV's assets, employees, and property involved in providing its services to subscribers were located outside of South Carolina.

DIRECTV's Income Tax Returns

For income tax purposes, corporations like DIRECTV apportion net income to South Carolina using a fraction in which the numerator is gross receipts from within South Carolina during the taxable year and the denominator is gross total receipts from everywhere during the taxable year. *See* S.C. Code Ann. § 12-6-2290 (2014). For the 2006, 2007, and 2008 tax years, DIRECTV originally filed corporate income tax returns in South Carolina in which it sourced 100% of its subscription receipts and 100% of its rental receipts from South Carolina subscribers to the numerator of the gross receipts ratio. This corresponded to gross receipt ratios of 1.9539% for 2006; 2.0016% for 2007; and 2.0543% for 2008, which DIRECTV used to apportion its net income to South Carolina. In 2008, the DOR conducted a field audit on DIRECTV's tax returns from 2006 through 2008. Following the audit, the DOR did not make any adjustments to DIRECTV's tax returns, and thus, accepted DIRECTV's original 2006 through 2008 corporate tax income returns as filed. However, DIRECTV subsequently filed amended corporate income tax returns for tax years 2006 through 2008, wherein DIRECTV's only change was the removal of 100% of the South Carolina customer subscription receipts that was originally sourced to the numerator of the gross receipts ratio.

As a result, the gross receipts ratio used to apportion DIRECTV's net income to South Carolina changed from the original 1.9539% to an amended 0.0246% for 2006; from 2.0016% to an amended 0.0810% for 2007; and from 2.0543% to an amended 0.1137% for 2008. DIRECTV attached the following statement, explaining the change, to each of its three amended returns:

> The return is being amended to apportion sales receipts to the state under S.C. Code Ann. § 12-6-2295 which [sic] sources sales of services under a pro-rate cost of performance method. The originally filed return incorrectly apportioned satellite television subscription receipts to South Carolina using market-based sourcing, rather than the cost of performance sourcing that is prescribed by statute.[4]

As a result of the change in the amended returns, DIRECTV attempted to reduce its income tax and license fee liability by $5,976,810 and sought a refund in the same amount. The DOR conducted another field audit of DIRECTV, and in its November 29, 2011 field audit report, the DOR denied DIRECTV's amended returns and refund request and accepted DIRECTV's original 2006 through 2008 tax returns as filed. In its filed original corporate income tax returns for tax years 2009 through 2011, DIRECTV used a method for calculating the gross receipt ratio similar to the one in its amended 2006 through 2008 returns,[5] which resulted in gross receipts ratios of 0.1437% for the 2009 tax year; 0.1570% for the 2010 tax year; and 0.2962% for the 2011 tax year. Again, the DOR conducted an audit on these returns, and in its January 28, 2014 field audit report, the DOR assessed DIRECTV for income taxes and license fees for 2009 through 2011 that calculated the gross receipts ratio by attributing 100% of DIRECTV's South Carolina subscription receipts to the numerator of the ratio.

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[4] In its amended order, the ALC noted both parties originally erred in referencing South Carolina's apportionment statute but later agreed and clarified their positions to reflect "that South Carolina uses a method of apportionment based on the proportion of income-producing activity conducted within the State."

[5] While DIRECTV did not include any South Carolina subscription receipts in the numerator of its gross receipts ratio in the amended 2006 through 2008 returns or on the original 2009 and 2010 returns, it did change its method slightly for the original 2011 returns by sourcing a percentage of its total subscription receipts to South Carolina based on a ratio of its South Carolina payroll to its total payroll, which ultimately resulted in approximately $22 million of its $410 million in South Carolina subscription receipts (approximately 5%) being included in the gross receipts ratio numerator.

DOR Determination and ALC Hearing

On February 18, 2014, the DOR issued a department determination in which it found the gross receipts DIRECTV generated from the sale of subscriptions were directly produced from activity occurring within South Carolina, namely the delivery of the signal into South Carolina homes and businesses and onto customers' television sets. Accordingly, the DOR determined the revenue from DIRECTV's subscription receipts should be sourced to South Carolina. Thereafter, DIRECTV requested a contested case hearing of the DOR's determination before the ALC, seeking a determination of the extent to which DIRECTV's IPA occurred in South Carolina and whether the DOR properly assessed substantial understatement penalties against DIRECTV for taxes owed for the 2009 through 2011 tax years.

