

speaking of ethics

By Saul Jay Singer



One fine morning in the District of Columbia, at a Litigation Department meeting:

PETER PARTNER: Good morning, folks. I am pleased to announce that we have a new client and a very important, high-profile case.

We represent Sarah Spreadsheet, formerly an accountant with Ronald Dump Enterprises, Inc., in her wrongful termination action against Dump, Inc. and her sexual harassment claim against the director of Dump's accounting department, Darth Krueger. She alleges that Krueger, who is well known for crediting the company's success to his "hands-on" management style, decided to implement that style in an all too literal manner, thereby creating the ultimate hostile work environment for our client. When, despite several warnings, Krueger refused to cease his unwelcome advances, Sarah filed a complaint with human resources . . . and was fired three days later.

Pazuzu "Ozzie" Sauron and the Volde-mort Law Firm, who represent both Dump and Krueger, assert that Sarah was fired for incompetence. Specifically, Ozzie alleges that, by using the MACRS (Modified Accelerated Cost Recovery System) method for tax purposes, she failed to carry out the explicit directions of her supervisor, Idi Caligula, to use the straight line depreciation method on the Lector account. Sarah says that Caligula never said a thing about the depreciation method to be used on the Lector project, that the general practice at the office was to always use MACRS, and that the whole "depreciation" issue is merely a subterfuge to cover up her wrongful termination.

I want us to hit the ground running on this.

Bob, you and Amy Amigo, an accountant still employed at Dump, were high school classmates. Call her to reminisce about the good old days at Helium High and, while you're at it, probe her about the company's general policy regarding the depreciation method.

Carol, call Cy Sycophant, formerly a

Can We Talk?

Dump accountant and now a project manager at Flexxon's D.C. headquarters. He is very close with Krueger, so you are not to tell him that you represent Sarah in this matter. Just say that you are considering seeking employment as an accountant with Dump and that you are hoping he would be willing to discuss his experience there. Learn whatever you can about Dump's depreciation methodology and tape your conversation with him for possible use as evidence.¹

Ted, we have learned that Barry Blotto, Dump's chairperson, drinks himself silly every Friday night at the Georgetown Bar & Grill. Call our investigator, Dick Gumshoe, and prep him on this case; send him out to the bar tonight to buy Blotto a couple of drinks and get him talking, and instruct him to find out as much as possible from the chairperson about Dump's litigation strategy in the Spreadsheet case.

Alice, I have a terrific settlement offer that I know I can get Krueger to accept, if only I could talk to him without Ozzie's scorched-earth interference. As you know, we cannot speak directly to Krueger—but *Sarah* can. Have her call Krueger and offer him our settlement terms. Sarah should tell Krueger to call me if he has any questions.

Many years ago, in a real estate deal gone south, Ozzie represented Bertha Beancounter who, coincidentally, was Sarah's supervisor at Overprice Water-closet when our client first commenced work there after college. We have a credible report that Ozzie is trying to induce Bertha to say that Sarah was an incompetent accountant who had made serious accounting errors at Overprice. In fact, Sarah was rated very well, and the client has instructed us to bring a defamation action against Bertha if she publishes any allegation to the contrary. We don't know yet if Bertha is represented by counsel, but we must act quickly and prepare to handle any allegations adverse to our client. I will contact Bertha and I will provide a full debriefing at Monday's staff meeting.

Finally, I will personally call Dr. Ziggy, who has been treating Sarah for

severe depression caused by her wrongful termination, and I will instruct him in no uncertain terms that he is not to have *any* communication with Ozzie and Voldemort. If Dump's lawyers want information from Dr. Ziggy, they can serve him with a subpoena and deal with our motion to quash.

Meeting over. Let's get moving.

BOB & CAROL & TED & ALICE:
But is that ethical?

* * *

Any analysis of the D.C. Rules of Professional Conduct regarding communications by a lawyer must begin with Rule 4.2, the primary purpose of which is to protect "represented persons unschooled in the law from direct communications from counsel for an adverse person."² Pursuant to Rule 4.2(a):

During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.

