

speaking of ethics

By Hope C. Todd

With sincerest apologies to Thomas Jefferson and the founding fathers: Were the legal profession to declare its ethical standards in esteemed and familiar form, it might begin something like this:

We hold these truths to be self-evident, that all clients are created equal, that they are owed certain ethical duties by us, their lawyers, that among these are competence, diligence and zeal, communication, confidentiality, loyalty, and the safekeeping of property.

For the most part, ethical duties owed to clients by lawyers are universal, and they exist without regard to the specifics of the legal matter or the type of client. Each such duty applies to the relationship between lawyer and client, whether the lawyer's services are in the nature of advice, advocacy, or the creation and modification of legal instruments.

Across the spectrum of duties lawyers owe to their clients, perhaps the most sacrosanct is that of confidentiality.¹ Indeed, the duty of confidentiality can arise before an attorney-client relationship forms,² and lasts well beyond the end of the professional relationship, surviving even the death of the client.³ The duty of confidentiality is the foundation of the lawyer-client relationship, as it enables and encourages the client to communicate fully and frankly with his or her lawyer, even when the information provided by the client is embarrassing, incriminating, or even horrific.

Generally speaking, "the full development of facts" is necessary for the competent provision of legal advice and services.⁴ A principal societal value advanced by the lawyer's duty of confidentiality is support for the rule of law.⁵ Open communication between lawyer and client facilitates compliance with the law.⁶ In addition, a lawyer is often in the best, or only, position to prevent a client from engaging in illegal or fraudu-

Lawyer vs. Client: The Problem With Keeping Secrets

lent conduct, or to assist a client in the curtailment of such conduct when it is revealed to the lawyer.⁷

As set forth in D.C. Rule 1.6, the duty of confidentiality is broad, encompassing the protection of both client "confidences" and "secrets."⁸ It mandates that, in the absence of a specifically enumerated exception, a lawyer shall not knowingly reveal a client's confidences or secrets, or use same to the disadvantage of a client, or to the advantage of the lawyer or a third person.⁹ Indeed, the duty of confidentiality has been aptly summarized by legal ethicists Geoffrey Hazard and William Hodes as "protect[ing] virtually all information coming into a lawyer's hands concerning a client and forbidding virtually *all voluntary* disclosures."¹⁰ (Emphasis added.)

Although paramount and far-reaching in scope, the duty of confidentiality is not absolute, and, in certain instances, it yields to other social, moral, ethical, or legal values. Such other values underlie the narrow exceptions to Rule 1.6, which permit lawyers in very specific circumstances, and to a limited extent, to use or reveal client confidences or secrets. Among others, these values include the prevention of substantial bodily injury or death¹¹ and the prevention or mitigation of substantial economic harm to another, when the lawyer's services were used or are being used to further a client's crime or fraud.¹²

But what happens when a lawyer becomes the *victim* of a client's wrongful or illegal conduct? Are there circumstances in which a lawyer's duty of confidentiality may actually prevent the lawyer from revealing the conduct, in effect requiring the lawyer to forfeit his or her right to seek legal redress?

D.C. Bar Legal Ethics Opinion 363 examines whether an in-house lawyer may use or disclose his or her employer/client's confidences or secrets in support of the lawyer's claim against the employer/client for employment discrimination or retaliatory discharge.¹³

In the case of an in-house lawyer

whose client is the lawyer's employer,¹⁴ little, if any, client information may be likely to escape the umbrella of client "secrets." Such a scenario begs the question of whether any exception to Rule 1.6 would permit an in-house lawyer to voluntarily disclose client information when necessary to establish or support a claim for discrimination or wrongful discharge.

In examining the plain language and legislative history of D.C. Rule 1.6(e) (3), the Legal Ethics Committee explains that, unlike ABA Model Rule 1.6, which permits a lawyer to reveal information relating to a representation to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,"¹⁵ (emphasis added), the D.C. Rule permits a lawyer to reveal and use client confidences and secrets *only* to the extent reasonably necessary to "establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations *by the client* concerning the lawyer's representation of the client." (Emphasis added.) Thus, in the absence of some other exception to Rule 1.6,¹⁶ the opinion concludes, per the plain language of the rule, that an in-house lawyer may not reveal or use employer confidences or secrets in an *offensive* lawsuit against his or her employer.