Following a hearing, the ALC issued an amended final order and decision on June 12, 2015. The ALC found (1) DIRECTV's IPA was the delivery of the signal into homes and businesses and onto the television sets of its customers; (2) the IPAs related to South Carolina customers occurred entirely within South Carolina; and (3) 100% of DIRECTV's subscription receipts from South Carolina customers must be sourced to the numerator of the gross receipts ratio. Additionally, the ALC found DIRECTV liable for substantial understatement penalties. Furthermore, the ALC denied DIRECTV's refund request for its amended 2006 through 2008 income tax returns and assessed DIRECTV $6,646,168 in tax and license fees; $653,425 in interest; and $1,246,155.75 in penalties relating to its 2009, 2010, and 2011 income tax returns. This appeal followed.

ISSUES ON APPEAL

I. Did the ALC err in (1) holding DIRECTV's IPAs consist solely of the delivery of the signal into the homes of its customers and finding that DIRECTV failed to establish the portion of its IPAs that were conducted in South Carolina, and (2) applying an improper burden of proof?

II. Did the ALC err in finding the DOR properly imposed substantial underpayment penalties?

STANDARD OF REVIEW

The Administrative Procedures Act (APA) governs appellate review of decisions from the ALC. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 203, 712 S.E.2d 428, 431 (2011).

> The review of the [ALC]'s order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or[] it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2016).

An appellate court should only reverse the ALC's order if it is unsupported by substantial evidence in the record or contains an error of law. *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d

674, 676 (Ct. App. 2008); *see also Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 144, 694 S.E.2d 525, 528 (2010) ("A reviewing court may reverse the decision of the ALC [when] it is in violation of a statutory provision or it is affected by an error of law."). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence [that], when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached . . . ." *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000) (quoting *Welch Moving & Storage Co. v. Pub. Serv. Comm'n of S.C.*, 301 S.C. 259, 261, 391 S.E.2d 556, 557 (1990)). However, "[q]uestions of statutory interpretation are questions of law, which [the appellate court is] free to decide without any deference to the court below." *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (first alteration in original) (quoting *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)).

LAW/ANALYSIS

I. DIRECTV's IPAs and Burden of Proof

A. DIRECTV's IPA

DIRECTV asserts the ALC erred as a matter of law by misinterpreting sections 12-6-2290 and 12-6-2295(A)(5) of the South Carolina Code. Further, DIRECTV argues the ALC erred in holding its IPA was the delivery of the signal into the homes and businesses of its customers and in finding DIRECTV failed to establish the portion of its IPAs that occurred in South Carolina because the ALC's findings are not supported by substantial evidence. We disagree.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "Whe[n] the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Media Gen. Commc'ns, Inc.*, 388 S.C. at 148, 694 S.E.2d at 530 (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan*, 371 S.C. at 499, 640 S.E.2d at 459.

However, a court will reject the plain and ordinary meaning of the statute if the interpretation of the statute by its plain, ordinary meaning leads to an absurd result that was unintended by the legislature. *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). "If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect." *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). "In so doing, the [c]ourt should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose." *Duke Energy Corp.*, 415 S.C. at 355, 782 S.E.2d at 592; *see also Etiwan Fertilizer Co. v. S.C. Tax Comm'n,* 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950) ("The prime object, of course, in the construction of a statute is to ascertain and give effect to the legislative intent.").

Corporate income tax in South Carolina "is imposed annually at the rate of five percent on the South Carolina taxable income of every corporation . . . transacting, conducting, or doing business within this State or having income within this State, regardless of whether these activities are carried on in intrastate, interstate, or foreign commerce." S.C. Code Ann. § 12-6-530 (2014). In South Carolina, a corporation's taxable income "is computed using the Internal Revenue Code with modifications as provided by South Carolina law, and this amount is 'subject to allocation and apportionment as provided in Article 17 of this chapter.'" *Media Gen. Commc'ns, Inc.*, 388 S.C. at 145, 694 S.E.2d at 528 (quoting S.C. Code Ann. § 12-6-580 (2014)). "If a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State." S.C. Code Ann. § 12-6-2210(B) (2014); *see also Lockwood Greene Eng'rs, Inc. v. S.C. Tax Comm'n*, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (Ct. App. 1987) ("The purpose of the allocation statutes is to provide for imposition of South Carolina income tax 'upon a base which reasonably represents the proportion of the trade or business carried on within this State.'" (quoting *Hertz Corp. v. S.C. Tax Comm'n*, 246 S.C. 92, 95, 142 S.E.2d 445, 446 (1965))). Our supreme court has previously held that "the apportionment formula is a reasonable basis for establishing the income tax of corporations [that] . . . do business on a multistate level." *Eastman Kodak Co. v. S.C. Tax Comm'n*, 308 S.C. 415, 419, 418 S.E.2d 542, 544 (1992).

