speaking of ethics

By Hope C. Todd

E-Discovery Vendors and Nonlawyer Partners

Mick Wiggins

Ann Debtladen was a second-year associate in the Washington, D.C., office of BIGFIRM, LLP when she and 90 other BIGFIRM lawyers nationwide were summarily "let go" in 2009. While at BIGFIRM, she had worked on projects for I. Find Loopholes, Esq. and Trade Marks, Esq., tax and intellectual property partners, respectively, who also received pink slips that same oppressively hot August day.

Attorney Loopholes, J.D., C.P.A., M.B.A., however, had seen the handwriting on the wall. For months, he had been meeting with other professionals and well-heeled friends interested in getting in on the ground floor of a new venture. With nonlawyer investor money in hand, Loopholes, his graduate school buddies Ad Mann and IT Genius, and a few former BIGFIRM lawyers launched ONE STOP (E-Discovery) SHOP, INC. The company immediately commenced operations in the District, promising "highly skilled lawyers, ready to manage all aspects of document review and the discovery process—soup to nuts—and cheap."

Meanwhile, after three months without a paycheck, the 28-year-old Debtladen swallowed her pride. She had outstanding law school loans in the six figures; a large mortgage on her Arlington, Virginia, condo; and a beloved purebred Shih Tzu on Lasix for a chronic heart condition. Armed with Matt Ritter's best survival tips,[1] Debtladen joined the ranks of document review contract lawyers.[2] ONE STOP's promise of $30 per hour and 60-hour workweeks was a no-brainer.

After almost three years, Attorney Marks joined NEWFIRM, LLP. As a solo, he had done reasonably well, but Marks missed collaborating with other lawyers. He missed having support staff. He missed his regular, weekly take-home pay. His transition, however, was a bit of a jolt. During his first week, NEWFIRM's largest IP client was sued in a matter that promised to require a massive ESI production.[3] The client demanded that discovery be handled by ONE STOP.

Thursday morning's voice mail brought a familiar Texas drawl:

> *Marks! Loopholes here. Hey, how great is it to be practicing law together again! Remember Debtladen? She'll be on your project; she's been working for me for years, already got a legion of reviewers ready to go. Listen, per client instructions, we'll prepare the privilege log and the response to any request for production and have it all tidy and ready for your signature, which I AM SURE will be a load off you and leave you with time to do the <u>important</u> litigation stuff. Talk soon.*

Marks, who had worked closely with e-discovery vendors before, and with much greater involvement and supervision by his firm, knew that Loopholes and Debtladen were decent lawyers, and yet something did not feel right about this whole situation.

In the District of Columbia, the "unauthorized practice of law" is defined by Rule 49 of the District of Columbia Court of Appeals. The court charged the Committee on Unauthorized Practice of Law (UPL Committee) with the enforcement of Rule 49, and the UPL Committee issues opinions on questions arising under the rule.[4]

In January 2012 the UPL Committee issued Opinion 21-12, which addresses the applicability of Rule 49 to discovery service companies, including e-discovery companies. Opinion 21-12 provides direction to vendors about "the permissible scope of services that may be performed without engaging in the practice of law" and how to promote those services consistent with the holding out provisions of Rule 49.[5]

The failure of discovery service vendors to comply with the provisions of Rule 49, as interpreted by UPL Opinion 21-12, can raise ethical problems for D.C. lawyers who own, manage, work for, or retain such vendors. In Opinion 362 the D.C. Bar Legal Ethics Committee specifically addresses the risk to lawyers of running afoul of D.C. Rule 5.4(b)'s prohibition on nonlawyer passive investment in law firms, and Rule 5.5(b)'s prohibition on assisting others in the unauthorized practice of law, emphasizing the ethical duties attendant to each lawyer's role.

Opinion 362 begins with an analysis of the District's unique Rule 5.4(b), which allows nonlawyer ownership of law firms in certain limited circumstances.[6] The general rule in the District of Columbia, and other U.S. jurisdictions, is that a lawyer may not share legal fees with a nonlawyer. The universally stated reason for this prohibition is "to protect the lawyer's professional independence of judgment."[7]

The D.C. exception, while pioneering among U.S. jurisdictions, is narrow in scope. Rule 5.4(b) permits a lawyer to practice law ". . . in an organization in which a financial interest is held or managerial authority is exercised by an individual non-lawyer who performs professional services which assist the organization in providing legal services to clients." However, the organization "must have as its sole purpose providing legal services to clients" and, more important, as emphasized in Opinion 362, the nonlawyer partner or manager must *truly* be "an individual performing professional services within the law firm" and not a mere investor.[8] Thus, for lawyer owners and managers of discovery service vendors that engage in the practice of law, the presence of nonlawyer passive investors is problematic and violates Rule 5.4(b).

