speaking of ethics

By Hope C. Todd

Helping the Indigent Client: A Threat to Lawyer Independence?

Mick Wiggins

Pursuant to her 2010 New Year's resolution to represent at least one new pro bono client, Sally Solo accepted free of charge Dire Straights' wrongful employment termination case, which she believes to be very strong. Sally was, therefore, stunned when her ashen and visibly upset client ran into her office unannounced to beg her to settle the case immediately for "whatever those life destroyers are willing to pay!" Though Sally knew her client was experiencing financial difficulties, she had no idea of the extent of those problems until that day when Dire broke down sobbing that he was facing eviction from his apartment and would be living on the street within a week. He wept that he no longer could pay for his necessary daily medications, which had just yesterday resulted in a life-threatening trip to the emergency room, adding yet another bill to his mountainous pile of accruing debt. Moreover, he said, he would soon lose his cell phone service, and he did not know how he would, thereafter, communicate with Sally about the case—or, for that matter, how he could talk to his ailing mother in China.

Sally had little disposable income; indeed, assuming the expenses of Dire's case, including retaining an expert witness, already was cutting into her limited funds. Nonetheless, the supremely compassionate lawyer told her client: "Don't worry, Dire, I will take care of all of your expenses—your rent, your medications, your cell phone, and any other bills. When we win your case, you can pay me back whatever you see fit."

In the early development of legal ethics, lawyers were prohibited from advancing costs or expenses to clients by "common law and professional rules against champerty and maintenance," which existed in large part to prevent lawyers (and others) from "stirring up baseless litigation."[1] The proscription against a lawyer acquiring a financial interest in a matter, even in meritorious cases, also sought to prevent an adverse impact on the professional judgment of a lawyer, who might become overly concerned about protecting his or her personal investments to the client's detriment.

One of the earliest recognized exceptions under both the American Bar Association (ABA) Model Code of Professional Responsibility and the District of Columbia Code permitted "lawyers to obtain a contractual interest in a matter in the form of a contingent fee."[2] Lawyers also were permitted to advance payments for out-of-pocket litigation expenses, so long as such advances clearly were loans for which clients ultimately remained responsible.[3]

Over time, competing ethical and public policy debates ensued within the profession. Some lawyers championed expanding a lawyer's ethical right to advance or guarantee funds to clients, and others defended the existing limitations. Arguments supporting expansion included: 1) the modern pace of litigation—often slow—and the practical inability of many litigants to "wait out" the judicial process in the face of real world financial obligations; 2) basic access to the judicial system by litigants who cannot afford the necessary court costs and litigation expenses; and 3) other humanitarian considerations.[4] In addition, as the cost of litigation increased, the ability of a lawyer to advance significant litigation expenses (which, as a practical matter, the lawyer might or might not recover) weakened arguments that a lawyer's payment of other costs created a fundamentally different or more sinister "financial conflict of interest."[5]

However, those who favored strictly limiting lawyers' financial assistance to clients cited the strong public interest against lawyers "buying clients" or using financial inducements as a form of advertising, and raised fundamental ethical questions about a lawyer's ability to properly maintain professional independence in the face of material personal financial investment.[6]

The current ABA Model Rule[7] "walks the line" between these two ethical approaches. On one hand, the ABA rule yields to concerns of access to justice and permits the lawyer to: (1) advance court costs and litigation expenses (allowing repayment to be contingent on the outcome of a matter); and (2) make outright gifts of these same costs to indigent clients. On the other hand, the ABA remains steadfast in prohibiting lawyers from lending or donating money to clients for any other expenses, including living expenses.[8]

Since 1991, however, the District of Columbia has taken a different approach in allowing lawyers not only to pay (as outright gifts or loans) "[t]he expenses of litigation or administrative proceedings," but also to provide *"[o]ther financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings."*[9] (emphasis added)

As Comment [9] to D.C. Rule 1.8 explains, "the purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement." But the comment also clarifies that "the payment of these additional expenses is limited to those strictly necessary to sustain the client during the litigation, such as medical and minimum living expenses" and that the rule "does not permit lawyers to 'bid' for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed."

The D.C. Bar Legal Ethics Committee in Opinion 354 examined the scope of D.C. Rule 1.8(d)(2) in addressing "whether the D.C. Rules permit a lawyer representing a prospective immigrant in an immigration matter to sign an Affidavit of Support as a cosponsor in support of the client's application."[10] The committee concluded that the resulting significant and long-term financial obligation to the client fell outside the permissible exception to Rule 1.8(d)(2):

> The Affidavit of Support requires the sponsor to guarantee financial assistance to the immigrant for years after a change of status is granted. Because the guarantee extends far

beyond the duration of the subject matter of the representation—the immigration application—the Rule 1.8(d)(2) exception does not apply. A financial guarantee that extends long after a proceeding does not meet the during-the-proceeding limitation that the comments to Rule 1.8 make clear.

