speaking of ethics

By Saul Jay Singer

Are You Giving Your Client 'The Business?'

Mick Wiggins

Max Mogul, Esquire, is a true "Renaissance man." After earning a Ph.D. in economics and becoming a licensed CPA, Mogul took a few years off, backpacked around the Far East, learned Chinese, became a champion Mah Jongg player, and earned a master's degree in origami. Returning to the United States, he decided to become a lawyer and, after graduating the K Street School of Law summa cum laude and passing the D.C. Bar exam, he launched Taxes, Shmaxes, PLLC, a prominent law firm specializing in federal tax law.

Mogul also owns and operates a number of side businesses unrelated to his law practice. In particular, his company Down to Brass Tax, Inc. has become the number one tax preparation company in the District of Columbia; its Dallas affiliate, Deep in the Heart of Taxes, Inc., is also phenomenally successful; and his consulting firm, Economists 'R' Us, is a favorite among D.C.'s most respected plaintiff's firms.

One of his tax preparation customers is Ms. Olive Oil, a wealthy retired investor and corporate manager for whom Mogul personally prepares tax returns each year. When they first met, the sweet but sharp-as-a-tack senior citizen told him, with a twinkle in her eye: "I know that you're a highfalutin', big-shot tax lawyer, and I'd much rather have someone like you doing my taxes than some bozo high school kid from E-Z Tax."[1]

During his visit this year, she appears very troubled, and Mogul asks her if everything is okay. "Well," she tells him, "I am actually very worried about my sister, J.P. Babcock, who serves as president of Mah Jongg Corporation, the premier manufacturer of decorative, personalized tile holders and other game paraphernalia. Ignoring my advice, she sank her entire fortune into this relatively new startup company, and I just learned last night that the IRS, which has disallowed various corporate and business deductions taken by the company over the past three years, has imposed a significant penalty and interest that, if left unchallenged, will bankrupt both Mah Jongg and poor J.P. . . ."

Mogul can almost see the light bulb go on over Olive's head. "Hey Max," she says, "Isn't this the kind of case that your law firm handles?"

Mogul explains that it certainly is, and Olive calls Babcock, who makes an appointment to see Mogul. They discuss the Mah Jongg case at great length, and Mogul advises her that, because of previous litigation on a similar issue before a California court in which the IRS reversed itself, he is very familiar with the statute at issue and has great confidence in her case and—although, of course, he could never guarantee results—he would be pleased to take on the representation. He adds that, as a Mah Jongg champion, he would bring a unique perspective to the case, and Babcock is sold.

However, due to IRS liens and other financial problems, Mah Jongg finds itself in particularly dire financial straits and the company, already overleveraged, cannot secure additional loans. As such, Babcock, as the company's duly authorized constituent,[2] advises Mogul that Mah Jongg has no choice but to drop the case and settle with the IRS—which, she sighs, will undoubtedly bankrupt the company.

Mogul is upset for two reasons. First, of course, he doesn't want to lose the client and the fee. However, he is also a competent and zealous professional who believes strongly in his client's case and expects it to ultimately prevail. Moreover, having carefully reviewed the company's finances and business plans, and knowing the target market extremely well, he believes that if the client can weather its immediate legal financial problems, it will develop into a hugely profitable enterprise. As such, he proposes the following to Babcock:

"I have a win–win proposition for you, J.P. I believe in your case, and I believe in Mah Jongg. As such, I will put my money where my mouth is: My firm will advance all fees and expenses necessary to see this tax litigation through until the end, including any appeals, if necessary.[3] In exchange, at the end of each month, I will submit an invoice and the company will issue 10 shares of its stock to my firm for each hour we spend on the matter."

A delighted Babcock consults with her board and, that very afternoon, signs a retainer agreement with Taxes, Shmaxes. However, due to research incompetently performed by a new associate at the firm, Mogul loses the case, and a furious Babcock threatens a malpractice action against Taxes, Shmaxes and a Bar complaint against Mogul. Anxious to avoid both, Mogul offers Babcock a deal and presents it as one that the company cannot refuse: He says that while Taxes, Shmaxes has done nothing wrong, he will pay the entire IRS tax lien himself—plus an additional $25,000 for Mah Jongg's trouble—and return all shares to the company. He conditions the settlement on a confidentiality clause and advises that his offer will be pulled by the close of business that day. The Mah Jongg board, believing that it knows a good deal when it sees one, quickly accepts.

* * *

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client.[4] As such, any time a lawyer wants to conduct business with a client, he or she must be very careful to meet the three-pronged mandate of Rule 1.8(a):

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client[5] and are fully disclosed and transmitted in writing to the client

in a manner which can be reasonably understood by the client;
(2) The client is given a reasonable opportunity to seek the advice of independent counsel on the transaction; and
(3) The client gives informed consent writing thereto.

