speaking of ethics

By Saul Jay Singer

Mick Wiggins

D.C. Is Different!

Larry Lawyer, who is admitted to practice only in the District of Columbia, has been admitted *pro hac vice* by the Maryland court to represent Connie Client in her employment discrimination/wrongful termination case against Predator Corporation, a Delaware corporation that interviewed and hired her in its Virginia office but assigned her to work out of its California office. Connie alleges that the harassment at issue took place while she was on assignment working with a Predator customer in Florida, and that she received notice of her unlawful termination while on a trip to Texas seeking new business opportunities for the corporation.

Connie assures Larry that this was the first time in the course of her long and successful career that her employment was terminated and that she has never before been a plaintiff in a discrimination suit, a material point that Larry argues in a memorandum of law he submits to the court. A few weeks later, however, he learns that Connie had previously filed a racial discrimination action against her then-supervisor under her maiden name, Connie Con, which the court had thrown out on defendant's motion to dismiss. When he confronts her and asks about her prior lawsuit, she vehemently and vociferously denies ever filing it, until he shows her a copy of her own date-stamped complaint in the case.

Larry urges Connie to allow him to correct his misrepresentation to the court and advises that he will withdraw from the representation if she refuses.[1] She responds, "I'm not stupid; I know that you are duty bound to strictly maintain and protect my confidences, so let me be clear: I absolutely prohibit you from making any disclosures about this or about anything else related to my case. Predator's counsel, Laura Litigator, is not the sharpest knife in the drawer, and I guarantee that she will never find out about my past lawsuit if you keep your mouth shut as instructed."

Except that Laura does find out—as Larry learns one fine morning when he receives notice from the Office of Bar Counsel that she has filed a Bar complaint against him for failing to correct his false representation to the court. After an initial rush of horror, Larry quickly turns to Rule 3.3(a)(1) (Candor to Tribunal) of the D.C. Rules of Professional Conduct which, to his great relief, confirms the propriety of his action:

> A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, *unless correction would require disclosure of information that is prohibited by Rule 1.6*.

(Emphasis added). Rule 1.6 (Confidentiality of Information) details the lawyer's broad ethical duty to protect client confidences and secrets. Thus, under the D.C. Rule, not only was Larry not required to advise the court of his previous misrepresentation but, in fact, doing so would have constituted a serious ethical violation . . .

Except that the D.C. Rules do not apply here.

* * *

Larry is by no means the only lawyer to mistakenly believe that because he is a D.C. lawyer, the *D.C. Rules* apply to his conduct. D.C. Rule 8.5 (Disciplinary Authority; Choice of Law) identifies the body of ethics law to be applied by the Office of Bar Counsel in any given representation and, although space does not permit this article to serve as a full exposition of Rule 8.5, it is worth noting in this case that, pursuant to Rule 8.5(b)(1):

> For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.

Thus, because Connie's case is pending before a Maryland tribunal, the *Maryland* Rules of Professional Conduct apply. Thus, notwithstanding Rule 1.6, Larry committed an ethical violation by failing to report his misrepresentation to the Maryland court.[2]

Rule 3.3(a)(1) provides but one example where the D.C. Rules vary significantly from the ABA Model Rules, which have been adopted in whole or part in many U.S. jurisdictions. In some instances, the D.C. Rules are much more stringent than the Model Rules as, for example, with respect to the duty to maintain and protect client confidences and secrets, as discussed more fully below. In other instances, the D.C. Rules are more permissive than the Model Rules. For example, the District of Columbia is the only jurisdiction that—under very limited circumstances—permits a lawyer to share legal fees with a nonlawyer and allows nonlawyers to exercise a degree of managerial authority in a law firm.

Presented below is a list of some of the important differences between the D.C. Rules and the ABA Model Rules. **Please note that this list is *not* exhaustive.** Limited space prevents a comprehensive analysis of the various rules highlighted below, and the intent here is to simply make the reader aware of certain key areas where the choice of ethics law question is particularly critical.

1. Written Retainer Agreement: D.C. Rule 1.5 requires that the lawyer submit a writing to the client communicating three elements: the scope of the representation, the basis of the fee, and the expenses for which a client will be responsible, to be set forth in writing whenever a lawyer has not regularly represented a client.[3] Model Rule 1.5 expresses a preference for a written retainer agreement, but it does not require one.

2. Confidentiality of Information: The scope of information protected by D.C. Rule 1.6 differs from its ABA analogue.

While the Model Rule protects "information related to a representation," the D.C Rule protects "client confidences and secrets," which includes not only information protected by the attorney–client privilege under applicable law, but extends to *any* information "gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client"—whether or not such information is related to the representation. This includes not only information gained from the client, but also information gained from *any other source* through or in the course of the representation.