In South Carolina, the nature of the taxpayer's business in the state determines the method of apportionment a taxpayer must use. For tax years prior to 2007,[6] the net income of a service provider such as DIRECTV[7] was apportioned "using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is total gross receipts from everywhere during the taxable year." S.C. Code Ann. § 12-6-2290 (1995) (amended Supp. 2007). For tax years following 2006, section 12-6-2290 of the South Carolina Code (2014) provides that "[f]or purposes of this section, items included in gross receipts are as provided in [s]ection 12-6-2295." The relevant subsection in the instant case is subsection 12-6-2295(A)(5), which states:

> (A) The terms "sales" as used in [s]ection 12-6-2280 and "gross receipts" as used in [s]ection 12-6-2290 include, but are not limited to, the following items if they have not been separately allocated:
>
> . . . .
>
> (5) receipts from services if the entire income-producing activity is within this [s]tate. If the income-producing activity is performed partly within and partly without this [s]tate, sales are attributable to this [s]tate to the extent the income-producing activity is performed within this [s]tate.

S.C. Code Ann. § 12-6-2295 (2014).

In the instant case, DIRECTV argues the ALC committed an error of law because it misinterpreted section 12-6-2295(A)(5) when it looked to the location of

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[6] In 2007, the General Assembly amended section 12-6-2290 by adding a sentence to the end of the existing statute, which included a cross reference to the new definition of "gross receipts" and took effect in the 2007 tax year. *See* Act No. 110, 2007 S.C. Acts 36–37.

[7] The ALC identified DIRECTV as a service provider, and DIRECTV does not dispute this finding.

DIRECTV's customers in determining DIRECTV's IPA. Because this argument concerns statutory interpretation, it is a question of law, which we may decide without any deference to the ALC. *See CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881. As used in section 12-6-2295(A)(5), the term "income-producing activity" helps define gross receipts as used in section 12-6-2290, which requires taxpayers like DIRECTV to apportion its corporate income to South Carolina using a fraction wherein the numerator is gross receipts from South Carolina during the taxable year and the denominator is gross receipts from everywhere during the taxable year. *See* S.C. Code Ann. § 12-6-2290 (2014). When examining the apportionment statutes, "the statutory policy is designed to apportion to South Carolina a fraction of the taxpayer's total income *reasonably attributable* to its business activity in this State." *Duke Energy Corp.*, 415 S.C. at 356, 782 S.E.2d at 592 (quoting *Emerson Elec. Co. v. S.C. Dep't of Revenue*, 395 S.C. 481, 485–86, 719 S.E.2d 650, 652 (2011)).

As applied, section 12-6-2295(A)(5) defines gross receipts as "receipts from services if the entire income-producing activity is within this [s]tate. If the income-producing activity is performed partly within and partly without this [s]tate, sales are attributable to this [s]tate to the extent the income-producing activity is performed within this [s]tate." Giving the statutory language its plain and ordinary meaning, we find section 12-6-2295(A)(5) establishes that if a corporation generates revenue or income from activity performed exclusively within South Carolina, then its gross receipts must include that income in the numerator of the gross receipts ratio. However, if a corporation, acting on a multistate level, derives its revenue from activities occurring both inside and outside of South Carolina, then the revenue generated from its services performed within South Carolina are its gross receipts from South Carolina, and thus, must be included in the numerator of the gross receipts ratio. This interpretation keeps the legislative purpose of the allocation statutes intact. *See Lockwood Greene*, 293 S.C. at 449, 361 S.E.2d at 347.

Nevertheless, DIRECTV argues it presented substantial evidence at the ALC hearing to show how it generates income. DIRECTV's expert economist, Dr. Brian J. Cody, identified four primary value drivers—content development, marketing, broadcast operations, and customer service—that influence customers' decisions in subscribing to DIRECTV's services. Dr. Cody explained these drivers are DIRECTV's IPAs because DIRECTV engages in these activities to convert

potential customers into subscribers and to create additional income from existing subscribers. Basing his formula on the methodology found in *Lockwood Greene*, Dr. Cody determined the percentage these IPAs occurred in South Carolina using a payroll and assets method, calculating DIRECTV's payroll and assets in South Carolina relative to their total payroll and assets everywhere else, as a proxy for approximating the amount of DIRECTV's total revenue occurring inside South Carolina.

