speaking of ethics

By Hope C. Todd

When Lawyers Lobby

Mick Wiggins

The Ethics Help Line frequently receives inquiries about whether a nonlawyer or an out-of-state lawyer may engage in certain activities in the District of Columbia. Such inquiries generally fall outside of the scope of the guidance provided by the D.C. Bar Legal Ethics Program. While Rule 5.5 of the District of Columbia Rules of Professional Conduct (D.C. Rules) makes it unethical for a lawyer to engage in, or assist another to engage in, the unauthorized practice of law, Comment [2] clarifies that the definition of the practice of law is established by law and varies from one jurisdiction to another.

In the District of Columbia, the "unauthorized practice of law" is defined by Rule 49 of the District of Columbia Court of Appeals.[1] The court charged the Committee on Unauthorized Practice of Law (UPL Committee) with the enforcement of Rule 49. Similar to the D.C. Bar Legal Ethics Committee, which issues advisory opinions on questions arising under the D.C. Rules of Professional Conduct, the UPL Committee issues opinions on questions arising under Rule 49. Occasionally, the D.C. Rules of Professional Conduct and Rule 49 intersect, posing interesting and complicated questions of professional ethics.

In December 2007 the UPL Committee issued Opinion 19-07, holding that United States legislative lobbying is not the practice of law under Rule 49, and, thus, nonlawyers may engage in such conduct. This holding should not surprise those familiar with lobbying in our nation's capital. Individuals who are not licensed to practice law in the District of Columbia regularly accomplish a fair amount of congressional lobbying activity in this jurisdiction. However, the UPL Committee's opinion squarely presents an ethical question for D.C. Bar members and law firms engaged in lobbying activities in the District of Columbia: whether and when the D.C. Rules of Professional Conduct apply when lawyers lobby.

In D.C. Bar Legal Ethics Opinion 344, the Legal Ethics Committee examines the specific question of whether D.C. Rule 1.7, which governs conflicts of interests between current clients of a lawyer or law firm,[2] applies to lobbying matters. More generally, in light of the UPL Committee's opinion and pursuant to D.C. Rule 5.7 (Responsibilities Regarding Law-Related Services), Opinion 344 provides guidance on when lawyers and their associates[3] may appropriately remove lobbying activities from the conflicts provisions of the D.C. Rules.

As an initial matter, Opinion 344 underscores that the D.C. Rules regulate "lobbying activity" when undertaken by lawyers. Rule 1.0(h) defines *matter* to include "any … lobbying activity … except as expressly limited in a particular rule." The opinion finds that when lawyers engage in lobbying activities, the absolute Rule 1.7(a) prohibition applies such that a lawyer or law firm cannot advance two conflicting positions of the same lobbying matter, even with the informed consent of all clients. However, the specific question before the Legal Ethics Committee was not whether the lawyer could advance opposite sides of the same lobbying matter, but, rather, whether a lawyer could advance a lobbying position of one client that might adversely affect the lawyer's other client, whom the lawyer represents *in a wholly separate matter*.

The Legal Ethics Committee concludes that lobbying representations are not subject to Rule 1.7(b)(1) because such representations are not "matters involving a specific party or parties,"[4] but they are subject to Rules 1.7(b)(2)–(4).[5] Thus, in those lobbying representations where 1) the proposed representation is likely to be adversely affected by another representation; 2) another representation is likely to be adversely affected by the proposed representation; or 3) the lawyer-lobbyist's professional judgment 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, the lawyer may not take on the lobbying representation unless A) the lawyer believes that the lawyer will be able to provide competent and diligent representation to each client; and B) the lawyer obtains the informed consent of all affected parties. *See* D.C. Rule 1.7(c)(1)–(2).

Finding that most rules governing conflicts of interest between current clients apply to lawyers when they take on lobbying representations, Opinion 344 then turns to the question of if, and when, a lawyer-lobbyist may properly remove a lobbying activity from these conflict provisions.

D.C. Rule 5.7[6] recognizes that not all services provided by lawyers are legal services, even if those services are often performed in conjunction with, or are in substance related to, the provision of legal services. Among those activities listed in Comment [9] to Rule 5.7 as an example of a "law-related service" is "legislative lobbying." The rule provides that a lawyer is subject to the D.C. Rules of Professional Conduct with respect to the provision of law-related services if the lawyer provides those services "in circumstances that are not distinct" from the lawyer's legal services. Thus, for the most part, a lawyer providing lobbying services among his or her other legal services would be subject to the D.C. Rules, including those governing conflicts of interests.

However, the lawyer can remove lobbying services from the conflicts rules provided that 1) the services are distinct from the lawyer's provision of legal services; and 2) when the law-related services are provided by an entity controlled by the lawyer individually or with others, if the lawyer "takes reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client–lawyer relationship do not exist."[7]

continued on page 46

and relocated to 7910 Woodmont Avenue in Bethesda, Maryland.

Author! Author!

