

speaking of ethics

By Saul Jay Singer

Larry Lawyer very much enjoyed his legal work and had met with great success in his law practice of some 20 years, but he still wondered if he had made the right career choice. He is also a talented carpenter who has always loved building things, and he missed the time he used to spend together with his late father on various construction projects. A few years ago, Larry's wife, who often quipped that Larry had an "edifice complex," suggested that he could have the best of both worlds by taking fewer cases so that he could take on various construction projects at night and on weekends and, although his time is always very much at a premium, Larry has managed to develop a thriving business building decks.

His reputation for excellent and reasonably priced work has begun to spread, and one day, he is approached by a major hotel chain, The C'mon Inn, and offered a large contract to build 50 decks for a high-end addition it recently completed for its local D.C. resort. And the best part: hotel management, understanding that Larry works only when he can fit it in because of his law practice, is willing to let him do the work on his own schedule.

There are only two potential problems. First, The C'mon Inn wants to report Larry's pay to the tax authorities so as to reduce the hotel's aggregate tax liability. Second, Larry currently represents Paul Plaintiff in a wrongful termination case against the hotel.

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We get many questions on the Legal Ethics Helpline on ethical issues from lawyers who perform nonlegal activities that are unrelated to their practice of law.¹ The general rule is that a lawyer subject to the D.C. Rules² may engage in nonlegal activities, but only if:

- (1) the lawyer doesn't violate Rule 8.4 (Misconduct);
- (2) the work doesn't present an "unfixable" personal conflict under Rule 1.7(b)(4); and

May a D.C. Lawyer Build a Deck?

- (3) where applicable, the lawyer meets the mandate of Rule 5.7 (Responsibilities Regarding Law-Related Services).

The Rule 8.4 Issue

Rule 8.4 generally makes most³ criminal or fraudulent activity by a lawyer—*whether or not he or she is representing a client or otherwise acting as a lawyer at the time*—violations of professional misconduct. These are "24-7" Rules and, as D.C. Disciplinary Counsel Wallace "Gene" Shipp is fond of saying, "you never take off your lawyer's hat."

Thus, under our hypothetical, Larry may certainly structure his fee so as to assist The C'mon Inn with its *legitimate* efforts to reduce its tax burden. However, if such actions are illegal or fraudulent, Rule 8.4 mandates Larry's refusal, even though the fact that he is a lawyer is wholly incidental to the work he will be performing as a carpenter.

The Rule 1.7(b)(4) Issue

Disqualifying conflicts most often arise in the context of a lawyer's simultaneous representation of another current client or his prior representation of a former client. Although the D.C. Bar's Legal Ethics Committee has concluded that an attorney-client relationship is ordinarily not created when a lawyer is not acting as such,⁴ "personal conflicts" may *nevertheless* arise where, as here, a lawyer is providing nonlegal services to a customer.

The analysis begins with Rule 1.7(b)(4):

- (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: . . .
- (4) The 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.



Mick Wiggins

(Emphasis added). This rule has exceptionally broad applicability; a lawyer has a Rule 1.7(b)(4) conflict not only where there exists an actual personal conflict, but even in cases where it is objectively *possible* for the lawyer to "pull his punches" in representing a client.

As such, under our hypothetical, there is little question that there exists at least the possibility that Larry might pull his punches in litigating the case against The C'mon Inn because he does not want to risk alienating an important customer or jeopardizing his lucrative and rewarding construction gig.⁵

The Law-Related Services Issue⁶

Rule 5.7 imposes additional duties upon a lawyer who provides "law-related services" to a customer, which Rule 5.7(b) defines as follows:

The term law-related services denotes services that might reasonably be performed in connection with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

As Comment [9] explains:

A broad range of economic and other interests of clients may be served by lawyers engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

Under this definition, it is clear that Larry's deck-building business does not constitute a law-related service and would thus not subject him to additional duties (to be discussed below) under Rule 5.7.

But consider instead the following scenario: Bob, a nonlawyer, decides that his finances have become sufficiently complex so as to warrant his retention of a professional to do his taxes this year. Rather than go to some accounting major who moonlights as a tax preparer at I & S Blockhead, he retains Connie Counsel, a well-known local tax lawyer who specializes in individual taxation matters in the local District of Columbia courts. Connie, who is also a Certified Public Accountant, runs a side business during tax season preparing tax returns, and Bob reasons: who better to do his taxes than a tax lawyer, who surely knows more than some young and inexperienced college kid?

Bob discusses with Connie many aspects of his financial affairs, including some investment deals that are legally sketchy and the fact that he successfully hid some interest-bearing assets from his ex-wife during their divorce settlement 10 years ago.⁷ Sometime after April 15th, Connie is approached by New Client in a large and important matter that will generate significant legal fees. The problem is that the representation, in part, involves bringing suit against Bob relating to his finances and tax filings.

