speaking of ethics

By Heather Bupp-Habuda

Agreement Between Lawyer and Media Representatives

Mick Wiggins

Rule 1.8(c) of the D.C. Rules of Professional Conduct forbids the acquisition of literary or media rights by a lawyer while representation is ongoing and the lawyer's decisions for the client may still be influenced. As such, Rule 1.8(c) does not allow for the possibility of a client waiver of that conflict in any circumstances.

Rule 1.7(b)(4) generally provides that a lawyer may not represent a client with respect to a matter where "[t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests." A lawyer may seek, however, a Rule 1.7(c) waiver. *See* D.C. Rules of Prof'l Conduct R. 1.7(b)(1)–(4), (c).

Recently, in Opinion 334 (2006), the D.C. Bar Legal Ethics Committee addressed important issues pertaining to Rules 1.7 and 1.8. A lawyer representing a pro bono client in litigation drew the interest of the press and was approached by reporters considering writing a book or producing a movie about the litigation. The primary interest was in the lawyer rather than the client. The media representatives wanted to arrange for the attorney to receive compensation in return for cooperation and rights to the story. The client would also receive compensation.

The committee concluded in Opinion 334 that Rule 1.8(c) is inapplicable because the rule "prohibits a lawyer from acquiring media rights from the client or otherwise; it does not, however, prohibit the lawyer from making an agreement with media representatives with respect to his own media rights." D.C. Bar Legal Ethics Comm. Op. 334, at 3. The committee further held that the facts described above raise a serious issue under Rule 1.7(b)(4), and that the lawyer cannot proceed to negotiate with the media representatives without full disclosure to the client and an appropriate waiver, if possible, under Rule 1.7(c).

Rule 1.7(b)(4) covers the very wide range of interests and responsibilities that a lawyer may have that do not involve representation of a different client. The broad scope of subparagraph (b)(4) shows that "any kind of interest or obligation of the lawyer can trigger the applicability of the subparagraph if the presence of that interest could reasonably adversely affect the lawyer's ability to represent a client in a matter." D.C. Bar Legal Ethics Comm. Op. 334, at 5.

The question of how, and even whether, a client may consent to a conflict under Rule 1.7(c) is crucial. Valid consent may be obtained only after consultation with the client, that is, "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." D.C. Rules of Prof'l Conduct, Terminology [3]. According to Opinion 334, the question is whether the lawyer's judgment on how to conduct the representation for the client might be adversely affected by the lawyer's pecuniary or publicity interest.

Two impediments exist to a clear appreciation by the client of what is at stake. First, future developments in the representation involve possibilities that may not well be presently understood, so that an appreciation of them currently might be difficult or impossible. Second, the impact on the lawyer's judgment in representing a client involves issues particularly within the knowledge of lawyers, but not of clients.

As to the first problem, Opinion 309 (2001) comprehensively examined the question of the degree to which consent can be valid when it is given in advance of events that affect the scope of the conflict. There the committee concluded that a valid advance consent can be given only where full consultation as described in the Rules can be had, and a client has the ability to give fully informed consent, in advance. Opinion 309 did not specifically treat a conflict that arises under Rule 1.7(b)(4) and is sought to be waived in advance.

In Opinion 334 the committee noted that a large part of obtaining a valid waiver of any conflict caused by the lawyer's negotiation of a contract with media representatives would involve the detailed explanation to the client of the litigation choices that the lawyer expects and the possible impact on those choices that are the result of having the media contract. "Loyalty, and the ability to act despite somewhat divided loyalties, is a relatively simple concept to understand. But the impact of the lawyer's personal interests on the lawyer's ability to make tactical and strategic decisions for a client, which is presented in a conflict arising under Rule 1.7(b)(4), requires the lawyer to explain, and the client to understand, the significance to the client of influences on the lawyer's handling of specific issues." D.C. Bar Legal Ethics Comm. Op. 334, at 7.

The committee opined that the client would benefit from independent counsel to offer advice on the scope of any adverse impact on the lawyer's ability to provide adequate representation despite whatever influences the media arrangement may have. A second but less viable option is for the lawyer to obtain independent legal advice to provide the most objective view possible of the lawyer's ability to act adequately for the client in the circumstances. As a general rule, practicing lawyers should be open to seeking the guidance of independent legal advice when appropriate to address a potential conflict.