It is not entirely clear why the D.C. Rule omits the ABA Model Rule exception, although it is certainly revealing that the Jordan Committee,¹⁷ as discussed in Opinion 363, grappled with whether the D.C. Rule 1.6 exceptions should even permit a lawyer to use client confidences or secrets to sue a client for legal fees.¹⁸ Additionally, the fact that the D.C. Rules depart from the Model Rules on an issue involving client confidentiality is far from unique. For example, pursuant to D.C. Rule 3.3(a) (Candor to the Tribunal), a lawyer's affirmative duty to correct false statements of material fact or law previously made to a tribunal by



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the lawyer is significantly limited by D.C. Rule 1.6.¹⁹ In contrast, ABA Model Rule 3.3 requires a lawyer to make such corrections even if compliance necessitates disclosures of information otherwise protected by Model Rule 1.6.

Similarly, although D.C. Rule 1.13(b) requires, in some instances, a lawyer for organization to “report up” within the organization illegal conduct of an officer, employee, or other person associated with the organization, the D.C. Rules do not permit a lawyer to report such conduct outside the organization, unless the lawyer is able to do so pursuant to an exception to Rule 1.6.²⁰ In contrast, the significantly more permissive ABA Model Rule 1.13 permits organizational lawyers to “report out” illegal conduct.

These examples illustrate important policy decisions of the D.C. Court of Appeals in its promulgation of lawyer ethics rules that strongly favor client confidentiality, in some instances over other significant values. No doubt, important social, moral, and legal values undergird an employee’s right to sue an employer for discrimination and/or retaliatory discharge. Opinion 363 highlights the often inherent tension between the duty of confidentiality and other competing values.²¹ At least for now, the balance tips in favor of the client.

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 lawyer–client relationship is a *fiduciary relationship*, by definition, one of trust.

2 See D.C. Rule 1.6, Comment [9], and D.C. Rule 1.18 (Duties to Prospective Clients) (“Even when no client–lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation.”).

3 See D.C. Rule 1.6(g); see also D.C. Legal Ethics Opinion 324 (Disclosure of Deceased Client’s Files) (2004) and *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

4 D.C. Rule 1.6, Comment [2].

5 For a general discussion of the purposes underlying the duty of confidentiality, see Geoffrey C. Hazard Jr. & W. William Hodes, *The Law of Lawyering*, §§ 9.2 and 9.3 at (9-6)–(9-14) (3d ed. Supp. 2012).

6 See D.C. Rule 1.6, Comment [3].

7 See Comment [47], page 54, *Proposed Rules of Professional Conduct and Related Comments* by the D.C. Bar Model Rules of Professional Conduct Committee (hereinafter “Jordan Committee”) (1986).

8 “Confidence” refers to information protected by the attorney–client privilege under applicable law, and ‘secret’ refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.” D.C. Rule 1.6; Importantly, “[a secret] exists without regard to the nature or source of the information or the fact that

others share the knowledge.” *Id.*, Comment [8].

9 “Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:

- (1) reveal a confidence or secret of the lawyer’s client;
- (2) use a confidence or secret of the lawyer’s client to the disadvantage of the client;
- (3) use a confidence or secret of the lawyer’s client for the advantage of the lawyer or of a third person.”

D.C. Rule 1.6(a).

10 Geoffrey C. Hazard Jr. & W. William Hodes, *The Law of Lawyering*, § 9.5 at (9-18) (3d ed. Supp. 2012).

11 D.C. Rule 1.6(c)(1).

12 D.C. Rule 1.6(d).

13 D.C. Legal Ethics Opinion 363 (In-House Lawyer’s Disclosure or Use of Employer/Client’s Confidences or Secrets in Claim Against Employer/Client for Employment Discrimination or Retaliatory Discharge) (2012).