Connie considers: she has never represented Bob, who was never her client but, rather, her customer. She feels very comfortable that she has no Rule 1.7(b)(4) personal conflict because she has no concerns at all about losing Bob as a future customer, particularly given the importance of New Client's matter. She *knows* that she will be able to competently, diligently, and zealously pursue New Client's interests and that there is no possibility whatsoever about even the potential for "pulling her punches" simply because Bob was a previous customer.

As such, Connie concludes that there is no conflict, and she enters into a retainer agreement with New Client in accordance with Rule 1.5(b) (Fees) . . . and, in so doing, commits a violation of Rule 5.7 because accounting and tax services constitute defining examples of "law-related services."

The problem is that Bob may not appreciate that, though Connie is a lawyer, she was not acting as such in performing services for him and that, among other things, protections ordinarily afforded by the attorney-client privilege will *not* attach to their communications.⁸ The risk of such confusion is particularly severe where the lawyer is providing both legal advice and law-related services to the same person in the same matter, or where the

recipient of services lacks sophistication,⁹ but the additional duties imposed by Rule 5.7(a) apply in *all* cases where a lawyer is providing law-related services:

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
 - (1) By the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
 - (2) In other circumstances if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

Connie maintained a separate office for her seasonal tax return business, and the accounting services that she provided out of that office were entirely distinct from the legal services that she provided to her clients through her law office. As such, Rule 5.7(a)(1) would not bar her representation of New Client.

However, pursuant to Rule 5.7(a)(2), Connie was required—*before* undertaking to provide law-related services to Bob—to explain to him, consistent with his degree of sophistication and understanding and preferably in writing, that her being a lawyer is wholly incidental to her provision of tax services to him and, in particular, that no lawyer-client relationship has been established.¹⁰ Moreover, she bears the burden to prove that she "has taken responsible measures under the circumstances to communicate the desired understanding."¹¹ Her failure to do so here means that Bob will be treated as an actual *client* under the D.C. Rules for *all* purposes, including for purposes of conflicts analysis¹² and potential confidentiality issues. As such, it is manifestly clear that she cannot now—absent Bob's informed consent (which is unlikely, at best)—represent New Client because of conflicts under Rule 1.9 (Conflict of Interest—Former Client) and Rule 1.6 (Confidentiality of Information).

Conclusion and practice tip: Whenever you intend to provide services to a customer that might reasonably be performed with, and are substantially related to, legal services that only a licensed lawyer could provide to a client, carefully

recite the following magical formula (and repeat as needed):

I am a lawyer, but I am not your lawyer. I perform legal work, *but not for you*. I give legal advice, *but never to you*. This means, among other things, that you will receive no benefits or protections that ordinarily arise out of a lawyer-client relationship. In particular, this means that your communications with me are not afforded the legal protection usually afforded to attorney-client communications.

With respect to persons to whom you are providing both legal and law-related services, this formulation will obviously not work. In such cases, it is crucially important to remember at all times which "hat" you are wearing—lawyer or mere services provider—and to be meticulous in communicating with the client and keeping him or her in the loop; e.g., "I am now acting not as your lawyer, but as your financial planner, so remember that your communications with me now in this regard are not privileged."

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Notes

1 As a preliminary matter, it is important to note that the line between legal and nonlegal services may not always be clear, and the determination of whether the line has been crossed into practicing law is ultimately a question of fact and law. Lawyers may address their questions on what constitutes the practice of law, as well as inquiries regarding the unauthorized practice of law (UPL) under Rule 5.5, to the UPL Committee, which was established by the District of Columbia Court of Appeals, at 202-879-2777. For a more fulsome discussion of these issues, see Hope C. Todd, *When Lawyers Lobby* (Wash. Law., Sept. 2008 at 10).

2 Many D.C. lawyers erroneously believe that because they are D.C. lawyers, they are always subject to the D.C. Rules. This is incorrect; see Rule 8.5 (Disciplinary Authority; Choice of Law). For example, for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits will usually control.

3 "Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return . . . Although a lawyer is answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category." Rule 8.4, Comment [1].

4 See, e.g., Legal Ethics Opinions 226, 306, and 336.

5 Notwithstanding his personal conflict, it may still be possible for Larry to "fix" the conflict and represent

the hotel if he can: (1) obtain informed consent from Plaintiff; and (2) determine, under both objective and subjective tests, that he will be able to provide competent and diligent representation to Plaintiff. *See* Rule 1.7(c). *See also* Saul Jay Singer, *Rule 1.7(b)(4) Conflicts: When It's Personal* (Wash. Law., Sept. 2013 at 14).

6 For purposes of clarity, I refer to recipients of legal services as "clients" and to recipients of nonlegal services as "customers" throughout this article.

7 We assume, for purposes of this hypothetical that: (1) none of these facts in any way interfere with Connie's ability to act ethically, both in her capacity as a CPA and as a D.C. lawyer, to complete and file Bob's tax returns—i.e., no Rule 8.4 issue; (2) all of Bob's communications were made for the purpose of obtaining Connie's accounting service and not for legal advice; and (3) there is no "accountant-client" privilege under the applicable substantive law.

8 *See* Rule 5.7, Comment [1].

9 *Id.*, Comment [8].

