

Ethical Coffee Break no. 5 (July 2011)

National

Again on civility in the profession.

As reported in our Ethical Coffee Break no. 3, the South Carolina Supreme Court has recently sanctioned two lawyers for being uncivil. *In the matter of Anonymous Member of the South Carolina Bar*, Opinion No. 26964, filed on April 25, 2011; *In the Matter of William Garry White, III*, No. 26939 filed March 7, 2011.

The issue of civility has also been addressed by U.S. Supreme Court Justice Stephen G. Breyer at the ABA Opening Assembly of the American Bar Association Annual Meeting in Toronto. In fact, his speech contained calls for civility, better education and respect for the Rule of Law. "We want good lawyers to be in a profession and nation that reflects civility," said Breyer. "We have to begin here." See <http://www.abanow.org/2011/08/supreme-court-justice-stephen-breyer-urges-civility-improved-education-at-aba-opening-assembly>.

South Carolina

Is a lawyer negligent when he informed his client twice that he can assist in negotiations but not in a lawsuit brought in a state in which he is not admitted and if so, can his client be relieved from a default judgment on account of her lawyer's negligence?

The South Carolina Court of Appeals has recently dealt with a limited engagement agreement issue.¹ The court found the limited engagement agreement effective. The lawyer was not negligent. Had he been negligent, could his negligence be imputed to his client? And if not, could his client be relieved from a default judgment on account of lawyer's negligence? We do not know because the Court, finding no negligence, did not decide the last two issues. *ITC Commercial Funding, Inc. v. Crerar*, No. 4844, filed June 15, 2011.

These are the facts: during a loan default negotiations, the lawyer ("Lawyer") for the debtor (Alice Crerar, guarantor of the loan: "Crerar") -- while mailing to his client copies of settlement proposals by the creditor (ITC Commercial Funding, LLC: "ITC") --

¹ On limited engagement agreement, see Nathan M. Crystal, *Limited Engagement Agreements; an Important Tool for Limiting Liability and Dealing with Conflicts*, South Carolina Lawyer (May 2011), available also in this website, section "PROFESSIONAL RESPONSIBILITY" / Attorney-Client Relationship.

clearly notified Crerar twice "I will not be able to represent you in the South Carolina lawsuit since I am not admitted to practice before the courts of that State." In fact, a lawsuit was brought against Crerar in South Carolina, as part of the settlement proposal. No responsive pleading had been filed. Since Crerar did not pay as agreed, ITC filed a request for entry of default and motion for default judgment against Crerar. Crerar filed a motion for relief from judgment, citing, among others Rule 60(b) SCRCP ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect"). The trial court denied the motion, finding that Crerar's negligence in failing to answer ITC's complaint was not excusable under Rule 60(b) SCRCP. Crerar appealed claiming the trial court erred (i) in rejecting the claim that the Lawyer was negligent because Lawyer's two letters did not contain an explanation of the risks regarding his limited representation and (ii) in finding that Lawyer's negligence was imputed to his client Crerar.

The Court of Appeals affirmed. The court found that the record contained evidence that Lawyer acted with reasonable care in informing Crerar that he could not represent her. The court held therefore that the trial court did not abuse its discretion in finding Crerar's negligence in failing to answer ITC's complaint not excusable under Rule 60(b) SCRCP.

The court obviously considered the limited engagement agreement to be valid. The court reminded that Rule 1.2(c), RPC provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent"; informed consent means an "agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct" (Rule 1.0(g) RPC.) The court referred to Comment 6 to Rule 1.0 RPC on the content of the information to the client and Comment 7 to Rule 1.0 RPC on the manner of informed consent. The court, however, also relied on a decision of the South Carolina Supreme Court for the proposition that "the failure to comply with the RPC should not . . . be considered as evidence of negligence per se." *Smith v. Haynsworth, Marion, McKay & Geurard*, 472 S.E.2d 612, 614 n.6 (1996). And also: "[T]he RPC may be relevant and admissible in assessing the legal duty of an attorney in a malpractice action ... [but an attorney's failure to comply with the RPC is] merely a circumstance that, along with other facts and circumstances, may be considered in determining whether the attorney acted with reasonable care in fulfilling his legal duties to a client." *Id.* at 614 n. 6. Here, according to the Court of Appeals, Lawyer "acted with reasonable care in informing . . . [Crerar] he could not represent her."