The opinion also addresses two related questions not discussed herein: whether the lawyer may disclose or use employer/client confidences or secrets if the employer/client puts the lawyer’s conduct at issue, and whether the in-house lawyer is prohibited from bringing a claim against her employer/client merely because the client may find it necessary or helpful to disclose its confidences or secrets.

14 See D.C. Rule 1.13(a) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).

15 ABA Model Rule 1.6; see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 01-424 (2001) (concluding that Model Rule 1.6 permits the offensive use of client information in an in-house lawyer’s lawsuit for wrongful discharge).

16 See, e.g., D.C. Rule 1.6(d). Opinion 363 notes the possibility that an in-house lawyer could sue a client pursuant to Rule 1.6(e)(5) in an action for the lawyer’s fee; however, FN[10] clarifies that an in-house lawyer’s salary does not constitute a fee within the meaning of Rule 1.6(e)(5).

17 In 1986 the Jordan Committee made recommendations for the adoption of the initial D.C. Rules of Professional Conduct in light of the ABA’s adoption of the Model Rules of Professional Conduct in 1983. The D.C. Rules became effective January 1, 1991.

18 See D.C. Legal Ethics Opinion 363 (2012); D.C. Rule 1.6(e)(5) permits lawyers to use or reveal client confidences or secrets “to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer’s fee.”

19 “(a) A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6.” D.C. Rule 3.3(a)(1); *But see* D.C. Rule 3.3(d), “A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).”

20 See, e.g., D.C. Rule 1.6(d) (limited economic crime/fraud exception); D.C. Rule 1.6(e)(2)(A) (when required by court order or law).

21 Indeed, the Legal Ethics Committee acknowledges “important public policy that encourages redress in cases of employment discrimination and retaliatory discharge.” D.C. Legal Ethics Opinion 363 (2012).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE ROBERT A. HUFF. Bar No. 454716. October 19, 2012. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar

Huff. Huff pleaded guilty before the U.S. District Court for the Eastern District of Wisconsin to conspiring to distribute a controlled substance (1,000 or more kilograms of marijuana), in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, and 18 U.S.C. § 2, a crime involving moral turpitude per se for which disbarment is mandatory under D.C. Code § 11-2503(a) (2001).

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE DAVID AGATSTEIN. Bar No. 427112. October 3, 2012. Agatstein was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE AMAKO N. K. AHAGHOTU. Bar No. 352237. September 27, 2012. Ahaghotu was suspended on an interim basis pursuant to D.C. Bar Rule XI, § 9(g), pending final action on the Board on Professional Responsibility’s July 20, 2012, recommendation of disbarment.

IN RE STEPHANIE Y. BRADLEY. Bar No. 288910. September 27, 2012. Bradley was suspended on an interim basis pursuant to D.C. Bar Rule XI, § 9(g), pending final action on the Board on Professional Responsibility’s July 31, 2012, recommendation of a two-year suspension with fitness.

IN RE KIMUEL W. LEE. Bar No. 424701. October 31, 2012. Lee was suspended on an interim basis based upon discipline imposed in Louisiana.

IN RE ANN M. OLIVARIUS. Bar No. 429231. October 31, 2012. Olivarius was suspended on an interim basis based upon the revocation of her previously granted admission to the practice of law in New York.

IN RE LATHAL PONDER JR. Bar No. 434951. October 16, 2012. Ponder was suspended on an interim basis based upon discipline imposed in the U.S. District Court for the District of Columbia.

IN RE JOHN A. SUTHERLAND JR. Bar No. 358924. October 3, 2012. Sutherland was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE ERIN M. WEBER ANDERSON. Bar No. 422977. October 16, 2012. Weber Anderson was suspended
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Bar Happenings

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yers” will teach attorneys the basics of reading financial statements.

This course offers a primer on the three types of financial statements: income statement, balance sheet, and statement of cash flows. Faculty will discuss the different components of each financial statement and how they are interrelated, as well as cover a variety of technical accounting matters that participants may encounter in their practice. This course is designed for attorneys with little or no formal accounting background.

Attorney Felicia C. Battista and David J. Piper of Deloitte Financial Advisory Services LLP will serve as faculty.