10 *Id.*, Comment [6]. Though a writing is not an absolute ethical requirement under the Rule, this comment makes clear the strong preference that the required communication—which must be made "in a manner sufficient to assure that the person understands the significance of the fact that the relationship of the person to the business entity will not be a client-lawyer relationship"—be memorialized.

11 *Id.*, Comment [7].

12 Absent strict compliance with the requirements of Rule 5.7, the conflicts rules will generally apply to the lawyer's nonlegal work on behalf of the customer. For an excellent discussion of this point in the context of lobbying activities, see Legal Ethics Opinion 344 and Hope C. Todd's discussion in her article *When Lawyers Lobby*, *supra*, note 1.

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE BARRY K. DOWNEY. Bar No. 416968. December 28, 2015. The Board on Professional Responsibility ordered Disciplinary Counsel to informally admonish Downey. Downey pleaded guilty to a single count of engaging in the business of money transmission without a license, in violation of D.C. Code § 26-1002 (2001), a felony that does not require proof of scienter. He received a suspended sentence and \$2,500 fine. The Board affirmed, based on a de novo review, the Hearing Committee's unanimous Conclusions of Law that the offense constituted a "serious crime" and that the facts surrounding Downey's conviction did not demonstrate moral turpitude.

IN RE DONALD MCCLURE. Bar No. 955575. December 31, 2015. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar McClure. This matter involves McClure's mishandling of a medical malpractice case and his subsequent dishonest and contemptuous actions when trying to obtain attorneys' fees in that case after he and his co-counsel were terminated by their clients and replaced by successor counsel who subsequently

settled the matter. McClure failed to provide competent representation; failed to serve the client with skill and care; failed to charge the client reasonable fees; knowingly made false statement of fact to a tribunal; knowingly disobeyed an obligation under the rules of a tribunal; engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation; and engaged in conduct that seriously interfered with the administration of justice. Rules 1.1(a), 1.1(b), 1.5(a), 3.3(a), 3.4(c), 8.4(c), and 8.4(d).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE ALLISON M. BLACK MCIVER. Bar No. 480248. December 10, 2015. The D.C. Court of Appeals indefinitely suspended Black McIver from the practice of law in the District of Columbia, effective immediately, and that any pending matters be held in abeyance pursuant to D.C. Bar R. XI, § 13(e), until further order of the court pursuant to D.C. Bar R. XI, § 13(c).

IN RE MARGAUX D. HALL. Bar No. 990435. December 10, 2015. The D.C. Court of Appeals indefinitely suspended Hall from the practice of law in the District of Columbia, effective immediately, and that any pending matters be held in abeyance pursuant to D.C. Bar R. XI, § 13(e), until further order of the court pursuant to D.C. Bar R. XI, § 13(c).

Reciprocal Matters

IN RE SHERON A. BARTON. Bar No. 997851. December 17, 2015. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and indefinitely suspended Barton, with the right to petition for reinstatement after five years, or after reinstatement in Maryland, whichever occurs first. In Maryland, Barton was indefinitely suspended for a pattern of client neglect, failure to properly supervise nonlawyer employees, and an instance of misrepresentation before a court.

IN RE JOEL D. JOSEPH. Bar No. 183830. December 17, 2015. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Joseph, nunc pro tunc to October 29, 2015. In Maryland, Joseph was found to have made material misrepresentations in applications for admission pro hac vice in California state and federal courts.

IN RE GARY L. SHAFFER. Bar No. 465556. December 17, 2015. In a reciprocal matter from Pennsylvania, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Shaffer for five months, nunc pro tunc to November 12, 2015. Shaffer stipulated that he had neglected two clients' trademark applications and thereafter failed to inform the clients that the trademark applications had been abandoned.

IN RE TAWANA D. SHEPHARD. Bar No. 486834. December 17, 2015. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Shephard. In Maryland, Shephard was found to have engaged in the unauthorized practice of law by acting as managing partner of a Maryland law firm without being licensed to practice law in Maryland. She was also found to have neglected clients' matters and failed to supervise nonlawyer assistants, resulting in a failure to safeguard client funds that were deposited out of trust.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE ROSEMARY FOSTER. Bar No. 207332. December 23, 2015. Foster was suspended on an interim basis based upon discipline imposed in Oregon.

IN RE THEODORE L. FREEDMAN. Bar No. 165290. December 23, 2015. Freedman was suspended on an interim basis based upon discipline imposed in New York.

IN RE PAUL AARON HERMAN. Bar No. 1013933. December 23, 2015. Herman was suspended on an interim basis based upon discipline imposed in the United States Bankruptcy Court for the Southern District of Florida and the Supreme Court of Florida.

IN RE JAMES C. UNDERHILL JR. Bar No. 297762. December 23, 2015. Underhill was suspended on an interim basis based upon discipline imposed in Colorado.

Informal Admonitions Issued by the Office of Disciplinary Counsel

IN RE LYNNE K. ZUSMAN. Bar No. 263962. November 13, 2015. Disciplinary Counsel issued Zusman an informal admonition after she failed to comply

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