3. An Attorney Paying Client Expenses: Both D.C. Rule 1.8(d) and Model Rule 1.8(e) generally permit lawyers to advance litigation costs to a client. However, D.C. Rule 1.8(d)(2) allows lawyers to provide "other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings."[4]

4. Imputation: In February 2009 the ABA amended Model Rule 1.10 so as to allow the ethical screening of lawyers moving between private sector jobs *without* requiring informed consent from the client or former client, provided that certain written notifications are initially made and that certain post-hoc certification requirements are met. In marked contrast, D.C. Rule 1.10 currently does not permit screening[5] except under narrow circumstances described by the Rule. However, pursuant to D.C. Rule 1.11, the District does allow the screening of government lawyers who move to private firms.

A proposal from the D.C. Rules of Professional Conduct Review Committee to amend D.C. Rule 1.10 so as to bring it more in line with the Model Rule is currently pending before the District of Columbia Court of Appeals.[6]

5. 'Reporting Out': This is another example where, under the D.C. Rules, a lawyer's duty to protect a client's confidences and secrets generally trumps a contrary ethical imperative.

Under both the D.C. and Model Rules, lawyers representing entities must "report up" unlawful conduct; that is, they must report certain violations by constituents of the organization up to the highest authority *within* the organization. However, while Model Rule 1.13(c) permits a lawyer to "report out"—that is, to disclose protected information of a client entity to the government or to other third parties when the lawyer is unable to persuade the entity's highest authority to take action to prevent or stop a clear violation of law—D.C. Rule 1.13 does not generally permit such an option.[7]

6. Safekeeping Property: Effective August 1, 2010, D.C. Rule 1.15 makes participation in the D.C. Interest on Lawyers' Trust Account (IOLTA) program mandatory for D.C. Bar members who receive IOLTA-eligible funds, except when a lawyer is otherwise compliant with the contrary mandates of a tribunal, or when the lawyer is participating in, and compliant with, trust accounting rules and the IOLTA program of the jurisdiction where the lawyer is licensed and principally practices. The Model Rules do not contain any corresponding provision regarding IOLTA programs.

7. Prospective Clients: Pursuant to D.C. Rule 1.18(c), a lawyer's duty of confidentiality to a prospective client is coextensive with his or her broad duty of confidentiality to actual clients, even if an attorney–client relationship is never formed with the prospective client. In contrast, Model Rule 1.18(c) requires disqualification of the lawyer under the conflicts rules only if he or she received information that could be "significantly harmful" to the prospective client.

8. Candor to Tribunal: This is the case presented by our lead hypothetical; *see* discussion above. In addition, though Model Rule 3.3(a)(3) categorically prohibits a lawyer from offering evidence that he or she knows to be false, D.C. Rule 3.3(b) permits a lawyer to allow a client who is a defendant in a criminal case to give such evidence, subject to certain conditions.[8]

Lawyers have duties to their clients but, as officers of the court, they also have duties to the court and to the justice system. When these duties conflict—as they often do under Rule 3.3 scenarios—the determination of which rules apply will often be outcome determinative in establishing which duty prevails.

9. Inadvertent Production of Privileged Documents: Model Rule 4.4(b) provides that when a lawyer receives documents related to a representation that he or she knows or reasonably should know were inadvertently sent, the receiving lawyer must notify the sender to permit the sender to take protective measures. D.C. Rule 4.4(b) requires that a receiving lawyer who knows[9]—*before* examining the writing—that it has been inadvertently sent, must notify the sending party *and* follow the instructions of the sending party regarding the return or destruction of the writing. However, if the lawyer has read the document before realizing that it was inadvertently produced or was transmitted in error, the lawyer not only may use it but, indeed, in many circumstances he or she has the affirmative *duty* of competence, diligence, and zealousness to use it to the greatest possible extent on behalf of the client.

10. Nonlawyer Partners: As mentioned above, D.C. Rule 5.4(b) permits nonlawyers to have an ownership interest in a law firm, or to exercise managerial authority in the firm, under very limited circumstances.[10] The Model Rule analogue categorically prohibits lawyers and nonlawyers from sharing legal fees.

11. Solicitation: Model Rule 7.3(a), which contains broader restrictions on the right of a lawyer to solicit new clients than the D.C. Rule, prohibits in-person solicitation for pecuniary gain. D.C. Rule 7.1(b), on the other hand, allows in-person solicitation, unless it is false or misleading, involves the use of undue influence, or violates other specific standards.