American University Washington College of Law professor **Ira P. Robbins** has written an article titled "Digitus Impudicus: The Middle Finger and the Law," which appeared in the *UC Davis Law Review* (volume 41, 2008)… **Paul Rothstein**, professor of law at Georgetown University Law Center, has written two books published by Thomson West: *Federal Testimonial Privileges: Evidentiary Privileges Relating to Witnesses and Documents in Federal Law Cases* (second edition, 2007–08) and *Federal Rules of Evidence* (third edition, 2008), containing practice commentary and cases… **Rumu Sarkar**, a member of the Millennium-IP3 board of directors and adjunct faculty at Georgetown University Law Center, has been awarded the grand prize by the Saint-Cyr Foundation for her essay "A Fearful Symmetry: A New Global Balance of Power?"… **Peter A. Frandsen** has coauthored the article "Check Kiting" in the *Banking Law Journal*… **Bernard Max Resnick's** article, "Tips for the Beginning Entertainment Law Attorney," appeared in the "Barristers Tips" section of the May 2008 issue of the *Los Angeles Lawyer*… **J. Craig Williams**, founding member of The Williams Lindberg Law Firm, PC, has written the book *How to Get Sued: An Instructional Guide,* published by Kaplan Publishing (2008)… **Judith R. O'Sullivan's** "A Drop of Deadly Ink: A Killer Week in the Life of Fr. Fred Reilly, Exorcist" will be published in the *2008 Deadly Ink Short Story Anthology*… **Raymond S. Dietrich** has written *Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney*, published by LexisNexis… **Karl M. Nobert** and **Gary L. Yingling** of K&L Gates recently coauthored the article "Regulatory Considerations Related to Stem Cell Treatment in Horses," which appeared in the June 1, 2008, edition of the *Journal of the American Veterinary Medical Association*… **Jeannine R. Reardon** has written *Confidential Communications*, a legal thriller published by Xlibris Corporation.

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. Steven J. Stauffer can be reached by e-mail at sstauffer@dcbar.org.

Bar Happenings

continued from page 9

Faculty Virginia A. McArthur, founder of the Law Office of Virginia A. McArthur, will address issues such as conflicts of interest, marginally competent clients, management of client assets, agreeing to serve as fiduciary, termination of representation, fee collections for trusts and estates practice, and unauthorized practices.

This course is cosponsored by the D.C. Bar Estates, Trusts and Probate Law Section and Taxation Section.

Estate and tax attorneys would also benefit from "The Practical Guide to Federal and State Estate Tax Returns for D.C.-Area Estates," which runs from 6 to 9:15 p.m. on September 25.

Participants will gain practical insights and tips on how to properly prepare federal and state estate tax returns for estates in the Washington metropolitan area. The class also will learn about federal and D.C. estate tax returns and the differences in estate tax returns in the District of Columbia, Maryland, and Virginia.

The course also will address overarching tax issues such as reporting, includability, deductability, valuation and elections with specifics on filing, payments and penalties, amending returns and claims for refunds, disclaimers and postmortem elections, information that must be included with returns and individual schedules, and closing letters.

Kate M. H. Kilberg of the Law Office of Virginia A. McArthur and Sarah M. Johnson of Venable LLP, both associates at their respective firms, will lead this course.

This course is cosponsored by the D.C. Bar Estates, Trusts and Probate Law Section.

Both offerings take place at the D.C. Bar Conference Center, 1250 H Street NW, B-1 level.

For more information or a complete list of Continuing Legal Education Program courses in September, contact the CLE Office at 202-626-3488 or visit www.dcbar.org/cle.

Reach Kathryn Alfisi by e-mail at kalfisi @dcbar.org.

Speaking of Ethics

continued from page 10

While such "reasonable measures" are not defined by Rule 5.7, the burden will fall directly on the lawyer to prove the client clearly understood at the outset of the relationship that the client was not receiving legal services from the lawyer, and the lawyer would not be bound by ethical duties normally attendant to a lawyer–client relationship.

Lawyers should remember that a client often hires the lawyer-lobbyist precisely because the lobbyist is a lawyer. There are certain expectations and obligations that arise in a lawyer–client relationship, not the least of which are duties of confidentiality and loyalty.[8]

Notes

1 Contact information for the Committee on Unauthorized Practice of Law, Rule 49, and opinions issued thereto can be found on the Web site of the District of Columbia Court of Appeals at www.dcappeals.gov/dccourts/appeals/cupl/index.jsp.

2 Rule 1.10 of the District of Columbia Rules of Professional Conduct generally imputes conflicts of an individual lawyer to the lawyer's law firm. Thus, in most instances, if a lawyer is unable to represent a client because of a conflict under Rule 1.7, the entire law firm also is unable to take on the representation. *See* Rule 1.10.

3 Conduct of nonlawyer lobbyists working in law firms must also be consistent with the District of Columbia Rules of Professional Conduct. *See* Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants).

4 D.C. Bar Legal Ethics Op. 344 provides a thorough examination of the meaning of the phrase "matters involving a specific party or parties" and the legislative history of Rule 1.7(b)(1) to conclude that the phrase as used in 1.7(b)(1) excludes lobbying, rulemaking, and other matters of general government policy.

5 "Collectively, these three rules all apply to circumstances in which an objective observer would doubt the lawyer's incentive to be a zealous advocate. For this reason, they are often referred to as the 'punch-pulling' conflicts because the lawyer might be tempted to 'pull … punches' on behalf of one client so as not to harm the interests of another." D.C. Bar Legal Ethics Op. 344 (2008) *citing* D.C. Bar Legal Ethics Op. 309 (2001). *Accord* D.C. Bar Legal Ethics Op. 317 n.6 (2002).

6 Rule 5.7 became effective February 1, 2007, in the District of Columbia.

7 When a client–lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the same lawyer, individually or with others, the lawyer must comply with Rule 1.8(a). Rule 5.7 Comment [5].

8 The foregoing column describes only a summary of the conclusions of D.C. Bar Legal Ethics Op. 344. For lawyers and law firms engaged in lobbying, Opinion 344 in its entirety is a must-read. The District of Columbia Rules of Professional Conduct and Legal Ethics Opinions can be found at www.dcbar.org/ethics.

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