In *Lockwood Greene*, the taxpayer—an engineering firm with offices, projects, and clients in numerous states, including South Carolina—sought a refund of income tax based on the argument that the then-apportionment statute required receipts to be apportioned based on where its customers were located and payments were made, which is an "origin of payment" view. 293 S.C. at 448, 361 S.E.2d at 347. The tax commission argued for a "place of activity" view, which apportions income based on the place where the services are performed. *Id.* The court of appeals noted that the taxpayer provided services to its clients through highly trained engineers and personnel and that clients paid the taxpayer for the expertise and time of its employees. *Id.* at 449, 361 S.E.2d at 347. The court determined that the business of engineering firms, like the taxpayer, carried on in a state was reasonably measured by services rendered by its personnel in that state, which represented a "place of activity" test. *Id.* The court also noted that the taxpayer's argument regarding the tax commission's inconsistent interpretation of the statute based on the commission's guidelines was unpersuasive because the taxpayer did not operate a similar business to those businesses in which the tax commission focused on whether the services were performed in South Carolina. *Id.* at 450, 361 S.E.2d at 348.

DIRECTV asserts the "place of activity" test is still applicable, and thus, because the four primary value drivers representing its IPAs were accomplished through its employees, the payroll and assets method would reasonably represent "the proportion of gross receipts that should be sourced to South Carolina."[8] Moreover,

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[8] Dr. Cody's method resulted in an average of 0.85% of DIRECTV's gross subscriber receipts being sourced to South Carolina over the tax years at issue. Dr. Cody calculated the payroll formula by dividing DIRECTV's South Carolina-based payroll of two employees by its total payroll, which gave a weighted average of 0.07%. Dr. Cody then repeated this method by dividing the value of DIRECTV's

DIRECTV argues the ALC—in finding that all of DIRECTV's activities, outside of beaming the satellite signals to its customers, were "preparatory" activities and were "too attenuated to the production of income" to be IPAs—misinterpreted and misapplied *Mercury Motor Express, Inc. v. South Carolina Tax Commission*, 244 S.C. 134, 135 S.E.2d 756 (1964).[9] DIRECTV argues the transactions listed by the supreme court in *Mercury Motor* are analogous to DIRECTV's activities of content development, marketing, and broadcast operations in that both series of activities contribute to the generation of gross receipts, and ultimately, to net income to be apportioned.

Upon our review of the record, substantial evidence supports the ALC's finding that DIRECTV's IPA is the delivery of signal to its customers nationwide, and accordingly, the delivery of signal to South Carolina customers is represented by 100% of its South Carolina subscription receipts. Dr. Glen W. Harrison, the

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South Carolina assets by its total assets, resulting in an average of 1.63% for the tax period at issue. Dr. Cody then averaged these two figures to obtain the 0.85% figure.

[9] In *Mercury Motor*, the taxpayer, a multistate motor carrier, claimed the statutory apportionment formula improperly apportioned 17% of its income to South Carolina—representing 17% of its mileage in the state—when the taxpayer only generated approximately 1% of its gross revenue from delivery or picking up freight within South Carolina. 244 S.C. at 139, 135 S.E.2d at 758. Our supreme court stated the taxpayer was "engaged in income producing activity actually done and performed within" South Carolina, when the taxpayer's trucks traveled the state's highways. *Id.* at 141, 135 S.E.2d at 759. The court also listed a series of transactions—solicitation of freight, hauling of freight, picking up freight, delivering freight, and collecting charges—and stated each transaction in the series contributed to the earning and net income of the taxpayer, and "while each transaction is necessarily incidental to the production of its income, the transaction which primarily earns the income is the hauling of the freight." *Id.* The court found that the taxpayer failed to meet its burden of showing the tax was unconstitutional, arbitrary, and discriminatory because nothing indicated that its trucks, while traveling 17% of the roads, failed to contribute to the taxpayer's income or failed to earn less than 17% of the income. *Id.* at 141, 135 S.E.2d at 760.