12. Nondiscrimination: D.C. Rule 9.1 makes it a disciplinary offense for a lawyer to discriminate against any individual in conditions of employment because of the individual's race, religion, sex, age, sexual orientation, and other specified factors. The Model Rules contain no specific corresponding provision.

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Practice tip and conclusion: No competent lawyer would ever undertake to apply the substantive law to the facts of a particular case without first carefully considering choice of law principles and ascertaining which law applies. That duty is no less important with respect to the application of Rule 8.5 and the determination of which body of *ethics* law applies. The failure of the former will often result in a malpractice claim and professional liability; a failure of the latter may well result in professional discipline, including possible disbarment. There are fun-

damental and critical differences between the D.C. Rules and the ABA Model Rules, and the failure by a lawyer to know and understand these differences will invariably lead to the unhappy receipt of a "Dear Lawyer" letter from the Office of Bar Counsel.

Legal Ethics counsel Saul Jay Singer, Hope C. Todd, and Erika Stillabower are available for telephone inquiries at 202-737-4700, ext. 3232, 3231, and 3198, respectively, or by e-mail at ethics@dcbar.org.

Notes

1 There are circumstances under the D.C. Rules where the inability of a lawyer to correct a false statement made to the tribunal *requires* the lawyer to seek to withdraw from the matter in order to avoid assisting a client in perpetrating or furthering a crime or fraud pursuant to D.C. Rule 1.2(e) and/or Rule 3.3(a)(2).

2 *See*, *e.g.*, Comment [2] to D.C. Rule 3.3, which specifically notes that "This provision in paragraph (a)(1) differs from the ABA Model Rule 3.3(a)(1), which requires a lawyer to disclose information otherwise protected by Rule 1.6 if necessary to correct the lawyer's false statement."

Maryland Rule 3.3(a)(1), like ABA Model Rule 3.3(a)(1), provides that "A lawyer shall not make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

3 This writing, which need not be a "formal" retainer agreement, can be, for example, in the form of an e-mail, or even on a note jotted on a napkin in a restaurant. While only the three listed elements are ethically required, a prudent lawyer will nonetheless anticipate issues that can arise in a representation and carefully address them within the four corners of the retainer agreement.

4 As Comment [9] to D.C. Rule 1.8 makes clear, this broadening of the ethical right of a lawyer to pay or advance client costs is designed to "avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms" and is limited to expenses "strictly necessary to sustain the client during the litigation, such as medical expenses and minimal living expenses." *See also* Hope C. Todd, *Helping the Indigent Client: A Threat to Lawyer Independence?* (Wash. Law., Nov. 2010).

5 D.C. Rule 1.0(l) defines "screening" as "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within the firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law."

6 Supporters of expanding lateral screening under the D.C. Rules to cover moves between private sector jobs argue, *inter alia*, that retaining such broad restrictions on a lawyer's right to practice "not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer." *See* D.C. Rule 5.6, Comment [1]. Opponents question, among other things, whether the former client can be expected to have confidence that its secrets will be protected.

7 The D.C. Rule does permit the disclosure of client confidences—and, in some cases, *mandates* such disclosure: (a) under the economic "crime/fraud" exception of Rule 1.6(d), where the client has used or is using the lawyer's services to further a crime or fraud; or (b) if the applicable substantive law requires such disclosure.

8 *See*, *e.g.*, Saul Jay Singer, "The Client Perjury Problem" (Wash. Law., Nov. 2009).

9 This connotes *actual* knowledge, which may be inferred from the circumstances. *See* Rule 1.0(f).

10 *See*, *e.g.*, Saul Jay Singer, "Let's Split" (Wash. Law. Nov., 2013).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE LEONARD S. BLONDES. Bar No. 72140. December 23, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Blondes by consent.

IN RE J. MICHAEL FARREN. Bar No. 368895. December 22, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Farren pursuant to D.C. Code § 11-2503(a) based on his conviction of a crime involving moral turpitude *per se*. Farren was convicted in the Superior Court of Connecticut, Stamford/Norwalk Judicial District, of attempted murder, assault in the first degree, and risk of injury to a minor.

IN RE ALAN S. GREGORY. Bar No. 411664. December 19, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Gregory by consent.

IN RE MICHELLE E. KLASS. Bar No. 468470. December 22, 2014. The Board on Professional Responsibility reprimanded Klass. Klass commingled a fee advance with her operating funds and failed to maintain complete records of trust account funds. Rules 1.15(a) and 1.15(e).

