Ethical Coffee Break no. 3 (May)

South Carolina

Does a lawyer have a right of being rude? It would seem he does not. In two cases the SC Supreme Court sanctioned lawyers for being uncivil.

In a *per curiam* decision, the SC Supreme Court held that when a lawyer sends to an opposing counsel an email claiming that a drug dealer had told him that the other lawyer's daughter bought some controlled substance from him and questioning on how this other lawyer brings up his children, the former violates the Civility Clause of the state's lawyer oath and several legal ethics rules. *In the matter of Anonymous Member of the South Carolina Bar,* Opinion No. 26964, filed on April 25, 2011.

These are the facts: a lawyer representing a mother in a domestic relation case sent to the opposing counsel the following email:

> I have a client who is a drug dealer on … Street down town. He informed me that your daughter was detained for buying cocaine and heroine (sic). She is, or was, a teenager, right? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night.

The addressee's spouse filed a complaint with the State Office of Disciplinary Counsel that found against the lawyer. On appeal, the Supreme Court affirmed, except that it reduced the sanction to a letter of caution.

The main violation involved in the case was against the Civility Clause that provides: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."

There may be questions about the constitutionality of this Clause on vagueness grounds but provided that the Clause is constitutional, it certainly seems uncivil for a lawyer to attack the child of the other lawyer with information that has no

relationship to the case. In fact, the lawyer admitted that his email was wrong, and that was a factor in the Court's decision to reduce the sanction to a letter of caution.

In the Matter of William Garry White, III, No. 26939 filed March 7, 2011, the Supreme Court sanctioned another episode of incivility.

These are the facts: Mr. White represented the plaintiff Church in a zoning dispute against the Town of Atlantic Beach. The case was settled; the agreement provided in part that in the future the Church would comply with the Town's building, permitting, and zoning requirements. Subsequently, the town attorney sent a letter to the owners of property where the Church was located ("Landlords") about compliance with zoning requirements. In response to this letter, Mr. White sent the following letters to the Landlords:

> You have been sent a letter by purported Town Manager Kenneth McIver. The letter is false. You notice McIver has no Order. He also has no brains and it is questionable if he has a soul. Christ was crucified some 2000 years ago. The church is His body on earth. The pagans at Atlantic Beach want to crucify His body here on earth yet again.
>
> We will continue to defend you against the Town's insane [sic]. As they continue to have to pay for damages they pigheadedly cause the church. You will also be entitled to damages if you want to pursue them.
>
> First graders know about freedom of religion. The pagans of Atlantic Beach think they are above God and the Federal law. They do not seem to be able to learn. People like them in S.C. tried to defy Federal law before with similar lack of success.

The Office of Disciplinary Counsel charged Mr. White ("respondent") with violation of Rule 4.4, dealing with respect for rights of third persons, conduct prejudicial to the administration of justice in violation of Rule 8.4(e), and violation of the lawyer's oath of office. The Court found that respondent had violated Rule 4.4. It rejected his claim that the letter served other purposes than to embarrass third persons: "However, the fact that the letter could have served other purposes does

not prevent his conduct from being in violation of Rule 4.4(a)." Respondent also argued that his conduct was justified because he was zealously representing and following his clients directions, but the Court rejected this argument as well: "Respondent cannot discharge his responsibility for his use of disparaging name-calling and epithets by simply stating he was asked to behave in this unprofessional manner by this client." The Court also rejected respondent's First Amendment arguments pointing out that the state has a compelling interest in regulating the legal profession and respondent could have zealously represented his client while complying with professional standards.

The Fourth Circuit reinstated out-of-state lawyers whose *pro hac vice* status had been revoked by a federal district court judge after the lawyers had asked him to recuse himself. *Belue v. Leventhal.*

These are the singular facts of this case: in 2008 three Florida lawyers members of a Washington based firm, had been admitted *pro hac vice* in front of US Senior District Judge G. Ross Anderson as counsel for defendant in a class action against Transamerica Life Insurance. *Belue v Transamerica Life Insurance Company*. As it is known, *pro hac vice* status allows lawyers not admitted in a jurisdiction to provisionally act before a tribunal for a specific matter. In July 2009 the lawyers asked the judge to recuse himself based on two federal statutes, 28 USC §§ 144 and 455 (judicial bias). They felt that the judge had pre-decided their case because he had refused most of the lawyers' motions. In particular he had refused a motion to stay and had speeded up class certification. Far from recusing himself, Judge Anderson, revoked their *pro hac vice* status, adding that "I don't want anything to do with them. I think they are a disgrace to the profession." In a previous occasion, the judge had threatened to "disbar the whole firm", would not the lawyer attend a hearing he had set. After some months from the revocation hearing, the parties of the underlying case settled but the lawyers had in the meantime appealed the order of revocation of their *pro hac vice* status.

The Fourth Circuit vacated the district court order for a Due Process violation. The Fourth Circuit held that the district court had not given them adequate notice of the revocation and had denied them any "meaningful opportunity to be heard" before the revocation. Indeed, the court said that the judge had revoked their status "without affording them even the minimal process that the law required." The Fourth Circuit also held that "dissatisfaction with a judge's

views on the merit of a case may present ample grounds for appeal, but it rarely – if ever – presents a basis for recusal."

NEW YORK

The Committee on Professional Ethics opined that fee sharing and co-counsel arrangements with a lawyer not licensed in New York is permissible if compliant with Rule 1.5(g) and that the Rules of Professional Conduct do not require the disclosure of the name of the out-of-stater in the engagement agreement.

A lawyer is ethically permitted to work on a personal injury case with an out-of-state lawyer and share legal fees with that lawyer if the arrangement complies with Rule 1.5(g). Opinion 864 (5/10/11).
The basis of this opinion is Rule 1.5(g) that provides that a lawyer shall not not divide a fee for legal services with another lawyer who is not associated in the same law firm unless three factors are met:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

The Committee opined that "[l]awyers from other U.S. jurisdictions are "lawyers" within the meaning of Rule 1.5(g), and New York lawyers may share fees with lawyers from other U.S. jurisdictions as long as the fee-sharing arrangement complies with the terms of Rule 1.5(g)."

As for possible disclosure issues, the Committee concluded that "the New York Rules of Professional Conduct do not require either the name of the Out-of-State Lawyer or the basis for division of fees to be included in a retainer agreement."