ETHICAL COFFEE BREAK NO.1 (MARCH 2011)

i.e. Recent developments in the Professional Responsibility field that you can read while sipping a coffee (an espresso does not count, however)

NATIONAL DEVELOPMENTS

- **Disclosure in lawyer's self-defense**

Recently the ABA Ethics Committee dealt with the issue of whether a lawyer could voluntarily disclose information requested by a prosecutor that was relevant to the defendant's claim of ineffective assistance of counsel. The committee held that a lawyer generally could not make such a disclosure outside of a formal judicial proceeding. ABA Ethics Committee Formal Opinion 10-456.

- **Website Visitors as Prospective Clients?**

Recently the ABA Ethics Committee dealt with a number of ethical issues raised by lawyers' increasing use of websites to obtain business. The Committee discussed (1) information about lawyers, their firms, and their clients; (2) information about the law; (3) the consequences of website visitor inquiries, and (4) the use of warnings or cautionary statements. In particular it is interesting to notice the discussion about when a visitor to a lawyer's website becomes a prospective client under Rule 1.18. The Committee decided that when a lawyer "discusses" the possibility of representation, the person becomes a prospective client. What amounts to a discussion depends on a variety of factors, including the features of the site. ABA Ethics Committee Formal Opinion 10-457.

SOUTH CAROLINA DEVELOPMENTS

- **Having an affair with your client's spouse is a violation per se**

The rules of professional conduct do not expressly prohibit lawyers from having a sexual relationship with the spouse of a current client. However, the supreme court has warned lawyers that such conduct constitutes a per se violation of the rules because it "creates the significant risk that the representation of the client will be limited by the personal interests of the attorney." In re Anonymous Member of the South Carolina Bar, 389 S.C. 462, 699 S.E.2d 693 (2010).

- **A lawyer's bad tactical decision not per se malpractice. Causation and Damages**

Recently the South Carolina Supreme Court discussed a number of aspects of the duty of care in a legal malpractice case. In the opinion the court discussed the principles applicable to a malpractice case when the client alleges the attorney made an error of judgment. The court rejected "as a matter of law any suggestion that a bad result is evidence of the breach of the standard of care." The court left open the question of whether it would adopt the "judgmental immunity rule," which provides that "there can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment." Besides, the court reaffirmed that the standard of care applicable in legal malpractice cases is "the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." The supreme court stated also that it was insufficient for an expert witness to testify that the lawyer's conduct reduced the chance of success, being necessary that he testifies that the lawyer's breach of duty "most probably" caused the loss to the client. Harris Teeter v. Moore & Van Allen, 390 S.C. 275, 701 S.E.2d 742 (2010).

- **Firm's billing for contract attorneys**

A firm may bill for the services of a contract attorney as either legal fees or expenses. If the firm bills for the services as legal fees, then the following rules apply: The firm must either adopt the services of the contract attorney as its own and be responsible for the services under Rule 1.1 or it must supervise the services under Rule 5.1. The amount paid by the firm to the contract attorney is a matter of contract between the firm and the attorney and need not be disclosed to the client. The total fee for the services rendered to the client must be reasonable under Rule 1.5(a). If the firm does not adopt the services of the contract attorney as its own or supervise the services, then it cannot bill for the services as legal fees. It must treat the fees as an expense or cost. In that case the details of the arrangement must be disclosed and consented to by the client. S.C. Bar Ethics Adv. Op. #10-08.

- **Of Counsel Relationships**

Recently the Ethics Advisory Committee ruled that a lawyer may be "Of Counsel." to more than one firm. However, the implications of such a dual relationship may, as a practical matter, make it impossible for a lawyer to have such relationships.

With regard to conflicts of interest, the Committee stated: "The two firms effectively become a single firm for purposes of conflict-of-interest and imputed disqualification rules. Clients and former clients of each of the two firms must be considered clients and former clients, respectively, of the other firm for purposes of evaluating conflicts of interest under Rules 1.7, 1.8, 1.9, and 1.10." S.C. Bar Ethics Adv Op. #10-06.

- **Private Settlements Restricting a Lawyer's Future Practice**

Recently the Advisory Committee dealt with a proposed settlement agreement in which the defendant sought confidentiality of the amount of the settlement and an agreement from the plaintiff's lawyer in which the lawyer agreed not to use the defendant's name for "commercial or commercially-related publicity purposes." The Committee decided that the proposed agreement by the lawyer violated Rule 5.6(b) because the rule is aimed broadly "at lawyers' access to legal markets and, more importantly, clients' access to lawyers of their choosing." Thus, under the Committee's opinion a settlement agreement could not prohibit a lawyer from advertising for clients against a particular defendant. S.C. Ethics Advisory Op. #10-04.

- When the modern payment systems result in ethical pitfalls …

Recently the South Carolina Supreme Court dealt with the danger of the interplay between trust accounting and technology. A Lawyer was disciplined, among other things, because (i) using a scanner provided by the bank that allowed him to scan deposit items from his office, failed to check that the scanned image had been properly transmitted to bank and drew checks on the funds; (ii) accepting credit cards payment from clients, failed to realize the impact of the credit card transaction fees, leading to a discrepancy in his trust account. The lawyer admittedly violated S.C. Rules of Professional Conduct 1.15. In Re Halford, Opinion No. 26924 (S.C. Feb 7, 2011).