speaking of ethics

By Hope C. Todd

Mick Wiggins

Changing Jobs

Iam Green always dreamed of championing "The Cause," which is, after all, why she attended law school. After toiling away for eight years at Loan Repayment Law Firm, her opportunity to "make a difference" seems to have arrived. Last week she submitted her résumé to Renewed Relevance Federal Agency (RRFA), and while she awaits the agency's response, she considers when and how she will advise her clients that she is leaving the firm. She is particularly concerned about informing Polluter, whom she knows will be infuriated by her departure. Although she eagerly anticipates saying "good riddance" to a very unpleasant client, she realizes that in representing Polluter, she gained important knowledge and valuable experience that she expects to use in her new position with RRFA.

Green decides she will not advise Polluter of her imminent departure before the client's important hearing next Monday in its lawsuit against RRFA. She reasons that there is no conflict of interest because she will go the extra mile for Polluter at the hearing to impress RRFA. She also reasons that there is no need for any disclosure since she has yet to interview with the agency, let alone be offered a position. Ideally, the firm will inform Polluter after Green is nicely settled into her new RRFA office.

With a new administration fueling an increase in the number of lawyers moving into and out of government service, and with a recession threatening attorney layoffs and encouraging anticipatory movement between firms, it seems timely to devote an ethics column to a few of the more frequent questions about job changes directed to the D.C. Bar Ethics Helpline.[1]

1. *When must I tell my clients that I am changing jobs, and what must I tell them?*

This issue is governed primarily by Rule 1.4 (Communication) of the D.C. Rules of Professional Conduct, which requires that a lawyer keep the client "reasonably informed about the status of a matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

As explained in Legal Ethics Committee Opinion 273 (Ethical Considerations of Lawyers Moving From One Private Law Firm to Another), a lawyer must inform his or her clients of a "planned departure and of a lawyer's prospective new affiliation" and must "advise [each] client whether the lawyer will be able to continue to represent it" at the lawyer's new affiliation.[2] Additionally, "such communication must occur sufficiently in advance of the departure to give the client adequate opportunity to consider whether it wants to continue representation by the departing lawyer and, if not, to make other representation arrangements."[3]

2. *Is a lawyer ever obligated to inform a client when the lawyer merely has applied for a job?*

Legal Ethics Committee Opinion 210 (Representation of Criminal Defendants by Attorney Seeking Position as Assistant U.S. Attorney) narrowly addressed the question of when a criminal defense lawyer is required to inform her clients that she is applying for a job in the prosecutor's office. The committee concluded that the lawyer must advise her clients of such intention as soon as she "takes the first active step in seeking employment" and, certainly, "when the lawyer submits a resume." The opinion clarifies that a personal conflict of interest immediately arises under Rule 1.7(b)(4) (Conflict of Interest: General) when the lawyer merely seeks employment with opposing counsel's office. Indeed, such a conflict arises whenever a lawyer's professional judgment on behalf of a client will be, or reasonably may be, adversely affected by a lawyer's personal interests. Once such a conflict arises, a lawyer cannot continue to represent a client in a matter absent the client's informed consent "after full disclosure [to the client] of the existence and nature of the possible conflict and the possible adverse consequences of such representation."[4] Not only must the client consent to the continued representation, the lawyer must also make an independent determination that she will be able to provide competent and diligent representation to the client under the circumstances.[5]

It is not unusual for a lawyer who regularly represents clients before or against a particular agency to apply for a position within that agency at some point, and the guidance provided by Legal Ethics Opinion 210 remains relevant to such situations. In most instances, when a lawyer seeks employment with an agency before or against which he or she maintains active representations, the lawyer must promptly disclose to, and obtain informed consent from, each affected client before continuing those representations.

3. *If I move from private practice to a position within the government, can I work on government matters that may harm the interests of my former clients?*

Principally analyzing Rule 1.6 (Confidentiality of Information) and Rule 1.9 (Conflict of Interest: Former Client), Legal Ethics Opinion 308 (Ethical Constraints on Lawyers Who Leave Private Employment for Government Service) sets out the continuing duties that a government lawyer owes to his former clients. Absent a specifically enumerated exception, Rule 1.6 prohibits a lawyer from revealing a former client's confidences and secrets to others and bars the lawyer's use of such information to the disadvantage of a former client, or for the advantage of the lawyer or a third party.[6] Absent the client's informed consent, Rule 1.9 prohibits the lawyer from undertaking government work that is materially adverse to the interests of the former client in any matter that is "the same or substantially related" to work performed for a former client. Thus, a lawyer may work on matters that will be detrimental to, or disadvantage, a former client, but only to the extent that such work is consistent with the these important limitations imposed by the rules.

