Ethical Coffee Break No. 10 (December 2011-January 2012)

SOUTH CAROLINA

Amendments to Rule 416, South Carolina Appellate Court Rules.

On December 6, 2011, the South Carolina Supreme Court adopted amendments proposed by the South Carolina Bar concerning the Resolution of Fee Disputes. Specifically, the new rules clarified that the refusal of a client to pay a bill does not create jurisdiction for the Resolution of Fee Disputes Board, increased the threshold for a hearing panel to $75,000, permitted matters under $1000 to be investigated by Bar staff, and required service of the fee dispute by electronic mail.

A counsel can reveal the tax fraud learned in the deposition of the opposing party only with his or her client's consent.

The Ethics Advisory Committee issued an opinion addressing whether an opposing lawyer may report tax fraud discovered during a deposition to the IRS and state tax commission. The Committee opined that a lawyer may only report information learned by taking the deposition of the opposing party to tax authorities with his or her client's informed consent (*see* Rule 1.6(a), RPC, Rule 407, SCACR).

Because Rule 4.5 precludes a party from reporting or threatening to report information solely to obtain an advantage in a civil action, the Committee advises that the lawyer wait until the litigation is concluded. Ethics Advisory Opinion 11-09.

A lawyer cannot apply the trust account funds received from his or her client for one matter to cover the fees due by that client for another matter.

The Ethics Advisory Committee issued an opinion concerning whether a law firm representing one client in two matters may apply trust account proceeds from the first matter to an unpaid balance on the second matter when the law firm is no longer able to communicate with the client.

The Committee determined that a law firm is not authorized to use the funds received as a retainer in the first matter to cover a portion of the amount due on the second matter, unless the fee agreement so specifies. The Committee reasoned that a law firm may only withdraw funds for (1) payment of services rendered in connection with the matter for which they were designated or (2) when refunding unearned fees to the client (*see* Rule 1.15, RPC, Rule 407, SCACR). The law firm

should take appropriate steps to notify the client of its right to recover the surplus. Ethics Advisory Opinion 12-01.

Based on this opinion, the advice that I an give to lawyers dealing with multiple issues for a same client is simple: they should insert a clear provision in their retainer agreement to the effect that "The Client acknowledges that, in the course of a continuative professional relationship with the lawyer, it might happened that while the funds received as a retainer from Client for one matter and kept by the Lawyer in the trust account are in excess of the fees due for that matter, there might be an outstanding balance due for the fees of another matter of the Client. The Client agrees that the Lawyer could apply those exceeding funds to cover in whole or in part the amount due on the second matter."

NEW YORK

A verdict will not be set aside due to an attorney making inflammatory comments in a closing statement, unless the attorney preserves such objections for appeal. In any event, making inflammatory remarks is ever worthwhile, anyway?

In *Chappotin v. City of New* York, a New York County jury returned a verdict for the Defendant. The Plaintiff moved to set aside the verdict arguing that the defense counsel's inflammatory closing statement deprived him of a fair trial. The Supreme Court of New York County granted plaintiff's motion. On appeal, the New York Appellate Division (First Department) reversed the motion to set aside the verdict. The court reinstated the verdict because the plaintiff did not object to thirteen of the fifteen comments and the court gave a curative instruction. The dissenting justice argued that the comments were so egregious that the verdict should be set aside in the interest of justice.

Just to clarify the picture, these were some of the remarks uttered by the attorney for the defendant: (1) "this is a man who has played the system going on 15 years"; (2) "here's someone who doesn't have a concern about getting medical care … he doesn't have a concern about working"; (3) "this is someone who understands how to make his way in the world … he has come here with a story about falling here"; (4) "I submit to you that the truth that you heard from the plaintiff stopped by the time he was picked up on the corner of 112th Street and Third Avenue"; (5) "everything from that time forward has been designed to create and advance a lawsuit"; (6) "money is a huge motivator … now, Lord knows it's true, that he is looking for my money … and I don't want to give it … and you shouldn't want to give

it when you really evaluate how this case has come to you"; and (6) "this is a classic case … you have been lied to by the plaintiff … there is no nice way to say this … you have been lied to by the plaintiff and his goal is to obtain money." The Supreme Court of New York County granted plaintiff's motion.

Here the defendant has been lucky. The lesson that lawyers should learn from the decision, however, is exactly the reverse of what it might appear by the outcome. Had the opposing counsel preserve the objections, the verdict would have been set aside. So, are inflammatory remarks ever worthwhile?

Inflammatory remarks are a specific instance of incivility. In a past Coffee Break we have discussed cases in which courts have found that lawyers engaged in uncivil conduct.[1] Typically, such conduct occurs in cases that have become emotionally charged and the lawyer has lost his or her detachment. As this case shows, the pressures of litigation are another cause of such behavior. Lawyers should keep your cool. The frontier between zealous advocacy and incivility is sometimes difficult to trace. If you overcome that frontier, however, you do not do a service to your client because he or she can easily suffer damage because of your excessive passion.

Lawyers could get inspiration from the Standards of Civility of the NY courts system.[2] Standard I reads: "Lawyers should be courteous and civil in all professional dealings with other persons." Standard I(A): "Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others". Standard I(B): "Lawyers can disagree without being disagreeable. Effective representation does

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[1] See 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.

[2] As set in the Preamble:

> The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules, or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses."

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