Ethical Coffee Break No. 9 (November 2011)

SOUTH CAROLINA

The South Carolina Supreme Court holds that a competent *pro se* litigant in family court waives the right to a court-appointed attorney once trial commences.

In *Roesler v. Roesler* (case No. 4906), the South Carolina Supreme Court affirmed a family court's decision to proceed to trial even though the Wife requested a court-appointed attorney during trial.

At the beginning of the divorce proceeding, the judge questioned the Wife about proceeding as a *pro se* litigant. The Wife responded she was competent, understood the nature of the proceedings, and asserted that she could not afford to pay $5,000 in attorney fees. Then, the court addressed and denied the Wife's motion to dismiss for lack of jurisdiction. During the course of trial, the Wife requested a court-appointed attorney several times. Nonetheless, the wife testified, presented evidence, and cross-examined her husband.

On appeal, the wife argued that the family court erred in proceeding to trial because she had no attorney, requested an attorney, and could not afford an attorney.

The Court concluded that the judge did not err because the family court had no obligation to appoint the Wife an attorney in a divorce proceeding because she chose to represent herself at the outset. The Court reasoned that the state and federal due process right to an attorney did not apply to a separation proceeding in a family court. As such, the Court affirmed the final order granting the Husband a divorce.

A Work Share Agreement between a Law Firm and Real Estate Agency violates the South Carolina Rules of Professional Conduct because it involves improper fee sharing.

The South Carolina Ethics Advisory Committee recently issued Ethics Advisory Opinion 11-08 and opined that a work share agreement between a law firm and real estate agency violated Rules 5.4(a) and 7.2 because the services to be performed

by the parties are those that the parties would customarily perform in the absence of an agreement.

A real estate agency ("Real Estate Agency") sought to enter a "work share agreement" ("WSA") with a South Carolina firm ("Law Firm") that handles real estate closings. The proposed WSA states that the Real Estate Agency would provide an executed contract, real estate agent contact information, party names, addresses, social security numbers, copies of invoices for appraisals, surveys, home inspections and insurance. The proposed agreement recites that the Real Estate Agency is engaged in the business of marketing and selling real estate, while the Law Firm is engaged in the business of providing title and ancillary legal services in connection with real estate closings. Additionally, the Law Firm would pay the Real Estate Agency $225.00 for each transaction where the Real Estate Agency was the buyer's or seller's agent.

Under Rule 5.4(a), a lawyer may share legal fees with a non-lawyer in very limited circumstances. According to Rule 7.2(c), a lawyer may not furnish anything of value to a person in exchange for referrals. In this case, the WSA provides that the Law Firm will compensate the Real Estate Agency $225.00 each transaction, although the Agency did not provide any services under the WSA in addition to the services the Agency already provided. The Committee noted that South Carolina has not adopted Rule 7.2(b)(4), which permits lawyers to enter nonexclusive reciprocal referral agreements. As such, the Committee reasoned that South Carolina considers the nonexclusive reciprocal referral agreement here an ethical violation.

NEW YORK

A lawyer that does not provide written notice of cancellation under a mortgage contingency clause is not guilty of malpractice if the client independently breached the contract.

In Humbert v. Allen (2011 NY Slip Op. 08125, decided November 9, 2011), the Second Department of the New York Supreme Court dismissed a legal malpractice cross-claim and granted summary judgment to a lawyer and his law firm because a real estate buyer did not establish that he would have been entitled to a down payment refund, but for the lawyer's failure to provide written notice of cancellation to the seller.

The plaintiff (Seller) and defendant (Buyer) contracted for a sale of real property. The Buyer deposited a down payment in escrow with his lawyer. The contract contained a mortgage contingency clause, which provided that the Seller would refund the deposit if the Buyer were unable to secure a $427,500 mortgage loan in good faith. After the Buyer applied for an $846,000 loan intending to purchase another parcel of real property, the Buyer instructed the lawyer to cancel the contract pursuant to the mortgage contingency clause. The lawyer did not.

The Seller sued the Buyer to retain the down payment as liquidated damages arguing the Buyer failed to apply for the mortgage in accordance with the contract. The Buyer impleaded his lawyer and law firm arguing that they committed legal malpractice by failing to provide written notice of cancellation pursuant the mortgage contingency clause.

The court granted summary judgment to the lawyer and law firm because the Buyer failed to prove that the alleged malpractice was the proximate cause of the down payment forfeiture. Because the Buyer applied for and was granted a loan in excess of the amount specified under the contract, the Buyer could not cancel the contract pursuant to the mortgage contingency provision. The court reasoned that the Buyer independently breached the contract by seeking a loan in excess of the amount specified under the terms of agreement and, thus, forfeited the down payment regardless of any malpractice of his lawyer.

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