4. *I am considering moving to a law firm whose clients may be adverse to my current law firm's clients on a number of matters. Can't I just be "walled off" from any matter in which there is a conflict?*

Although there is a proposal pending

before the American Bar Association to allow such screening,[7] Rule 1.10(a) imputes an arriving lawyer's conflicts to the entire firm.[8] Significantly, however, Rule 1.10(b) limits the imputation of conflicts to those matters in which the arriving lawyer actually acquired confidential information in the earlier representation that is material to the new law firm's current representation.[9]

Because imputed disqualification can be a substantial obstacle to lawyers moving between firms, a lawyer involved in employment discussions should provide sufficient information to allow a prospective law firm to conduct a proper conflicts check. Legal Ethics Committee Op. 312 (2002) discusses what information may be properly disclosed by a lawyer to a prospective firm to facilitate a conflicts check. Importantly, there are times where Rule 1.6 will prohibit disclosure of certain information that a lawyer normally could provide to a prospective firm. For example, if the mere fact that a particular client retained the lawyer is a "secret" under Rule 1.6, either because the client asked that this fact be held inviolate or because the revelation of the fact will be embarrassing or harmful to the client, the lawyer *cannot* reveal even the name of the client to a prospective firm.

While this column addresses some of the callers' more frequently asked questions and identifies a few red flags for Iam Green, it is not intended to constitute a comprehensive list of myriad ethical issues that can arise when lawyers change jobs. Lawyers are encouraged to call the D.C. Bar Ethics Helpline for assistance in navigating the ethics of employment transitions.

Notes

1 Due to space limitations, this column does not address questions related to leaving government services. Such a lawyer should carefully review Rule 1.11 (Successive Government and Private or Other Employment) of the D.C. Rules of Professional Conduct. Other important resources, such as D.C. Bar Legal Ethics Committee Ops. 297, 313, and 315, as well as pertinent federal and local statutes and regulations, are available at the Bar's Web site at www.dcbar.org/ethics. Substantive law imposes obligations on arriving and departing government lawyers beyond the Rules of Professional Conduct. Ethics officers in government agencies also can assist lawyers in these transitions.

2 The lawyer should also provide the client with enough information to make an informed decision about the lawyer's continued representation. Importantly, the opinion cautions that providing information that exceeds that which is ethically required may run afoul of other substantive law. *See* Legal Ethics Committee Op. 273 (1997).

3 It goes without saying that a lawyer withdrawing from a client's matter must ensure that such withdrawal is accomplished consistent with the requirements of Rule 1.16 (Declining or Terminating Representation). Among those requirements are protecting the client's interests to the extent reasonably practicable (i.e., allowing time for employment of successor counsel); promptly surrendering papers and property to which the client is entitled (i.e., the client's file); and seeking the court's permission to withdraw when so required. *See* Rule 1.16.

4 *See* Rule 1.7(c)(1).

5 *See* Rule 1.7(c)(2).

6 *See* Rule 1.6(a)(1)-(3). Consistent with Rule 1.6(a)(2), Legal Ethics Opinion 308 advises that a lawyer cannot even use protected information (without revealing it) to achieve a better result for the government if there is any reasonably foreseeable disadvantage to the former client. However, the plain language of Rule 1.6(a)(3) also prevents the lawyer from using a former client's protected information for the government's benefit, even where there is no foreseeable detriment to the former client.

7 At the time of this writing, Report 109 was scheduled to be presented before the American Bar Association House of Delegates at the ABA 2009 Midyear Meeting as a recommendation to amend Rule 1.10 of the ABA Model Rules of Professional Conduct.

8 Rule 1.10(a) provided that, "while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless:

(1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4), and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm; or

(2) the representation is permitted by Rules 1.11, 1.12, or 1.18.

As summarized in Legal Ethics Opinion 279, screening is available to cure an imputed conflict in only three limited circumstances: where the disqualified lawyer 1) was not a lawyer when involved in the previous matter; 2) was a government employee when involved in the related representation; or 3) acquired information from a prospective client who is now adverse to the firm's representation.

9 *See* Legal Ethics Opinion 312 (2002); *See* also Rule 1.10(b).

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Editor's Note:
The disciplinary summaries will appear monthly, accompanying both the "Bar Counsel" and "Speaking of Ethics" columns.

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE NAVRON PONDS. Bar No. 306589. December 29, 2008. In a reciprocal matter from the Maryland District Court, the Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Ponds as identical reciprocal discipline. The Maryland District Court disbarred Ponds on default, based on his offense of criminal contempt of court, in violation of 18 U.S.C. § 401(1).