DOR's expert, determined the purchase of DIRECTV's services and the delivery of television services in the customers' homes or businesses was the activity that "actually generate[d] income" for DIRECTV. We also find DIRECTV's reliance on *Lockwood Greene* for the development of its proxy method is unfounded. While we acknowledge that the court in *Lockwood Greene* utilized a "place of activity" test based on the services provided by personnel in South Carolina, the facts are distinguishable from the instant case. *Lockwood Greene* involved an engineering firm that provided its clients a service from which it derived its income by offering the time and expertise of its highly trained engineers and personnel. 293 S.C. at 448, 361 S.E.2d at 347. Here, however, while DIRECTV has highly trained engineers and personnel obtaining content and producing innovative technology, DIRECTV's customers are paying DIRECTV for the end result of the personnel's work—the delivery of the signal that allows customers to enjoy the digital entertainment for which they pay DIRECTV. The service DIRECTV provides is entirely different from *Lockwood Greene* and DIRECTV's source of income does not derive from its engineers, but rather from subscriptions to its programming packages.

Although we recognize that South Carolina law only requires a reasonable approximation for apportionment, we find Dr. Cody's method is not a reasonable approximation of DIRECTV's business activity in South Carolina. *See Covington Fabrics Corp. v. S.C. Tax Comm'n*, 264 S.C. 59, 66, 212 S.E.2d 574, 577 (1975). Dr. Cody designed his payroll and assets method to represent "the proportion of gross receipts that *should* be sourced to South Carolina," which would generate a hypothetical figure of South Carolina subscription receipts that would result from multiplying a payroll and assets percentage for a given year by DIRECTV's total subscription revenue for that year. (emphasis added). However, while DIRECTV asserts its IPA is its four primary value drivers and the payroll and assets method is a reasonable proxy for determining how much of its IPA should be apportioned to South Carolina, we find that 0.85% of DIRECTV's total subscription revenue does not reasonably represent DIRECTV's business activity in South Carolina. The payroll and assets method cannot be a reasonable approximation of the business activity conducted in South Carolina because DIRECTV's personnel in South Carolina during the periods at issue consisted of two employees, at most, and the only assets that DIRECTV owned in South Carolina were the four local collection facilities and the equipment purchased or leased by its subscribers. Additionally, we find Dr. Harrison correctly stated that the DOR appropriately sourced

DIRECTV's subscription revenue from its South Carolina customers to the numerator of the gross receipts ratio because it directly represented DIRECTV's business activity in South Carolina and calculated DIRECTV's activity in the state. Furthermore, we agree with Dr. Harrison's statement that the proxies or approximations employed by DIRECTV were unnecessary in measuring the value of DIRECTV's services in South Carolina because the subscription fee paid by DIRECTV's subscribers directly placed a value on DIRECTV's services.

We note DIRECTV states its principal aim is to "package and deliver high quality video entertainment" to subscribers, and that it is not a media broadcaster, but "is a producer of original content and a multichannel video programming distributor, whose revenue is derived from fees paid by its customers for rentals of set-top boxes and subscriptions to its programming services." Stated differently, the service DIRECTV provides to its approximately twenty million nationwide customers is the delivery of high quality television entertainment. Its clients pay DIRECTV for the delivery of its television programming packages and for the equipment to process the signal DIRECTV sends to its customers. Thus, as a service provider, DIRECTV's IPA is the delivery of its programming signal to its customers across the country and in South Carolina.

In accordance with statutory language and policy, the fees paid by South Carolina subscribers for the lease and purchase of DIRECTV's equipment and the delivery of the signal to the subscribers represent the extent of the IPAs occurring in South Carolina; reasonably represent DIRECTV's business activity in South Carolina; and are to be included in the numerator of the gross receipts ratio as the South Carolina gross receipts for DIRECTV. *See* S.C. Code Ann. §§ 12-6-2290, -2295(A)(5); *see also Duke Energy Corp.*, 415 S.C. at 356, 782 S.E.2d at 592 ("[T]he statutory policy [for the apportionment statutes] is designed to apportion to South Carolina a fraction of the taxpayer's total income *reasonably attributable* to its business activity in this State." (quoting *Emerson Elec. Co.*, 395 S.C. at 485–86, 719 S.E.2d at 652)); *Eastman Kodak Co.*, 308 S.C. at 419, 418 S.E.2d at 544 ("The fact that a very small percentage of the leased assets are located in South Carolina is accounted for in the numerator of the apportionment formula in which Kodak's payroll, property, and sales in this state are computed. Therefore, the apportionment formula reflects a 'reasonable representation' of Kodak's business in this state."). Therefore, we agree with the ALC and find DIRECTV should source

100% of its South Carolina subscriber receipts to the numerator of the gross receipts ratio.