The committee also identified the clear financial conflict of interest that would arise under Rule 1.7(b)(4) for a lawyer undertaking such a substantial financial commitment on behalf of a client,[11] and it noted the likelihood of a lawyer under these particular circumstances possessing a personal conflict distinct from, and in addition to, the lawyer's financial conflict, finding:

> . . . [T]he circumstances that lead a lawyer to consider undertaking such extraordinary obligations on behalf of a particular client may suggest the presence of a different kind of personal interest conflict. Most rational lawyers would not—and financially, could not—undertake obligations like those imposed by the Affidavit of Support for any client. The fact that a lawyer would consider such an extraordinary undertaking for a particular, special client should cause the lawyer to question whether he or she can maintain the professional distance necessary to represent the client effectively and dispassionately.

Indeed, an ethical conflict arises under D.C. Rule 1.7(b)(4) whenever 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."

Although some conflicts arising under Rule 1.7(b)(4) effectively may be waived by the client pursuant to Rule 1.7(c), the rule requires not only the informed consent of the client, but also that "the lawyer reasonably believe that [he or she] will be able to provide competent and diligent representation to [the client]."[12] Comment [11] makes clear that "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client." Thus, in Legal Ethics Opinion 354, the committee concluded that "the enforceability of such a waiver by an individual immigration client in these circumstances is doubtful."

Under D.C. Rule 1.8(d)(2), Sally would be permitted—though not required—to lend or donate funds to Dire to cover the cost of his rent, necessary medical expenses, and any other living expenses "strictly necessary to sustain him during the litigation."[13] Yet, given Sally's own personally limited financial circumstances, she would be wise to carefully consider her Rule 1.7(b)(4) conflict and the Rule 1.7(c) waiver requirements before moving forward as both her client's counsel and his financial supporter.

The D.C. Rules certainly are not meant to prohibit or discourage lawyer generosity. Indeed, D.C. Rule 1.8(d)(2) defines permissive financial assistance to clients more expansively than most other jurisdictions. Yet, even the most compassionate of lawyers must be ever-vigilant of the need to maintain professional distance, which ultimately serves the best interests of lawyer and client alike.

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 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 12.11 at 12–30 (3d ed. Supp. 2004).

2 *Id.* at 12–21 (3d ed. Supp. 2004); *see also* DR 5-103(A) D.C. Code of Professional Responsibility (1979).

3 DR 5-103(B) D.C. Code of Professional Responsibility (1979).

4 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 12.11 at 12–21 (3d ed. Supp. 2004); *see also Louisiana State Bar Ass'n v. Edwins*, 329 So.2d 437, 446 (La. 1976).

5 *See Mississippi Bar v. Shaw*, 919 So.2d 51 (Miss. 2005) (ultimately *Shaw* upheld the limitations within Mississippi's Rule 1.8).

6 *Id.*; *see also Shea v. Virginia State Bar*, 236 Va. 442, 374 S.E.2d 63 (Va. 1988).

7 D.C. practitioners are subject to the D.C. Rules of Professional Conduct, not the ABA Model Rules.

8 *See* ABA Model Rule 1.8(e). Comment [10] to Model Rule 1.8(e) states: "making or guaranteeing loans to their clients for living expenses … encourage[s] clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation."

9 D.C. Rule 1.8(d) provides as follows:

> While representing a client in connection with contemplated or pending litigation or administrative proceedings, 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 or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and (2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.

10 D.C. Bar Legal Ethics Committee Opinion 354 explains in detail the requirements and obligations that arise when an individual signs an Affidavit of Support (U.S. Citizenship and Immigration Services Form I-864) as a sponsor or cosponsor.

11 *See Id.*

12 D.C. Rule 1.7(c)(2).

13 The cell phone bill presents an interesting question. To the extent that the cell phone is the only means by which Sally can communicate with her client (an ethical obligation under Rule 1.4), there is a reasonable argument that her funding some type of prepaid cell phone in these circumstance legitimately falls within the 1.8(d)(2) exception as a cost "reasonably necessary to sustain the representation." On the other hand, paying for calls to China does not.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE ROBERT J. PLESHAW. Bar No. 938241. August 12, 2010. The D.C. Court of Appeals disbarred Pleshaw based on his misconduct as conservator for a client, where he engaged in reckless misappropriation on two occasions by paying himself commissions without prior court approval. Although the court disbarred Pleshaw based on his reckless misappropriation of conservator funds, it also accepted the Board on Professional Responsibility's recommendations regarding the two other counts and violations of Rules 1.1(a), 1.1(b), 1.3(c), 1.5(a), 1.5(b), 1.15(a), 1.16(a)(3), 3.3(a)(1), 8.4(a), 8.4(c), and 8.4(d).

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE S. MICHAEL BENDER. Bar No. 93393. August 17, 2010. Bender was suspended on an interim basis based upon discipline imposed in New Jersey.

IN RE PAUL W. BERGRIN. Bar No. 477326. August 9, 2010. Bergrin was suspended on an interim basis based upon discipline imposed in New York.

IN RE JEFFREY E. DETLEFSEN. Bar No. 395026. August 9, 2010. Detlefsen was suspended on an interim basis based upon discipline imposed in Oregon.