New comment 11 to Rule 1.7 and new comments 1, 2, 3, and 4 to Rule 1.8 of the D.C. Bar Board of Governors Proposed Amendments to the D.C. Rules of Professional Conduct are consistent with the conclusions reached in Opinion 334.

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December 8, 2005. The D.C. Court of Appeals disbarred Sager by consent, effective forthwith.

IN RE JULIA A. SOININEN. Bar No. 448700. December 22, 2005. The D.C. Court of Appeals disbarred Soininen, stayed upon a showing of *Kersey* mitigation, and placed her on three years' probation subject to the conditions imposed by the Board on Professional Responsibility in its report and recommendation. Soininen failed to provide competent representation, failed to serve a client with skill and care, charged an unreasonable fee, engaged in reckless misappropriation, and engaged in conduct that seriously interfered with the administration of justice in connection with her service as guardian and conservator to a client and the client's estate between 1997 and 2000. Rules 1.1(a), 1.1(b), 1.5(a), 1.15(a), and 8.4(d).

Reciprocal Matters

IN RE STEVEN M. ANGEL. Bar No. 405417. December 22, 2005. In a consolidated reciprocal matter from Oklahoma, the D.C. Court of Appeals publicly censured Angel in one matter and suspended him for five years with fitness in another matter. The Oklahoma Supreme Court publicly reprimanded Angel in the first matter. Thereafter, faced with 13 additional grievances under investigation in Oklahoma, and claiming mental distress caused by family illness, Angel tendered his resignation from the practice of law in Oklahoma. The Oklahoma court approved Angel's resignation and directed him to reimburse the Client Security Fund for any money disbursed because of his conduct, struck his name from the roll of attorneys, and prohibited him from applying for reinstatement for five years.

IN RE TIMOTHY BROWN. Bar No. 366743. January 19, 2006. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed nonidentical reciprocal discipline and suspended Brown for 30 days, nunc pro tunc to March 16, 1994, with reinstatement conditioned upon his compliance with the restitution requirement imposed in Maryland. The Maryland Court of Appeals indefinitely suspended Brown, with conditions for reinstatement, on the basis of a joint petition. In that petition Brown effectively admitted that he charged his client an excessive fee; failed to respond to attempts to contact him; failed to return an unearned fee; failed to put a retainer in a separate account; and failed to respond to the Attorney Grievance Commission's inquiries regarding his client's complaint. This reciprocal matter, which had been dismissed without prejudice in 1994 after the court imposed an indefinite suspension upon Brown "on account of disability, that disability having resulted from the respondent's long-term abuse of alcohol, marijuana, and cocaine," was reactivated after Brown was conditionally reinstated to the practice of law in the District of Columbia on March 25, 2004.

IN RE DOUGLAS F. GANSLER. Bar No. 425465. December 15, 2005. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed functionally identical reciprocal discipline and publicly censured Gansler. The Court of Appeals of Maryland publicly reprimanded Gansler for making improper out-of-court statements to the press in his capacity as state's attorney for Montgomery County, Maryland, regarding three criminal prosecutions.

IN RE JOHN L. GIZZARELLI JR. Bar No. 183194. December 8, 2005. In a reciprocal matter from Massachusetts, the D.C. Court of Appeals imposed functionally identical reciprocal discipline and suspended Gizzarelli for five years with fitness. The Supreme Judicial Court of Massachusetts indefinitely suspended Gizzarelli. Gizzarelli, while retained to enforce an agreement for the purchase of real estate, failed to take enough action in his client's matter, resulting in the dismissal of the case; to inform his client of the case standing or the fact that he had ceased to practice law; to deposit his client's retainer in a segregated trust account; to refund the unearned portion of the client's retainer; and to cooperate with the Massachusetts bar authorities.

IN RE RICHARD L. GRUBER. Bar No. 314765. December 22, 2005. In a consolidated reciprocal matter from New Jersey, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Gruber. In one matter, the Supreme Court of New Jersey disbarred Gruber for multiple violations of the New Jersey Rules of Professional Conduct, including dishonesty and misappropriation of a client's funds for his personal use. In a second matter, the New Jersey court reprimanded Gruber for misconduct, including gross neglect, lack of diligence, failure to communicate, and failure to cooperate with disciplinary authorities.