IN RE RANDY MCRAE. Bar No. 430494. December 29, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar McRae pursuant to D.C. Code § 11-2503(a) based on his conviction of crimes involving moral turpitude *per se*. McRae was convicted in the Circuit Court for Prince George's County, Maryland, of three counts of felony theft, in violation of Maryland Criminal Code § 7-104, and one count of uttering a counterfeit document, in violation of Maryland Criminal Code § 8-602.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE LORENZO C. FITZGERALD JR. Bar No. 390603. December 4, 2014. The D.C. Court of Appeals suspended Fitzgerald for one year with fitness. Fitzgerald failed to deliver a client's file to the client's successor counsel, did not respond to Bar Counsel in a timely manner, falsely asserted to Bar Counsel that he properly delivered the client's file, and falsely asserted to Bar Counsel that he did not receive Bar Counsel's requests for information. Rules 1.16(d), 8.1(a), 8.1(b), 8.4(c), and 8.4(d).

IN RE STEPHEN T. YELVERTON. Bar No. 264044. December 24, 2014. The D.C. Court of Appeals suspended Yelverton for 30 days with a fitness requirement. While representing a third-party witness who was the alleged victim of simple assault, Yelverton made submissions to the court that were not well grounded in law and fact, and engaged in conduct that seriously interfered with the administration of justice. Rules 3.1 and 8.4(d).

Reciprocal Matters

IN RE RUNAN ZHANG. Bar No. 465022. December 11, 2014. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Zhang, *nunc pro tunc* to October 15, 2014. In Maryland, Zhang was found to have represented her niece in a matter even though she was not licensed to practice law in Virginia and even though a conflict existed because of a concurrent representation of her niece's husband in an immigration matter, authorized co-counsel to sign settlement agreements on behalf of her niece despite failing to obtain her niece's consent to settle, misrepresented her niece's ability to communicate in English, and concealed her representation of her niece from the Virginia court.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE SCOTT J. BLOCH. Bar No. 984264. December 29, 2014. Bloch was suspended on an interim basis based upon discipline imposed in California.

Disciplinary Actions Taken by Other Jurisdictions

In accordance with D.C. Bar Rule XI, § 11(c), the D.C. Court of Appeals has ordered public notice of the following nonsuspensory and nonprobationary disciplinary sanctions imposed on D.C. attorneys by other jurisdictions. To obtain copies of these decisions, visit www.dcattorneydiscipline.org and search by individual names.

IN RE JUAN CHARDIET. Bar No. 399250. The Fifth District Section I Sub-

committee of the Virginia State Bar publicly admonished Chardiet on September 26, 2014, having found that he engaged in misconduct relating to communication and protecting a client's interests upon termination of the representation.

IN RE EDWARD S. COOPER. Bar No. 448918. The Supreme Court of New Jersey reprimanded Cooper by consent on July 11, 2014, having found that he failed to safeguard entrusted funds, failed to notify a person of receipt of entrusted funds, and knowingly disobeyed an obligation under the rules of a tribunal.

IN RE JOHN O. IWEANOGE II. Bar No. 439913. The Attorney Grievance Commission of Maryland reprimanded Iweanoge by consent on August 25, 2014, having found that he engaged in misconduct relating to a client's appeal in a criminal matter.

IN RE DAVID B. SHAPIRO. Bar No. 431948. The Court of Appeals of Maryland reprimanded Shapiro by consent on November 13, 2014, having found that he violated rules relating to improper solicitation following an automobile accident.

IN RE IVAN YACUB. Bar No. 980698. The Fourth District Subcommittee of the Virginia State Bar publicly reprimanded Yacub by consent on October 7, 2014, having found that he violated rules relating to recordkeeping and safekeeping entrusted funds.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE J. B. DORSEY III. Bar No. 265181. November 3, 2014. Bar Counsel issued Dorsey an informal admonition. While retained to assist a client in correctly filing probate documents for her sister's estate in order to pursue wrongful death litigation, Dorsey engaged in conduct that seriously interfered with the administration of justice. Specifically, Dorsey filed a renunciation with a signature other than that of the purported signer, with no indication that it was a false signature. Rule 8.4(d).

IN RE ARAGAW MEHARI. Bar No. 431595. November 13, 2014. Bar Counsel issued Mehari an informal admonition. While representing a client in an asylum matter, Mehari failed to provide competent representation to a client, including the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. In addition, Mehari failed to act with diligence and zeal in representing the client's interests. Rules 1.1(a) and 1.3(a).

IN RE BRENT S. TANTILLO. Bar No. 489978. November 24, 2014. Bar Counsel issued Tantillo an informal admonition. Tantillo falsely told a U.S. magistrate judge's secretary that he had obtained prior supervisory review and approval of a tracker warrant application that he was filing with the court when he had not obtained such review or approval. Florida Rule 4-8.4(c) as made applicable through D.C. Rule 8.5(b)(1).

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted at www.dcattorneydiscipline.org. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.*