As a general rule, Rule 1.8(a) does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5. However, the rule *does* apply when, as here, "the lawyer accepts an interest in the client's business or other non-monetary property as payment of all or part of a fee."[6]

Turning to the first element, our hypothetical does not present any facts to determine whether Mogul took advantage of a client in a difficult position; for example, the current price of company stock, the market forecast on the street, and the degree of company control that Taxes, Shmaxes would be acquiring are only some of the factors that we cannot quantify in ascertaining whether the deal was "fair and reasonable" to Mah Jongg. While we know that Mogul offered a retainer agreement and that Babcock signed it, we do not know (1) whether Mogul provided any additional writing; (2) whether the written terms of the transaction were transmitted "in a manner that can be reasonably understood by the client;"[7] and (3) whether he met his obligation to "discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives. . . ."[8]

As to the second element, we are told only that Babcock signed the retainer that very afternoon, and it seems clear that the client never consulted with independent counsel about whether entering into the transaction with Mogul would be in Mah Jongg's interest. However, Rule 1.8(a) does not *require* that the client have such a consultation, only that it have a reasonable opportunity to do so.[9] Our facts state that the board agreed to Mogul's terms after meeting to discuss his acquisition of company shares, and it may well have decided to forego its right to an evaluation by an independent counsel. Under such circumstances, the second element of Rule 1.8(a) will be satisfied.[10]

As to the third element, informed consent is also going to be a fact-specific question.[11] Under the D.C. Rules, this is one of the very few situations where a client's informed consent is required to be obtained *in writing*. However, though "a writing is only required when the underlying Rule requiring informed consent so specifies,"[12] the fact that a signature is not *ethically* required does not mean that it isn't always a fine idea to nonetheless obtain the client's informed consent in writing.

Examples of "business transactions" with clients subject to Rule 1.8(a) include situations where lawyers are engaged in the sale of goods or services related to the practice of law as, for example, "the sale of title insurance or investment services to the existing clients of the lawyer's legal practice,"[13] and estate planning, insurance sales, and—recalling Mogul's ownership of Economists 'R' Us—professional consulting. Rule 1.8(a) also extends to seemingly "simple" transactions, such as renting an apartment to or from a client, providing payroll services, and referring a client to a nonlawyer entity owned by the lawyer.[14]

In proposing to settle Mah Jongg's malpractice claims, Mogul is again subject to Rule 1.8(a) because, should the company accept the settlement offer, he will be gaining a pecuniary interest adverse to it. While an agreement settling a claim for malpractice arising out of a lawyer's conduct is not prohibited, the drafters of our Rules so feared the possibility of a lawyer taking advantage of a client in such cases[15] that they enacted an additional provision under Rule 1.8(g)(2) that affords further protection to the client:

> A lawyer shall not . . . settle a claim or potential claim for malpractice arising out of the lawyer's past conduct with unrepresented client or former client unless that person is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable opportunity to do so in connection therewith.

Thus, it is not enough now for Mogul to simply afford Mah Jongg a reasonable opportunity to seek the advice of independent counsel, as in the usual Rule 1.8 scenario. Here, he must also affirmatively advise the client—in writing—that it *should* seek such counsel. A lawyer who settles a malpractice case with a client who failed to consult with independent counsel will bear a heavy burden of proof to demonstrate that he or she expended every reasonable effort to urge the client to do so.

In this case, Mogul almost certainly violated both Rule 1.8(a) and Rule 1.8(g). By threatening to pull the offer off the table by the close of business that very day, the client was not afforded a reasonable opportunity for an independent consultation. Moreover, there is nothing in our facts to suggest that Mogul provided the company with any writing of any kind, let alone the specific writing required by the Rules. Furthermore, though the terms of the settlement seem to satisfy Rule 1.8(a) in that the basic terms of the proposed settlement do arguably seem fair to the client—Mogul is not only making the company whole, but he is also paying it a much-needed financial "dividend"—he has nonetheless violated the first element by failing to make full disclosure in writing in a manner that can be reasonably understood by the client.

As to Mogul's attempt to settle Mah Jongg's claims in the face of Babcock's threat to file a Bar complaint against him, Legal Ethics Opinion 260 could not be clearer or more definitive:[16]

> Under no circumstances may a lawyer condition a settlement on a client's agreement not to file a Bar complaint. Allowing a lawyer to bargain with a client to avoid those procedures, would significantly impair the Bar's ability to regulate its members as well as protect the courts, the legal profession, and the public's confidence in the integrity and competence of the judicial system . . . Under no circumstances may a lawyer seek to thwart the Bar's duty to oversee, regulate and discipline its members by eliciting a former client's agreement not to file a complaint with Bar Counsel.

Finally, a practice tip: Always be aware of your heightened fiduciary duty when transacting business with your client—and even "Renaissance men" must comply with the Rules of Professional Conduct.

Legal Ethics counsel Saul Jay Singer, Hope 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 Even though Mogul does not represent Olive as a lawyer, nor is he providing any legal advice to her, he will be subject to the full range of the D.C. Rules, including, specifically, the conflicts rules—unless he meets the mandate of Rule 5.7 (Responsibilities Regarding Law-Related Services).

2 *See* Rule 1.13(a).

3 *See* Rule 1.8(d)(1): "While representing a client in connection with contemplated or pending litigation . . . a lawyer shall not advance or guarantee financial assistance

to the client, except that a lawyer may pay or otherwise provide: (1) the expenses of litigation . . . including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence. . . ."