Reciprocal Matters

IN RE ROYAL DANIEL III. Bar No. 237503. December 22, 2008. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Daniel. The Supreme Court of Colorado found clear and convincing evidence that Daniel engaged in misconduct in four separate matters. Daniel was obligated to hold the proceeds of real estate sales in trust, but, instead, he knowingly converted the entrusted funds to his own use and engaged in dishonesty.

IN RE L. GILBERT FARR. Bar No. 957365. December 23, 2008. The Board on Professional Responsibility recommends that the D.C. Court of Appeals impose identical reciprocal discipline and disbar Farr. The Supreme Court of New Jersey disbarred Farr based on misconduct alleged in nine separate complaints. Farr committed violations of the New Jersey Rules of Professional Conduct pertaining to gross neglect; pattern of neglect; lack of diligence; failure to communicate; unreasonable fee; failure to provide a written fee agreement; failure to safeguard client property; negligent misappropriation of client funds; failure to maintain required attorney books and records; improper termination of representation; failure to disclose material fact to the tribunal; failure to cooperate with ethics authorities; commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness; conduct involving fraud, dishonesty, deceit, or misrepresentation; and conduct prejudicial to the administration of justice.

IN RE MERRILYN FEIRMAN. Bar No. 375519. December 30, 2008. In a reciprocal matter from Tennessee, the Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Feirman for two years with fitness as functionally identical reciprocal discipline. The Supreme Court of Tennessee suspended Feirman for violating the Tennessee Rules of Professional Conduct pertaining to competence, diligence, communication, and declining and terminating representation while appointed to represent a client on criminal appeal.

IN RE SAMUEL GEN. Bar No. 448638. December 23, 2008. The Board on Professional Responsibility recommends that the D.C. Court of Appeals impose identical reciprocal discipline and disbar Gen. The Appellate Division of the Supreme Court, First Department, of New York concluded that Gen should be disbarred for his "extortionate scheme to obstruct justice." Gen was convicted of attempted grand larceny in the fourth degree in violation of N.Y. CLS Penal §§ 110.00 and 155.30.

IN RE OTHA M. JACKSON. Bar No. 248393. December 4, 2008. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Jackson, and that for purposes of reinstatement, Jackson's disbarment be deemed to run nunc pro tunc to June 13, 2008, if he files a supplemental section 14(g) affidavit within 14 days from the entry of this report. If he does not file it, the period of disbarment should run from the date he files a fully compliant affidavit. Jackson was convicted in the United States District Court of the Northern District of Ohio of conspiracy, in violation of 18 U.S.C. § 371, and mail fraud and aiding and abetting, in violation of 18 U.S.C. §§ 1341 and 2 for which disbarment is mandatory under D.C. Code § 11-2503(a) (2001).

IN RE VICTOR MBA-JONAS. Bar No. 452042. December 30, 2008. The Board on Professional Responsibility recommends that the D.C. Court of Appeals impose functionally identical reciprocal discipline and suspend Mba-Jonas for six months with fitness. The Court of Appeals of Maryland found that Mba-Jonas had violated rules related to handling entrusted funds and record keeping, and that he had engaged in conduct prejudicial to the administration of justice. The Maryland court also continued a previous indefinite suspension and postponed Mba-Jonas' right to apply for readmission in Maryland for an additional six months. One member of the board filed a concurring statement.

IN RE DAVID W. PARSONS. Bar No. 323709. December 9, 2008. In a reciprocal matter from Maryland, the Board on Professional Responsibility recommends that the D.C. Court of Appeals impose identical reciprocal discipline and disbar Parsons. The Court of Appeals of Maryland found that in an application for leave to appear pro hac vice in the United States District Court for the Northern District of Illinois, Parsons signed "under penalty of perjury" a statement that he was a member in good standing in Maryland, the District of Columbia, and the United States District Court for the District Court of Maryland. The Maryland court found, however, that at the time he signed and presented that application, Parsons knew he was suspended from the practice of law in the District of Columbia and, consequently, not a member in good standing of the District of Columbia Bar. The Maryland court also found that Parsons, as president and general counsel of a company, had approved the issuance of a news release designed to deceive potential investors by making the company appear more successful than it actually was, and that he had approved that falsehood to induce potential investors to buy stock in the company. Finally, the Maryland court found that Parsons was practicing law in New York and elsewhere without being licensed to do so.