In addition to fee-splitting issues arising under 5.4, Rule 5.5(b) prohibits a lawyer from "assist[ing] a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." Opinion 362 thus cautions that "a lawyer who works for, partially owns, or engages a discovery service organization with passive non–lawyer ownership may be assisting another 'person' or 'non-lawyer' in the unauthorized practice of law" in violation of Rule 5.5(b).

So What Is a Lawyer to Do?

Read together, UPL Opinion 21-12 and Legal Ethics Opinion 362 provide a road map for lawyers on how to ethically own, manage, work for, and retain discovery service vendors in the District of Columbia.

In the introductory narrative, Loopholes is clearly on the hook. According to UPL Opinion 21-12, ONE STOP consistently violates Rule 49 in both word and deed, and with its nonlawyer passive investors, is no doubt engaging in violations of Rules 5.4(b) and 5.5(b) as well. Legal Ethics Opinion 362 directs that a lawyer who owns or manages a discovery service vendor should ensure that either 1) the organization with nonlawyer partners complies with Rule 5.4(b) and does not have nonlawyer passive investors, or 2) the organization does not engage in the practice of law or otherwise violate Rule 49.

As a document review lawyer–employee, it is unlikely that Debtladen has acted unethically. Opinion 362 states that in the absence of *actual knowledge*[9] that a discovery service vendor is 1) practicing law or promoting itself in violation of Rule 49, and 2) is owned in whole or part by nonlawyer passive investors, there is no affirmative duty for lawyer–employees engaged principally in document review to "investigate how the organization promotes itself or whether [it] has passive non-lawyer ownership."[10]

In addition, such lawyer–reviewers may also rely on the reasonable assurances of a vendor's supervisory lawyer that its operations are in compliance and consistent with Rule 49 and D.C. Rule 5.4(b).[11] If at any time, however, Debtladen had acquired actual knowledge of ONE STOP's unauthorized practice of law and the existence of its nonlawyer passive investors, she could not have ethically hidden behind Loopholes' assurances to the contrary.

Attorney Marks also cannot rely on Loopholes' assurances in this particular scenario because, as Opinion 362 explains, a lawyer who retains a discovery service vendor on behalf of a client violates Rule 5.4(b) if that lawyer knows that the discovery service vendor has nonlawyer passive investors and "abdicates to that organization responsibilities that include the practice of law."[12] Additionally, the opinion directs that such hiring lawyer should assure "that the services being provided for [him or her] will not extend to the practice of law."[13]

Attorney Marks should call Loopholes ASAP and clarify his and NEWFIRM's supervisory and professional responsibilities in the e-discovery process for the client. He certainly may not relinquish his ethical duties by simply "signing off" on ONE STOP's finished product.

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

Notes

1 Matt Ritter is a comedian/writer/actor/lawyer and former contributor to the law practice blog, Lawyerist.com, where he posted from the trenches of actual document reviews.

2 *See* UPL Opinion 16-05, holding that attorneys regularly practicing in the District of Columbia as contract attorneys must be members of the D.C. Bar. The opinion acknowledges that reviewing documents for potential relevance or privilege may not always constitute the practice of law; however, "when a person is hired and billed as a lawyer, the person is generally engaged in the practice of law, and is certainly being held out as authorized and competent to practice law."

3 Electronically Stored Information.

4 Contact information for the Committee on Unauthorized Practice of Law, Rule 49, and opinions issued thereto may be found at http://www.dccourts.gov/internet/appellate/unauthcommittee/main.jsf.

5 *See* UPL Opinion 21-12.

6 Contrary to the popular notion that this rule exists in Washington, D.C., for the primary benefit of lobbyists, it was adopted by the District of Columbia Court of Appeals in 1990 on recommendation of the D.C. Model Rules of Professional Conduct Committee, which adopted the substance of the proposal first conceived by the ABA's "Kutak Committee" in January 1981. That innovative proposal "would have eliminated traditional prohibitions against lawyers practicing in organizations where financial interests or managerial authority was held by others." *See* Jordan Committee Report at 207 (1986).