4 Rule 1.8, Comment [1].

5 The "fairness" of the fee arrangement is judged *at the time of the engagement*, and no ethical violation would occur if subsequent events, beyond the control of the lawyer, caused the fee to appear unfair or unreasonable. *See* Legal Ethics Opinion 300.

6 Rule 1.8, Comment [1].

7 This determination, which will always be one of fact, will vary significantly by the circumstances. For example, the degree of client sophistication, *vel non*, could render the writing ethically sufficient in one case but violate Rule 1.8(a)(1) in another.

8 *See* Rule 1.8, comment [2].

9 *See* Legal Ethics Opinion 260.

10 It is worth noting that it may actually have been in Mogul's interest for Mah Jongg to have availed itself of the opportunity to consult with independent counsel, and lawyers entering into business dealings with their clients should seriously consider making such consultation a condition precedent to entering into the business transaction. *See*, *e.g.*, Comment [4] ("The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client, as paragraph (a)(1) requires.")

11 "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e).

12 *See* Legal Ethics Opinion 355.

13 Rule 1.8, Comment [1].

14 *See In re Brown*, 930 A.2d 249 (D.C. 2007). *See also* Rule 5.7, Comment [3].

15 Rule 1.8, Comment [14].

16 *See also In re Martin*, App. No. 11-BG-775 (D.C. Feb. 13, 2014).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE BENITO A. GARZA. Bar No. 489890. February 5, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Garza by consent.

IN RE LILY MAZAHERY. Bar No. 480044. February 5, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Mazahery by consent.

IN RE JOSEPH J. O'HARA. Bar No. 362581. February 26, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar O'Hara. O'Hara pleaded guilty in the U.S. District Court for the Western District of Texas to one count of conspiracy to commit mail fraud and the deprivation of honest services, in violation of 18 U.S.C. §§ 1341, 1346, and 1349. The court has previously held that violations of 18 U.S.C. §§ 1341 and 1346 involve moral turpitude *per se* for which disbarment is mandatory under D.C. Code § 11-2503(a) (2001).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE DOUGLAS R. ARNTSEN. Bar No. 483328. February 27, 2014. The D.C. Court of Appeals disbarred Arntsen because his crime of grand larceny in the first degree involved moral turpitude *per se* for which disbarment is mandatory under D.C. Code § 11-2503(a) (2001).

IN RE STEPHANIE Y. BRADLEY. Bar No. 288910. February 6, 2014. The D.C. Court of Appeals disbarred Bradley by consent, effective immediately.

IN RE BENITO A. GARZA. Bar No. 489890. February 20, 2014. The D.C. Court of Appeals disbarred Garza by consent, effective immediately.

IN RE LILY MAZAHERY. Bar No. 480044. February 20, 2014. The D.C. Court of Appeals disbarred Mazahery by consent, effective immediately.

IN RE KAREN J. MILLER. Bar No. 417139. February 6, 2014. The D.C. Court of Appeals disbarred Miller by consent, effective immediately.

Reciprocal Matters

IN RE MIRA S. BURGHARDT. Bar No. 484157. February 20, 2014. In a reciprocal matter from Massachusetts, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Burghardt for one year and one day with fitness, *nunc pro tunc* to December 6, 2013, effective immediately. In Massachusetts, Burghardt stipulated that she had engaged in dishonesty relating to obtaining reimbursement from her firm for personal expenses for which she was not entitled to reimbursement.

IN RE BRIAN R. DINNING. Bar No. 435906. February 20, 2014. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed functionally identical reciprocal discipline and disbarred Dinning, effective immediately. In Virginia, Dinning had consented to revocation of his law license following a guilty plea to wire fraud and bank fraud.

IN RE CHARLES P. INGENITO. Bar No. 450710. February 20, 2014. In a reciprocal matter from New Jersey, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Ingenito, *nunc pro tunc* to January 7, 2014. In New Jersey, Ingenito was found to have knowingly misappropriated client funds.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE KYLE M. COURTNALL. Bar No. 468109. February 12, 2014. Courtnall was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE MICHELLE HAMILTON DAVY. Bar No. 454524. February 3, 2014. Davy was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE LARRY J. FELDMAN. Bar No. 460824. February 12, 2014. Feldman was suspended on an interim basis based upon discipline imposed in the U.S. District Court for the District of Maryland.

IN RE GEORGE J. GEESING. Bar No. 449222. February 12, 2014. Geesing was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE SHERRYL V.R.S. GOFFER, (AKA SHERRYL SNODGRASS CAFFEY). Bar No. 405100. February 3, 2014. Goffer was suspended on an interim basis based upon discipline imposed in Alabama.

IN RE BARRY J. NACE. Bar No. 130724. January 17, 2014. Nace was suspended on an interim basis based upon discipline imposed in West Virginia. The interim suspension is for a period of 120 days, *nunc pro tunc* to February 6, 2014 (*amended temporary suspension*).

IN RE DAVID A. VESEL. Bar No. 423456. February 12, 2014. Vesel was suspended on an interim basis based upon discipline imposed in North Carolina.

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.*