As to whether a lawyer's negligence can or cannot be imputed to his client, the Court of Appeals did not decide the issue. Since the trial court failed to make any specific findings of negligence by Lawyer and therefore did not impute negligence to Crerar, "we do not consider the Appellant's argument that the trial court erred in imputing negligence to her".

Groupon and similar deal-of-the-day websites: is their use ethical for a lawyer? It seems so, according to a recent opinion of the Ethics Advisory opinion, but are the risks worth its while?

Groupon is an online company that offers daily deals at local businesses. You can get discounts on manicure service, drinks, local restaurants . . . and maybe on lawyers' services. Groupon is not unique. There are many websites like Groupon and there are also -- even if someone could find it inelegant -- lawyers who find it desirable to sell their services in this way. Is that ethical? The issues are obviously fee-splitting and advertising.

In South Carolina the relevant rules are Rule 5.4(a) "A lawyer or law firm shall not share legal fees with a nonlawyer" (save limited exceptions expressly listed) and Rule 7.2(c):

A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and
- (3) pay for a law practice in accordance with Rule 1.17.

Proper consideration should also be given to Comment 6 to Rule 7.2 to the Rule.²

In the case submitted to the Committee, a lawyer would like to use "daily deal" websites that offer products and services at discounted rates to market her legal services. In particular, lawyer would like to use sites in which users purchase a voucher through the

² Lawyers are not permitted to pay others for channeling professional work. Paragraph (c)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the cost of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public relations personnel, business development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

website to be subsequently redeemed for a discounted product or service. The proceeds of the purchase are split between the website offering the voucher and the business at which it is to be redeemed. Lawyer envisions using such websites to offer legal services such as preparation of wills.

Answering the question whether a lawyer violates the Rules of Professional Conduct by contracting with a website to offer vouchers that can be purchased from the website and then subsequently redeemed for discounted legal services such as the preparation of wills, the Committee opined that it does not. "The use of 'daily deal' websites to sell vouchers to be redeemed for discounted legal services does not violate the Rule 5.4(a) prohibition on sharing of legal fees."

Why? According to the Committee, for two reasons: (1) The fee charged by the website for use of its service (i.e. a percentage of the money paid by for the coupon), can be qualified as a payment for the "the reasonable cost of advertisements or communications," pursuant to Rule 7.2(c)(1). The Committee found that it was not significant whether the fee is deducted up front by the company rather than invoiced and then paid later by lawyer. (2) Even if the fee does constitute fee splitting with a non-lawyer, since the website does not have the ability to exercise any control over the lawyer's services, the prohibition of fee-splitting in Rule 5.4(a) does not apply because it only applies where a fee-splitting agreement interferes with "the lawyer's professional independence of judgment".

A great victory of the attorneys on sale? It is hardly so. The Committee cautioned that the use of such websites must be in compliance with Rules 7.1 and 7.2. Easy to do with the coupons website? We would not say that. Rule 7.1 expressly provides that an attorney must ensure that the communication does not contain any false, misleading, deceptive or unfair information about the lawyer or her services.³ Rule 7.2 provides that "[a] lawyer is responsible for the content of any advertisement or solicitation placed or disseminated by the lawyer and has a duty to review the advertisement or solicitation prior to its dissemination to reasonably ensure its compliance with the Rules of Professional Conduct."

In addition, the Committee cautioned the lawyer on the possibility of breaching several other rules, i.e. 1.5(b) (requiring the lawyer to disclose the scope of representation and the basis of her fee within a reasonable time of the commencement of representation), Rule 1.15(c) (requiring the lawyer to deposit

³ As we reported in the Ethical Coffee Break no. 4, the South Carolina Supreme Court has recently applied - and quite strictly -- the misleading advertisement rule to websites. *In Re Wells*, Opinion No. 26969, May 9, 2011.

unearned fees into a client trust account until the fees are actually earned) and Rule 1.7 and 1.9 on conflicts of interest.

It seems to us that it may be quite difficult for a lawyer taking part in a deal-of-the-day website to assure compliance with these rules. And even if, investing attention and time, the compliance is possible, is the investment of energy worth its while to sell your services by coupons? Opinion 11-05, available at <http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1012/Ethics-Advisory-Opinion-11-05.aspx>