7 *See, e.g.,* Comment [1] to Rule 5.4. In the District, the technical exception to Rule 5.4(a) is Rule 5.4(a)(4), which permits the sharing of legal fees with nonlawyers "in an organization meeting the requirements of Rule 5.4(b)."

8 *See* Legal Ethics Opinion 362; *see also* Rule 5.4, Comment 8.

9 *See* Rule 1.0(f). "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

10 Legal Ethics Opinion 362.

11 *See* Legal Ethics Opinion 362; Rule 5.2(b).

12 *See* Rule 8.4(a).

13 Legal Ethics Opinion 362.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE WAYNE R. BRYANT. Bar No. 957480. June 21, 2012. The D.C. Court of Appeals disbarred Bryant. Bryant was convicted of six counts of honest services fraud in violation of 18 U.S.C. §§ 1341, 1343, and 1346; one count of bribery in violation of 18 U.S.C. § 666 (a); and five counts of mail fraud in violation of 18 U.S.C. § 1341, crimes involving moral turpitude *per se,* for which disbarment is mandatory under D.C. Code § 11-2503(a)(2001).

Reciprocal Matters

IN RE BARBARA L. BRACKETT. Bar No. 445457. June 7, 2012. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed functionally equivalent reciprocal discipline and disbarred Brackett, effective immediately.

IN RE ANTHONY J. DE LAURENTIS. Bar No. 111278. June 7, 2012. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred De Laurentis, *nunc pro tunc* to April 5, 2012, effective immediately.

IN RE PHILIP ALEXANDER GOIRAN. Bar No. 452024. June 7, 2012. In a reciprocal matter from Colorado, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Goiran for 60 days, all stayed in lieu of a two-year probation and compliance with all conditions imposed by the state of Colorado, effective immediately.

IN RE DARYL D. JONES. Bar No. 443302. June 7, 2012. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed functionally equivalent reciprocal discipline and suspended Jones for six months with fitness, *nunc pro tunc* to March 29, 2012, effective immediately.

IN RE GERALD I. KATZ. Bar No. 237925. June 7, 2012. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Katz for six months, *nunc pro tunc* to May 11, 2012.

IN RE PIERCE HENRY O'DONNELL. Bar No. 168674. June 7, 2012. In a reciprocal matter from California, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended O'Donnell for two years with all but 120 days stayed, followed by a two-year probationary period, effective immediately.

IN RE EARLE A. PARTINGTON. Bar No. 87700. June 7, 2012. In a reciprocal matter from Hawaii, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Partington for 30 days with fitness, effective immediately.

IN RE JOHN K. REIFF. Bar No. 454800. June 7, 2012. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline

continued on page 46

Attorney Briefs

continued from page 44

Wright PLLC as member, serving as co-leader of the firm's antitrust practice group… **Thomas L. Eldert** has joined Mayer Brown LLP as partner in the firm's global projects group and banking and finance practice… Intellectual property attorneys **Elizabeth Burke** and **Louis Troilo** have joined O'Brien Jones, PLLC as members… **Robert Nichols** has joined Covington & Burling LLP to cochair and expand the firm's government contracts practice group. **Uma Everett**, **Sarah Hoagland**, **Jessica Parezo**, and **Scott Roades** have been promoted to special counsel at the firm. **Wendy Feng** has been promoted to of counsel... **Timothy L. Jacobs**, **Daniel G. Vivarelli Jr.**, and **Amanda L. Wait** have been promoted to partner at Hunton & Williams LLP… **Kathleen E. Burtschi** has joined Vorys, Sater, Seymour and Pease LLP as of counsel in the firm's housing and urban development finance practice… **Mark Roth** has joined Tully Rinckey PLLC as union development specialist and senior counsel… **W. Blake Coblentz, Barry Golob**, **Louis M. Heidelberger**, and **Donald R. McPhail** have joined Cozen O'Connor as members in the firm's intellectual property group. **Michael D. Klein** has joined as member in the firm's energy, environmental and public utility practice group. **Joshua L. Belcher** and **Aaron S. Lukas** have come on as associates… **Charles M. "Chip" English** has joined Davis Wright Tremaine LLP as partner, concentrating his practice on challenging and defending federal and state regulatory decisions affecting the food and beverage industry… **Michael S. Kosmas** has joined Kelley Drye & Warren LLP as special counsel in the firm's business group… **Arlene Fickler** and **Angela Hart-Edwards** have joined Schnader Harrison Segal & Lewis LLP as partner in the firm's litigation services department in Philadelphia and Washington, D.C., respectively… Former Solicitor of Labor **Gregory F. Jacob** has joined O'Melveny & Myers LLP as partner in the firm's financial services practice group… **Rosemary De Bellis** has been promoted to assistant commissioner at the New York City Police Department… **G. Brent Connor, Charles A. Hunnicutt,** and **Patricia N. Snyder** have joined transportation group at Thompson Hine LLP… **Scott D. Burke** has joined Shapiro, Lifschitz & Schram, P.C. as associate in the firm's litigation and trial practice… **N. Richard "Dick" Janis** has joined Manatt, Phelps & Phillips, LLP as a partner in the firm's corporate investigations and white collar defense practice… **Anthony S. Barkow**, a former assistant U.S. attorney for the Southern District of New York, has joined the New York office of Jenner & Block LLP as a partner in the firm's white collar defense and investigations practice… **Mark D. Hopson** has been named managing partner of Sidley Austin LLP's Washington, D.C., office.