Last, we find DIRECTV's *Mercury Motor* argument unpersuasive. The "preparatory" activities that DIRECTV engages in for the production of its programming and marketing are not an IPA for the purposes of section 12-6-2295(A)(5). We note Dr. Cody testified these activities were conducted "in anticipation" of customers signing up for DIRECTV's services and DIRECTV engages in these activities "in anticipation of future profits." Accordingly, these activities cannot be IPAs because they do not produce income, but rather, are "income-anticipatory" activities. DIRECTV's primary income-*producing* activity is the delivery of the signal to the customer because this activity actually generates income for DIRECTV. While the other activities occurring prior to the delivery of signal are important for DIRECTV in that it can help lead to income, section 12-6-2295(A)(5) requires activities that actually produce income. Thus, we agree with the ALC and find that these activities are "too attenuated" to be considered income-producing for the purposes of section 12-6-2295(A)(5).

In conclusion, we affirm the ALC because its decision is not affected by an error of law and is supported by substantial evidence. *See Media Gen. Commc'ns, Inc.*, 388 S.C. at 144, 694 S.E.2d at 528.

B. Burden of Proof

DIRECTV next argues the ALC erred by applying an improper burden of proof because DIRECTV proved by a preponderance of the evidence it was entitled to a refund for tax years 2006 through 2008 and the DOR's assessment for the tax years 2009 through 2011 was incorrect. We disagree.

The standard of proof in an administrative hearing of a contested case is by a preponderance of the evidence. *See* S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2016) ("Unless otherwise provided by statute, the standard of proof in a contested case is by a preponderance of the evidence."). In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof. *See Leventis*, 340 S.C. at 132–33, 530 S.E.2d at 651. "In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the de novo contested case proceeding." *S.C. Dep't of Revenue v. Sandalwood Soc.*

Club, 399 S.C. 267, 279, 731 S.E.2d 330, 337 (Ct. App. 2012) (emphasis omitted). "The Rules of Procedure for the Administrative Law Judge Division require that the AL[C] make independent findings of fact in contested case hearings, and the [APA] clearly contemplates that the AL[C] will make [its] own findings of fact in a contested case hearing." *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997) (citation omitted). When conflicting evidence on an issue exists, the appellate court defers to the findings of the fact-finder in accordance with the substantial evidence standard of review. *Risher*, 393 S.C. at 210, 712 S.E.2d at 435.

In the instant case, the ALC determined DIRECTV had the burden of proof because it was challenging the DOR's determination that it must source its South Carolina subscription receipts from South Carolina customers to the numerator of the gross receipts ratio. Thus, the ALC required DIRECTV prove the DOR was incorrect for including DIRECTV's subscription receipts for its South Carolina customers in the numerator of the gross receipts ratio and that a refund of the 2006 through 2008 tax years and reassessment of 2009 through 2011 tax years was proper. However, the ALC determined DIRECTV failed to prove by a preponderance of the evidence that it was not required to source all of its subscription receipts from South Carolina customers to the numerator of the gross receipts ratio.

DIRECTV, on the other hand, relies on this court's findings in a property tax case—*Cloyd v. Mabry*, 295 S.C. 86, 367 S.E.2d 171 (Ct. App. 1988)—for support that it satisfied its burden of proof and is entitled to relief. In *Cloyd*, a county tax assessor assessed taxes on eight properties, which were located in a floodway and subject to strict restrictions on use following the enactment of an ordinance, without making an allowance for the ordinance's effect on the fair market value of the land. *Id.* at 87, 367 S.E.2d at 172. On appeal, the assessor claimed his assessment carried a presumption of correctness, which could not be set aside unless the landowners proved the actual value of their property. *Id.* at 88, 367 S.E.2d at 172–73. The court of appeals determined that a contesting taxpayer, who has the burden of proving the taxing authority's valuation incorrect, could overturn that presumption of correctness and be entitled to relief if the taxpayer either proved the actual value of the property or could show other evidence to indicate the assessing authority's valuation was incorrect. *Id.* at 88–89, 367 S.E.2d at 173.

