Ethical Coffee Break no. 6 (August 2011)

NATIONAL

The Due Process Clause does not entitle a supporting parent to a state provided counsel in a civil contempt proceeding when the other parent is not represented by counsel and the State provides alternative procedural safeguards.

On June 20, 2011, in *Turner v Rogers*,[1] the U.S. Supreme Court decided an issue of right of receiving the assistance of counsel. The Court held that where the custodial parent who is entitled to receive the support is unrepresented by counsel, the Due Process Clause does not oblige the State to provide counsel in civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration. However, the State must have alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, i.e., whether the supporting parent is able to comply with the support order.[2] Absent these procedures, the supporting parent's incarceration violates due process because he received neither counsel nor the benefit of alternative procedures. This is the situation in Turner's case and thus the Court reversed the S.C. Supreme Court's decision.

These are the facts: South Carolina family court ordered Turner to pay $51.73 per week to Rogers to help support their child. Turner repeatedly failed to pay the amount due and was held in contempt five times. For the first four, he was sentenced to 90 days' imprisonment, but he ultimately paid what he owed. The fifth time he did not pay but completed a 6-month sentence. After his release, the family court clerk issued a new

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[1] 564 U.S. ___ (2011).

[2] Examples of the procedural safeguards include: (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

"show cause" order against Turner because he was $5728.76 in arrears. Both he and Rogers were unrepresented by counsel at his brief civil contempt hearing. The judge found Turner in willful contempt and sentenced him to 12 months in prison. Turner served that term. Afterwards Turner claimed that the Federal Constitution entitled him to counsel at his contempt hearing. The South Carolina Supreme Court rejected the claim, holding that civil contempt does not require all the constitutional safeguards applicable in criminal contempt proceedings.

The US Supreme Court made the point that there was no precedent providing a definitive answer to the question whether counsel must be provided. While the Sixth Amendment granting an indigent criminal defendant the right to counsel did not apply because the case was not criminal, the Due Process might have required counsel. But, specified the Court, "due process does not always require the provision of counsel in civil proceedings where incarceration is threatened". Besides, providing counsel where "the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent unrepresented by counsel … could create an asymmetry of representation that would alter significantly the nature of the proceeding". In addition, "substitute procedural safeguards … that … if employed together, can significantly reduce the risk of an erroneous deprivation of liberty."

SOUTH CAROLINA

South Carolina Supreme Court broadens but also restricts lawyers' advertisement.

By order of August 22, 2011, the SC Supreme Court amended the South Carolina Rules of Professional Conduct[3] and Rule 407 of the South Carolina Appellate Court Rules (SCACR).

Declining to adopt the majority of the changes proposed by the South Carolina Bar's Commission on Lawyer Advertising, the Court has accepted some of the proposed amendments to Rules 7.1, 7.2 and 7.3 of the South Carolina Rules of Professional Conduct, and to Rule 407, SCACR. The intervention of the Court has broadened the ability of lawyers to advertise

[3] The rules, as amended, are available at www.sccourts.org/courtReg.

on one side but, on the other side, has also introduced some hurdles that did not exist before.

In particular, the Court loosed the regulation by deleting the term "unfair" from Rule 7.1[4] and the ban on testimonials from Rule 7.1(d) (replaced with language allowing testimonials under certain conditions).[5] Another simplification is the elimination in Rule 7.3(c) of the requirement that solicitations be filed with the Commission on Lawyer Conduct, together with a $50 filing fee.

On the other side, the Court heightened the requirements for permissible advertisement by amending Rule 7.2(a) to provide that

> all advertisements shall be predominately informational such that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication.

In addition, on the side of the increased obligations, you might want to consider both the addition in Rule 7.3 of electronic solicitations to the types of solicitations for which lawyers must maintain a file, and the amendment in Rule 7.3(d)(1) to require that email solicitations be labeled as advertising material in the subject line and at the beginning and end of the message in capital letters and prominent type. While the above are not a

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[4] Rule 7.1 reads now: "A lawyer shall not make false, misleading, or deceptive communications about the lawyer or the lawyer's services". The Court has deleted the reference to the "unfair communications" that was vague and of no immediate grasp.

[5] Rule 7.1(d) now bans testimonials and endorsements only in the following circumstances:

> (1) without identifying the fact that it is a testimonial or endorsement;
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> (2) for which payment has been made, without disclosing that fact;
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> (3) which is not made by an actual client, without identifying that fact; and
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> (4) which does not clearly and conspicuously state that any result the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate similar results can be obtained for other clients.

complete list of the amendments, they are for sure the most important from the order.[6]

The SC Supreme Court decided that lawyers' services are property for the purpose of the Taking Clause; therefore, in court appointments, just compensation is required but that it is for the trial court to decide what is just. In the decision, the SC Supreme Court reminds us the duties entailed by the profession.