Rule 4.2(b) goes on to permit communications with nonparty employees of organizations, subject to an important condition when the lawyer communicates with employees of represented adverse entities:

During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of the organization's lawyer. If the organization is an adverse party, however, prior to communicating with any such nonparty employee, a lawyer must disclose

to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.

A number of important principles may be extracted from these rules:

1. The bar on a lawyer communicating with a represented person is not limited to communications with represented *parties* but, rather, extends to *anyone* represented by counsel.³

2. The language of the rule (“... or cause another to communicate”) makes the prohibition applicable not only to communications by the lawyer, but also to communications by any agent or other person acting on the lawyer's behalf.⁴

3. The Rule 4.2 prohibition applies only to communications made by the lawyer “during the course of representing a client.” All other communications do not fall within the ambit of the rule.

4. The prohibition applies only to communications made to persons who are represented by counsel “in the matter.” Thus, Rule 4.2 does not prohibit a lawyer from communicating directly with a person or party represented by counsel in a *different* matter.⁵

5. The prohibition applies only to “the subject of the representation;” other communications are generally permissible.⁶

6. There is no *per se* prohibition against a lawyer communicating with an employee of a represented company. However, there exists an important limitation on the lawyer's right to communicate with an *opposing party's* employee or former employee.⁷

7. A lawyer may communicate directly with a represented person if the lawyer first obtains the consent of that person's counsel.

As such, Peter—and possibly Bob, Carol, Ted, and Alice, if they carry out his instructions⁸—will have committed several ethical violations.

First, since Dump is an adverse party, and since Amy Amigo remains a Dump employee, Bob can only communicate with her if, in accordance with Rule 4.2(b), he makes clear to her that he represents Sarah in her suit against Dump and Krueger.⁹

Similarly, even though Cy Sycophant is no longer a Dump employee, Carol must identify herself to him and disclose that she is counsel for Spreadsheet in a suit against Cy's former employer—notwithstanding Peter's specific instructions to the contrary.¹⁰ Carol faces an additional ethical problem if she follows Peter's direc-

tions: telling Cy that she is “considering seeking employment as an accountant with Dump” would be dishonest and deceitful and would violate Rule 8.4(c).¹¹

As we have seen, since Gumshoe will be acting at Peter's and Ted's direction, he must identify himself to Chairperson Blotto as an investigator for Peter in the Spreadsheet matter. However, even if Gumshoe were to provide Blotto with the requisite notice,¹² in *no* instance (absent express permission from Ozzie Sauron) may Sarah's counsel or their agents communicate with Blotto if, as is probable here, he is Dump's decision maker in the Spreadsheet case (i.e., if Blotto is the person with the authority to bind Dump regarding the underlying dispute).¹³ As such, Gumshoe may not speak to Chairperson Blotto about anything having to do with the case—either at the bar or anywhere else.

Parties almost always¹⁴ have the right to communicate directly with each other, and a lawyer may advise a client concerning a communication that the client is legally entitled to make. However, such advice from the lawyer cannot be “solely for the purpose of evading restrictions imposed on the lawyer by this rule.”¹⁵ As such, Peter and Alice cannot affect an “end-around” Rule 4.2 by having Sarah make a settlement offer directly to Krueger in his counsel's absence. Moreover, even if Krueger takes the initiative to voluntarily contact Peter (and knowingly waives his right to have his counsel present during such discussions), Peter may not communicate with him absent Ozzie's express consent.¹⁶

As to Dr. Ziggy, Peter may demand that the psychiatrist comply with his confidentiality obligations to Sarah under law, and Peter may inform him that he has the right not to communicate at all with Ozzie and Voldemort. However, Peter may not request or instruct Dr. Ziggy not to have any communications with opposing counsel, as this would violate Rule 4.4 (Respect for Rights of Third Persons).¹⁷

Finally, there are also conditions and limitations applicable to a D.C. lawyer's right to communicate with an *unrepresented* person. First, as previously mentioned, a lawyer usually cannot “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”¹⁸ More specifically, pursuant to Rule 4.3(a), if an unrepresented person's interests have a reasonable possibility of being in conflict with the interests of the lawyer's client, then the lawyer may not give legal advice to that person (other than advice to secure counsel) and the lawyer may not state or imply that she is disinterested. Pursuant to

Rule 4.3(b), the lawyer must make reasonable efforts to clarify her role in the matter to the unrepresented person.