DIRECTV asserts *Cloyd* is applicable here because it has been used in other tax cases unrelated to property tax. Furthermore, based on the findings in *Cloyd*, DIRECTV contends it is entitled to appropriate relief because it satisfied its burden of proof by presenting detailed testimony and substantial evidence that showed the DOR's assessment was incorrect and because the DOR did not present credible evidence as to DIRECTV's IPA.

We find DIRECTV's reliance on *Cloyd* is misguided. While it has been used as the burden of proof in personal income tax, sales tax, and accommodation tax cases before the ALC, we note that none of these cases involved corporate income tax, or more importantly, the apportionment of corporate income. Thus, because the facts of *Cloyd* are too far removed from the facts of the instant case, the application of the *Cloyd* burden of proof is inapplicable here. Furthermore, even if we applied *Cloyd*, we find DIRECTV failed to satisfy its burden of proof because it did not demonstrate an actual value for its IPAs and did not present other evidence proving the DOR incorrectly included 100% of DIRECTV's subscription receipts from South Carolina customers in the numerator of the gross receipts ratio.

As the fact-finder, the ALC was free to weigh evidence and determine witness credibility in making its factual findings. *See MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 392 S.C. 314, 324, 709 S.E.2d 626, 631 (2011). Both parties presented their own experts in economics and tax policy to convey their opinions on where DIRECTV's IPA occurred. In light of the evidence presented, the ALC found DIRECTV's argument unpersuasive. In particular, the ALC found Dr. Cody's methods did not provide actual values for DIRECTV's services and his proxies did not provide a reasonably approximate value of DIRECTV's IPAs in South Carolina. As previously mentioned, we agree with the ALC's assessment that DIRECTV's payroll and assets proxy is not a reasonable approximation of its IPA in South Carolina. Moreover, because the DOR presented evidence that conflicted with DIRECTV's evidence regarding the sourcing of the IPA, our substantial evidence standard of review dictates that we defer to the findings of the fact-finder. *See Risher*, 393 S.C. at 210, 712 S.E.2d at 435. Accordingly, the ALC properly determined DIRECTV did not satisfy its burden based on the ALC's findings that "rental and sales receipts received from South Carolina customers are properly included in the numerator of the gross receipts ratio."

Additionally, DIRECTV argues the ALC ignored the substantial factual and economic evidence it presented. DIRECTV points out the ALC held that "the delivery of the signal into the homes and onto the television sets of DIRECTV's customers" was DIRECTV's IPA despite stating that it did not adopt the DOR's view that IPA of "businesses within the direct broadcast services industry is completely limited to the delivery of a signal into the customer's home and onto the customer's television."

We find, however, that simply because the ALC did not agree with the DOR's apportionment method does not mean DIRECTV satisfied its burden of proof. DIRECTV was still required to prove that removing South Carolina subscription receipts from the numerator reasonably represented its business activity in South Carolina. *See Lockwood Greene*, 293 S.C. at 449, 361 S.E.2d at 347. Furthermore, we agree with the ALC that the outcome of the DOR's assessment—including 100% of South Carolina subscription receipts in the numerator of the gross receipts ratio—is correct, but like the ALC, we find this is not DIRECTV's sole IPA in South Carolina. Nevertheless, while other IPAs may have occurred within the state, sourcing 100% of DIRECTV's subscriptions to the numerator of the gross receipts ratio best represents DIRECTV's activity within South Carolina.

Mindful of our standard of review and in light of the evidence presented in the record, we affirm the ALC because its findings were not "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-610(B)(e) (Supp. 2016). Thus, we find DIRECTV failed to meet its burden of proof and show why its South Carolina subscription receipts should not be sourced to the numerator of the gross receipts ratio.

II. Substantial Underpayment Penalties

Last, DIRECTV argues substantial evidence does not support the ALC's finding that the DOR properly imposed substantial understatement penalties. We disagree.

Section 12-54-43(A) of the South Carolina Code (2014) applies civil penalties to every South Carolina tax law that requires a return unless otherwise provided. Section 12-54-155(A)(1) of the South Carolina Code (2014) addresses substantial underpayments of taxes and provides that "[i]f there is an underpayment attributable to . . . a substantial understatement of tax for a taxable period . . . ,

there must be added to the tax an amount equal to twenty-five percent of the amount of the underpayment." "[T]here is a substantial understatement of tax for a taxable period if the amount of the understatement for the taxable period exceeds the greater of ten percent of the tax required to be shown on the return for the taxable period or five thousand dollars." S.C. Code Ann. § 12-54-155(B)(1)(a) (2014). As applied, the term "understatement" means "the excess of the amount of the tax required to be shown on the return for the taxable period over the amount of the tax imposed which is shown on the return." S.C. Code Ann. § 12-54-155(B)(2)(a) (2014).