Company Changes

S. Robert Sutton has opened **The Law Office of S. Robert Sutton** at 17 West Jefferson Street, suite 105, in Rockville, Maryland. The firm focuses on civil litigation.

Author! Author!

Jasper Kim, a professor at Ewha Womans University in Seoul, South Korea, has written *ABA Fundamentals: International Economic Systems*, a primer for attorneys on international economic concepts, published by ABA Publishing. His book *24 Hours With 24 Lawyers: Profiles of Traditional and Non-Traditional Careers* has been released on Kindle and in paperback by Thomson Reuters Westlaw… **Nadine Wettstein**, an immigration law practitioner, has cowritten the second edition of *Immigration Law Service*, an eight-volume immigration law treatise published by Thomson Reuters Westlaw… **Harold J. Kwalwasser** has written *Renewal: Remaking America's Schools for the Twenty-First Century*, published by Rowman & Littlefield Publishing Group… **Ira P. Robbins** has written "Writings on the Wall: The Need for an Authorship-Centric Approach to the Authentication of Social-Networking Evidence," which appeared in the winter 2012 issue of the *Minnesota Journal of Law, Science & Technology*… Williams & Connolly LLP attorneys **Robert M. Cary**, **Simon A. Latcovich**, and **Craig D. Singer** have written the book *Federal Criminal Discovery,* which was published by the American Bar Association. The book covers each of the methods of discovery available to the parties in federal criminal cases.

D.C. Bar members in good standing are welcome to submit announcements for this column. When making a submission, please include name, position, organization, and address. Please e–mail submissions to D.C. Bar staff writer Thai Phi Le at tle@dcbar.org.

Speaking of Ethics

continued from page 13

and disbarred Reiff, *nunc pro tunc* to April 5, 2012, effective immediately.

IN RE ROBERT M. SETO. Bar No. 259374. June 7, 2012. In a reciprocal matter from Hawaii, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Seto for two years with fitness, *nunc pro tunc* to April 11, 2012, effective immediately.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE SUSAN A. FRIERY. Bar No. 446623. June 26, 2012. Friery was suspended on an interim basis based upon discipline imposed in Massachusetts.

IN RE JOSHUA J. R. GESSLER. Bar No. 474109. June 21, 2012. Gessler was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE ROBERT A. HUFF. Bar No. 454716. June 26, 2012. Huff was suspended on an interim basis based upon his conviction of a serious crime in the United States District Court for the Eastern District of Wisconsin.

IN RE PETER R. MAIGNAN. Bar No. 461974. June 26, 2012. Maignan was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE DAVID J. PERCELY. Bar No. 403066. June 27, 2012. Percely was suspended on an interim basis based upon discipline imposed in New Jersey.

IN RE CHRISTOPHER M. UHL. Bar No. 442034. June 27, 2012. Uhl was suspended on an interim basis based upon discipline imposed in New York.

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 on the D.C. Bar Web site at www.dcbar.org/discipline. 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.*