IN RE PETER W. DIGIOVANNI. Bar No. 445335. August 9, 2010. DiGiovanni was suspended on an interim basis based upon discipline imposed in Pennsylvania.

IN RE KIMLA C. JOHNSON. Bar No. 419056. August 9, 2010. Johnson was suspended on an interim basis based upon discipline imposed in South Carolina.

IN RE VINCENT J. KROCKA. Bar No.

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Letters

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a small home library, be they on shelves or, in my case, on floors "represent, bedevil and impeach us." That seems like incentive enough, at least to me, to believe that a market for the printed page will continue to exist with the added benefit of occasionally, well-designed book jackets and first editions to cherish.

Kemper's article is focused largely on what is happening and may yet happen here in the United States, including the inevitable copyright issues and litigation that surround digital publishing. Electronic storage may indeed be the perfect repository for the hundreds of books that are published daily in this country and are likely never read. Its greatest advantage seems to be the ability to search across stored works with keywords, although that seems more beneficial for the researcher rather than the recreational reader. And it may also level the playing field for small publishers so that they can compete with the likes of Simon & Schuster, Inc. (Jill Priluck, *Digital Publishing Levels the Playing Field for Small Publishers,* Wash. Post, Aug. 15, 2010).

The Jeffersonian notion that "ideas should freely spread from one to another over the globe" (Letter of Thomas Jefferson to Isaac McPherson, August 13, 1813) could well be achieved with digital technology if we lived in a perfect world. But as we have seen most vividly in countries such as China, Iran, and Saudi Arabia, repressive regimes that do not provide the same or any of the First Amendment rights that exist in our country can censor or block electronic data storage and transmission. Were the concept of a printed press, something that suffers no backward-compatibility issues, to become a lost art in our very real world where dictators seem to outnumber democrats, I fear—hopefully overly so—that reliance upon the Internet, e-readers, and gimmicks such as Twitter alone to disseminate unpopular ideas may undermine Jefferson's vision.

Lastly, I cannot believe that *Washington Lawyer*'s future readers will experience the same joy with an e-reader that they do upon taking in hand a magazine and immediately turning to the last page to mull over, amid the Sturm and Drang of daily legal practice, the wit and wisdom in a Jake Stein column.

Jim McKeown
Washington, D.C.

Over Time, Standards Remain Valid

Kudos! to Office of Bar Counsel lawyers Joe Penny and Bill Ross for flying the flag of civility in their excellent article "These Standards Are Voluntary—and Valid," which ran in the July/August 2010 issue. The article reminded us that adhering to the D.C. Bar Voluntary Standards of Civility in Professional Conduct (the Standards) could keep lawyers from running afoul of Bar Counsel.

In an article I wrote years ago for *Washington Lawyer*, "Civility—A Casualty of Modern Litigation? An Alert to the Bench and Bar," I defined civility as "decent behavior and treatment characterized by generally accepted social behavior and politeness practiced toward those with whom we come into contact, whether they be judge, lawyer, witness or court personnel."

The Standards, when followed, should result in that "decent behavior" we all aspire to and thus stop in its tracks situations that may escalate into violations of the Rules of Professional Conduct—or otherwise, Bar Counsel business.

I understand that Bar Counsel has enough business to contend with already. Let us hope that Bar Counsel's workload, like that of the Maytag repairman, will be substantially reduced when all adhere to the Standards.

—Judge Bruce S. Mencher
Superior Court of the District of Columbia

Let Us Hear From You

Washington Lawyer *welcomes your letters. Submissions should be directed to Washington Lawyer, District of Columbia Bar, 1101 K Street NW, Suite 200, Washington, DC 20005-4210. Submissions are also accepted by fax at 202-626-3471 or by e-mail at communications@dcbar.org. Letters may be edited for clarity and space.*

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425902. August 9, 2010. Krocka was suspended on an interim basis based upon discipline imposed in Florida.

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.dcbar.org/discipline and search by individual names.

IN RE BENNETT ALLAN BROWN. Bar No. 235143. On October 20, 2003, the Fifth District Section I Subcommittee of the Virginia State Bar publicly reprimanded Brown, with terms.

IN RE BENNETT ALLAN BROWN. Bar No. 235143. On July 9, 2010, the Fifth District Section I Committee of the Virginia State Bar publicly reprimanded Brown, with terms.

IN RE CHRIS KLEPPIN. Bar No. 471804. On June 14, 2010, the Supreme Court of Florida admonished Kleppin.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE BRYNEE K. BAYLOR. Bar No. 475406. August 11, 2010. Bar Counsel issued Baylor an informal admonition for failing to protect client confidences while retained to represent a client in a contract dispute with a mortgage company. (Rule 1.6(a) of the Maryland Rules of Professional Conduct made applicable through D.C. Rule 8.5(b)(1).)

IN RE NATHANIEL FRIENDS. Bar No. 382426. July 22, 2010. Bar Counsel issued Friends an informal admonition for failing to protect client confidences in a lawsuit he initiated against the client for attorney's fees. (Rule 1.6(a) of the Virginia Rules of Professional Conduct 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 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.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.*