In this case, Peter does not know if Bertha Beancounter is represented by counsel, and he may ethically call her to inquire in that regard. However, “a lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.”¹⁹ So if Bertha is represented by counsel, Peter must immediately cease communicating with her.

If, on the other hand, Bertha has not yet retained counsel, Peter must first make clear to her that he represents Sarah in a lawsuit against Dump and Krueger and clarify where his interests lie. Moreover, Peter may not give legal advice to Bertha because there exists—at the very least, given the likelihood of a defamation suit being filed against her—the possibility that Bertha's interests are adverse to Sarah's.

“Can we talk?”

Answer: It depends . . . and D.C. lawyers should proceed with caution.

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 The District of Columbia is a “one-party consent” jurisdiction. See D.C. Code Ann. § 23-542(b)(3) (it is lawful to intercept a communication if one is a party to that communication). See also Legal Ethics Opinion 229 (surreptitious tape recording by attorney).

2 Rule 4.2, Comment [5].

3 See also Rule 4.2, Comment [1].

4 See also generally Rule 8.4(a) (a lawyer may not accomplish through another that which he may not ethically do himself).

5 Rule 4.2, Comment [2].

6 *Id.*

7 See discussion, *infra*.

8 See Rule 5.2 (Subordinate Lawyers). For a discussion of the circumstances under which a subordinate lawyer must refuse to follow a supervisor's instructions, see Saul Jay Singer, *Obedience*, Wash. Law., Jan. 2009, at 12.

9 Of course, that the rules permit Bob to speak to Amy does not necessarily mean that Amy will agree to discuss the matter with him. Ozzie Sauron's Rule 1.1 duty of competence would presumably require him to advise Dump management to instruct all Dump employees not to discuss the Spreadsheet lawsuit with anyone and to immediately report all attempted communications on that subject to Ozzie.

10 See Rule 4.2, Comment [6]. See also Legal Ethics Opinion 287 (ex parte contact with former employees of party-opponents), which emphasizes that Carol may not attempt to solicit confidential information from Cy.

11 “It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” This Rule 8.4(c) prohibition applies to D.C. lawyers even if the conduct does not take place in the context of representing a client or acting as a lawyer.

12 It is beyond the scope of this article to consider whether a lawyer meets his duty under Rule 4.2 if he makes the required disclosures, but the person is incapable of understanding the implications of those disclosures.

13 See Rule 4.2, Comment [3]; see also Legal Ethics Opinion 129. If an entity is a party, then, by definition, *so is its decision maker*. Rule 4.2(c).

14 One notable exception is that a party proceeding pro se in a matter may *not* communicate directly with a represented adverse party. See Legal Ethics Opinion 258. 15 Rule 4.2, Comment [2].

16 *Id.*, Comment [8]: “This rule applies even though the represented person initiates or consents to the communication.” An exception to this rule, however, is that a lawyer may speak to a represented person “who is seeking advice from a lawyer who is not otherwise representing a client in the matter.” *Id.*, Comment [7]. The classic situation in which this arises is when a represented person, unhappy with her counsel, intends to switch lawyers and consults with another lawyer about taking on the representation.

17 See Legal Ethics Opinion 360.

18 A fascinating exception to this rule applies to certain government lawyers as, for example, national security operatives, where the lawyer’s misrepresentations are reasonably intended to further the lawyer’s professional duties or are otherwise authorized by law. See Legal Ethics Opinion 323.

19 Rule 4.2, Comment [8].

Disciplinary Actions Taken by the Board on Professional Responsibility Hearing Committees on Negotiated Discipline

