Ethical Coffee Break no. 4 (June 2011)

## South Carolina

**Lawyers cannot misrepresent their amount of experience, kinds of expertise, availability of locations and the like in their websites, even if the website is up only for a short time.**

On May 9, 2011, the South Carolina Supreme Court issued a decision in which it publicly reprimanded a lawyer, imposing a fine of $1,000, and the completion of the Ethics School and the Advertising School of the Legal Ethics and Practice Program (plus the payment of the costs of disciplinary proceeding). The lawyer had exaggerated his credentials in his website. In another industry, someone might call it "commercial puffery" but we are speaking of a lawyer; the Court considered that misleading advertising. The website stated that (i) Mr. Wells had "worked in the legal environment for over twenty years" (when actually he had been practicing for seven years); (ii) the law firm had "numerous trained and experienced attorneys" (when the two associates had only been admitted for less than one year); (iii) "attorneys handle all types of legal matters in state and federal court in South Carolina" (when it was not the case); ((iv) the firm represents clients "in every level of the South Carolina state court system" (when again it was not true); (v) every attorney of the firm focused only in one area of the law (when the site listed 27 areas and the firm only had 3 attorneys); (vii) the firm had served clients in constitutional law, civil rights, ethics and professional responsibility, and toxic torts (when no lawyer in the firm had actually done that) . . . the list of the misrepresentations on Mr. Well's site could go on. The principle however is already clear: the site reported information that was not accurate. The site was on for three or four months only, until Mr. Wells received the ethics complaint. But it was enough for the Supreme Court to uphold the sanction for misleading advertisements. The lawyer acknowledged his wrongdoing and expressed remorse and willingness to take remedial actions. He did not have any previous disciplinary sanction. That is the reason why the Court was generous in the sanction.

The decision of the Supreme Court is correct; it would be pointless for us to comment on that. Instead of commenting on the decision, we would like to remind – just as a short hand website checklist - some basic points coming from the rules: (i) Mr. Wells' defense was that he relied on a local public relation firm to create the advertisement. Public relation firms are a useful tool but lawyers should be

careful. What is good to optimize the Google search (so called "SEO terms") does not necessarily comply with the ethic rules; (ii) as Mr. Anthony Davis, Esq., has recently pointed out in a speech held on June 7, 2011, for the New York State Bar Association: if you put something in the Internet, it is universally accessible and forever. It does not matter how long the advertisement is effectively in the Internet, it can haunt you also once you think you have removed it; (iii) if you are a lawyer, you have a special standard to respect. Your Constitutional right of Free Speech is not absolute. You have to exercise it in the respect of the rules of Professional Conduct. In particular, lawyers should remember that website content is a communication to the public and that all communications about a lawyer's services, regardless of form, must not be false or misleading. They should remember that Rule 7.1 prohibits "deceptive" and "unfair" communications. They should have a look at Comment 2 to Rule 7.2 that provides a nonexclusive list of acceptable advertising content, including name or firm name, address and telephone number, as well as areas of practice. And they should be mindful to comply with Rule 7.4, which sharply limits a lawyer's ability to assert expertise or specialization in an area of practice. Moreover, even if we can doubt the constitutionality of the rule, lawyer should remember that Rule 7.2(f) prohibits lawyers from making statements in advertisements that are "merely self-laudatory or which describe or characterize the quality of the lawyer's services." In re Wells, Opinion No. 26969, May 9, 2011.

**Do you want a power of attorney? Donate $25 or more: receive your POA (and possibly a tax deduction)**

The South Carolina Ethics Advisory Committee opined that providing free powers of attorney in exchange for donations to charitable or religious organizations does not violate the Rules of Professional Conduct, provided the Lawyer does not allow the charitable organization to influence his independent judgment.

These are the facts presented to the Committee: A lawyer would like to offer to the general public that he will prepare free powers of attorney if the client makes a contribution to a charity or religious organization (i.e. the organization through which he is planning to offer the service) of $25 or more. Only "basic" powers of attorney will be provided. Clients who need more attention will be advised to seek advice from a qualified attorney. They will be advised to talk to their own attorney if they have one, or they can call Lawyer's office to make an appointment. No further assistance will be provided at the appointments held under this program.

The concerns were Rule 5.4(a) that prohibits sharing fees with nonlawyers, Rules 7.2 (advertisement), and Rule 7.3 (in-person solicitation prohibition).

As for Rule 5.4(a), according to the Committee, donations are not legal fees for several reasons: (i) the amount of the donation is unspecified by Lawyer and possibly unknown to Lawyer; (ii) $25 is not reflective of a legal fee for even a simple power of attorney; (iii) "there appears to be no direct or indirect benefit to Lawyer from the $25 other than the marketing of his practice." And even if it is a "fee," the Committee concluded that the Lawyer does not violate Rule 5.4 because there is no encroachment by the charity on the Lawyer's independent judgment, which is the main reason for the forbiddance of Rule 5.4.

As for Rule 7.2 and 7.3, while the offer is obviously an advertisement and therefore the content must conform to Rule 7.2, there is no violation of Rule 7.3: (i) as for a possible solicitation to enroll in the program, this would be done by employee of the charity - i.e. by someone "who is not paid or controlled by the lawyer" (quoting *In re Anonymous*, 386 S.C. 133, 687 S.E.2d 41 (2009)); (ii) as for additional legal services for additional fees that Lawyer may suggest, "once a client signs up for the program, offering further legal services for an additional fee does not violate the in-person solicitation prohibition of Rule 7.3 because, by then, the person is an existing client." Ethics Advisory Opinion 11-03.

Formally we do not disagree with the Committee's opinion and we naturally appreciate the charitable value of the program. But, consider that through agreements with one or more charities (that receive a benefit from the lawyer's activity even if from a person different from the Lawyer himself) and the drafting of a simple (probably pre-prepared) form, Lawyer obtains the possibility to solicit a wide portfolio of clients, who in return receive a tax deduction for the donation made in consideration for the legal activity. Everybody is happy. However, does the lawyer's offer of services in exchange for a charitable contribution amount to a payment to the Charity to recommend the lawyer's services, and if so does it violate the spirit (even if not the language) of the Rules?