The course takes place from 6 to 8:45 p.m. and is cosponsored by the D.C. Bar Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Estates, Trusts and Probate Law Section; Family Law Section; Government Contracts and Litigation Section; Health Law Section; Labor and Employment Law Section; Law Practice Management Section; Litigation Section; and Taxation Section.

Both courses will be held at the D.C. Bar Conference Center, 1101 K Street NW, first floor. For more information, contact the CLE Office at 202-626-3488 or visit www.dcbar.org/cle.

Meditation Session Underscores Daily Life Benefits for Lawyers

On January 7 the D.C. Bar Sections and the D.C. Bar Lawyer Assistance Program will host a mindfulness meditation session for lawyers.

“Introducing Lawyers to the Power and Serenity Meditation” will provide participants with the fundamentals of mindfulness meditation. Attendees will learn about some of the recent research on the benefits of meditation in daily life and will go through a guided meditation session led by Hugh Byrne, a senior teacher with the Insight Meditation Community of Washington.

The session takes place from 5:30 to 7:30 p.m. and will be held at the D.C. Bar Conference Center, 1101 K Street NW, first floor.

For more information or to register, visit www.dcbar.org/for_lawyers/events.

Reach D.C. Bar staff writer Kathryn Alfisi at kalfisi@dcbar.org.

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on an interim basis based upon discipline imposed in Virginia.

IN RE WARREN M. WILLIAMS. Bar No. 220558. October 3, 2012. Williams was suspended on an interim basis based upon discipline imposed in the U.S. Virgin Islands.

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 REX L. FULLER III. Bar No. 499699. On November 22, 2011, the Attorney Grievance Commission of Maryland reprimanded Fuller for misconduct involving lack of competence, failure to communicate with his clients, and failure to obtain informed consent to joint representation, confirmed in writing.

IN RE KRISTEN GRIM HUGHES. Bar No. 456171. On March 23, 2012, the Virginia State Bar Disciplinary Board publicly reprimanded Grim Hughes for the unauthorized practice of law after her administrative suspension from the Virginia Bar.

IN RE JOSEPH R. KEILP. Bar No. 84491. On January 17, 2012, the Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona admonished Keilp for failing to file a timely answer to a complaint served upon his clients, for failing to tell his clients about sanctions ordered against them, and for failing to respond to opposing counsel's motion for sanctions.

IN RE CHARLES S. RAND. Bar No. 396942. On May 18, 2012, the Attorney Grievance Commission of Maryland reprimanded Rand for conduct prejudicial to the administration of justice relating to his failure to ensure that all information in his personal bankruptcy filing was accurate and complete.

IN RE JESUS R. ROMO VEJAR. Bar No. 416922. On May 19, 2011, the Attorney

Discipline Probable Cause Committee of the Supreme Court of Arizona admonished Romo Vejar for failing to have a written fee agreement and for failing to advise a client of the desirability of seeking the advice of independent counsel regarding a loan transaction between the lawyer and client.

IN RE JESUS R. ROMO VEJAR. Bar No. 416922. On March 13, 2012, the Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona admonished Romo Vejar for failing to provide a client an accounting of the work done for a \$10,000 flat fee charged.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE EDWARD C. BOU. Bar No. 37713. October 3, 2012. Bar Counsel issued Bou an informal admonition for failing to notify a third-party medical provider that his clients received insurance proceeds in satisfaction of a personal injury claim, even though Bou executed an assignment and authorization. Rule 1.15(c).

IN RE HAROLD G. MARTIN. Bar No. 985092. October 11, 2012. Bar Counsel issued Martin an informal admonition. After serving as a court-appointed attorney in a criminal matter that resulted in a conviction, Martin failed to obtain the client's current location and address, failed to notice an appeal of the criminal matter, and failed to take reasonable steps to protect the client's interests at the termination of the representation. Rules 1.1(a), 1.1(b), 1.3(a), 1.4(a), 1.4(b), and 1.16.

IN RE HENRY N. MATURI. Bar No. 498767. October 3, 2012. Bar Counsel issued Maturi an informal admonition for failing to file a timely appeal while representing a client in an immigration matter. Rules 1.1(a), 1.1(b), and 1.3(a).

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.