IN RE VIRGINIA R. FLING. Bar No. 375547. February 6, 2012. The Board on Professional Responsibility’s Hearing Committee Number 11 recommends that the D.C. Court of Appeals accept Fling’s petition for negotiated discipline for two consolidated matters and impose the following sanctions: (1) 120-day suspension with 90 days served and 30 days stayed; (2) 12 hours of continuing legal education courses in immigration law to be approved by Bar Counsel; (3) restitution to three clients; (4) one-year unsupervised probation; and (5) no fitness requirement, provided that Fling successfully completes probation. If Fling fails to meet all of the conditions set forth within a year of her reinstatement, she agrees the court should suspend her for the remaining 30 days of the original suspension and impose fitness. Fling violated Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), and 1.4(b).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE JOHN J. ZODROW. Bar No. 444703. February 10, 2012. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Zodrow. Zodrow was convicted in the United States District Court for the District of Colorado after a plea of guilty to making a false oath in relation

to a bankruptcy petition, which is a felony in violation of 18 U.S.C. § 152(2), a crime involving 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 WALTER L. BLAIR. Bar No. 471057. February 23, 2012. The D.C. Court of Appeals disbarred Blair. Blair was found guilty in the United States District Court for the District of Maryland of, inter alia, one felony count of witness tampering in violation of 18 U.S.C. § 1512(b)(3). Because witness tampering is a crime of moral turpitude per se, Blair’s disbarment was mandated by D.C. Code § 11-2503(a) (2001).

CHARLES M. JAMES III. Bar No. 436913. February 2, 2012. The D.C. Court of Appeals reinstated James, subject to the following condition: Prior to reentry into private practice in the District of Columbia, James must consult with the D.C. Bar Practice Management Advisory Service and establish a system to segregate client funds. James shall execute any necessary waivers of confidentiality required for Bar Counsel to obtain information on James’ compliance with this condition.

Reciprocal Matters

IN RE ALEXANDER N. AGILIGA. Bar No. 427535. February 23, 2012. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Agiliga, nunc pro tunc to December 20, 2011. The Maryland Court of Appeals disbarred Agiliga for misconduct that included intentional misappropriation of client funds.

IN RE ANDRÉ L. BRADY. Bar No. 490401. February 2, 2012. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Brady.

IN RE MICHAEL R. CALABRESE. Bar No. 366774. February 2, 2012. The D.C. Court of Appeals reinstated Calabrese.

IN RE JAGJOT S. KHANDPUR. Bar No. 438111. February 2, 2012. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed functionally equivalent discipline and suspended Khandpur for 60 days with fitness.

IN RE JOHN E. KOLOFOLIAS. Bar No. 97113. February 2, 2012. In a reciprocal matter from Massachusetts, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Kolofolias for six months and one day.

IN RE EGAN P. O’BRIEN. Bar No. 472249. February 2, 2012. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred O’Brien.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE ROBERT N. VOHRA. Bar No. 426365. February 1, 2012. Vohra was suspended on an interim basis pursuant to D.C. Bar R. XI, § 9(g), pending final action on the Board on Professional Responsibility’s December 14, 2011, recommendation of a three-year suspension with fitness.

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

IN RE JAMES A. STURDEVANT. Bar No. 233890. On November 10, 2011, the Disciplinary Board of the Washington State Bar Association admonished Sturdevant for violations of Washington RPC 1.1, 1.3, 1.4(a)(2), and 1.4(b).

Informal Admonitions Issued by the Office of Bar Counsel

IN RE ALLEN C. WILSON. Bar No. 479284. February 8, 2012. Bar Counsel issued Wilson an informal admonition. While retained to represent a personal representative in an estate matter, Wilson revealed a client’s confidence or secrets, failed to comply with applicable law requiring notice to or permission of a tribunal when terminating representation and in connection with the termination of the representation, and failed to take timely steps to the extent reasonably practicable to protect the client’s interests, such as giving reasonable notice to the client. Rules 1.6, 1.16(c), and 1.16(d).

continued on page 46

Speaking of Ethics

continued from page 12

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.

Legal Beat

continued from page 19

guidance of attorney volunteers, students acted as defense attorneys, prosecutors, jurors, judges, and witnesses. After the mock trials, participants were given the opportunity to talk with representatives from 11 local organizations and government agencies that had set up tables to offer law-related career information.

During the afternoon session, Marsali Hancock, president of iKeepSafe, and Etherly got the conversation going again about managing social media networks, and then raffled off 20 Verizon Center box seats for Washington Wizards games to five lucky attendees and 12 Six Flags passes to three students.