IN RE JAMES R. MARLEN. Bar No. 458330. December 30, 2005. In a reciprocal matter from Texas, the D.C. Court of Appeals suspended Marlen for two years, stayed in favor of two years' probation subject to the conditions set forth in the Texas Grievance Committee judgment. The Texas disciplinary authority found that Marlen, who had been retained to prosecute a securities fraud claim, violated Texas Rules of Disciplinary Conduct pertaining to competent and diligent representation, communication with client, safekeeping property, and failure to respond.

IN RE AGOSTINHO D. REIS. Bar No. 304436. December 15, 2005. In a reciprocal matter from New York, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Reis. The Appellate Division, Supreme Court of New York, First Judicial Department, disbarred Reis for his failure to respond to the disciplinary committee or the court or to seek reinstatement within six months from the date of the order of suspension. The New York disciplinary authorities charged Reis with misconduct over a three-year period involving his representation of clients despite certifying that he was retired from the practice of law, misappropriation of client funds, acceptance of fees for work he did not perform, and abandonment of clients.

Contempt Proceedings

IN RE MATTHEW J. MARSHALL JR. Bar No. 381184. January 12, 2006. The Honorable Harold L. Cushenberry Jr. of the Superior Court of the District of Columbia sentenced Marshall to 180 days' incarceration for criminal contempt of court. Judge Cushenberry found that Marshall had practiced law in violation of the disbarment order issued by the D.C. Court of Appeals on November 22, 2000.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE MICHAEL R. BIEL. Bar No. 35303. December 22, 2005. Bar Counsel issued Biel an informal admonition for practicing law while administratively suspended for nonpayment of bar dues, while serving as guardian and conservator in an inter-

vention proceeding matter. Rules 5.5(a) and 8.4(d).

IN RE MICHAEL L. GLASER. Bar No. 16899. December 29, 2005. Bar Counsel issued Glaser an informal admonition for filing a nonresidential attorney pro hac vice application, with the Arizona Corporation Commission, that contained representations he knew, or should have known, were false and failing to correct those representations. Rules 3.3(a) and 8.4(c).

IN RE WILLIAM J. HOWARD. Bar No. 45559. December 27, 2005. Bar Counsel issued Howard an informal admonition for failing to keep his client reasonably informed about the status of a matter and to comply with reasonable requests for information, while representing his client in a collection matter. Rule 1.4(a).

IN RE ELISE A. JOYNER. Bar No. 416485. December 28, 2005. Bar Counsel issued Joyner an informal admonition for failing to safeguard entrusted funds she received on behalf of a client in which two medical providers had a third-party interest. Joyner's client disputed the medical provider's entitlement to the funds and Joyner delivered the disputed funds to the client. The ethical rules require that the lawyer decline to release disputed funds to either the client or the third party until the dispute is resolved. Rule 1.15(c).

IN RE JOHN S. LOPATTO III. Bar No. 965426. September 23, 2005. Bar Counsel issued Lopatto an informal admonition for engaging in technical commingling. Lopatto failed to keep separate his personal monies from entrusted funds he received in connection with his representation of clients, in that he failed to withdraw earned fees promptly from his trust account. Rule 1.15(a).

IN RE JACQUELINE J. MOORE. Bar No. 228908. December 29, 2005. Bar Counsel issued Moore an informal admonition. While serving as the court-appointed fiduciary for an adult ward of the Probate Division of the Superior Court, Moore failed to file, for at least five years, the required inventory within the required time after her appointment in 1995 and the required annual accounts with the probate court. In addition, Moore failed to file the necessary final account as required following her resignation as conservator appointed by the Superior Court. Rules 1.3(a), 1.3(c), 1.16(d), and 8.4(d).

IN RE KEITH J. SMITH. Bar No. 415529. December 28, 2005. Bar Counsel issued Smith an informal admonition for failing to provide a writing setting forth the rate or basis of his fee, while representing his client in a probate matter. Rule 1.5(b).

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Reports and recommendations issued by the Board on Professional Responsibility, as well as informal admonitions issued by the Office of Bar Counsel, are posted on the D.C. Bar web site at www.dcbar.org. Court opinions are printed in the Atlantic Reporter *and, for decisions issued since mid-1998, are also available online. To obtain a copy of a recent slip opinion, visit www.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp. Please note that in some cases Bar members may have the same name. To confirm the identity of individuals who have been subject to discipline, contact the D.C. Bar Member Service Center at 202-626-3475 or membership@dcbar.org.*

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