> The amount of the understatement . . . must be reduced by that portion of the understatement which is attributable to the tax treatment of an item: (i) by the taxpayer if there is or was substantial authority for that treatment, or (ii) with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return and there is a reasonable basis for the tax treatment of the item by the taxpayer.

S.C. Code Ann. § 12-54-155(B)(2)(b). The statute further adds that "[a] penalty must not be imposed pursuant to this section with respect to a portion of an underpayment if it is shown that there was a reasonable cause for the portion and that the taxpayer acted in good faith with respect to the portion." S.C. Code Ann. § 12-54-155(D)(1) (2014).

The ALC found the DOR was correct in its understatement and interest calculations for the 2009 through 2011 tax years. It also found no substantial authority supported DIRECTV's treatment of its subscription receipts and DIRECTV's basis for its tax treatment of the subscription receipts was unreasonable. However, the ALC reduced the understatement penalty to 25% of the original penalty because DIRECTV acted with sufficient belief in bringing its claim regarding the portion of the understated tax amounts.

DIRECTV, however, asserts it presented substantial evidence and testimony demonstrating its treatment of subscription revenue was correct. DIRECTV also asserts it had substantial authority for its treatment of the subscription revenue

based on the holdings in *Lockwood Greene* and *Mercury Motor*. Finally, DIRECTV claims it demonstrated good faith by attributing a portion of its subscription revenue to South Carolina for the 2011 tax year. We affirm the ALC's decision to assess underpayment penalties.

As previously discussed, the record contains substantial evidence demonstrating DIRECTV's use of the payroll and assets method was an unreasonable approximation of its IPA in South Carolina and did not reasonably represent DIRECTV's business activity in the state. *See Duke Energy Corp.*, 415 S.C. at 356, 782 S.E.2d at 592 ("[T]he statutory policy [for the apportionment statutes] is designed to apportion to South Carolina a fraction of the taxpayer's total income *reasonably attributable* to its business activity in this State." (quoting *Emerson Elec. Co.*, 395 S.C. at 485–86, 719 S.E.2d at 652)); *Covington Fabrics Corp.*, 264 S.C. at 66, 212 S.E.2d at 577 (explaining only a reasonable approximation is necessary for apportionment purposes). Moreover, DIRECTV's original tax returns filed for the 2006 through 2008 tax years sourced all of its subscription receipts in South Carolina to the numerator of the gross receipts ratio, but only after filing amended returns did DIRECTV rely on the holdings of *Lockwood Greene* and *Mercury Motor*, both of which were settled law by 2006. DIRECTV's reliance on these cases is unfounded because—regardless of their holding—established law dictates the purpose of the apportionment statutes is to apportion corporate income upon a basis that reasonably represents the corporation's business activity in South Carolina. *See* S.C. Code Ann. § 12-6-2210(B); *Duke Energy Corp.*, 415 S.C. at 356, 782 S.E.2d at 592; *Lockwood Greene*, 293 S.C. at 449, 361 S.E.2d at 347. Because DIRECTV's treatment of its income tax did not reasonably represent its business activity in the state, DIRECTV could not have relied on substantial authority for its treatment of the subscription receipts.

Finally, subsection 12-54-155(D)(1) requires the taxpayer to both act in good faith and have a reasonable cause for the portion of an underpayment before the removal of the penalty. In the instant case, the ALC reduced DIRECTV's penalty to 25% of the original amount because DIRECTV "acted with sufficient belief in bringing its claim regarding the portion of the understated tax amounts." While the ALC found DIRECTV acted in good faith, the ALC did not, however, find a reasonable cause for DIRECTV's underpayment. Therefore, in accordance with our standard of review, we affirm the ALC's amended order regarding substantial understatement penalties.

CONCLUSION

Based on the foregoing, we find the ALC did not err by finding DIRECTV's IPA was the delivery of its signal into the homes and businesses of its customers and DIRECTV must source 100% of its subscription receipts from South Carolina customers to the numerator of the gross receipts ratio. We likewise affirm the ALC's assessment of underpayment penalties. Accordingly, the ALC's decision is

AFFIRMED.

KONDUROS, J., and LEE, A.J., concur.