IN RE JONATHAN N. PORTNER. Bar No. 421576. December 30, 2008. In a reciprocal matter from Maryland, the Board on Professional Responsibility recommends that the D.C. Court of Appeals direct the Office of Bar Counsel to publish notice of the letter of reprimand issued against Portner by the Attorney Grievance Commission in the D.C. Bar magazine, *Washington Lawyer*, and also post the letter on the D.C. Bar Web site.

IN RE STEVEN J. RIGGS. Bar No. 413902. December 18, 2008. In a consolidated reciprocal matter involving independent disbarments from both California and the Seventh Circuit, the Board on Professional Responsibility recommends that the D.C. Court of Appeals impose identical reciprocal discipline and disbar Riggs. The Seventh Circuit disbarred Riggs for his protracted failure to prosecute four criminal appeals. The Supreme Court of California disbarred Riggs for willful misconduct including: (a) failing to promptly return an unearned fee to his client at the conclusion of the representation; (b) failing to keep his client reasonably informed of significant developments such as the fact that he was not going to prosecute the client's appeal, or that Riggs had been suspended from the practice of law; and (c) committing an act involving moral turpitude, dishonesty, or corruption by falsely representing that he had notified clients about his earlier suspension.

IN RE RUSSELL G. SMALL. Bar No. 428219. December 31, 2008. In a reciprocal matter from Connecticut, the Board on Professional Responsibility recommends that the D.C. Court of Appeals direct the Office of Bar Counsel to publish notice of the letter of reprimand issued against Small by the Statewide Grievance Commission in the D.C. Bar magazine, *Washington Lawyer*, and post the letter on the D.C. Bar Web site.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE BRYAN A. CHAPMAN. Bar No. 439184. December 31, 2008. The D.C. Court of Appeals suspended Chapman for 60 days, with 30 days stayed, in favor of one year of probation within which time Chapman must complete continuing legal education courses in employment discrimination law, federal court procedure, and professional responsibility. Chapman, who was retained to represent a client in an employment discrimination case against her employer, neglected his client's case and handled it incompetently, resulting in the case being dismissed. Chapman violated rules pertaining to competent representation, skill and care, and zeal and diligence. Rules 1.1(a), 1.1(b), and 1.3(a). The court determined that Chapman's deliberate dishonesty in his dealings with the Office of Bar Counsel, when combined with the other aggravating factors present in the case, justified imposing a sanction greater than that recommended by the board.

IN RE ROBERT J. HILL. Bar No. 424239. December 4, 2008. The D.C. Court of Appeals suspended Hill based on disability, effective immediately.

IN RE DAVID M. PAYNE. Bar No. 413776. December 4, 2008. The D.C. Court of Appeals disbarred Payne by consent, effective immediately.

IN RE BRUCE A. PELKEY. Bar No. 446164. December 23, 2008. The D.C. Court of Appeals disbarred Pelkey, effective 30 days from the date of the opinion, with reinstatement conditioned upon making full restitution to the Clients' Security Fund with interest at the legal rate of 6 percent and satisfying all outstanding judgments against him in favor of the complainant or the related business entities. The misconduct arose from business transactions between 1996 and 1999. Pelkey, who acted as legal counsel for business entities he created and operated with an individual with whom he was romantically involved, engaged in criminal conduct (theft) as well as dishonesty, and he violated various ethical rules in court and arbitration proceedings. Rules 3.1, 3.2(a), 3.3(a)(1), 4.4, 8.4(b), 8.4(c), and 8.4(d).

Reciprocal Matters

IN RE MARSHALL E. ROSENBERG. Bar No. 440649. December 4, 2008. In a reciprocal matter from Pennsylvania, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Rosenberg.

Interim Suspensions Taken by the District of Columbia Court of Appeals

IN RE THEODORE F. STEVENS. Bar No. 55152. December 11, 2008. Stevens was suspended on an interim basis for his conviction of a crime in the United States District Court for the District of Columbia.

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 JAMISON S. SPEIDEL. Bar No. 477796. On October 30, 2008, the Investigative Panel of the Lawyer Disciplinary Board of West Virginia admonished Speidel.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE DAVID E. FOX. Bar No. 165258. October 24, 2008. The Office of Bar Counsel issued Fox an informal admonition, in connection with representing clients in a personal injury matter, for failing to keep a third-party medical provider's disputed funds in his trust account until the dispute was resolved. Rule 1.15(c).

IN RE LAURA E. JORDAN. Bar No. 416707. October 24, 2008. The Office of Bar Counsel issued Jordan an informal admonition for failing to file her client's civil complaint in federal court before the statutory period had expired, in connection with the representation of a client in an administrative action. Rules 1.1(a), 1.1(b), and 1.3(c).

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.*