The 2012 Youth Law Fair was cosponsored by the D.C. Bar Antitrust and Consumer Law Section; Corporation, Finance and Securities Law Section; Criminal Law and Individual Rights Section; Environment, Energy and Natural Resources Section; Family Law Section; Intellectual Property Law Section; Law Practice Management Section; and Taxation Section.—*T.L.*

Members Authorize Two Resolutions at Special Membership Meeting

On March 20 the D.C. Bar held a special membership meeting for all active Bar members to vote on the organization's authority regarding court funding and access to justice issues.

Bar President Darrell G. Mottley called the meeting to order, describing the issues on which members were asked to vote. The first was regarding the renewal of the Bar's authority to make public statements about funding for the District of Columbia Courts, which includes the D.C. Court of Appeals and the Superior Court of the District of Columbia. The authority

SWEET CHARITY



From left, Palena Restaurant pastry chef Aggie Chin, Dos Gringos Café owner Alex Kramer, and Palena chef and owner Frank Ruta sample the cake entries at the Washington Lawyers' Committee for Civil Rights and Urban Affairs 2012 Cooking for Kids Bake Sale and Taste-Off on March 19. Fourteen law firms in the District of Columbia participated in the competition, which raises money for D.C. public schools. —*K.A.*

expired March 31, 2011.

Mottley opened up the floor to members who wished to speak for or against the resolution; each member had a three-minute time limit. Paulette Chapman, a partner at Koonz, McKenney, Johnson, DePaolis & Lightfoot, LLP and member of the Bar's Board of Governors, and immediate past president Ronald Flagg spoke on behalf of the proposal, citing important court initiatives that need support to ensure that they are preserved.

"Eleven years ago the bipartisan Committee on Court Funding painted the people on the Board of Governors and the Bar the dire financial picture of our D.C. Courts. The committee detailed in its report the significant threats to the administration of justice that had resulted from the underfunding of the courts' budget," Chapman said. "Today, we bring news of progress, but strongly advocate continued vigilance on this important issue. The need to fund the D.C. Courts' core functions and programs continue to be and should remain an ongoing concern of this Bar, especially in an era of thinly stretched budgets all around."

Flagg added, "We urge the membership to reauthorize the Board and the officers of the Bar to speak on federal legislation to fund the D.C. courts adequately to preserve the administration of justice in this community. I would add that the Bar's role is particularly important given our lack of vot-

ing representation in Congress."

Following the "pro" statements, Nathan Dodell, an inactive Bar member, offered his opinion against the resolution. "The 1976 referendum clearly states that the membership must be advised of the position—and I emphasize the word "the"—the position to be taken by the Board on behalf of the Bar. If one looks at the resolution, including the eloquent statements of the two people who preceded me, one finds no specific position presented," Dodell said.

By taking a vote on the Bar's authority to make any public statement on court funding without providing the exact details, the organization would be violating the referendum, Dodell stated. The 1976 referendum allowed the Board of Governors to speak on behalf of the Bar regarding legislation only if the subject matter is closely related to the administration of justice and has authorization from the membership.

Active members in the room were asked to stand up and hold green cards if they were in favor of passing the proposal. In a vote of 135–0, the Bar received a quorum, and the resolution will now move to the Bar's Board of Governors for approval. If approved, the resolution would be effective for five years.

The second resolution for consideration was the renewal of the Bar's authority to make recommendations and public statements in support of funding for proposals recommended by the D.C. Access to Justice Commission that would improve delivery of civil legal services in the District.

Amy Bess, a shareholder at Vedder Price and a member of the Bar's Board of Governors; Peter Edelman, professor of law at The Georgetown University Law Center and chair of the Access to Justice Commission; and Talib Karim of TEC Law Group offered statements for approving the proposal.

"The public funding that we have been receiving through the D.C. Bar Foundation for the last five years has made a tremendous difference. It's added something on the order of 30-plus lawyers [that are] full-time lawyers that we have in the city," Edelman said. "The support of the Bar has been absolutely essential. It has made a huge difference in making the case to the mayor and the City Council that this funding should be provided."

The resolution passed with a vote of 136–0. Renewal of the authorization would be effective for five years, if approved by the Board of Governors.

The meeting was held at the D.C. Bar Conference Center.—*T.L.*