On June 21, 2011 in *Ex parte Brown*, No. 26991, the S.C. Supreme Court accepted the South Carolina Bar's amicus curiae brief and held that "the Takings Clause of the Fifth Amendment to the United States Constitution is implicated when an attorney is appointed by the court to represent an indigent litigant. In such circumstances, the attorney's services constitute property entitling the attorney to just compensation."

The holding, however, did not benefit the lawyer involved. In this case, attorney James A. Brown had been appointed on March 1, 2007, pursuant to Rule 608, SCACR, by the trial court to represent Alfonzo J. Howard, an indigent in a capital case. From the beginning, Mr. Brown complained about the appointment to represent Howard, first to the circuit's chief administrative judge and then to the trial judge. Mr. Brown asked to be relieved as counsel, stating that his obligations to an appointed

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[6] For completeness, the other changes in the Rules of Professional Conduct are the following: (1) Rule 7.3(d)(2) and (d)(3) are amended to apply to "solicitations" and "communications," instead of being limited to "written or recorded solicitations"; (2) Rule 7.3(i) is modified to require a lawyer who reasonably believes a lawyer other than the lawyer whose name or signature appears on the communication will likely be the lawyer who primarily handles the case or matter, or that the case or matter will be referred to another lawyer or law firm, to notify a potential client; (3) deletion of Rule 7.2(f); (4) amendment of Rule 7.3(d)(2)(A) by adding directories and the advice of others as alternative methods for obtaining information about other lawyers; (5) Comments [1] and [3] to Rule 7.1 are modified to address the change in the ban on testimonials; (6) addition of a new Comment [4] to address the amendment to Rule 7.2(a); (7) Amendment to Comment [8] to Rule 7.2; (8) amendment of New Comment [6] to Rule 7.2 to state that it is the responsibility of the lawyer who disseminates or causes the dissemination of the advertisement to review it for compliance with the South Carolina Rules of Professional Conduct.

capital case were taking up substantial amounts of time. His repeated requests to withdraw were always denied by the judge, who even threatened to hold him in contempt because of Brown's statement that he did not desire "to do any work in this case" and he would stop. No contempt was issued but the judge told him to go forward more than one time. Mr. Brown, after consulting with a lawyer, finally decided to continue with representation of the indigent defendant. At the end of the trial the court, considering Mr. Brown's behavior, refused to award fees in excess of the statutory maximum fee of $3,500. Mr. Brown directly appealed the denial to the SC Supreme Court. The Supreme Court affirmed because it could find no abuse of discretion under the unique facts and circumstances presented.

The Supreme Court reminded that an award of attorney's fees in excess of the section 17-3-50 statutory cap is within the sound discretion of the trial judge.[7] In this case, "[g]iven the egregious level of Appellant's inexcusable conduct and persistent disregard of the trial court's orders, we find the trial court did not abuse its discretion in refusing to award fees in excess of the statutory cap."

The Supreme Court, however, accepted the position contained in the amicus curiae of the SC Bar and held that that the Fifth Amendment Takings Clause is implicated when an attorney is appointed to represent an indigent litigant.[8] In such circumstances, the attorney's services constitute property entitling the attorney to just compensation.[9]

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[7] Section 17-3-50(D) provides that

> The Payment in excess of the hourly rates and limits in subsection (A) or (B) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred.

[8] The SC Supreme Court cited to the Kansas Supreme Court: "Attorneys make their living through their services. Their services are the means of their livelihood. ... When attorneys' services are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good. ... State v. Smith, 747 P.2d 816, 842 (Kan. 1987).

[9] For budgeting reasons, the Court's holding is to apply to court-appointed cases after July 1, 2012.

But, a moment: just compensation is … how much in a complex case? We do not know. According to the Supreme Court, the amount of attorney's fees in complex appointed cases is to be decided by the trial court on a case-by-case basis, subject to an abuse of discretion standard of review. In fact, the Court held that while the issue of a taking "is one of law. The question of what constitutes a fair attorney's fee under the circumstances would be one of fact."

We would like to call the readers' attention to one aspect of the *Brown*'s decision. In recognizing that the lawyers' services are property for the purpose of the Taking Clause, the Supreme Court made very clear that the holding was "limited to an attorney's constitutional entitlement to compensation in appointed cases" and that the holding did not change "the nature of the practice of law in this state. … We continue to adhere to the view that the license to practice law is a privilege and not a right. As such, the practice of law remains subject to control, regulation, and discipline — all as this Court directs."

In particular, the Court reminds that Rule 608(a) requires members of the South Carolina Bar to "serve as counsel for indigent persons in the circuit and family courts pursuant to statutory and constitutional mandates." In addition, among other things, the Court cited to its precedent of *In Re Jacobson,* 126 S.E.2d 346, 353 (1962), reminding that "[a] lawyer is not a merchant; the law is a regulated public service profession. While the merchant and lawyer both seek gain, the difference between a business and a profession is essentially that while the chief end of a trade or business is personal gain, the chief end of a profession is public service."

In these days in which the economic crisis has generated new challenges, new hazards, and risks that may tempt some lawyers to lower the level of the profession to survive the hard times, we think that the words of the Supreme Court are a valuable reminder.